

# LUCHA SI, ENTREGA NO: HOW AN “AWKWARD POWER SHARING ARRANGEMENT” ENABLED RETIREES TO UPEND A PLAN OF ADJUSTMENT

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*In 2016, the Commonwealth of Puerto Rico owed \$70 billion in debt to bondholders and had a \$50 billion-dollar pension deficit, the equivalent of more than a full year of economic activity. Despite protests about colonialism, Congress created a Financial Oversight and Management Board (Junta) and granted it broad powers to solve the Commonwealth of Puerto Rico’s debt crisis through a combination of fiscal discipline and debt restructuring. The Junta sought to use that power against workers by seeking to cut pension benefits by 25% at first, and then agreeing to an 8.5% cut of all pension benefits above \$1,500 a month, or \$18,000 per year. But that is not what happened.*

*In this case study, I argue that retirees utilized the Puerto Rico Oversight, Management, and Economic Stabilization Act’s (PROMESA) “awkward power sharing arrangement,” as set out in 48 U.S.C. § 2174(b)(3) and (b)(5), to upset the Junta’s proposed plan of adjustment. The retirees’ holdout behavior forced legislators and the Junta to enter into a new agreement that exchanged legislative approval of the tax-exempt bonds needed to effect confirmation of the Junta’s restructuring support agreement under § 2174(b)(3) and (b)(5) for zero pension cuts. Some scholars may respond to this set of events by calling for further fiscal powers for emergency managers in municipalities or territories that exhibit financial weakness by repealing or modifying 48 U.S.C. § 2174(b)(3) and (b)(5) and its analogue 11 U.S.C. § 943(b). This article argues that Congress should not amend 48 U.S.C. § 2174(b)(3) and (b)(5) because those provisions are key to ensuring that local elected officials buy into the confirmed plan of adjustment and implement the plan as efficiently as possible.*

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## INTRODUCTION

In 2016, Congress, pursuant to the Territories Clause of the U.S. Constitution, enacted the Puerto Rico Oversight, Management, and Economic Stabilization Act (PROMESA)<sup>1</sup> to facilitate the rehabilitation of Puerto Rico's finances and provide for a "bespoke" debt restructuring proceeding.<sup>2</sup> That law mandated that an unelected Financial Oversight and Management Board consisting of seven unelected experts in finance and law supervise Puerto Rico's financial affairs<sup>3</sup> commonly known as the "Junta."<sup>4</sup> The Junta's power over Puerto Rico's finances was near absolute thanks to PROMESA's strong grant of power,<sup>5</sup> and the U.S. District Court for the District of Puerto Rico's frequent agreement with the Junta's positions in court during the proceedings taking place under title III of PROMESA.<sup>6</sup>

In 2019, the tides began to turn against the Junta. Puerto Rico's Center for Investigative Journalism published a story revealing the leaked contents of a Telegram chat between then-governor Ricky Rosselló and his cabinet containing 800 pages of vulgar, racist, and homophobic comments.<sup>7</sup> The scandal came to be called "Rickyleaks."<sup>8</sup> In response, the people of Puerto

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<sup>1</sup> 48 U.S.C. § 2101 *et seq.*

<sup>2</sup> Laura Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359, 361 (2021). Even though Professor Coordes uses the term bespoke bankruptcy to refer to the proceedings under title III of PROMESA, this article refers to them as restructuring proceedings or title III proceedings. Title 11 of the U.S. Code covers bankruptcies, but title 48, under which PROMESA is placed in the U.S. Code, covers insular affairs and matters applying to the territories of the United States.

<sup>3</sup> 48 U.S.C. § 2121(e).

<sup>4</sup> Susan Cornwall and Nick Brown, *Puerto Rico Oversight Board Appointed*, REUTERS (Aug. 31, 2016), <https://www.reuters.com/article/us-puertorico-debt-board/puerto-rico-oversight-board-appointed-idUSKCN11628X/>. This article refers to the congressionally set up board as the Junta (pronounced hoon-tah).

<sup>5</sup> *See infra* Part I.c.

<sup>6</sup> *See infra* Part I.c.ii.

<sup>7</sup> Luis J. Valentin and Carla Minet, *The 889 Pages of the Telegram Chat between Rosselló Nevaes and His Closest Aides*, CENTER FOR INVESTIGATIVE JOURNALISM (July 13, 2019), <https://periodismoinvestigativo.com/2019/07/the-889-pages-of-the-telegram-chat-between-rossello-nevaes-and-his-closest-aides/>.

<sup>8</sup> Ray Sanchez, *These are some of the leaked chat messages at the center of Puerto Rico's political crisis*, CNN (July 17, 2019),

Rico engaged in fifteen days of massive protests in which an estimated 500,000 people took to the streets of Puerto Rico.<sup>9</sup> Amongst the most popular chants heard in the crowd were “Ricky Renuncia, y llevate la Junta” or “Ricky Resign, and take the Board with you.”<sup>10</sup> The crowd got half their wish. Then-governor Rosselló resigned.<sup>11</sup> However, the Junta did not, and could not, go anywhere.<sup>12</sup>

The frequency of the chant during the summer of 2019 demonstrated that the Junta was not a popular entity amongst Puerto Rico’s populace and helped further galvanize retirees (who were upset about a certain agreement) into action.<sup>13</sup> Why were people upset with the Junta? First, people were angry with the Junta for entering into a Restructuring Support Agreement (RSA) with senior secured creditors<sup>14</sup> that left very little room for the Junta to provide the people of Puerto Rico with any relief from a regressive 11.5%

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<https://www.cnn.com/2019/07/16/us/puerto-rico-governor-rossello-private-chats/index.html>.

<sup>9</sup> Simon Romero, et al., *15 Days of Fury: How Puerto Rico’s Government Collapsed*, N.Y. TIMES (July 27, 2019), <https://www.nytimes.com/2019/07/27/us/puerto-rico-protests-timeline.html>; *Hundreds of thousands demand Puerto Rico’s governor resign*, AL-JAZEERA (July 22, 2019), <https://www.aljazeera.com/news/2019/7/22/hundreds-of-thousands-demand-puerto-ricos-governor-resign>.

<sup>10</sup> Kate Aronoff, *As Puerto Rico Erupts in Protests and Governor Resigns, “La Junta” Eyes More Power*, THE INTERCEPT (July 24, 2019), <https://theintercept.com/2019/07/24/puerto-rico-protests-ricardo-rossello-la-junta/>.

<sup>11</sup> Nicole Acevedo, et al., *Embattled Puerto Rico Gov. Ricardo Rosselló Resigns Amid Public Outcry*, NBC NEWS (July 24, 2019), <https://www.nbcnews.com/news/latino/embattled-puerto-rico-gov-ricardo-rossell-resigns-amid-public-outcry-n1033241>.

<sup>12</sup> See 48 U.S.C. § 2149.

<sup>13</sup> See, e.g., David A. Skeel, Jr., *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 U.P.R. L. REV. 862, 866 (2018) (explaining how control boards are unpopular at first, and then later accepted, but acknowledging that this has not been the case in Puerto Rico two years after PROMESA’s enactment).

<sup>14</sup> Mary Childs, *Puerto Rico Reaches Agreement on Cofina Debt*, BARRON’S (Aug. 10, 2018), <https://www.barrons.com/articles/puerto-rico-reaches-agreement-on-cofina-debt-1533920320>; see also COFINA Plan Support Agreement at <https://drive.google.com/file/d/1YfGXodyeTEezi56XEbYH-YpTVV1sqGuY/view>.

sales tax burden,<sup>15</sup> the highest in the United States.<sup>16</sup> Second, retirees were upset that the Junta arrived at an agreement with the Official Retiree Committee (COR).<sup>17</sup> That agreement stipulated that anyone making over \$1,500 per month, or essentially \$18,000 per year, would experience an 8.5% reduction in their benefits.<sup>18</sup> Up to 40% of Puerto Rico's 167,000 retirees were at risk of experiencing a reduction in their benefits.<sup>19</sup>

Public pensioners have strong moral claims because they are often in a vulnerable economic position.<sup>20</sup> But moral claims do not, without more, always carry the day. That is why, in the case of Puerto Rico, retirees had

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<sup>15</sup> See generally Press Release, Espacios Abierto, Espacios Abiertos y el Experto en Reestructuración de Deuda, Martín Guzmán, Alertan Sobre las Implicaciones de que se Apruebe el Acuerdo de la Deuda de COFINA (Jan. 14, 2019), <https://espaciosabiertos.org/espacios-abiertos-y-el-experto-en-reestructuracion-de-deuda-martin-guzman-alertan-sobre-las-implicaciones-de-que-se-apruebe-el-acuerdo-de-la-deuda-de-cofina/>; Brad Setzer, *Will the Proposed Restructuring of COFINA Bonds Assure Puerto Rico's Return to Debt Sustainability?*, COUNCIL ON FOREIGN RELATIONS (Sept. 27, 2018), <https://www.cfr.org/blog/will-proposed-restructuring-cofina-bonds-assure-puerto-ricos-return-debt-sustainability>).

<sup>16</sup> Christian Ramos-Segarra, *Puerto Rico Among Countries with Worst Tax Systems*, THE NEWS J. (Aug. 4, 2021), [https://www.theweeklyjournal.com/business/puerto-rico-among-countries-with-worst-tax-systems/article\\_617200d8-f54d-11eb-a056-cf601d47d2d0.html](https://www.theweeklyjournal.com/business/puerto-rico-among-countries-with-worst-tax-systems/article_617200d8-f54d-11eb-a056-cf601d47d2d0.html).

<sup>17</sup> Weekly Journal Staff, *Puerto Rico Retirees Committee Reaches Deal with Oversight Board*, THE NEWS J. (June 12, 2019), [https://www.theweeklyjournal.com/online\\_features/puerto-rico-retirees-committee-reaches-deal-with-oversight-board/article\\_3f411a24-8d32-11e9-aca5-5faa8ef18044.html](https://www.theweeklyjournal.com/online_features/puerto-rico-retirees-committee-reaches-deal-with-oversight-board/article_3f411a24-8d32-11e9-aca5-5faa8ef18044.html).

<sup>18</sup> Disclosure Statement for the Seventh Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al. (hereinafter "Confirmed Disclosure Statement"), at 48 and ex. F at 20, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. July 30, 2021), ECF No. 17628, <https://cases.ra.kroll.com//puertorico/Home-DownloadPDF?id1=MTAyODU3NQ==&id2=0>.

Going forward, this article will reference back to the Confirmed Disclosure Statement because the title III court approved it for distribution. It contains all of the information available to creditors, including retirees, in reviewing the Junta's proposed plan of adjustment.

<sup>19</sup> Danica Cotto, *Retirees Defy Puerto Rico Govt, Get Pension Deal with Board*, ASSOC. PRESS (June 12, 2019), <https://www.yahoo.com/now/retirees-defy-puerto-rico-govt-154823763.html>.

<sup>20</sup> Jack Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 91-92 (2013) (arguing that pensioners deserve as much consideration as bondholders despite significant moral hazard problems).

to shelf the “Ricky Resign” chant. Puerto Ricans turned to using a well-known protest chant during the summer of 2019 Rickyleaks protest, “Lucha Si! Entrega No!” Or in English, “Struggle Yes! Surrender No!”<sup>21</sup> The court overseeing the restructuring proceedings was already familiar with this chant, having seen it in correspondence from the public as early as 2017.<sup>22</sup> Now it was being repurposed to capture the attitude that retirees, joined by community allies and labor unions, would now engage in *lucha* (struggle) by marching, banging on their pots and pans and otherwise mobilizing until the end of the title III proceedings to protect their very livelihoods.<sup>23</sup>

Part I of this article explains the article’s unique contribution to the literature. Part II paints a picture of why the Puerto Rico legislature’s *entrega* (surrender), and a subsequent surrender by retirees, appeared inevitable under PROMESA’s statutory language. Part III tells the story of how the summer of 2019’s protest in response to Rickyleaks marked a transition from *entrega*’s inevitability to *lucha*’s viability despite the Junta’s success in court. Part IV explains why Congress should not change 48 U.S.C. § 2174(b)(3) and 11 U.S.C. § 943(b)(4), despite the result in Puerto Rico’s restructuring proceedings. The article concludes by arguing that retirees were able to organize and exploit PROMESA’s awkward power-sharing arrangement to engage in holdout behavior to save their benefits from being reduced.<sup>24</sup>

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<sup>21</sup>Julio César Aizprúa, *El clamor de Puerto Rico: ‘Ricky, renuncia’*, LA PRENSA (July 23, 2019), [https://www.prensa.com/imprensa/panorama/clamor-Puerto-Rico-Ricky-renuncia\\_0\\_5355964427.html](https://www.prensa.com/imprensa/panorama/clamor-Puerto-Rico-Ricky-renuncia_0_5355964427.html). The chant was also used by those of Puerto Rican origin who lived on the mainland. See, e.g., Carrie Maxwell, *Rally calls for Puerto Rico gov’s resignation after anti-LGBTQ chat surfaces*, WINDY CITY TIMES (July 17, 2019), <https://www.windycitytimes.com/lgbt/Rally-calls-for-Puerto-Rico-govs-resignation-after-anti-LGBTQ-chat-surfaces/66576.html> (providing translation of the chant).

<sup>22</sup> See, e.g., Notice of Correspondence Received by the Court, at 50, 69, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. June 13, 2017), ECF No. 638.

<sup>23</sup> See, e.g., *Retirados Madruga a Carrión III al Son de Cacerolas*, UNIVISION (Sept. 30, 2019), <https://www.univision.com/local/puerto-rico-wlii/retirados-madruga-a-carriion-iii-al-son-de-cacerolas-fotos>.

<sup>24</sup> For ease of reading, this article will continue to cite only to 48 U.S.C. § 2174(b)(3) with the understanding that it is referencing to both (b)(3) and (b)(5), and its counterpart in chapter 9 of the Bankruptcy Code, 11 U.S.C. § 943(b)(4) and (b)(6).

## I. The Commentary Before the Lucha Begins

This article makes a new contribution to both bankruptcy and studies on political movements by using Puerto Rico's title III proceeding as a case study to explore the intersection of political activism and the structure of the Bankruptcy Code's democracy saving provisions. As Jack Beerman stated, public pension claimants have strong moral claims. They are often in a vulnerable economic position.<sup>25</sup> But moral claims do not always carry the day, especially in debt restructuring proceedings with potential moral hazard concerns.<sup>26</sup> In this way, even though some work exists analyzing populist backlash against corporate bankruptcies under chapter 11 of the Bankruptcy Code,<sup>27</sup> not much attention has been given to the power of constituent (here, retirees) mobilization; in that manner, this article also contributes to social movement literature as it relates to public sector debt restructurings.<sup>28</sup>

Specifically, this article attempts to demonstrate that the PROMESA's democracy saving provision for plan confirmation at 48 U.S.C. § 2174(b)(3), borrowed from 11 U.S.C. § 943(b)(4) and (b)(6), is inert unless brought to life with political organizing. The language is worth quoting at length. It states that,

the court shall confirm the plan if—  
 (1) the plan complies with the provisions of title 11 of the  
 United States Code, made applicable to a case under this title

<sup>25</sup> See generally Beermann, *supra* note 20.

<sup>26</sup> See, e.g., Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1425–1448 (2012) (discussing moral hazard); Michael J. Deitch, *Time for an Update: A New Framework for Evaluating Chapter 9 Bankruptcies*, 83 FORDHAM L. REV. 2705, 2709 (2015) (discussing moral hazards that bankruptcy courts face balancing multiple creditors and need for municipality to deliver basic services); Laura N. Coordes, *Gatekeepers Gone Wrong: Reforming the Chapter 9 Eligibility Rules*, 94 WASH. U. L. REV. 1191, 1243–1244 (2017) (speculating how changing Chapter 9's eligibility requirements may exacerbate moral hazard).

<sup>27</sup> See David Skeel, *The Populist Backlash in Chapter 11*, BROOKINGS (2022), <https://www.brookings.edu/research/the-populist-backlash-in-chapter-11/>.

<sup>28</sup> See, e.g., FRANCES PIVEN AND RICHARD CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (Vintage 1978); LAW AND SOCIAL MOVEMENTS (Michael McCann ed., Routledge 2016).

by section 301 of this Act;

(2) the plan complies with the provisions of this title;

(3) *the debtor is not prohibited by law from taking any action necessary to carry out the plan;*

(4) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in 507(a)(2) of title 11, United States Code, will receive on account of such claim cash equal to the allowed amount of such claim;

(5) *any legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval;*

(6) the plan is *feasible* and in the best interests of creditors, which shall require the court to consider whether available remedies under the nonbankruptcy laws and constitution of the territory would result in a greater recovery for the creditors than is provided by such plan; and

(7) the plan is consistent with the applicable Fiscal Plan certified by the Oversight Board under title II.<sup>29</sup>

A close examination of § 2174(b)(3) of PROMESA reveals critical components of the reorganization process that are largely underdeveloped in the current literature. One note scratches at the surface of these issues by observing that 48 U.S.C. § 2174(b)(5) effectively broadens the scope of court and governmental regulatory approvals under § 1129(a)(4) and (a)(6) of the Bankruptcy Code.<sup>30</sup> Section 2174(b)(5) encompasses “any legislative, regulatory, and electoral approval” necessary to carry out the plan.<sup>31</sup> This language is certainly different than chapter 11 of the Bankruptcy Code, which governs primarily corporate bankruptcies, but it is not that different

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<sup>29</sup> 48 U.S.C. § 2174(b) (emphasis added).

<sup>30</sup> See Christine Joh, Comment, *A Fly in the Ointment, PROMESA’s Drafting Error in § 314(b)(7)*, 35 EMORY BANKR.

DEV. J. 645, 669, 670–671 (2019).

<sup>31</sup> *Id.*



from 11 U.S.C. § 943(b)(6), which governs municipal bankruptcies.<sup>32</sup> Section 943(b)(6) states that a plan must have “any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval.”<sup>33</sup>

Most of the other literature on PROMESA focuses on issues outside the scope of this article. For example, there is a bevy of literature exploring Congress’s use of the Territories Clause to enact PROMESA, and rightfully critiquing Congress for engaging in an exercise of colonial power.<sup>34</sup> There is some literature explaining that Puerto Rico’s debt restructuring could serve as a template for restructuring other territories in fiscal distress such as the Virgin Islands.<sup>35</sup> However, little scholarly attention has been placed on how retirees and workers mobilized in response to the dangers to their financial interests in more recent bankruptcies, and specifically the Puerto Rico title III proceedings.<sup>36</sup>

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<sup>32</sup> Compare 48 U.S.C. § 2174(b)(3) and (b)(5) with 11 U.S.C. § 943(b)(4) and (b)(6).

<sup>33</sup> 11 U.S.C. § 943(b)(6).

<sup>34</sup> U.S. Const. art. IV, § 3, cl. 2; see also Elizabeth Whiting, Comment, *Puerto Rico Debt Restructuring: Origins of a Constitutional and Humanitarian Crisis*, 50 U. MIAMI INTER-AMERICAN L. REV. 237 (2018); Emily Leblanc, Comment, *What Happens When an Island Starts to Drown under Its Own Weight: the Debt Crisis in Puerto Rico*, 20 OR. REV. INT’L L. 305 (2018); Nathan A. Mooney, Comment, *Dealing with an Inevitable Case of I Told-You-So: Crafting a Framework for Resolving State Fiscal Distress Post-Puerto Rico*, 15 N.Y.U. J.L. & BUS. 653 (2019); Adriel I. Cepeda Derieux and Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J. FORUM 284 (2020); Julia R. Cummings, Comment, *Broken PROMESA: Why the United States Should Abandon Its Use of the Territories Clause to Control the Local Affairs of Puerto Rico*, 87 BROOK. L. REV. 349 (2021); Pedro Caban, *PROMESA, Puerto Rico and the American Empire* 33, Latin American, Caribbean, and U.S. Latino Studies Faculty Scholarship, [https://scholarsarchive.library.albany.edu/cgi/viewcontent.cgi?article=1032&context=la\\_cs\\_fac\\_scholar](https://scholarsarchive.library.albany.edu/cgi/viewcontent.cgi?article=1032&context=la_cs_fac_scholar).

<sup>35</sup> Dean Delasalas, Comment, *La Promesa Cumplida: How the U.S. Constitution Has Enabled Colonialism*, 67 CATH. U. L. REV. 761 (2018); Mary Williams Walsh, *After Puerto Rico’s Debt Crisis, Worries Shift to Virgin Islands*, N.Y. TIMES (June 25, 2017), <https://www.nytimes.com/2017/06/25/business/dealbook/virgin-islands-debt-payment-pensions.html>.

<sup>36</sup> See generally Iris J. Lav, *Curbing the Consequences: Achieving Better Outcomes for Workers in Municipal Bankruptcies*, 23 NEW LABOR FORUM 48–56 (2014) (exploring how union members suffer the consequences for macro-economic factors that they did not create in bankruptcy proceedings such as in the case of Detroit).

Perhaps the two articles that come closest and speak to some related issues are by Professor Diane Lourdes Dick and Professor Adam Levitin. In her article *Bondholders vs. Retirees in Municipal Bankruptcies: The Political Economy of Chapter 9*, Professor Dick examines previous municipal bankruptcies in which retirees escaped without benefit cuts made to their pension. However, she anchors her analysis in the power that the California Public Employees Retirement System wielded as a creditor both before and after the filing of a petition for bankruptcy, and not in the political mobilizing of the workers.<sup>37</sup> Closer to the mark is Professor Levitin's article *Bankruptcy Politics and the Politics of Bankruptcy*.<sup>38</sup> In that article, Professor Levitin discusses ways in which bankruptcy can be a political tool because it can give politicians cover to enter into agreements their constituents disagree with, and provides different incentives for elected officials of different parties.<sup>39</sup> The focus of that article though is not on the intersection of restructuring law and protests, but rather on political economy.

In focusing on whether a plan of adjustment is feasible, this article provides a unique response to those scholars who argue that the law should incentivize the creation of unelected control boards. It is also worth noting that there is little literature exploring the intersection of the plan confirmation requirements of § 2174(b)(3) and § 943(b)(4) and their relation to the feasibility determination, though this interplay was discussed to some extent by Judge Rhodes in one his decisions in the Detroit chapter 9 case.<sup>40</sup> This article argues that scholars and bankruptcy judges need to consider the important role played by democratically elected officials who have to implement the confirmed plan of adjustment and RSAs when considering

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<sup>37</sup> Diane Lourdes Dick, *Bondholders vs. Retirees in Municipal Bankruptcies: The Political Economy of Chapter 9*, 92 AM. BANKR. L.J. 73, 94, 108 (2018).

<sup>38</sup> Levitin, *supra* note 26.

<sup>39</sup> *Id.* at 1446–1448.

<sup>40</sup> Compare 11 U.S.C. § 943(b)(4) and (b)(6) with 48 U.S.C. § 2174(b)(3) and (b)(5). See, e.g., Clayton P. Gillette and David A. Skeel Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150, 1198–1206 (2016); see also Clayton Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373 (2013) (arguing that the case for financial control board being anti-democratic is overstated).

confirmation of a plan and its feasibility as required by PROMESA and chapter 9 of the Bankruptcy Code. The next section begins to tell that story by laying out some basics about PROMESA.

## II. The Seeming Inevitability of Entrega to the Junta

### A. Puerto Rico's Prologue: The retirees enter battle with the Junta weakened by years of anemic economic activity and fiscal austerity.

Congress enacted PROMESA to deal with Puerto Rico's financial woes and created the Junta "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets" in response to substantial headwinds facing Puerto Rico's economy.<sup>41</sup> Most accounts explain that Puerto Rico's financial crisis began in 1996, when Congress voted to repeal § 936 of the Internal Revenue Code, effective in 2006.<sup>42</sup> Section 936 allowed firms operating in Puerto Rico to report income generated on the island tax-free. Puerto Rico substantially depended on § 936 of the Internal Revenue Code to generate employment.<sup>43</sup> In 2006, the phaseout period for § 936 came to an end. Available manufacturing jobs on the island plummeted almost immediately, wiping out a substantial portion of the Commonwealth's income tax base.<sup>44</sup>

Puerto Rico's local government responded to these economic headwinds

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<sup>41</sup> 48 U.S.C. § 2121(a).

<sup>42</sup> See Confirmed Disclosure Statement, *supra* note 18, at 179–183; see also John Schoen, *Here's how an obscure tax change sank Puerto Rico's economy*, CNBC (Sept. 26, 2017), <https://www.cnbc.com/2017/09/26/heres-how-an-obscure-tax-change-sank-puerto-ricos-economy.html>; Amelia Cheatham and Diana Roy, Backgrounder, *Puerto Rico: A U.S. Territory in Crisis*, COUNCIL ON FOREIGN RELATIONS (Sept. 29, 2022), <https://www.cfr.org/backgrounder/puerto-rico-us-territory-crisis>; Antonio J. Pietrantonio, Comment, *Restructuring Puerto Rico's General Obligation Debt*, 85 REV. JUR. U.P.R. 629, 631 (2016).

<sup>43</sup> Schoen, *supra* note 42; Cheatham and Roy, *supra* note 42.

<sup>44</sup> Argeo Quinones and Ian J. Seda Irizarry, *Wealth Extraction, Governmental Servitude, and Social Disintegration in Colonial Puerto Rico*, 15 NEW POLITICS 60 (2016) (arguing that Puerto Rico's outdated economic model led to its economic collapse), [https://newpol.org/issue\\_post/wealth-extraction-governmental-servitude-and-social-disintegration-colonial-puerto-rico/](https://newpol.org/issue_post/wealth-extraction-governmental-servitude-and-social-disintegration-colonial-puerto-rico/).

in several ways. In 2000, Puerto Rico closed access to its pension plan and required all employees to enter into a defined contribution plan much like a 401(k).<sup>45</sup> In 2006, Puerto Rico experienced a local government shutdown that left 95,000 workers furloughed.<sup>46</sup> In order to resolve that shutdown, the legislature imposed a sales tax on its people for the very first time.<sup>47</sup> The legislature created a special purpose entity called COFINA, which used the proceeds from the newly instituted sales tax to pay off legacy debt and reopen the Commonwealth government.<sup>48</sup>

In 2008, Puerto Rico tried to remedy their primary pension plan's funding crisis by issuing \$3.5 billion of Pension Obligation Bonds, essentially gambling that the borrowed funds would generate investment returns greater than the interest due on the bonds.<sup>49</sup> The 2008 financial crisis undermined the local government's ability to use those borrowed bonds to keep the pension fund solvent. In 2009, the government enacted an emergency law that resulted in the permanent layoff of 17,000 workers, or one-sixth of the workforce, on the basis of seniority.<sup>50</sup> That emergency law also raised a series of taxes and enabled the issuance of further COFINA debt, backed by the collection of sales taxes.<sup>51</sup> The U.S. District Court for the District of Puerto Rico upheld the measure against a contract clause challenge brought by several unions,<sup>52</sup> and the First Circuit affirmed the lower court's decision.<sup>53</sup> Some economists believe that the layoffs

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<sup>45</sup> P.R. Act 305 of 1999.

<sup>46</sup> P.R. Act 91 of 2006.

<sup>47</sup> P.R. Act 91 of 2006 at Statement of Motives.

<sup>48</sup> P.R. Act 91 of 2006 at art. 3(a)(2) and (b)(2).

<sup>49</sup> Reuters, *Puerto Rico's Governor Approves Bailout, Ending Impasse*, N.Y. TIMES (May 14, 2006), <https://www.nytimes.com/2006/05/14/us/14puerto.html>; Marc Joffe, *The Cautionary Tale of Puerto Rico's Pensions*, REASON FOUNDATION (May 22, 2018), <https://reason.org/commentary/the-cautionary-tale-of-puerto-ricos-pensions/>.

<sup>50</sup> P.R. Act 7 of 2009 at art. 37; see also José A. Laguarda Ramírez, *Puerto Rico to Lay Off 17,000; Splintered Labor Movement Scrambles to Respond*, LABOR NOTES (Oct. 22, 2009), <https://labornotes.org/2009/10/puerto-rico-lay-17000-splintered-labor-movement-scrambles-respond>.

<sup>51</sup> P.R. Act 7 at art. 49–50.

<sup>52</sup> *United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño*, 677 F. Supp. 2d 530, 533 (D.P.R. 2009).

<sup>53</sup> *United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño*, 633 F.3d 37 (1st Cir. 2011).

exacerbated Puerto Rico macroeconomic woes.<sup>54</sup> History proved them right, as the pain did not end just then.

In April 2013, the legislature passed Public Law 3. Public Law 3 of 2013 contained a series of additional pension reforms that (i) froze the accumulation of further benefits under previously existing pension benefit laws for all active employees,<sup>55</sup> (ii) significantly increased the retirement age,<sup>56</sup> (iii) increased the amount of money active employees were obligated to contribute to their retirements from 8.5% to 10% of their salary,<sup>57</sup> (iv) moved current employees who had enjoyed defined benefit pension benefits into 401(k) hybrid style plans,<sup>58</sup> and (v) modified fringe benefits that the pension plan provided such as health care.<sup>59</sup> The law also required the government of Puerto Rico to make increased contributions to the fund (that it never made).<sup>60</sup>

The Supreme Court of Puerto Rico upheld the legality of those pension reforms as it applied to the Commonwealth's Employee Retirement System against a Contracts Clause challenge in *Trinidad Hernández v. Estado Libre Asociado*.<sup>61</sup> However, that same court used the Contracts Clause to strike down mostly similar reforms as applied to the Teachers Retirement System only one year later in *Asociación de Maestros v. Sistema de Retiro*.<sup>62</sup> The Supreme Court of Puerto Rico invalidated some key elements of attempted pension reform efforts that would have affected teachers because they

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<sup>54</sup> *Ley 7 fue adversa para la Economía*, PRIMERA HORA (Apr. 19, 2011) (economist stating that Law 7 caused Puerto Rico to lose 120,000 jobs rather than the 45,000 projected), <https://www.primerahora.com/noticias/gobierno-politica/notas/ley-7-fue-adversa-para-la-economia/#:~:text=%E2%80%9CPer%C3%B3la%20realidad%20es%20que,la%20econom%C3%ADa%20las%20empeor%C3%B3E2%80%9D>; see also Quinones and Seda Irizarry, *supra* note 44.

<sup>54</sup> P.R. Act 305 of 1999.

<sup>55</sup> P.R. Act 3 of 2013 at § 17.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* § 19.

<sup>58</sup> *Id.* § 15.

<sup>59</sup> *Id.* § 35.

<sup>60</sup> *Id.* § 20.

<sup>61</sup> *Trinidad Hernández v. ELA*, 188 D.P.R. 828, 840–841 (P.R. 2013).

<sup>62</sup> *AMPR v. Sist. Retiro Maestros IV*, 190 D.P.R. 854, 880 (P.R. 2014). The court enjoined the majority of Law 160 of 2013 but allowed its changes to medical and other fringe benefits to take effect.

cannot participate in social security. Notably, at least one ex-official believes that the teacher groups were a powerful interest that fought back. According to Hector Mayol, the top official at both Employees' Retirement System (ERS) and Teachers' Retirement System (TRS) from 2009 to 2013, "[t]hey're homogeneous, they're well-organized, and they lobby hard."<sup>63</sup>

Taken together, neither the austerity-imposed pain, nor Puerto Rico's long-term macroeconomic nosedive forced Congress to act. Compounding Puerto Rico's bind at that time was the fact that Puerto Rico is neither a state nor an independent country, but an unincorporated territory of the United States.<sup>64</sup> If it were an independent nation, it would have been able to seek support from the International Monetary Fund as a member country or exercise its sovereign powers to somehow force creditors into a debt restructuring process.<sup>65</sup> If it were a state, then Puerto Rico's cities and electrical authority would have been able to file for relief under chapter 9 of the Bankruptcy Code.<sup>66</sup> As a territory of the United States, it could do neither. Only Congress could act and could do as it pleases with Puerto Rico, as explained by Justice White in his concurrence in *Downes v. Bidwell*:

The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether

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<sup>63</sup> Nick Brown, *Puerto Rico's Other Crisis: Impoverished Pensions*, REUTERS INVESTIGATES (Apr. 7, 2016), <https://www.reuters.com/investigates/special-report/usa-puertorico-pensions/>.

<sup>64</sup> *Downes v. Bidwell*, 182 U.S. 244, 246 (1901). The Court's holding in this case, as well the *Insular Cases* generally, have been roundly criticized for containing racist language and clearly anti-democratic impulses. Justice Gorsuch recently called for the Court to overturn them in *United States v. Vaello Madero*, 596 U.S. 159 (2022).

<sup>65</sup> See International Monetary Fund Member List, IMF, <https://www.imf.org/external/np/sec/memdir/memdate.htm> (last accessed June 30, 2022).

<sup>66</sup> 11 U.S.C. § 101(52). It is important to note though that no state in the United States is currently eligible to file for bankruptcy. For an excellent discussion of the matter, see Matthew T. Repetto, Comment, *Whether Puerto Rico's Exclusion from Chapter 9 is Non-Uniform Within the Meaning of the Bankruptcy Clause of the United States Constitution*, 8 ST. JOHN'S BANK. RESEARCH LIBR. No. 22 (2016).

they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public wellbeing, *to deprive such territory of representative government if it is considered just to do so*, and to change such local governments at discretion.<sup>67</sup>

Congress acted only after two interlocking sets of events created a crisis point.

The first event that forced Congress to act occurred when then-governor Alejandro Garcia-Padilla declared that Puerto Rico's debts were not payable.<sup>68</sup> In an important interview with the *New York Times*, he took the position that it was the creditors' turn to accept a sacrifice.<sup>69</sup> At that time, Puerto Rico's \$74 billion in bonded debt was eight times that of Detroit's bonded debt and the heaviest per capita burden in the United States.<sup>70</sup> Furthermore, Puerto Rico's pension systems were broke. Puerto Rico had three retirement systems: one for judges, one for teachers, and one for all other Commonwealth employees. They needed \$50 billion to pay the pension benefits they collectively owed.<sup>71</sup>

At that time, Puerto Rico's status as a territory of the United States gave it few tools to restructure its debt under federal law. Puerto Rico found itself under a difficult situation even under its own laws. If Puerto Rico's elected officials decided at that time to rob Peter, in this case the creditors, to pay Paul, the pensioners, it would have been futile to do so under Puerto

<sup>67</sup> *Bidwell*, 182 U.S. at 289–290 (emphasis added).

<sup>68</sup> Michael Corkery and Mary Williams Walsh, *Puerto Rico's Governor Says Island's Debts Are 'Not Payable,'* N.Y. TIMES (June 28, 2015), [https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html#:~:text=Michael%20Corkery,Mary%20Williams%20Walsh;Financial%20Oversight%20and%20Management%20Board%20Special%20Claim's%20Committee,The%20Independent%20Investigators'%20Final%20Investigative%20Report,17,\(Aug.18,2018\),https://www.documentcloud.org/documents/4777926-JUNTA-Final-Investigative-Report-Kobre-amp-Kim](https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html#:~:text=Michael%20Corkery,Mary%20Williams%20Walsh;Financial%20Oversight%20and%20Management%20Board%20Special%20Claim's%20Committee,The%20Independent%20Investigators'%20Final%20Investigative%20Report,17,(Aug.18,2018),https://www.documentcloud.org/documents/4777926-JUNTA-Final-Investigative-Report-Kobre-amp-Kim).

<sup>69</sup> Corkery and Williams Walsh, *supra* note 68.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

Rico's Constitution because general obligation bondholders are those who hold bonds that are guaranteed by the full faith and credit of the government.<sup>72</sup> Sections 2 and 8 (art. VII) of Puerto Rico's Constitution provides general obligation bondholders of the Commonwealth's debt with stronger payment rights than pensioners. For example, § 8 (art. VII) states that: "[i]n case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law."<sup>73</sup>

If Puerto Rico did not pay as then-governor Garcia-Padilla indicated, under the constitution, holders of Puerto Rico's public debt would have been able to obtain immediate relief through a mandamus action. Puerto Rico's Constitution provides that "[t]he Secretary of the Treasury may be required to apply the available revenues including surplus to the payment of interest on the public debt and the amortization thereof in any case provided for by Section 8 of this Article VI at the suit of any holder of bonds or notes issued in evidence thereof."<sup>74</sup> In other words, if Puerto Rico were going to restructure its debt, it would need Congress to step in, just as the Supreme Court of the United States made clear in the second event that created a crisis point forcing Congress to act.

On June 30, 2016, the Supreme Court issued its decision in *Commonwealth of Puerto Rico, et al. v. Franklin California Tax-Free*

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<sup>72</sup> Antonio J. Pietrantonio, *Restructuring Puerto Rico's General Obligation Debt*, 85 REV. JUR. U.P.R. 629 (2016).

<sup>73</sup> Ramon Parrilla Carbia, Comment, *Full Faith Bonds and Revenue Bonds In Puerto Rico*, 82 U.P.R. L.J. 122, 138 (2013) (explaining fact that Puerto Ricans voted on this provision, and Congress also approved it). This section provides, on its face, strong remedies to creditors. The fact that such strong creditor remedies were included creates an interesting paradox when one considers that Puerto Rico's Socialist Party also had a strong influence in shaping Puerto Rico's Constitution. See, e.g., Jorge Farinacci Fernos, *PUERTO RICO'S CONSTITUTIONAL PARADOX: COLONIAL SUBORDINATION, DEMOCRATIC TENSION, AND THE PROMISE OF PROGRESSIVE TRANSFORMATION* (Hart Publishing 2023).

<sup>74</sup> P.R. Const. art. VI, § 8.



*Trust*.<sup>75</sup> In that case, asset management firm Franklin Templeton<sup>76</sup> brought suit against the government of Puerto Rico challenging the legality of the Puerto Rico Public Corporation Debt Enforcement and Recovery Act (Recovery Act).<sup>77</sup> The Recovery Act was generally based on principles contained in chapters 9 and 11 of the Bankruptcy Code,<sup>78</sup> though restructuring proceedings would take place in a specially created tribunal in Puerto Rico rather than before an Article I federal bankruptcy judge.<sup>79</sup> Franklin Templeton, a firm that held Puerto Rico Electrical Power Authority (PREPA) bonds, filed suit immediately seeking to invalidate that law.<sup>80</sup> The district court and the U.S. Court of Appeals for the First Circuit enjoined the Recovery Act from going into effect. After granting certiorari, the Supreme Court, through Justice Thomas, invalidated the attempt because Congress had not authorized Puerto Rico to file for bankruptcy protection.<sup>81</sup> Specifically, the Supreme Court held that the 1984 amendment to chapter 9 of the Bankruptcy Code excluded Puerto Rico from the definition of a “State” for purposes of who may be a debtor under the Bankruptcy Code.<sup>82</sup>

No one is quite sure why former Senator Strom Thurmond, well known for a long history of racism, proposed the amendment.<sup>83</sup> In fact, the First

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<sup>75</sup> Puerto Rico v. Franklin California Tax-Free Tr., 579 U.S. 115 (2016).

<sup>76</sup> Franklin Templeton had experience in seeking to obtain higher recoveries for itself at the expense of retirees. In the City of Stockton bankruptcy, it objected to a plan of adjustment that would have paid the California retirement system, known as CalPERS, in full, and receiving a 10-20% recovery on its claims. It complained that “no municipal bondholder has ever received so little in the history of municipal bankruptcy.” Max Whittaker, *U.S. Court Tosses Franklin’s Appeal of Stockton Bankruptcy Plan*, REUTERS (Dec. 11, 2015), <https://www.reuters.com/article/us-california-stockton-appeal/u-s-court-tosses-franklins-appeal-of-stockton-bankruptcy-plan-idUSKBN0TU2UM20151212>.

<sup>77</sup> P.R. Act 71 of 2014.

<sup>78</sup> *Id.* §§ 301–321.

<sup>79</sup> *Id.* §§ 102(18), 109.

<sup>80</sup> Puerto Rico v. Franklin California Tax-Free Tr., 579 U.S. 115, 119 (2016).

<sup>81</sup> *Id.* at 120, 130.

<sup>82</sup> *Id.*

<sup>83</sup> Jon Greenberg, *Mystery: Strom Thurmond, Puerto Rico and bankruptcy protection*, POLITIFACT (Poynter Institute) (Apr. 27, 2016), <https://www.politifact.com/factchecks/2016/apr/27/john-oliver/mystery-strom-thurmond-puerto-rico-and-bankruptcy/> (noting that Thurmond, who had a history as a virulent racist, introduced the amendment to exempt Puerto Rico from chapter 9’s

Circuit's decision explored Thurmond's actions at length in its opinion and concluded that the Congressional record concerning the 1984 amendments contained no record or justification for those amendments.<sup>84</sup> Whatever Senator Thurmond's intentions were, as rapper and Hamilton star Linn-Manuel Miranda so aptly put it in a television appearance with John Oliver: "Somewhere down the line, Strom Thurmond's ghost busted a cap in a chance at chapter 9."<sup>85</sup>

In essence, Congress had written Puerto Rico out of chapter 9's bankruptcy protection and the Supreme Court preempted Puerto Rico from helping itself by refusing to define it as a state for purposes of chapter 9. Only once the Supreme Court clearly laid Puerto Rico's woes at the feet of Congress did that body move into action with the enactment of PROMESA.

B. Congress's prologue: Congress applies important lessons from retiree wins in previous Chapter 9 bankruptcies in Prichard, Stockton, and Detroit.

Congress's enactment of PROMESA was influenced by the rash of municipal bankruptcies that were filed between the 2008 financial crisis and the Supreme Court's decision in *Franklin Templeton Investments* in 2016. Generally, the majority of chapter 9 cases are initiated by special purpose districts for the purpose of funding income producing infrastructure such as power plants, water distribution, or transportation networks.<sup>86</sup> Chapter 9 cases initiated by central governments are much rarer.<sup>87</sup> In many instances, governments place retiree benefit cuts on the table. Perhaps that is why

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bankruptcy protection, but noting that neither his archives nor the congressional record reveal why he made this decision).

<sup>84</sup> See *Franklin California Tax-Free Tr. v. Puerto Rico*, 805 F.3d 322, 349–350 (1st Cir. 2015), *aff'd*, 579 U.S. 115 (2016); see also Greenberg, *supra* note 83.

<sup>85</sup> Linn-Manuel Miranda and Alex Lacamoire, *100 Miles Across* (April 25, 2016), lyrics available at <https://linmanuel.tumblr.com/post/143385694570/here-are-my-lyrics-to-last-nights-john-oliver>.

<sup>86</sup> Mike Maciag, *Bankrupt Cities, Municipalities List and Map* (Mar. 23, 2012), <https://www.governing.com/archive/municipal-cities-counties-bankruptcies-and-defaults.html> (last updated Mar. 20, 2019) (last accessed June 20, 2022).

<sup>87</sup> *Id.*

they garner significant attention. For example, when the City of Prichard, Alabama, a suburb of Mobile, filed for bankruptcy in 1999, it was seeking to shed its pension debt. In that case, the city reduced its current and future pension benefit payments by 8.5% (among other modifications) through a confirmed plan of adjustment.<sup>88</sup>

The attention to municipal pension issues increased due to the negative impact that the 2008 financial crisis had on pension fund investments and university endowments. The crisis forced cities to look for ways to close the actuarial gap created by the 2008 financial crisis using fiscal tools.<sup>89</sup> Many cities were not able to close that gap. For that reason, a number of major cities filed or attempted to file for chapter 9 bankruptcy protection including, yet again, the City of Prichard, Alabama. It filed for bankruptcy protection a second time when pensioners brought a suit against it after missing six months of pension payments.<sup>90</sup> The cities of Vallejo, California, in 2008;<sup>91</sup> Central Falls, Rhode Island,<sup>92</sup> and Harrisburg, Pennsylvania, in

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<sup>88</sup> See *In re City of Prichard, Ala.*, No. 99-13465 (Bankr. S.D. Ala. Oct. 6, 2000).

<sup>89</sup> See generally *A widening gap in cities—Shortfalls in Funding for Pensions and Retiree Health Care*, PEW CHARITABLE TR., [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes\\_assets/2013/pewcitypensionsreportpdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2013/pewcitypensionsreportpdf.pdf); *The State Role in Local Government Financial Distress—As Cities Confront Challenges, States Weigh Whether to Help Them Pull Through*, PEW CHARITABLE TR., [https://www.pewtrusts.org/~media/assets/2016/04/pew\\_state\\_role\\_in\\_local\\_government\\_financial\\_distress.pdf](https://www.pewtrusts.org/~media/assets/2016/04/pew_state_role_in_local_government_financial_distress.pdf) (last visited July 29, 2022) (outlining cities that are experiencing fiscal distress).

<sup>90</sup> David Ferrara, *Prichard Files for Bankruptcy; City Faces Lawsuit Over Nearly Empty Pension Fund*, PRESS-REGISTER (Oct. 28, 2009), [https://www.al.com/live/2009/10/prichard\\_files\\_for\\_bankruptcy\\_1.html](https://www.al.com/live/2009/10/prichard_files_for_bankruptcy_1.html) (noting that the City of Prichard, Alabama, filed for bankruptcy due to pension cost pressures).

<sup>91</sup> Adam Tanner, *San Francisco Suburb Vallejo Files for Bankruptcy*, REUTERS (May 23, 2008), <https://www.reuters.com/article/us-bankruptcy-california-city/san-francisco-suburb-vallejo-files-for-bankruptcy-idUSN2352179020080524> (reporting on how Vallejo's public safety personnel created cost pressures).

<sup>92</sup> Scott Malone, *Rhode Island's Central Falls Files for Bankruptcy*, REUTERS (Aug. 1, 2011), <https://www.reuters.com/article/us-rhodeisland-centralfalls/rhode-islands-central-falls-files-for-bankruptcy-idUSTRE7703ID20110801>.

2011; and San Bernardino<sup>93</sup> and Stockton, California,<sup>94</sup> in 2012, all filed as well. The Stockton bankruptcy especially caused concern amongst those in the municipal bond market because the court in Stockton confirmed a plan of adjustment that did not cut pensions over the objection of a financial creditor but did contain a tax increase that residents voted favorably on. With an eye toward Detroit, financial creditors grew concerned that courts might protect unsecured pension claims over general obligation bonds (which are unsecured bonds).<sup>95</sup>

In response to concerns about municipal finances, the State of Michigan passed a law that gave an emergency manager broad powers over any city in financial distress. The emergency manager statute states:

Upon appointment, the emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. *Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the*

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<sup>93</sup> Tim Reid, *San Bernardino, California, files for bankruptcy with over \$1 billion in debts*, REUTERS (Aug. 1, 2012), <https://www.reuters.com/article/us-usa-bankruptcy-san-bernardino/san-bernardino-california-files-for-bankruptcy-with-over-1-billion-in-debts-idUSBRE87105220120802>.

<sup>94</sup> Jim Christie, *Stockton Files for Bankruptcy*, HUFFINGTON POST (June 28, 2012), [https://www.huffpost.com/entry/stockton-bankruptcy-california-chapter-9\\_n\\_1636343](https://www.huffpost.com/entry/stockton-bankruptcy-california-chapter-9_n_1636343).

<sup>95</sup> See, e.g., Caitlin Devitt, *Detroit, Like Stockton, Reveals Growing Tension Between Pensions and Bonds*, BOND BUYER (Nov. 10, 2014), <https://www.bondbuyer.com/news/detroit-like-stockton-reveals-growing-tension-between-pensions-and-bonds>.

*emergency manager.*<sup>96</sup>

The Governor of the State of Michigan immediately appointed an emergency manager to manage Detroit, a city plagued with financial woes due to a decline in economic activity in the auto sector.<sup>97</sup> Detroit's pension systems were severely underfunded when it filed for chapter 9 bankruptcy protection in 2014. The court was able to confirm the plan of adjustment only after Detroit's two pension funds received the state's bankruptcy contribution of \$194.8 million in early 2015 as part of its "grand bargain" to save the Detroit Institute of Arts from being liquidated.<sup>98</sup> Under the bankruptcy agreement, the city froze two existing pension plans, created two new plans for current and future workers, and established new governance structures to oversee the pensions.<sup>99</sup> Seventy-three percent of workers in the general fund voted to accept a 4.5% cut in their pension benefits and eliminate their cost of living adjustments.<sup>100</sup> For the police and fire funds, more than 80% voted to cut their cost of living adjustments.<sup>101</sup> Despite these cuts, financial creditors were not pleased at the outcome because some thought that pensioners got off too easily. As reported in the Detroit Free Press, "What the Detroit bankruptcy made clear is that in chapter 9 bankruptcies, retirees could have an edge over Wall Street. It was a shocking development for New York's bond industry, as City of Detroit

<sup>96</sup> 2012 Mich. Pub. Acts of 436 at § 9(a) (emphasis added).

<sup>97</sup> Chris Isidore, *Detroit, in Financial Trouble, Gets Emergency Manager*, CNN (Mar. 14, 2013), <https://money.cnn.com/2013/03/14/news/economy/detroit-emergency-manager/index.html>.

<sup>98</sup> Susan Tompor, *Even 5 Years Later, Retirees Feel the Effects of Detroit's Bankruptcy*, DETROIT FREE PRESS (July 18, 2018), <https://www.freep.com/story/money/personal-finance/susan-tompor/2018/07/18/detroit-bankruptcy-retirees-pension/759446002/>; see also Irene Hirano Inouye, *Detroit's Grand Bargain: Philanthropy as a Catalyst for a Brighter Future*, Ctr. on Philanthropy & Public Policy, Univ. of S. Cal. (Aug. 2017), [https://cppp.usc.edu/wp-content/uploads/2017/08/IHI\\_Digital\\_2017.pdf](https://cppp.usc.edu/wp-content/uploads/2017/08/IHI_Digital_2017.pdf); Pete Saunders, *Detroit's "Grand Bargain": A Model for Others?*, FORBES (May 7, 2016), <https://www.forbes.com/sites/petesauanders1/2016/05/07/detroits-grand-bargain-a-model-for-others/?sh=5e7bd9be55fa>.

<sup>99</sup> Saunders, *supra* note 98.

<sup>100</sup> Assoc. Press, *Detroit City Workers, Retirees Vote in Favor of Pension Cuts in Bankruptcy Plan*, FOX NEWS (Dec. 20, 2015), <https://www.foxnews.com/politics/detroit-city-workers-retirees-vote-in-favor-of-pension-cuts-in-bankruptcy-plan>.

<sup>101</sup> *Id.*

pensions overall ended up with a better recovery rate than general obligation bondholders, much to the frustration of Wall Street.”<sup>102</sup>

The structure of PROMESA demonstrates that Congress was reacting to a confluence of long-term trends affecting Puerto Rico’s economic activity, municipal bankruptcy outcomes, and the immediate crisis that the Supreme Court’s decision in *Franklin Templeton* caused. Even though Congress’s enactment of PROMESA certainly was, in the words of Professor Laura Coordes,<sup>103</sup> a bespoke bankruptcy solution, it seems like Congress was most interested in tailoring the imposition of a financial control board onto Puerto Rico as a way of ensuring that the Junta could impose discipline on the Commonwealth’s finances and cut pension benefits.<sup>104</sup> The next section of this article examines the broad financial powers that Congress gave to the Junta, its version of an emergency financial manager.

### C. Setting the Stage for Entrega - Congress creates a seemingly untouchable Junta.

One key to the retirees’ success in protecting their benefits in the Puerto Rico restructuring proceedings arises out of how Congress designed PROMESA’s power sharing arrangement between the elected government of Puerto Rico and the congressionally appointed Junta. PROMESA established, through Congress’s power to make needful regulations for the territories, a Financial Oversight and Management Board (the Junta).<sup>105</sup> Its

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<sup>102</sup> See Tompor, *supra* note 98.

<sup>103</sup> Coordes, *supra* note 2.

<sup>104</sup> 48 U.S.C. §§ 2231–2232. Title VI allowed for territories to restructure their debt and bind holdout creditors if two-thirds of all creditors voted in favor of a modification. Title VI’s inclusion of a collective action clause demonstrates that Congress was also experimenting with mechanisms used in sovereign debt restructurings. While the government of Puerto Rico did use title VI’s mechanism to arrive at an agreement with certain bondholders, those proceedings are not relevant to the events examined in this article.

<sup>105</sup> 48 U.S.C. § 2121(b)(2). It is worth noting that even though PROMESA invokes the Territories Clause as the basis for Congress’s authority to pass the law, it studiously avoids mention of *Downes v. Bidwell*, discussed above. One reason Congress may have avoided mentioning it explicitly is because the justices ruled that Puerto Rico and other

twofold purpose is to establish fiscal responsibility and access to the capital markets.<sup>106</sup> It could sunset only once Puerto Rico achieved access to the capital markets and reached four balanced budgets.<sup>107</sup>

Congress empowered that presidentially appointed, unelected board consisting of financial and legal experts to deal with Puerto Rico's bonded debt and ensure that pensions were "adequately funded."<sup>108</sup> The Junta consists of seven unelected members who are appointed by the president, mostly from lists submitted to him by various Congressional leaders.<sup>109</sup> The Governor of Puerto Rico or their delegate sits on the Junta as a non-voting ex officio member. Congress granted the members of the Junta complete autonomy from local government in order to insulate it from local politics.<sup>110</sup>

By using its power under the Territories Clause and not the Bankruptcy Clause, Congress was able to do what it could not do unilaterally to Puerto Rico if it were a state or independent country—impose an unelected financial manager to make politically unpopular decisions as some academics urged.<sup>111</sup> The success of public employee retirees in Stockton in rebuffing attempts to cut their pensions led some commentators to specifically argue that courts

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territories taken during the Spanish-American war are unincorporated territories, which were "foreign to the United States in a domestic sense." *Downes v. Bidwell*, 182 U.S. 244, 341–342 (1901). It is beyond the scope of this article to examine how PROMESA is a modern-day extension and nearly textbook application of the concept of systemic racism. It is worth noting in this review, however, that the public employees and retirees who struggled against having their pensions abrogated were organizing against a legal doctrine and set of cases that have become the modern-day equivalent of *Plessy v. Ferguson*. See Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, HARV. L. REV. BLOG (Mar. 28, 2018).

<sup>106</sup> 48 U.S.C. § 2121(a)–(b)(2).

<sup>107</sup> *Id.* § 2149.

<sup>108</sup> *Id.* § 2121(f).

<sup>109</sup> *Id.* § 2121(e). The Supreme Court held in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investments*, 140 S. Ct. 1649 (2020), that the president's appointments to the Junta do not require Senate confirmation because the officials are not officers of the United States.

<sup>110</sup> 48 U.S.C. § 2128(a).

<sup>111</sup> See, e.g., Clayton Gillette and David Skeel, *How the U.S. can help Puerto Rico*, N.Y. TIMES (Sept. 14, 2015), <https://www.nytimes.com/2015/09/14/opinion/how-congress-can-help-puerto-rico.html> (urging for the imposition of a financial control board on Puerto Rico); see also Gillette, *supra* note 40.

supervising a municipal bankruptcy already have the power to institute governance reforms to deal with pension issues when a locality lacks the political will to do so. For example, in 2014, Professors Richard M. Hynes and Steven D. Walt argued that courts should be able to interfere with a municipality's use of assets to reverse political decisions in some situations, including dealing with pensions.<sup>112</sup> Other scholars concurred.<sup>113</sup>

The Territories Clause thus gave Congress the power to experiment by imposing a fiscal control board who remained autonomous from political pressure. Congress was also able to use the Territories Clause to make the quixotic, self-contradictory declaration that the federally imposed Junta “shall be created as an entity within the territorial government for which it is established in accordance with this title; and (2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.”<sup>114</sup> It is not without irony that the U.S. district judge overseeing the proceedings pursuant to title III of PROMESA would correctly write that PROMESA created “an awkward power sharing arrangement” between the local government and the Junta. The court had not even taken into consideration how the application of 48 U.S.C. § 2174(b)(3) could lead to “mutual sabotage” because that decision came out well before the Junta thought about filing a motion for confirmation of a plan of adjustment.<sup>115</sup>

Congress's imposition of an unelected Junta over Puerto Rico's population proved to be deeply unpopular amongst students and the general populace.<sup>116</sup> As a member of the Junta admitted, to say that PROMESA is

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<sup>112</sup> Richard M. Hynes and Steven D. Walt, *Pensions and Property Rights in Municipal Bankruptcy*, 33 REV. BANKING & FIN. L. 609, 624–627 (2014).

<sup>113</sup> See, e.g., Gillette and Skeel, *supra* note 40.

<sup>114</sup> 48 U.S.C. § 2121(c).

<sup>115</sup> *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 330 F. Supp. 3d 685, 701–702 (D.P.R. 2018), *aff'd and remanded*, 945 F.3d 3 (1st Cir. 2019).

<sup>116</sup> Andrew Martinez and Nichole M. Garcia, *#HuelgaUPR: The Kidnapping of the University of Puerto Rico, Students Activism, and the Era of Trump*, FRONTIERS (Sept. 28, 2018), <https://www.frontiersin.org/articles/10.3389/feduc.2018.00084/full> (describing how students at the University of Puerto Rico mobilized organized resistance to PROMESA'S enactment and its effects on the school); Timothy Touissant, *As PROMESA is Implemented, Protests Begin in Puerto Rico*, PASQUINES (Sept. 20, 2016),



deeply unpopular amongst Puerto Ricans is an understatement.<sup>117</sup> Congress's enactment of PROMESA led to protests immediately upon passage by several sectors of Puerto Rican society.

Of course, labor, environmental, and other activists denounced Congress's reliance on the Territory Clause of the U.S. Constitution and the *Insular* cases to exercise colonial power and impose yet another layer of unelected officials over them.<sup>118</sup> For example, several groups protested that the elected officials of Puerto Rico should have audited the Commonwealth's debt to determine whether Puerto Rico issued debt in violation of its constitution, and brought lawsuits seeking a declaration that such debt was null and void.<sup>119</sup> Many of the island's youth protested PROMESA's provision allowing for the governor and the Junta to lower the minimum wage, which the Junta attempted to do by seeking a \$4.25 per hour minimum wage.<sup>120</sup>

The passage of PROMESA sparked protests before the president had even signed PROMESA into law.<sup>121</sup> Several protests in which protestors beat pots and pans, occurred at the Junta's office in San Juan, and its

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<https://pasquines.us/2016/09/20/as-promesa-is-implemented-protests-begin-in-puerto-rico/>.

<sup>117</sup> See, e.g., Skeel, *supra* note 13, at 866.

<sup>118</sup> Residents of Puerto Rico do not have the right to vote for president during the general election nor any voting members of Congress. See Congressional Research Services, *Parliamentary Rights of the Delegates and Resident Commissioner from Puerto Rico*, Report No. R40170 1 (Feb. 2, 2022). The highest office for which residents of Puerto Rico can vote is governor.

<sup>119</sup> See Luis J Valentin Ortiz, *Retrasada la Auditoría de la Junta, Mientras Coge Impulso la Negociación de la Deuda*, CENTRO POR PERIODISMO INVESTIGATIVO (June 11, 2018), <https://periodismoinvestigativo.com/2018/06/retrasada-la-auditoria-de-la-junta-mientras-coge-impulso-la-negociacion-de-la-deuda/>; see also Congressional Research Services, *Puerto Rico's Public Debts: Accumulation and Restructuring*, Report No. R46788, 47–48 (May 2, 2022) (noting creation and later disbandment of an audit commission, as well as voluntary citizen efforts to audit the debt).

<sup>120</sup> Daileen Joan Rodriguez and Istra Pacheco, *No Da El Salario Minimo*, PRIMERA HORA (Apr. 26, 2016), <https://www.primerahora.com/noticias/puerto-rico/notas/no-da-el-salario-minimo/> (last accessed June 19, 2022); see also 48 U.S.C. § 2192.

<sup>121</sup> *Prosiguen las manifestaciones en Puerto Rico en contra de la junta de control fiscal*, AGENTE EFE (July 4, 2016), <https://quepasamedia.com/noticias/mundo/centroamerica-y-caribe/prosiguen-las-manifestaciones-en-puerto-rico-en-contra-de-la/>.

meetings in outlying towns.<sup>122</sup> While these protests did nothing to stop any proposed plan of adjustment from going through because the Junta had barely begun operations, they demonstrated discontent with the Junta from the outset.<sup>123</sup>

The protests occurred with good reason. As the Supreme Court noted when evaluating whether PROMESA passed constitutional muster, the Junta has broad authority to “supervise and modify Puerto Rico’s laws (and budget).”<sup>124</sup> Amongst its most important powers is the Junta’s ability to certify the local government’s fiscal plan or create one if the local government does not provide a fiscal plan that the Junta wishes to certify.<sup>125</sup> Congress directed the Junta to adopt fiscal plans and required that the elected government of Puerto Rico follow the Junta’s certified fiscal plans as explained in the next subsection.<sup>126</sup>

1. The Junta’s power to certify fiscal plans make lucha appear futile.

The fiscal plan serves a dual purpose. First, it is a budget and policy document. It is a blueprint of the government’s expenditures, and the government’s yearly budget must conform to it.<sup>127</sup> However, the fiscal plan also serves as the base document for any plan of adjustment that the Junta will file with the court for the purposes of seeking judicial confirmation of the plan of adjustment.<sup>128</sup>

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<sup>122</sup> Assoc. Press in Spanish, *Protestan en Puerto Rico contra junta de control fiscal*, CHICAGO TRIBUNE (Nov. 18, 2016), <https://www.chicagotribune.com/hoy/ct-hoy-8751945-protestan-en-puerto-rico-contra-junta-de-control-fiscal-story.html>.

<sup>123</sup> David Dayan, *Protests Greet Puerto Rico Control Board*, THE PROSPECT (Oct. 4, 2016), <https://prospect.org/economy/protests-greet-puerto-rico-control-board/>; Democracy Now, *Protests Erupt in San Juan as Obama Forms Unelected Control Board to Run Puerto Rico* (Sept. 1, 2016), [https://www.democracynow.org/2016/9/1/protests\\_erupt\\_in\\_san\\_juan\\_as](https://www.democracynow.org/2016/9/1/protests_erupt_in_san_juan_as).

<sup>124</sup> Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., 140 S. Ct. 1649 (2020).

<sup>125</sup> 48 U.S.C. §§ 2141(a), (e).

<sup>126</sup> See generally *id.* § 2143.

<sup>127</sup> See *id.* § 2171(b)(1).

<sup>128</sup> *Id.* § 2174(b)(7).

The fiscal plan is a complicated document subject to competing priorities. Congress required that the Junta balance a number of different prerogatives in developing a fiscal plan: ensuring the provision of essential public services, providing *adequate* funding for pensions, eliminating structural deficits,<sup>129</sup> providing for capital expenditures necessary to promote economic growth, and respecting the priority of lawful priorities and liens contained in the territory's constitution.<sup>130</sup> The U.S. District Court for the District of Puerto Rico, sitting under title III of PROMESA, does not have jurisdiction under § 305 of PROMESA<sup>131</sup> to review the Junta's fiscal plan certification decisions, and furthermore accorded the Junta's preemption determination *Chevron* deference.<sup>132</sup>

Under PROMESA, if the island's elected officials approve any budgetary spending that is inconsistent with the Junta-certified budget, the Junta has statutory authority effectively to take over the island's expenditures and reduce any spending other than for debt service.<sup>133</sup> The island's governor and legislature must submit any proposed budget or approved legislation to the Junta, which has authority either to certify the budget/legislation as consistent with its approved fiscal plan or to determine that the budget is "not compliant" with the fiscal plan's requirements.<sup>134</sup> If the governor and legislature persist in submitting non-compliant budgets, the Junta may set the Commonwealth's budget on its own initiative.<sup>135</sup> Interestingly, despite calls from financial creditor groups,<sup>136</sup> labor unions

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<sup>129</sup> This is different than the term "unfunded actuarial liability." See 48 CFR § 9904.413-30 (defining unfunded actuarial liability for purposes of the Employee Retirement Income Security Act (ERISA)). The term "adequate funding" is not well defined and does not appear in pension literature as a term of art.

<sup>130</sup> 48 U.S.C. § 2141(b)(1).

<sup>131</sup> *Id.* § 2165.

<sup>132</sup> See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Garced (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico)*, 616 B.R. 238, 253–254 (D.P.R. 2020), *citing* *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–844 (1984). *Chevron* sets forth a two-step analysis for courts to apply in determining whether a court should defer to a government agency's interpretation of a statute which it administers.

<sup>133</sup> 48 U.S.C. § 2143(d)(1).

<sup>134</sup> *Id.* §§ 2142(c)(1), 2144(a)(1).

<sup>135</sup> PROMESA §§ 202(c), (d).

<sup>136</sup> Nick Brown, *Puerto Rico Bondholders in for a Bumpy Ride*, REUTERS (May 4, 2017), <https://www.reuters.com/article/us-puertorico-debt-bankruptcy-analysis/puerto-rico-bondholders-in-for-bumpy-bankruptcy-ride-idUSKBN18022T>.

and local activists, and members of Congress to define essential services in the fiscal plan;<sup>137</sup> neither the Junta nor the government of Puerto Rico ever did so, other than to so that all spending is essential.

PROMESA's statutory text states that Congress's goal in creating the Junta was not to preempt the Commonwealth's traditional governmental authority but instead to "provide an oversight mechanism to assist the government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring."<sup>138</sup> The Junta received a congressional grant of complete autonomy from local government in order to insulate it from local politics.<sup>139</sup> While the government of the territory cannot enact a law that would defeat or frustrate the fiscal plan, nor can the Junta use its powers under the fiscal plan to impose taxes.<sup>140</sup>

The Junta aggressively defended its autonomy in the title III court by bringing suit against the local elected government. For example, the Junta brought suit against the government of Puerto Rico in the title III court for taking actions that violate the fiscal plan eight times as of the time of this writing and won all but one. The Junta has also engaged in a number of out-of-court tussles with local elected officials over a number of issues that concern workers in both the private and public sector. As one labor leader noted in 2017:

When Gov. Ricardo Rosselló presented a 2018 budget with over \$800 million in cuts to vital services, the Board rejected it and told him that if he doesn't make more cuts, they'll make good on their threats to institute furloughs and cut pay for public employees. The Board's use of public employees as a political football is inhumane. Teachers and other public

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<sup>137</sup> Press Release, *Soto Joins Chair Grijalva in the Introduction of "Amendments to PROMESA Act" to Stabilize Puerto Rican Economy, Stop Austerity Cuts, Guarantee Services Funding*

(May 22, 2020), <https://soto.house.gov/media/press-releases/soto-joins-chair-grijalva-introduction-amendments-promesa-act-stabilize-puerto>.

<sup>138</sup> 48 U.S.C. § 2194(n)(3).

<sup>139</sup> *Id.* § 2128(a).

<sup>140</sup> *See id.* §§ 2147, 2128(a)(2).

workers provide vital services in their communities and their pay allows them to put food on their tables and to spend money locally.<sup>141</sup>

That leader gave voice to the workers' concerns. While it was clear that local leaders were resisting making politically unpopular spending cuts, their efforts were fruitless at that time. The court's early decisions cemented the Junta's ability to operate free from the pressure of protests and worker mobilizations.

The elected government's resistance did lead to one key decision in which the court made it very clear that the Junta's power is not absolute and started putting cracks into the Junta's foundation of power.<sup>142</sup> Interestingly, the crux of the dispute that led to this decision found its genesis in Puerto Rico's private sector labor laws instead of its public sector workforce management. Specifically, the Junta targeted Puerto Rico's just cause employment law for elimination.<sup>143</sup> The Junta had two reasons for doing so. First, it believed that making Puerto Rico an "at-will" jurisdiction would improve its business climate. Second, the Junta believed that such a measure would have a positive fiscal impact, thus making more money available to spend on debt service or providing other essential services through taxes collected due to increased economic activity. Puerto Rico's legislature

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<sup>141</sup> Hector Figueroa, *One year after PROMESA's passage, Puerto Ricans continue to face economic hardship*, THE HILL (June 30, 2017), <https://thehill.com/blogs/congress-blog/politics/340257-one-year-after-promesas-passage-puerto-ricans-continue-to-face?rl=1>.

<sup>142</sup> See generally *Nevares v. Fin. Oversight & Mgmt. Bd. for Puerto Rico* (*In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*), 330 F. Supp. 3d 685, 701–702 (D.P.R. 2018), *aff'd and remanded*, 945 F.3d 3 (1st Cir. 2019). Puerto Rico is unique in that it is one of two jurisdictions that requires just cause for the firing of employees. Generally speaking, employers generally may choose to fire a person for whatever reason, or no reason, so long as that reason does not violate a specified statute under Law 80. In Puerto Rico, private sector employers could not terminate employees who had worked for more than three months in most cases unless they had just cause for doing so. If they terminated someone without just cause, the employer had to provide up to six weeks of severance pay, depending on time served. See P.R. Act 80 of 1976. For an excellent discussion of Act 80, see Jorge Farinacci Fernos, *Curious In-Laws: The Legal Connections Between Montana and Puerto Rico*, 79 MONT. LAW. REV. 187 (2018).

<sup>143</sup> *Nevares*, 330 F. Supp. 3d at 701–702.

refused to repeal Puerto Rico's just cause employment protections.<sup>144</sup>

The Junta pivoted to seeking changes to the public sector workforce, including government agency consolidation<sup>145</sup> and local government implementation of automatic budget and workforce reductions in certain circumstances.<sup>146</sup> It also sought "Employee Benefits Reduction Measures."<sup>147</sup> The governor of Puerto Rico brought suit seeking a declaration that the Junta had overreached, and the court dismissed his claims.<sup>148</sup> In that sense, it was clear that the government had lost yet again.

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<sup>144</sup> *Id.* at 690–691.

<sup>145</sup> *Id.* at 692 (quoting § 12.1 of the fiscal plan, which is captioned "Changes to agency operational expenditures," and includes the following language: "the right-sized Government of the future should wherever possible reflect mainland U.S. benchmarks in terms of both number of agencies and size of agencies themselves to deliver services in as efficient a manner possible ... the Government should consolidate the 114 agencies into 22 groupings and a number of independent agencies.") (emphasis removed).

<sup>146</sup> *Id.* The court quoted § 12.3 of the fiscal plan, which provides,

If, after the third fiscal quarter of any fiscal year there remains unrealized agency efficiency savings for any grouping relative to the projected agency efficiency savings in the New Fiscal Plan for the applicable fiscal year, the Oversight Board will automatically reduce the budget for the corresponding grouping for the following fiscal year in the amount equal to the unrealized agency efficiency savings. In particular, if the Oversight Board determines that there is material underperformance in agency efficiency savings relative to the projections set forth in the New Fiscal Plan, intentional workforce reductions will be necessary to meet the agency efficiency savings targets set forth herein.

<sup>147</sup> *Nevarés*, 330 F. Supp. 3d at 692 (referencing (i) the fiscal plan's characterization of a hiring freeze, limitations on paid holidays, restrictions on sick and vacation days, and elimination of the Christmas bonus as policies that the government must continue, and (ii) the Challenged Budget Resolutions' alleged elimination of the Christmas bonus).

<sup>148</sup> *Id.* at 696–698. It is worth noting that between January 24, 2018, and April 5, 2018, the governor submitted four versions of a proposed Commonwealth fiscal plan for fiscal year 2019 to the Junta for its approval. The Junta rejected each proposed fiscal plan. Finally, on April 19, 2018, the Junta rejected the governor's fiscal plan and simultaneously certified its own fiscal plan pursuant to §§ 202(d)(2) and 202(e)(2) of PROMESA. The April 2018 Board Fiscal Plan was substantially similar to the governor's April 2018 Fiscal Plan but included certain policy initiatives that had previously been rejected by the governor and that accounted for an additional 1.7% of the incremental savings contemplated by the April 2018 Board Fiscal Plan. The policy measures included "right-sizing" specific personnel expenditures. Specifically, the governor identified five measures he had rejected. Those were all related to labor and employment matters that touched on

The court's ruling appeared in line with previous rulings. It stated that PROMESA expressly reserves political, legislative, and governmental power to the Commonwealth, stating that, with certain exceptions not relevant here, title III "does not limit or impair the power of a covered territory to control, by legislation or otherwise, the territory or any territorial instrumentality thereof in the exercise of the political or governmental powers of the territory or territorial instrumentality."<sup>149</sup> In many ways, the judge ruled in line with existing protections under § 904 of the Bankruptcy Code.

However, the case took a turn for the governor. On those matters that had to do with reducing the work force if the elected government failed to meet certain economic metrics, the judge refused to grant the Junta's motion for dismissal. The governor finally got a win. The court explained,

[[T]he FOMB's ability to impose a rejected policy is not one to be exercised lightly nor is it unconstrained ... policy measures that would require the adoption of new legislation or the repeal or modification of existing Commonwealth law, the Oversight Board has only budgetary tools and negotiations to use to elicit any necessary buy-in from the elected officials and legislators. Elected officials and legislators, on the other hand, have the ability to obstruct implementation altogether, or complicate it in such a way as to cripple Puerto Rico's ability to use it to promote the needed return to fiscal responsibility and access to capital markets. *PROMESA is an awkward power-sharing arrangement and fraught with potential for mutual sabotage.*<sup>150</sup>

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both the private sector and public sector including: (i) private-sector human-capital and labor reforms, (ii) pension reforms, (iii) government agency consolidations, (iv) compensation related initiatives, and (v) reductions in appropriations to the University of Puerto Rico. The governor asserted that the Oversight Board lacks power to impose these measures on the government.

<sup>149</sup> 48 U.S.C. § 2163.

<sup>150</sup> *Nevarres*, 330 F. Supp. 3d at 701–702 (emphasis added).

The court then turned to applying these principles, and in refusing to dismiss the government’s claim concerning implementing automatic cuts, stated that “[f]or subsequent fiscal years that are not covered by the certified budget, Section 202 of PROMESA requires the interactive process of soliciting proposals and revisions from the government before the Oversight Board can impose unilateral measures. Nothing in the statute authorizes automatic budgetary or personnel restrictions across separate budgets.”<sup>151</sup>

The court carefully considered how power was to be shared between the government and the Junta under title II of PROMESA. The judge’s decision set the stage for the legislature to exercise power and for political mobilization to have an effect, but the timing was not quite ripe for workers to exercise power. The ability for retirees or workers to use 48 U.S.C. § 2174(b)(3) for the “mutual sabotage” that the judge was concerned with could not take place in 2018 because the Junta had not yet filed a plan of adjustment for which it sought confirmation or needed legislative approval to implement. This article now turns to a more in-depth description of title III of PROMESA in the next subsection.

2. The Junta’s role as sole trustee of the Commonwealth of Puerto Rico in Title III proceedings also makes *lucha* appear futile.

Title III sets out the Junta’s powers over Puerto Rico’s restructuring proceedings and outlines rules to govern court supervised debt restructuring. While the fiscal plan plays a foundational role in the formation of a plan of adjustment under title III of PROMESA, it is important to understand how parts of title III interacted with the Junta’s title II fiscal plan powers. Title III incorporates relevant elements of chapter 9 municipal bankruptcy matters.<sup>152</sup> It also contains some unique provisions that exist because Congress enacted PROMESA under the Territories Clause of the U.S. Constitution, and not under the Bankruptcy Clause of the U.S. Constitution.<sup>153</sup>

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<sup>151</sup> *Id.* at 705.

<sup>152</sup> 48 U.S.C. § 2161(a).

<sup>153</sup> U.S. CONST. art. I, § 9, cl. 4.



While the Junta's certified fiscal plan serves as the backbone of the Commonwealth's approved territorial budget, it also clearly gives the Junta the upper hand by requiring local elected officials to essentially pass the budget dictated by it into law.<sup>154</sup> Similarly, the certified fiscal plan also serves as the backbone of the plan of adjustment because PROMESA explicitly requires that the court find the plan of adjustment to be consistent with the Junta's approved fiscal plan before it can confirm the plan of adjustment.<sup>155</sup> As trustee, the Junta has the sole power to initiate restructuring proceedings under title III of PROMESA,<sup>156</sup> and it alone can propose a plan of adjustment to the court under title III.<sup>157</sup>

Title III of PROMESA borrows heavily from chapter 9 (municipal bankruptcies) and chapter 11 (primarily corporate bankruptcies).<sup>158</sup> A perfect example of that dynamic is 48 U.S.C. § 2174(b)(3), which forms part of PROMESA and, as noted above, is borrowed from 11 U.S.C. §§ 943(b) and 1129(a)(6).<sup>159</sup>

Instead, activists and financial creditor groups placed much attention on what eventually became 48 U.S.C. § 2174(b)(6) for confirmation of the plan of adjustment by a court sitting pursuant to title III of PROMESA.<sup>160</sup> That provision requires that the court find that the plan of adjustment serve the best interest of creditors and is feasible. Specifically, it requires that the court consider whether available remedies under the nonbankruptcy laws and the Puerto Rico Constitution would result in a greater recovery for the creditors than is provided under the plan.<sup>161</sup> This provision was meant to

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<sup>154</sup> See generally 48 U.S.C. §§ 2142, 2143.

<sup>155</sup> *Id.* § 2174(b)(7).

<sup>156</sup> *Id.* §§ 2161(c)(7), 2164(a).

<sup>157</sup> *Id.* § 2172(a).

<sup>158</sup> *Id.* (incorporating numerous subsections from chapter 9 and chapter 11 of the Bankruptcy Code).

<sup>159</sup> See *supra* note 29.

<sup>160</sup> Mark Cymrot and Simon Johnson, *The Puerto Rico Bill is Good for Bondholders*, POLITICO (May 24, 2016), <https://www.politico.com/agenda/story/2016/05/puerto-rico-creditors-pass-bill-restructuring-000126/>; Financial Freedom Institute, *Puerto Rico Bondholders Must Be Treated Fairly*, SEEKING ALPHA (June 15, 2017), <https://seekingalpha.com/article/4081799-puerto-rico-bondholders-must-be-treated-fairly> (noting the strong protection § 2174(b)(6) provided creditors).

<sup>161</sup> 48 U.S.C. § 2174(b)(6).

support financial creditors who argued that they had first priority over and above employee payroll and pension expenses pursuant to art. VI, § 8 of Puerto Rico's Constitution. This language in PROMESA went far beyond its chapter 9 analogue, which only requires that the plan be in the best interest of creditors.<sup>162</sup>

Section 2174(b)(3), however, had the effect of tipping the scales of power in favor of the government of Puerto Rico, and by extension its people, due to the political pressure they could exert through mass mobilization. Section 2174(b)(3) requires that the court determine that “the debtor is not prohibited by law from taking any action necessary to carry out the plan.”<sup>163</sup> Similarly, § 2174(b)(5) states that a court can confirm a plan of adjustment if “any legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval.”<sup>164</sup>

The language in PROMESA mirrors the language in chapter 9 of the Bankruptcy Code, which states as a condition for plan confirmation that: “(4) the debtor is not prohibited by law from taking any action necessary to carry out the plan ... (6) any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval.”<sup>165</sup>

Nothing before the enactment of PROMESA exists in the Congressional record regarding 48 U.S.C. § 2174(b)(3) and (b)(5). Only an op-ed published in 2021 in *The Hill* by Congresswoman Nydia Velazquez, a congresswoman of Puerto Rican descent who was heavily involved in the drafting of PROMESA, and Congressman Chuy Garcia, provides some important insight.<sup>166</sup> In that op-ed, they express their support for retirees

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<sup>162</sup> Compare 48 U.S.C. § 2174(b)(7) with 11 U.S.C. § 1123(b)(7).

<sup>163</sup> 48 U.S.C. § 2174(b)(3).

<sup>164</sup> *Id.* § 2147(b)(5).

<sup>165</sup> 11 U.S.C. § 943(b)(4), (b)(6).

<sup>166</sup> Hon. Nydia Velazquez and Hon. Chuy Garcia, *Puerto Rico's Control Board is Violating the Spirit of the Law*, THE HILL (Sept. 17, 2021),

and also state:

When Congress created the Board through the 2016 law known as PROMESA, it did not give it a *carte blanche*. Specifically, Congress recognized that provisions of the bankruptcy code incorporated into PROMESA cannot be used to infringe upon the exclusive powers of the local government to legislate. That's why recent actions taken by the Board in an attempt to force pension cuts in spite of opposition from the elected government are so concerning.<sup>167</sup>

This op-ed by a key player involved in PROMESA suggests that Congress remained silent because it intended to create this power sharing; for purposes of administering a restructuring, it was unremarkable. That would make sense since § 2174(b)(3) is substantially comparable to 11 U.S.C. § 943(b)(4). Drawing from the chapter 9 bankruptcy framework in this way seemed uncontroversial given that PROMESA incorporated so much of chapter 9 into the bankruptcy framework it created.<sup>168</sup>

The language in PROMESA is not materially different from its counterparts in the Bankruptcy Code. What is strange is the silence concerning the possible effects of 48 U.S.C. § 2174(b)(3) on the relationship between the Junta and the government of Puerto Rico. PROMESA has been met with much condemnation for reinforcing Puerto Rico's status as a territory of the United States subject to colonial treatment.<sup>169</sup> Yet surprisingly, neither the Congressional record nor any publicly available correspondence from any elected official or advocacy groups reveal any serious concern, or praise, regarding this part of PROMESA at the time of the statute's enactment by Congress.<sup>170</sup>

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<https://thehill.com/blogs/congress-blog/politics/572846-puerto-ricos-control-board-is-violating-the-spirit-of-the-law/>.

<sup>167</sup> *Id.*

<sup>168</sup> 48 U.S.C. § 2161(a).

<sup>169</sup> *See supra* notes 34 and 35.

<sup>170</sup> Indeed, it is strange that none of Puerto Rico's political parties discussed this section. In Puerto Rico, the political parties are not aligned along a conservative/liberal paradigm as in the mainland United States, but rather are separated by support for whether Puerto Rico should become an independent country, a state, or remain a territory of the United States.

This lack of development in the Congressional record is startling. As discussed above, Congress's passage of PROMESA spurred protests concerning colonialism.<sup>171</sup> Yet somehow those discussions concerning the Junta's exercise of power did not translate into any discussion regarding 48 U.S.C. § 2174(b)(3) and its inter-relationship with 11 U.S.C. § 943(b)(4). No one discussed the opportunities for "mutual sabotage" that the court later identified. Surely, a provision that could potentially tip the balance of power between the Junta and the government of Puerto Rico in favor of the government would have elicited commentary from those concerned about colonialism, or from those who believed that Puerto Rico needed a fiscal control board.

The silence on these issues could be the result of PROMESA's use of major portions of chapter 9 and chapter 11 of the Bankruptcy Code, even though PROMESA is enacted under the Territories Clause of the U.S. Constitution, as earlier discussed. However, there was another side to Congress borrowing from chapter 9. Just as PROMESA incorporated tools for retirees to organize around, PROMESA's incorporation of so many of chapter 9 and chapter 11 concepts meant that the Junta could use vote distortion tools typically available to corporate debtors looking to keep control over workers and retirees. For example, due to the similarity in confirmation requirements contained in 48 U.S.C. §§ 2174(b)(1)–(b)(6) and the incorporation of 11 U.S.C. § 1129(b)'s cramdown provision in 48 U.S.C. § 2161(a), the Junta could borrow two weapons to obtain consent for its plans of adjustment from retirees: plan support agreements (RSAs) and the "deathtrap."

Neither PROMESA nor the Bankruptcy Code explicitly mention these tools to obtain consent to a restructuring plan from a creditor class. However, a recent article by Professor David Skeel outlines for the first time the tools that debtors, including the Junta, have available to them in

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Most politics are viewed and evaluated along this axis.

<sup>171</sup> Monica Cruz, *Nuyoricans Confront PROMESA Junta*, LIBERATION NEWS (Oct. 6, 2016), <https://www.liberationnews.org/nuyoricans-confront-promesa-junta/> (describing protests in New York City months after passage of PROMESA); see also Dayan, *supra* note 123.

bankruptcy to distort a plan vote and garner support for a plan before the ballot goes out to a creditor class. His article then outlines a normative framework for courts to use when evaluating whether such tools promote the goals of the Bankruptcy Code, and how the Junta used an RSA in its title III proceedings seeking to restructure the PREPA's debt.<sup>172</sup>

Professor Skeel's article explains that an RSA is an agreement by a creditor or creditor class to support a proposed plan of reorganization if the plan conforms with the terms of the RSA. The RSA ensures a proposed accepting class ahead of the vote on the plan of adjustment, and thus satisfies one of the criteria needed in order for a court to cram down dissenting creditors.<sup>173</sup> As will be discussed further below, the agreement with the Official Committee of Retirees (COR) was an RSA, but came as a result of a "deathtrap" threat.<sup>174</sup>

The object of using these tools is to ensure that a debtor has at least one impaired class who supports a plan, and thus facilitate confirmation. The Bankruptcy Code allows debtors who are dealing with a class of holdout creditors to "cram down" a proposed claim treatment over the objection of those creditors if the plan of reorganization is accepted by at least one impaired class and certain other requirements are met.<sup>175</sup> A class is deemed to have accepted a plan of reorganization if 50% in number and two-thirds in amount of the claims of the creditors voting in that class vote in favor of

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<sup>172</sup> See David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L. J. 366, 368 (2020).

<sup>173</sup> *Id.*

<sup>174</sup> Interestingly, Congress did not incorporate 11 U.S.C. § 1113 into PROMESA. Section 1113 provides protection to workers covered by a collective bargaining agreement in private sector bankruptcies. Congress's failure to include this provision meant that the Junta could have simply set aside (i.e., rejected) a labor agreement as outlined by the U.S. Supreme Court in *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In that case, the Supreme Court stated that a debtor must use reasonable efforts to resolve contract issues prior to rejection. It also ordered courts to consider the hardships of the rejection on workers. For an excellent review of the shortcomings of *Bildisco* and § 1113 of the Bankruptcy Code, see Hamiisi Junio Nsubuga, EMPLOYEE RIGHTS IN CORPORATE INSOLVENCY 9–61 (2020) and Olivia Hunter, Note, *A Bankrupt Bargain*, 2022 COLUM. BUS. L. REV. 447, 459–488.

<sup>175</sup> 11 U.S.C. § 1129(a)(10).

the plan.<sup>176</sup> The ability to confirm a plan of reorganization through a cramdown is a key component of the Bankruptcy Code. It is for that reason that the debtor's treatment of the creditor who is being crammed down must not unfairly discriminate against them, and the plan treatment must be in the best interest of creditors and be feasible.<sup>177</sup>

Debtors can use a deathtrap provision to create a "carrot and stick dynamic."<sup>178</sup> A deathtrap is a provision that a debtor includes in a plan of reorganization to provide a higher payout on claims if the class votes in favor of the proposed plan treatment. If the class votes against the plan, the plan provides them with a worse treatment than had they voted in favor of the plan. To be clear, a deathtrap does not punish creditors for their individual vote, it affects *classes* of creditors who choose to reject a plan.<sup>179</sup> The deathtrap provisions are enforced via the cramdown mechanism provided for in 11 U.S.C. § 1129(b), which PROMESA adopted in 48 U.S.C. § 2161(a).

RSAs and deathtraps, just like 48 U.S.C. § 2174(b)(3), received little scholarly attention or coverage by the press at the time of PROMESA's enactment. However, the combination of the Rickyleaks mobilization, concern regarding the retiree RSA, and the necessity of the Junta to obtain legislative consent to operationalize its proposed plan would soon fuel *lucha* by the retirees. However, before turning to the summer of 2019, this article will highlight the operation of 48 U.S.C. § 2174(b)(3) in the absence of mass mobilization through the ultimate example of *entrega* by the Puerto Rico legislature, namely, its vote in support of the COFINA RSA without any legislative debate or consideration.

#### D. The COFINA Deal, or how the Puerto Rico's Legislature rejected *lucha* and opted for *entrega*.

The *entrega* of Puerto Rico's legislature to the Junta suggests that the parties to the COFINA RSA realized the legal necessity of obtaining

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<sup>176</sup> *Id.* § 1126(c).

<sup>177</sup> *Id.* § 1129 (b)(1).

<sup>178</sup> *See* Skeel, *supra* note 172, at 368.

<sup>179</sup> *Id.* at 366.

legislative approval of the new bonds in order to obtain a confirmable plan of adjustment for COFINA's debt.<sup>180</sup> However, as explained below, few located in Puerto Rico and subject to some of the nation's highest sales tax rates were in a position to mobilize and capitalize on the implications of 48 U.S.C. § 2174(b)(3), perhaps to obtain sales tax relief or deeper debt concessions from financial creditors.

The Junta filed for relief under title III of PROMESA on May 3, 2017.<sup>181</sup> It was not until November 6, 2018, that the Junta and the COFINA creditors' court appointed agent announced that they had executed the RSA.<sup>182</sup> That RSA called for the exchange of approximately \$11.5 billion in bonds with a 6% current interest rate (approximately \$700 million in interest payments) for \$9.6 billion of new bonds with an average interest rate of 4.5%.<sup>183</sup> According to the Junta, this led to a 32% debt cut.<sup>184</sup> Several commentators critiqued the COFINA RSA for not providing enough debt relief on a variety of grounds, including that Puerto Rico would not have enough money left to satisfy other creditors.<sup>185</sup> In a then unnoticed provision of the agreement, the parties to that RSA acknowledged that the agreement was contingent on obtaining legislative approvals in order to protect COFINA creditors' property interest in tax revenues.<sup>186</sup>

Now that the Junta and COFINA creditors arrived at an agreement, it

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<sup>180</sup> COFINA Plan Support Agreement, *supra* note 14, at § 4.3(b); *see also* COFINA Plan Support Restructuring Proposal Summary of Terms and Conditions at II M, subheading entitled Legislation and Documentation, <https://drive.google.com/file/d/1YfGXodyeTEezi56XebYH-YpTVV1sqGuY/view>.

<sup>181</sup> Confirmed Disclosure Statement, *supra* note 18, at 15.

<sup>182</sup> Robert Slavin, *COFINA deal takes step forward with proposed settlement*, BOND BUYER (Nov. 6, 2018), <https://www.bondbuyer.com/news/cofina-deal-takes-step-forward-with-proposed-settlement>.

<sup>183</sup> *See* COFINA Fiscal Plan, ex. A, at 130, and app. B, at 140, <https://www.aafaf.pr.gov/assets/cofina-fiscal-plan-090718.pdf>; Setzer, *supra* note 15.

<sup>184</sup> Puerto Rico Financial Oversight and Management Board, COFINA Tab, <https://oversightboard.pr.gov/debt/> (last visited on Dec. 27, 2022).

<sup>185</sup> *See* Setzer, *supra* note 15.

<sup>186</sup> Memorandum Opinion and Order Approving Settlement Between Commonwealth of Puerto Rico and Puerto Rico Sales Tax Financing Corporation, *In re* Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-3283 (D.P.R. Feb. 4, 2019), ECF No. 5045, <https://www.nysd.uscourts.gov/sites/default/files/2019-04/In-re-The-Financial-Oversight-and-Management-Board-for-Puerto-Rico.pdf>.

was time for the legislature to act. The bill for what would eventually become the enabling act for the COFINA's RSA arrived at the House floor on November 6, 2018.<sup>187</sup> Rather than having a daytime session with debate, the House approved enabling legislation in a late-night perfunctory session with one legislator screaming at others that they were voting to approve a bill they did not understand and condemning Puerto Rico to 40 years of poverty and continuing to impose on Puerto Rico the highest sales tax in the United States. While that legislator pleaded or debated, his colleagues laughed at him.<sup>188</sup> The measure flew through the Senate as well on November 8, 2018.<sup>189</sup> Then-governor Ricky Rosselló signed the enabling legislation and converted the bill into Public Law 241 of 2018 on November 15, 2018.<sup>190</sup> The Junta issued a press release welcoming the legislature's action.<sup>191</sup> A Change.org petition posted just a few days prior to the vote had gathered over 42,000 signatures on a petition opposing the agreement, but it was too little, too late.<sup>192</sup>

The next event occurred at the federal courthouse in San Juan when the title III court held a confirmation hearing on COFINA's plan of adjustment on January 15, 2019. People mobilized for that hearing, as thousands of

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<sup>187</sup> *Cámara Aprueba Acuerdo Para Reestructurar Deuda de COFINA*, NOTICEL (Nov. 7, 2018), <https://www.noticel.com/article/20181108/camara-aprueba-acuerdo-para-reestructurar-deuda-de-cofina/>.

<sup>188</sup> *Natal sobre COFINA: "¡No es chiste! ¡Acaban de decidir por las próximas generaciones!"*, EL CALCE (Nov. 8, 2018), <https://www.elcalce.com/contexto/natal-cofina-chiste-acaban-decidir-las-proximas-generaciones/>. For those interested in viewing the very emotionally charged video in Spanish, you can locate it at <https://www.youtube.com/watch?v=xW-36O7xNMc>.

<sup>189</sup> *Senado Aprueba Acuerdo de Cofina que Impondría 40 años de IVU*, PRIMERA HORA (Nov. 8, 2018), <https://www.primerahora.com/noticias/gobierno-politica/notas/senado-aprueba-acuerdo-de-cofina-que-impondria-40-anos-de-ivu/>.

<sup>190</sup> P.R. Act 241 of 2018.

<sup>191</sup> Hazel Bradford, *COFINA Bond Restructuring Deal gets Puerto Rican Legislature's Approval*, PENSIONS AND INVESTMENT (Nov. 9, 2018), <https://www.pionline.com/article/20181109/ONLINE/181109854/cofina-bond-restructuring-deal-gets-puerto-rican-legislature-s-approval>.

<sup>192</sup> Frente Ciudadano por la Auditoría de la Deuda, *Judge Swain: Reject COFINA agreement proposed by the Fiscal Control Board*, CHANGE.ORG (Nov. 2, 2018), <https://www.change.org/p/jueza-swain-rechace-acuerdo-de-cofina-propuesto-por-la-junta>.



union members, pensioners, professors, and university students set up loudspeakers, tents, and marched in front of the federal courthouse.<sup>193</sup> But again, it was too little, too late, and addressed the wrong audience. Even though members of the public and certain unions as parties-in-interest objected on the grounds that the RSA was not feasible,<sup>194</sup> the court overruled them and confirmed the proposed plan after applying the factors contained in 48 U.S.C. § 2174(b) to the RSA.<sup>195</sup> The title III court concluded that the legislature validly enacted legislation supporting the agreement over the objection of certain parties-in-interest who claimed that the COFINA legislation was invalidly enacted due to violating a local legislator's right to debate.<sup>196</sup> The U.S. Court of Appeals for the First Circuit eventually upheld the title III court's decision on appeal on equitable mootness grounds.<sup>197</sup>

To a large extent, the fact that the legislature of Puerto Rico acted as a rubber stamp to the Junta's RSA was understandable. Certainly, one possible justification for the action of the legislature of Puerto Rico is that it felt powerless in light of prior court decisions siding with the Junta.<sup>198</sup> The title III court clearly validated the Junta's near absolute power over its fiscal plans, and made clear that it would not even hear cases having to do with

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<sup>193</sup> Joel Cintron Abrasetti, *La vista de COFINA Desde Adentro y Desde Afuera*, 80 GRADOS (Jan. 25, 2019), <https://www.80grados.net/la-vista-de-cofina-desde-adentro-y-desde-afuera/>.

<sup>194</sup> Press Release, Service Employees International Union, SEIU Opposes Debt Deal That Would Punish Puerto Rico's Working People (Jan. 14, 2019), <https://www.seiu.org/2019/01/seiu-opposes-debt-deal-that-would-punish-puerto-ricos-working-people>; see also Objection of the Service Employees International Union and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. Nov. 15, 2018), ECF No. 4556.

<sup>195</sup> See Amended Memorandum of Findings of Fact and Law in Connection with the Third Amended Title III Plan of Adjustment of Puerto Rico Sales Tax Financing Corporation, at § 172, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. Feb. 5, 2019), ECF No. 5045, <https://drive.google.com/file/d/1iOjdV-c5iXP3EvtylUkL3UFJpKpf5uIy/view>.

<sup>196</sup> *Id.* § 120, n.14.

<sup>197</sup> *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 19-1391, slip op. at 4-5 (1st Cir. Mar. 2, 2021), <http://media.ca1.uscourts.gov/pdf/opinions/19-1391P-01A.pdf>.

<sup>198</sup> 48 U.S.C. § 2166(a).

the Junta's process for certifying a fiscal plan.<sup>199</sup> This approach may have made it difficult for people to believe the elected representatives of Puerto Rico's government could win in any tug of war with the Junta.

If the Puerto Rico government's elected officials believed that resistance against the Junta was legally futile, then the entrega of the legislature makes sense. Even though people had been protesting the Junta's arrival since 2017,<sup>200</sup> they had not yet coalesced around a demand that local government officials could deliver in a sustained manner, at a moment where that political pressure could lead to effective change. It is hard to prove a negative in this case, but there are some theories that may explain why that pressure was not forthcoming.

One theory put forth by journalist Ed Morales is that the application of what Naomi Klein dubbed the "shock doctrine" left Puerto Ricans too sapped to mobilize at that moment.<sup>201</sup> Morales adopted Klein's definition of "shock doctrine" in stating that this occurs "when neoliberal powers take advantage of national economic and political crises to push through new policies that disaster-fatigued citizens find difficult to mount a resistance against."<sup>202</sup> For her part, Naomi Klein in her book *Battle for Paradise: Puerto Rico Takes on the Disaster Capitalists*,<sup>203</sup> also explored that possibility. She described an island weary of outside experiments.<sup>204</sup> However, she doubled down on the term she coined in Puerto Rico's case and stated that it had suffered through an application of "shock-after-shock-after-shock doctrine."<sup>205</sup>

Even though Klein published her book before the Junta entered into the COFINA RSA, that theory certainly fits the factual pattern around the

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<sup>199</sup> See *supra* note 131.

<sup>200</sup> See *supra* note 22.

<sup>201</sup> Ed Morales, FANTASY ISLAND: COLONIALISM, EXPLOITATION, AND THE BETRAYAL OF PUERTO RICO 230 (2019).

<sup>202</sup> *Id.*

<sup>203</sup> Naomi Klein, THE BATTLE FOR PARADISE: PUERTO RICO TAKES ON THE DISASTER CAPITALISTS 25 (2018).

<sup>204</sup> *Id.* at 43–53.

<sup>205</sup> *Id.* at 43.

Puerto Rico legislature's entrega on the COFINA agreement. In the year leading up to the announcement of the COFINA RSA in November 2018, Puerto Rico had been impacted by two major hurricanes: Irma and Maria. Hurricane Maria was the second deadliest hurricane in the history of the United States (claiming almost 3,000 lives), and left damage that even a year later had not been cleared out.<sup>206</sup> Even though the machinery of the title III proceedings was ongoing, ordinary people most likely had more pressing, and less abstract concerns, to worry about.

As Professor Elizabeth Aranda and Alessandra Rosa point out, between 159,000 and 176,000 people left Puerto Rico after Hurricanes Irma and Maria.<sup>207</sup> They observed that Puerto Ricans had suffered years of cultural trauma and defined that term as follows: "Whereas personal trauma 'involves a wound and the experience of great emotional anguish by an individual,' by cultural trauma, we mean what sociologist Jeffrey Alexander says 'occurs when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways.'"<sup>208</sup>

Among those Puerto Ricans who chose to remain, they would have to face basic challenges such as figuring out how to drive around fallen trees that had not been picked up a year later due to decreased government funding and ensuring that they had diesel to power their generators due to continuous brownouts.<sup>209</sup> Those who did not want to deal with these challenges simply moved to the mainland and emptied out Puerto Rico.<sup>210</sup>

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<sup>206</sup> Nicole Chavez, *Hurricane Maria killed 2,975 people in Puerto Rico. It's the second deadliest US storm in over a century*, CNN (Aug. 29, 2018), <https://www.cnn.com/2018/08/29/us/puerto-rico-deaths-new-york-9-11-trnd>.

<sup>207</sup> Elizabeth Aranda and Alessandra Rosa, *Puerto Ricans Unite Against Rosselló – and More Than a Decade of Cultural Trauma*, THE CONVERSATION (Aug. 2, 2019), <https://theconversation.com/puerto-ricans-unite-against-rossello-and-more-than-a-decade-of-cultural-trauma-121085>.

<sup>208</sup> *Id.*

<sup>209</sup> Umair Irfan, *9 Months After Hurricane Maria, Thousands of Puerto Ricans Still don't Have Power*, VOX (June 20, 2018), <https://www.vox.com/energy-and-environment/2018/6/13/17413828/puerto-rico-blackout-power-grid-hurricane-maria>.

<sup>210</sup> Frances Negron-Muntaner, *The Emptying Island: Puerto Rican Expulsion in Post-Maria Time*, 14 EMISFERICA 1 (2018).

Given all of these factors, combined with the speed at which the legislature acted on the bill that eventually led to Public Law 241 of 2018, massive mobilization may have been difficult.

The events that led the legislature to vote in favor of enabling legislation that allowed the title III court to confirm the plan of adjustment demonstrated in a very public matter to the people of Puerto Rico that their elected leaders did indeed have some role to play.<sup>211</sup> They could do something to counter the austerity that the Junta sought to impose, which resulted, in part, from the unsuccessful challenges to the primacy of the Junta's power under title II of PROMESA. To be clear, the communities of Puerto Ricans who lived on the U.S. mainland did protest against PROMESA and the treatment of their family by the federal government, concerns about pension cuts, and financial creditors, but that action was not tied to a specific local legislative demand and was sporadic in nature.<sup>212</sup> Nor did Puerto Ricans who lived on the island participate at that time. What needed to take place was a coalescing of community support around a legislative demand, a vehicle to exercise that power, and the right time to do

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<sup>211</sup> By way of example, the video of the legislator involved in the yelling incident, mentioned *supra* note 188, has been viewed over 21,000 times. Manuel Natal Albelo, Youtube (Nov. 8, 2018), <https://www.youtube.com/watch?v=xW-36O7xNMc&pp=ygUfRWwgR3JpdG8gZGUgbWFudWVsIG5hdGFsIGNvZmluYQ%3D%3D>.

<sup>212</sup> See, e.g., Danica Cotto, *Puerto Ricans Decry Austerity, Hurricane Help, at Hearing*, ASSOC. PRESS (Mar. 15, 2019), <https://apnews.com/article/puerto-rico-caribbean-ap-top-news-latin-america-san-juan-1211eb3e68b24c35a994c60973c8de65> (outlining concerns brought up at Congressional Field Hearing in Puerto Rico); Catherine McGoin, *Marchers demand Puerto Rico's freedom Protest marks one year since Hurricane Maria*, BAY STATE NEWS (Sept. 26, 2018), <https://www.baystatebanner.com/2018/09/26/marchers-demand-puerto-ricos-freedom/>; Jasmine Gomez, *Blackout in Puerto Rico: How 120 Years of Corporate Dominance and Political Inequality Stifle Self-Determination Today*, FREE SPEECH FOR PEOPLE.ORG AND UNITED FOR A FAIR ECONOMY 9 (July 2018), [https://d3n8a8pro7vhmx.cloudfront.net/ufe/pages/4096/attachments/original/1532544868/Blackout\\_in\\_Puerto\\_Rico\\_July\\_2018.pdf](https://d3n8a8pro7vhmx.cloudfront.net/ufe/pages/4096/attachments/original/1532544868/Blackout_in_Puerto_Rico_July_2018.pdf); see also Ed Newman, *Activists in New York City protest Museum of Modern Art ties to Puerto Rican debt*, RADIO HAVANA CUBA (Oct. 22, 2019), <https://www.radiohc.cu/en/noticias/internacionales/205614-activists-in-new-york-city-protest-museum-of-modern-art-ties-to-puerto-rican-debt>; Ashoka Jegroo, *New Yorkers picket Trump Tower in support of Puerto Rico*, WAGING NONVIOLENCE (Oct. 4, 2017), <https://wagingnonviolence.org/2017/10/new-york-trump-tower-puerto-rico-protest/>.

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The introduction of legislative resolutions concerning retirement benefits was the first step. However, those were simply statements of intent. Without a strong catalyst to energize people into mobilizing on a focused demand at the right time, the legislature of Puerto Rico would have no incentive to do anything other than engage in *entrega* when the moment came. Many Puerto Ricans had left the possibilities of 48 U.S.C. § 2174(b)(3) and for “mutual sabotage” inert even though pensioners had information concerning the possible effect of pension cuts well before the Junta filed its seventh plan of adjustment.<sup>213</sup> It took the fateful events of the summer of 2019, including the announcement of an RSA between the COR<sup>214</sup> and the leak of a controversial telegram chat, to provide a strong catalyst for *lucha* and bring § 2174(b)(3) to life. This article now turns to that fateful time.

### III. The Story of *Entrega*’s Seeming Inevitability to *Lucha*’s Viability.

#### A. Retirees equate the COR’s *lucha* in court and settlement as an *entrega*.

The summer of 2019 gave rise to two events that mobilized Puerto Ricans. The first one to occur was when the Junta announced it had reached a tentative RSA with the COR on June 7, 2019.<sup>215</sup> The COR consists of seven members appointed by the U.S. Trustee under the Bankruptcy Code from a cross section of employers and positions within the government of Puerto Rico; it was charged with representing retiree interests in the three statutorily created pension systems (teachers, retiree, and employees) of the central Commonwealth government in the title III case.<sup>216</sup> The charge it

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<sup>213</sup> Abner Denis, *The Puerto Rico Pension Heist*, PUBLIC ACCOUNTABILITY INITIATIVE (Apr. 23, 2019), <https://public-accountability.org/report/the-puerto-rico-pension-heist/>.

<sup>214</sup> COR is an acronym in Spanish for *Comite Oficial de Retirados*. See, e.g., Inter News Service, *Retirados llegan a un Acuerdo Tentativo con la Junta Fiscal*, NOTICENTRO (June 12, 2019), [https://wapa.tv/noticias/locales/retirados-llegan-a-un-acuerdo-tentativo-con-la-junta-fiscal/article\\_73135c3a-0df2-5367-9acc-6cf53a7840eb.html](https://wapa.tv/noticias/locales/retirados-llegan-a-un-acuerdo-tentativo-con-la-junta-fiscal/article_73135c3a-0df2-5367-9acc-6cf53a7840eb.html).

<sup>215</sup> Confirmed Disclosure Statement, *supra* note 18, at 48.

<sup>216</sup> *Comprometido con los pensionados del área este el Comité Oficial de Retirados*,

had on its shoulders was a large one. Puerto Rico has over 300,000 active and retired employees.<sup>217</sup> Together, active and retired government employees equal nearly 10% of the island's population.<sup>218</sup> The COR's president was a respected retired trial judge. He and the other members of the committee had a very personal stake in the outcome of their negotiations.<sup>219</sup>

The debtor's treatment of retirees was subject to intense scrutiny as the Junta looked for a solution to the \$50 billion actuarial deficit. Initially, the Junta sought a 25% reduction in retirement benefits.<sup>220</sup> The Junta then negotiated an RSA with the COR, and the COR negotiated a much better deal than what the Junta sought by agreeing to a cut of 8.5% in benefits only if a retiree earned more than \$1,200 in benefits per month instead of a 25% cut across the board for all retirees. Additionally, the COR's agreement with the Junta included the restoration of contributions made to defined contribution accounts that had gone missing.<sup>221</sup>

The agreement's restoration of benefits constituted a major benefit for workers and its import cannot be overstated. It restored money that they had directly contributed to their 401(k) like retirement savings plan. As retold in local press:

In 1999, the government enacted Act 305, which amended

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EL ORIENTAL (Oct. 8, 2018), <https://periodicoeloriental.com/noticias/comprometido-con-los-pensionados-del-area-este-el-comite-oficial-de-retirados/?amp=1>.

<sup>217</sup> See 2022 CERTIFIED FISCAL PLAN FOR PUERTO RICO at 316 (Jan. 22, 2022), [https://drive.google.com/file/d/1STrf0ksj1Sqc54UkABGcjrblZvc\\_JEm/view](https://drive.google.com/file/d/1STrf0ksj1Sqc54UkABGcjrblZvc_JEm/view) (last accessed June 19, 2022).

<sup>218</sup> *Id.* at 45.

<sup>219</sup> See *supra* note 216.

<sup>220</sup> Danica Cotto, *Puerto Rico Announces Referendum to Protect Public Pensions*, ASSOC. PRESS (July 20, 2020), <https://apnews.com/general-news-637ddaca457c7e71cf706597e1a21224>.

<sup>221</sup> *Retiro anuncia restitución de aportaciones del "Sistema 2000"*, TELEMUNDO PR (Mar. 15, 2023), <https://www.telemundopr.com/noticias/puerto-rico/retiro-anuncia-restitucion-de-aportaciones-del-sistema-2000/2316168/>; see also Confirmed Disclosure Statement, *supra* note 18, at 49 and ex. F at 20–22, <https://cases.ra.kroll.com//puertorico/Home-DownloadPDF?id1=MTAyODU3NQ=&id2=0>.

the 1951 pension system law to create a savings program to finance the retirement of workers who joined the government starting Jan. 1, 2000. Employees were required at the time to contribute 8.275% and 10% of their paychecks for their retirement in funds that were sent to the Employees Retirement System to put in accounts.

“However, because of poor fiscal practices, that process did not happen and the funds were used to cover other obligations of the Retirement System,” said Rosselló, providing the first clue by an official as to what happened with the missing funds.<sup>222</sup>

Just before the COR and the Junta announced the arrival of its RSA, the then-executive director of the Junta stated the matter more sharply. She said that “not transferring money withheld from employees” paychecks into their retirement accounts “is unconscionable and potentially unlawful.”<sup>223</sup> In other words, the Junta and the COR were using their agreement to right a major wrong. The COR’s agreement contained other benefits. It contained an upside bonus contribution toward pension benefits if the Commonwealth’s budget exceeded projections.<sup>224</sup>

Despite these benefits, most of the public focused on the fact that the centerpiece of the agreement was an 8.5% benefit cut for any benefits over \$1,500 on a monthly basis, or \$18,000/year.<sup>225</sup> The benefit reduction would have affected only 26% of Puerto Rico’s 167,000 pensioners. Conceivably, a majority of the retiree class was not going to be impaired. Despite that numerical reality, 43,420 retirees were still going to experience a potential benefit reduction.

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<sup>222</sup> Telemundo, *supra* note 221; *see also* Confirmed Disclosure Statement, *supra* note 18, at 49.

<sup>223</sup> Hazel Bradford, *Puerto Rico Board Asks for Investigation of Delinquent DC Transfers*, PENSIONS AND INVESTMENTS (May 30, 2019), <https://www.pionline.com/article/20190530/ONLINE/190539993/puerto-rico-board-asks-for-investigation-of-delinquent-dc-transfers>.

<sup>224</sup> Confirmed Disclosure Statement, *supra* note 18, at 49–50.

<sup>225</sup> *Id.*

The agreement removed the COR from agitating its members to take any type of action against the Junta because the RSA included a covenant to support any plan of adjustment that the Junta could offer.<sup>226</sup> As noted at the beginning of this piece, some commentators believe that the City of Prichard provides that post-petition claims by retirees are general unsecured claims, and therefore at the end of the priority line.<sup>227</sup> Decisions in the Stockton and the Detroit bankruptcy cases holding that pension claims were contractual claims that could be subject to cuts reinforced this fear.<sup>228</sup> That is why the COR explained to the public that the agreement provided certainty that only a federal court order implementing it through the plan of adjustment could provide. The COR argued that this was important insurance against the government of Puerto Rico's attempts to lower pensions further in the future.<sup>229</sup>

The COR also expressed a desire to avoid having the Junta resort to using a deathtrap and the cramdown provisions contained in § 1129 of the Bankruptcy Code to unilaterally impose a retirement plan on workers and retirees.<sup>230</sup> The Junta had threatened to do just that in the Seventh

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<sup>226</sup> *Id.* at Ex. E, Retiree Plan Support Agreement at § 3.03.

<sup>227</sup> See, e.g., Jeffrey B. Ellman and Daniel J. Merrett, *Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes*, 27 EMORY BANKR. DEV. J. 365, 401–402 (2011) (stating that “[a]pplying the Mammoth Mart test, a chapter 9 debtor's postpetition obligations to its retirees arising out of prepetition contractual (or impliedly contractual) relationships arguably are entitled to nothing more than general unsecured nonpriority status and may be impaired in a plan of adjustment. Likewise, employees' claims arguably would be entitled to priority only to the extent that they relate to postpetition services provided to the debtor.”).

<sup>228</sup> Amended Opinion Regarding Confirmation and Status of CalPERS at 3, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D. Cal. Feb. 27, 2015), <http://www.caeb.uscourts.gov/documents/Judges/Opinions/Published/12-32118MemoOpinion.pdf?dt=1642025> (also noting that even though CalPERS has an iron fist, it also has a glass jaw); see also Opinion Regarding Eligibility, at 73, 80, 92–93, *In re City of Detroit, Michigan*, No. 13-53846, ECF No. 1945 (Bankr. E.D. Mich. Dec. 5, 2013), <https://www.documentcloud.org/documents/886121-rhodes-decision.htm>.

<sup>229</sup> Miguel Fabre Ramirez, Editorial, *Plan de Ajuste de Deuda: Para Entender el Acuerdo Sobre las Pensiones*, EL NUEVO DIA (Mar. 9, 2021), <https://www.elnuevodia.com/opinion/punto-de-vista/para-entender-el-acuerdo-sobre-las-pensiones/>.

<sup>230</sup> Miguel J. Fabre Ramirez, Editorial, *¿Qué ocurre si los pensionados rechazan el Plan de Ajuste?*, EL NUEVO DIA (Sept. 8, 2021), <https://www.elnuevodia.com/opinion/punto->



Amended Plan of Adjustment.<sup>231</sup> The Junta may have insisted on retirement cuts because it was concerned that the title III court would not confirm a proposed plan of adjustment that “unfairly discriminated” against financial creditors by not demanding that retirees also receive a cut to their benefits.<sup>232</sup>

Specifically, the Junta’s proposed plan provided that retirees who made more than \$1,200 a month would be subject to a benefit cut of 8.5%. If the retirees voted against that proposed treatment as a creditor class, the Junta would seek a reduction of 10% with no limit on who would receive that cut.<sup>233</sup> The proposed plan that the Junta ultimately sought to confirm did not contain the deathtrap, and had a higher threshold for cuts of \$1,500. Additionally, the Junta proposed to utilize the cramdown mechanism to implement the 8.5% retirement benefit cut that it had previously agreed to in the RSA.<sup>234</sup> Due to these considerations, the COR made the best agreement it could after having engaged in extensive motion practice. It concluded that it was not in a position to seek a new agreement even in the face of significant criticism from its constituency.

Even though the fiduciary members of the COR had agreed to support the RSA, the general public members of the COR’s constituency were not bound by those provisions.<sup>235</sup> However, it seems like it took another catalyst to get retirees really mobilized and organized. It took a major

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[de-vista/que-ocurre-si-los-pensionados-rechazan-el-plan-de-ajuste/](#).

<sup>231</sup> Confirmed Disclosure Statement, *supra* note 18, at 525.

<sup>232</sup> See 48 U.S.C. § 2174(b)(1) (incorporating 11 U.S.C. § 1129) (requiring that a court evaluate whether a proposed plan of adjustment engages in unfair discrimination between creditor classes before confirming it); see also Dick, *supra* note 37, at 93 (explaining the court in Stockton have protected retirees even though bankruptcy law typically ranks retiree and bondholder claims as unsecured claims regardless of underlying state law).

<sup>233</sup> See Second Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico et al., *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. Mar. 8, 2021, ECF No. 15976), <https://cases.primedclerk.com/puertorico/Home-DownloadPDF?id1=MTAwMzg5Mg==&id2=0>.

<sup>234</sup> See Modified Eighth Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico et al., at § 1.321, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. Jan. 14, 2022), ECF No. 19784.

<sup>235</sup> Confirmed Disclosure Statement, *supra* note 18, at Ex. E, Retiree Plan Support Agreement at § 3.03(iv) (noting that the Committee had to encourage its constituency to vote for the plan).

scandal involving their governor that came to be known as “Rickyleaks.”

B. “Rickyleaks”—Eleven days of *lucha* leads to a governor’s *entrega* during the summer of 2019.

A few weeks after the Junta and the COR had announced the RSA, the defining moment of the summer of 2019 in Puerto Rico, Rickyleaks occurred. It is at that moment that the possibility of 48 U.S.C. § 2174(b)(3)’s potential came alive. Rickyleaks occurred when Puerto Rico’s Center for Investigative Journalism published a story revealing the leaked contents of a Telegram chat between then-governor Ricky Rosselló and his cabinet containing vulgar, homophobic, and unflattering comments about the then-governor’s political enemies.<sup>236</sup>

The ensuing scandal came to be called “Rickyleaks.”<sup>237</sup> In response to the leaks and long-simmering frustrations to a string of arrests of political appointees, the people of Puerto Rico engaged in eleven days of massive protests.<sup>238</sup> The brunt of the people’s frustration was certainly aimed at then-governor Rosselló, but the crowds also used the opportunity to let out its long-simmering frustrations against the Junta. Amongst the most popular chants heard in the crowd were “Ricky Renuncia, y llevate la Junta” or “Ricky Resign, and take the Board with you.”<sup>239</sup>

Members of Congress from both sides called on Rosselló to step down.<sup>240</sup> Protests against Rosselló took place not only in Puerto Rico, but

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<sup>236</sup> Valentin and Minet, *supra* note 7.

<sup>237</sup> Damaris Suárez, *Un año sin que el aparato de justicia concluya investigación sobre los “brothers” del chat de Telegram*, CENTRO POR PERIODISMO INVESTIGATIVO (July 13, 2020), <https://periodismoinvestigativo.com/series/rickyleaks/> (last accessed on Dec. 27, 2022).

<sup>238</sup> Catherine Kim, *Puerto Ricans Demand the Governor’s Resignation*, VOX MEDIA (July 28, 2019), <https://www.vox.com/vox-sentences/2019/7/18/20699944/vox-sentences-puerto-rico-governor-resign-protest>.

<sup>239</sup> *Id.*; see also Marisol Moreno, Commentary, *Puerto Ricans Have Had Enough: #RickyRenuncia is About a Lot More than Roselló*, THE HILL (July 24, 2019), <https://thehill.com/opinion/campaign/454558-puerto-ricans-have-had-enough-rickyrenuncia-is-about-a-lot-more-than-rosello/>.

<sup>240</sup> Doha Madani, U.S. *Elected Officials Call for Puerto Rico Governor to Resign as*

Florida and California as well.<sup>241</sup> At first, Rosselló dug in. He resigned as chair of his party, but refused to resign as governor.<sup>242</sup> Eventually, the continued pressure forced him to leave office. Those protests demonstrated that voters in Puerto Rico were discontented with both their local governor and the congressionally designated board meant to oversee their elected leaders.

In addition, the crowd wanted the Junta gone. The Junta was a group of unelected leaders empowered to make important financial decisions that negatively impacted the life of poorer Puerto Ricans by imposing a COFINA deal that left little room for cutting the already high regressive sales tax, proposing a cut on the mostly meager pension benefits of over 43,000 people, and freezing the accumulation of further benefits for the island's teachers. Nevertheless, the crowd got one-half of its chant. It got Ricky to resign, but he did not take the Junta with him, nor could he. PROMESA clearly states that the Junta can sunset only once Puerto Rico achieves access to the credit markets and four balanced budgets.<sup>243</sup>

There is literature exploring the summer of 2019, but most of it focuses on the success of pushing out the sitting governor from office and the Junta's colonial role. The literature does not tie back to the title III restructuring proceedings or the operation of 48 U.S.C. § 2174(b)(3).<sup>244</sup> That omission is

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*Protests Continue*, NBC NEWS (July 19, 2019), <https://www.nbcnews.com/news/latino/u-s-elected-officials-call-puerto-rico-governor-resign-protests-n1031926>.

<sup>241</sup> Fallon Silcox and Laurie Davison, *Bay Area Puerto Ricans Call for Governor to Resign*, SPECTRUM 9 NEWS (July 19, 2019), <https://www.baynews9.com/fl/tampa/news/2019/07/19/bay-area-puerto-ricans-to-hold-protest-over-ongoing-government-scandals>; Lyanne Melendez, *Bay Area Puerto Ricans Demand Gov. Rossello Step Down*, ABC 7 NEWS (July 17, 2019), <https://abc7news.com/sf-puerto-rico-bay-area-news-san-juan/5402526/>.

<sup>242</sup> Daniel Politi, *Puerto Rico Governor Won't Seek Reelection, Steps Down as Party Chair but Refuses to Resign*, SLATE (July 21, 2019), <https://slate.com/news-and-politics/2019/07/puerto-rico-governor-ricardo-rossello-refuses-resign-wont-seek-reelection.html>.

<sup>243</sup> 48 U.S.C. § 2149.

<sup>244</sup> See, e.g., Pedro Caban, *Puerto Rico's Summer 2019 Uprising and the Crisis of Colonialism*, 47 LATIN AM. PERSPECTIVES 103 (Mar. 2020), <https://journals.sagepub.com/doi/10.1177/0094582X20906509>; Alex Lubben, *Puerto Ricans Aren't Done Protesting. "La Junta is Why."*, VICE MAGAZINE (July 25, 2019),

understandable on its face because the protests in the summer of 2019 in response to Rickyleaks had little to do with the title III proceedings, and everything to do with massive discontent. Just because this article has devoted very little space to the matter, the reader should not take that to mean that the protests' effect on the title III proceedings were insignificant.

The protests were the fulcrum from which the Junta's control over the title III proceedings began its wane, at least as applied to the proposed retiree benefit cuts. Hundreds of thousands of people had expressed their frustration at the Junta and were now looking for additional ways to be heard. The confirmation hearing for the central government of Puerto Rico's plan of adjustment, and the chance to exercise direct and indirect pressure on the Junta through influencing the legislature through 48 U.S.C. § 2174 was still over a year away. All of these groups had enough cause to mobilize, and a realization that mobilization could lead to results. Over the next year, the retirees began to beat their pots and pans in anger in rejection of pension cuts and take other action to eventually lead up to legislative action. It was now their turn.

### C. Pots, pans, and the beginning of a continued lucha.

As soon as the agreement was announced on the COR's Facebook page in June, retiree Nancy Carmona said on behalf of a coalition of retirees, community groups, and activists called *Construyemos Otro Acuerdo* (in English: *We are Building Another Agreement*) that "the COR does not represent me" as an expression of repudiation of the RSA.<sup>245</sup> She pointed out that the House of Representatives had recently passed a resolution that made clear its intent to protect pensions.<sup>246</sup> As a result, that group called on the COR to ensure zero pension cuts and join litigation that was

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<https://www.vice.com/en/article/9kxxxxy/puerto-ricans-arent-done-protesting-la-junta-is-why>; Kate Aronoff, *As Puerto Rico Erupts in Protests and Governor Resigns, "La Junta" Eyes More Power*, THE INTERCEPT (July 24, 2019), <https://theintercept.com/2019/07/24/puerto-rico-protests-ricardo-rossello-la-junta/>.

<sup>245</sup> Cybernews, *Retirados Condenan Negociación de Recortes entre COR y JCF*, TELEMUNDOPR (June 1, 2019), <https://www.telemundopr.com/noticias/puerto-rico/pensionados-condenan-negociacion-de-recortes-entre-cor-y-jcf/105472/>.

<sup>246</sup> *Id.*

challenging whether Puerto Rico had issued its debt ultra vires. Even though that House resolution was on the books, it only expressed the desire of one chamber of Puerto Rico's legislature. Another group held a protest just a couple of days later.<sup>247</sup> In July, the retirees held another protest in Old San Juan, the historic center of Puerto Rico.<sup>248</sup>

Even though the Junta could use tools such as RSAs and deathtraps to distort anticipated retiree holdout votes on the plan of adjustment, those tools were ineffective in preventing retirees from seeking redress that their elected officials engage in holdout behavior. The use of these tools also did little to convince retirees to vote in favor of the pension reductions as they did in Detroit.<sup>249</sup> As creditors, they have the right to vote on the plan of adjustment within each of their classes.<sup>250</sup> In the case of Puerto Rico, 47 of 61 classes voted in favor of the plan of adjustment. Of the many retiree classes subject to the 8.5% cut, only the judges' retirement system participants accepted the cut. Participants in Puerto Rico's other two retirement systems did not.<sup>251</sup> The creditors in the retiree classes voted overwhelmingly against.

The Junta's RSA, which was binding on the official committees, threatened to use the § 1129(b) cramdown process to bind dissenting classes but did nothing to stop retirees from organizing. The RSA with an official committee could neither bind individual members of the committee into

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<sup>247</sup> Miladys Soto, *Jubilados Protestarán Contra Acuerdo del COR*, METRO (June 3, 2019), <https://www.metro.pr/pr/noticias/2019/07/03/jubilados-protestaran-acuerdo-del-cor.html>.

<sup>248</sup> Yaritza Rivera Clemente, *Jubilados protestan en Plaza Las Américas*, EL VOCERO (July 31, 2019), [https://www.elvocero.com/actualidad/jubilados-protestan-en-plaza-las-amicas/article\\_6cd4f3a8-b3a6-11e9-85f8-775910b16f12.html](https://www.elvocero.com/actualidad/jubilados-protestan-en-plaza-las-amicas/article_6cd4f3a8-b3a6-11e9-85f8-775910b16f12.html).

<sup>249</sup> Assoc. Press, *Detroit City Workers, Retirees Vote in Favor of Pension Cuts in Bankruptcy Plan*, FOX NEWS (Dec. 20, 2015), <https://www.foxnews.com/politics/detroit-city-workers-retirees-vote-in-favor-of-pension-cuts-in-bankruptcy-plan>.

<sup>250</sup> 11 U.S.C. § 1126.

<sup>251</sup> See Declaration of Christiana Pullo of Prime Clerk LLC, Seventh Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, ex. A, at 5, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-3283 (D.P.R. Nov. 3, 2021), ECF No. 19056 (explaining the solicitation of votes and tabulation of ballots cast on plan). The COR was not the only official committee to have its class reject an RSA it negotiated. Unsecured creditors also rejected the Unsecured Creditors' Committee RSA.

accepting a plan of adjustment nor bind other creditors whose interests the committee represents. That left individual creditor class members free to continue to hold out for better treatment. These holdout behaviors are typically focused on filing objections against the plan of adjustment, or in the chapter 9 scenario, exercising political pressure against elected officials to discourage further benefit reductions under the plan of adjustment.

Unlike the protests of the COFINA RSA, which were intense but limited to one day of mobilization at the federal courthouse *after* the legislature had approved legislation issuing new bonds as contemplated in the COFINA plan of adjustment, these new protests became ongoing and multi-locational. This appears to have happened organically. For example, on August 20, 2019, various groups began moving “from protest to proposal” in various cities on the island.<sup>252</sup> These student led groups in various parts of Puerto Rico began to spontaneously start “people’s democratic assemblies”.<sup>253</sup> At that moment, the demands were many but were beginning to come into greater focus. On September 30, 2019, retirees made their move and protested in front of then-chair of the Junta Jose Carrion III’s home.<sup>254</sup> On October 10, 2019, several other community groups joined retirees in protesting again in front of Carrion’s home.<sup>255</sup> On October 16, 2019, Little Sis, a Wall Street Accountability Group, published a report criticizing the COR’s RSA.<sup>256</sup>

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<sup>252</sup> Jacqueline Villarrubia-Mendoza and Roberto Velez-Velez, *Puerto Rican People Assemblies Shift from Protest to Proposal*, N. AM. CONGRESS ON LATIN AM. MAGAZINE (Aug. 20, 2019), <https://nacla.org/news/2019/08/22/puerto-rican-people%E2%80%99s-assemblies-shift-protest-proposal>.

<sup>253</sup> *Id.*

<sup>254</sup> *Jubilados protestan por recortes a pensiones frente a la residencia de José Carrión*, UNIVISION (Sept. 30, 2019), <https://www.univision.com/local/puerto-rico-wlii/jubilados-protestan-por-recortes-a-pensiones-frente-a-la-residencia-de-jose-carrion>.

<sup>255</sup> EFE, *Pensionados de Puerto Rico Llevan Protesta con Cacerolazo a “Penthouse” de Presidente de Junta de Supervisión Fiscal*, EL DIARIO (Oct. 10, 2019), <https://eldiario.com/2019/10/10/pensionados-de-puerto-rico-llevan-protesta-con-cacerolazo-a-penthouse-de-presidente-de-junta-de-supervision-fiscal/>.

<sup>256</sup> Abner Denis, *Una Guía para el Plan de Ajuste del Gobierno Central: Recortes a las Pensiones y Pago de Deuda Posiblemente Ilegal*, LITTLESIS (Oct. 16, 2019), <https://news.littlesis.org/2019/10/16/una-guia-para-el-plan-de-ajuste-del-gobierno-central-recortes-a-las-pensiones-y-pago-de-deuda-posiblemente-ilegal/>.

While it is difficult to measure whether that report had any impact on retiree organizing, only a couple of days later, on October 18, 2019, pensioners organized a protest in the southern city of Ponce, about a one-and-a-half-hour drive from San Juan.<sup>257</sup> On October 19, 2019, Puerto Rico's House of Representatives passed a resolution expressing that it would reject any plan of adjustment that would cut retiree pensions.<sup>258</sup> On October 29, 2019, retirees protested in Old San Juan and at the governor's mansion.<sup>259</sup> An October 31 commentary published in the *Orlando Sentinel* featured the story of a retiree (who had moved to Florida after Maria) raising concerns about their retirement, thus demonstrating that this problem affected Puerto Rican communities who lived in Florida,<sup>260</sup> a constituency so important to elected officials in Puerto Rico that the government of Puerto Rico opened a federal affairs office in Kissimmee, near Orlando, to serve Puerto Ricans who moved into the area.<sup>261</sup> On November 12, 2019, retirees engaged in another cacerlorazo (protest) at the home of the then-president of the Junta.<sup>262</sup> The series of mobilizations worked.

On November 14, 2019, the Senate of Puerto Rico joined the House and unanimously passed joint resolution RKC 0114.<sup>263</sup> That resolution

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<sup>257</sup> *Pensionados protestan en las Letras de Ponce y convocan marcha a Fortaleza*, PERIODICO EL SOL DE PUERTO RICO (Oct. 18, 2019), <https://periodicoelsolpr.com/2019/10/18/pensionados-protestan-en-las-letras-de-ponce-y-convocan-marcha-a-fortaleza/>.

<sup>258</sup> Yaritza Rivera Clemente, *Aprueban resolución oponiéndose al recorte a las pensiones y al Plan de Ajuste*, EL VOCERO (Oct. 21, 2019), [https://www.elvocero.com/gobierno/aprueban-resolucion-oponindose-al-recorte-a-las-pensiones-y-al-plan-de-ajuste/article\\_2190b716-f43c-11e9-a6e8-97c15d2d0148.html](https://www.elvocero.com/gobierno/aprueban-resolucion-oponindose-al-recorte-a-las-pensiones-y-al-plan-de-ajuste/article_2190b716-f43c-11e9-a6e8-97c15d2d0148.html).

<sup>259</sup> Fernando Pereira, *Jubilados Llevan Reclamo a La Fortaleza*, EL VOCERO (Oct. 21, 2019), [https://www.elvocero.com/gobierno/jubilados-llevan-reclamo-a-la-fortaleza/article\\_5338bc84-f3ae-11e9-9d03-27d202c73852.html](https://www.elvocero.com/gobierno/jubilados-llevan-reclamo-a-la-fortaleza/article_5338bc84-f3ae-11e9-9d03-27d202c73852.html).

<sup>260</sup> Maria Revelles, *Puerto Rican Retirees Worry PROMESA Breaks Pension Promise*, ORLANDO SENTINEL (Oct. 31, 2019), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-puerto-rico-retirees-worry-20191031-blorr7trcfdklilnw2vd6kbywe-story.html>.

<sup>261</sup> PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, <https://www.prfaa.pr.gov/services> (last accessed on Nov. 18, 2023).

<sup>262</sup> Osman Pérez Méndez, *Llevan Cacerolazo a Presidente de la Junta*, PRIMERA HORA (Nov. 12, 2019), <https://www.primerahora.com/noticias/puerto-rico/notas/llevan-cacerolazo-a-presidente-de-la-junta/>.

<sup>263</sup> PUERTO RICO LEGISLATURE CONCURRENT RESOLUTION 114 (Nov. 14, 2019),

stated that the legislature rejected the 8.5% benefit cut and that the Legislative Assembly of Puerto Rico would refuse to pass any legislation enabling a plan of adjustment with any such cuts, knowing that at least 120,000 retirees would be affected.<sup>264</sup> While that resolution made clear that the legislature intended to block the plan of adjustment, it received very little attention from the Junta at that time. It would be hard to speculate as to why the Junta did not make a public statement at the time of passage. One explanation could be that the Junta viewed the resolution as an aspirational statement lacking the force of law since the governor had not issued a statement regarding it. Another explanation could be that the matter was not ripe, as the Junta had not moved the court to confirm a plan of adjustment or approve a disclosure statement yet and would not do so until almost two years later. Whatever the motive for not responding, it allowed time for workers to begin building up a resistance.

On February 20, 2020, over 1,500 retirees gathered under the COA banner at an assembly in San Juan. At that meeting, they approved a resolution of the “National Assembly of Pensioners” to fight for the concept of a dignified retirement.<sup>265</sup> Shortly thereafter, on March 9, 2020, local politicians filed a bill known as House Bill 2434. The title of that bill was “the Law for a Dignified Retirement.” The resolution that the House passed in 2019 was three pages in length. In contrast, House Bill 2434 contained a 23-page single-spaced Statement of Legislative Motives and weighed in at 234 pages of statutory text.<sup>266</sup> The Statement of Legislative Motives contained the entire resolution passed at this national assembly.<sup>267</sup>

The House of Representatives voted House Bill 2434 into law, but the bill stalled in the Senate. On July 1, 2020, the then-Senate President stated that he opposed the bill because it violated the Puerto Rico Constitution’s

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<https://sutra.oslpr.org/osl/esutra/medidareg.aspx?rid=130807>.

<sup>264</sup> *Id.* at § 1.

<sup>265</sup> *Pensionados Aprueban Resolución para Establecer un Retiro Digno*, El VOCERO (Feb. 22, 2020), [https://www.elvocero.com/gobierno/pensionados-aprueban-resoluci-n-para-establecer-un-retiro-digno/article\\_5bc2c89a-559c-11ea-9b73-cff634b4f632.html](https://www.elvocero.com/gobierno/pensionados-aprueban-resoluci-n-para-establecer-un-retiro-digno/article_5bc2c89a-559c-11ea-9b73-cff634b4f632.html).

<sup>266</sup> *See* P.R. H.B. 2434 (2020) (legislative history available at <https://sutra.oslpr.org/osl/esutra/prontuario.aspx?rid=136895>).

<sup>267</sup> *See id.*



separation of powers between the legislature and the judiciary.<sup>268</sup> He also argued that the bill violated the Contracts Clause of the Puerto Rico Constitution.<sup>269</sup> Even though this bill did not ultimately become law, its introduction and citation of that assembly's resolution demonstrates that Puerto Rico's elected officials had paid attention to the retirees' political mobilization.

The Senate's stalling of the bill did not end the retirees' *lucha*. Instead, they redoubled their efforts. For example, on July 12, 2020, less than two weeks after the then-Senate President announced the stalling of House Bill 2434, the governor called the legislature to convene a special session to consider bills that would affect the retirement systems. Retirees responded by marching again and calling for the re-introduction of House Bill 2434.<sup>270</sup> Just a few days later, they called on the governor to issue a new call for a special session of the legislature to pass House Bill 2434, arguing that the proposals being considered were inadequate.<sup>271</sup> They failed in having the governor amend the call.

Even though the defeat of House Bill 2434, the pandemic, and the oncoming hurricane season certainly set back retirees' efforts to mobilize in person, they continued to engage in *lucha* instead of giving up. Since 2020 was an election year, the legislature of Puerto Rico's fall session could not occur until after the elections.<sup>272</sup> Nevertheless, on October 7, 2020, retirees

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<sup>268</sup> *Rivera Schatz Critica Proyecto de Retiro Digno*, EL VOCERO (July 7, 2020), [https://www.elvocero.com/gobierno/rivera-schatz-critica-proyecto-de-retiro-digno/article\\_ff21a214-bb9e-11ea-b365-1394b5ced60d.html](https://www.elvocero.com/gobierno/rivera-schatz-critica-proyecto-de-retiro-digno/article_ff21a214-bb9e-11ea-b365-1394b5ced60d.html).

<sup>269</sup> *Rivera Schatz Reacciona Tras Poner Freno a la Ley de Retiro Digno*, METRO PUERTO RICO (July 1, 2020), <https://www.metro.pr/pr/noticias/2020/07/01/rivera-schatz-reacciona-tras-poner-freno-a-la-ley-de-retiro-digno.html>.

<sup>270</sup> Osman Perez Mendez, *Manifestación Reclama se Aprueben Dos Proyectos Para Salvar las Pensiones*, PRIMERA HORA (July 12, 2020), <https://www.primerahora.com/noticias/puerto-rico/notas/manifestacion-reclama-se-aprueben-dos-proyectos-para-salvar-las-pensiones/>.

<sup>271</sup> Daniel Rivera Vargas, *Jubilados y Empleados Públicos Piden a Wanda Vázquez que Enmiende la Sesión Extraordinaria*, PRIMERA HORA (July 23, 2020), <https://www.primerahora.com/noticias/gobierno-politica/notas/jubilados-y-empleados-publicos-piden-a-wanda-vazquez-que-enmiende-la-sesion-extraordinaria/>.

<sup>272</sup> 16 L.P.R.A. § 4231; *see also* Jorge Farinacci Fernos, *La Veda Electoral*, 54 U.P.R. R.J. 27 (2019–2020) (discussing this law and its potential for the conduct of electoral activity).

showed up at the office of one of Puerto Rico's major parties demanding that its gubernatorial candidate support House Bill 2434, the Law for a Dignified Retirement.<sup>273</sup> On October 15, 2020, the retirees then made a public demand that the other party's major candidate, and eventual governor of Puerto Rico, Pedro Pierluisi, support the measure.<sup>274</sup> Even though other candidates agreed to support House Bill 2434, then-candidate Pierluisi took a different approach by expressing support for pensioners, but refusing to sign an agreement in support of that bill.<sup>275</sup>

A newly elected split-government took over on January 2, 2021. The head of both chambers in Puerto Rico's legislature came from the opposite party of newly-elected Governor Pierluisi. Despite that split, a bipartisan coalition of House members reintroduced the Law for a Dignified Retirement in Puerto Rico's House of Representatives, House Bill 120.<sup>276</sup> The Senate did not take up the bill right away, but it did pass Senate Resolution 6 as a way of expressing its support for protecting pensions on February 11, 2021.<sup>277</sup> This set up a showdown between the Junta, the Puerto Rico legislature, and the governor's office.

On February 20, 2021, the Junta answered back. It advised Puerto Rico's elected leaders that House Bill 120, the bill that eventually became Act 7 of 2021, the Law for a Dignified Retirement, was inconsistent with

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<sup>273</sup> Frances Rosario, *Pensionados Claman ser Escuchados por Charlie Delgado Frente a la Sede del PPD*, PRIMERA HORA (Oct. 7, 2020), <https://www.primerahora.com/noticias/gobierno-politica/notas/pensionados-claman-ser-escuchados-por-charlie-delgado-frente-a-la-sede-del-ppd/>.

<sup>274</sup> *Agenda de EFE América - Jueves 15 de octubre de 2020*, CLARIN (Oct. 15, 2020), [https://www.clarin.com/agencias/efe-agenda-efe-america-jueves-15-octubre-2020\\_0\\_ML1TK\\_p6v.html](https://www.clarin.com/agencias/efe-agenda-efe-america-jueves-15-octubre-2020_0_ML1TK_p6v.html).

<sup>275</sup> Kristaliz Rosa Rojas, *Pedro Pierluisi Asegura Protegerá las Pensiones, Pero No Garantiza la Firma de Un Acuerdo*, EL NUEVO DIA (Oct. 16, 2020), <https://www.elnuevodia.com/noticias/politica/notas/pedro-pierluisi-asegura-protegera-las-pensiones-pero-no-garantiza-la-firma-de-un-acuerdo/>.

<sup>276</sup> See P.R. H.B. 120 (the Law for a Dignified Retirement) (legislative history available at <https://sutra.oslpr.org/osl/esutra/medidareg.aspx?rid=136895>).

<sup>277</sup> *Senado Aprueba Resolución para no Legislar Recortes a las Pensiones y a la UPR*, PRIMERA HORA (Feb. 11, 2021), <https://www.primerahora.com/noticias/gobierno-politica/notas/senado-aprueba-resolucion-para-no-legislar-recortes-a-las-pensiones-y-a-la-upr/>.

the fiscal plan and therefore violated various provisions of PROMESA.<sup>278</sup> The Junta determined, based on these inconsistencies and its own findings of PROMESA violations, that the bill impairs and defeats PROMESA's purposes. After the Junta had lodged its objection, a House of Representatives committee took testimony from a large cross section of labor groups, retirees, and government agencies,<sup>279</sup> and eventually passed House Bill 120 on February 23, 2021.<sup>280</sup>

Now that the House had passed a bill, the Senate needed to consider the measure. On March 26, 2021, the Senate began hearing testimony. It invited labor, community groups, and several agencies of the executive branch of the government of Puerto Rico to testify orally or in writing on the measure.<sup>281</sup> Even though these groups were participating in the legislative process, they did not stop from mobilizing. For example, on April 18, 2021, unions and community groups joined with retirees and held another cacerlorazo in front of the Capitol alongside retirees calling for the passage of the Law for a Dignified Retirement.<sup>282</sup> Despite the Junta's continued objections and communications with the legislature, the Senate approved House Bill 120 on May 13, 2021, via a voice vote.<sup>283</sup>

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<sup>278</sup> See Letter from Natalie Jaresko to Gov. Pedro Pierluisi, FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO (Feb. 20, 2021), <https://drive.google.com/file/d/1t0xGjii2Pq3L4N1z1HqKsIKPrkeuLSe/view>.

<sup>279</sup> Camara de Representantes para El Estado Libre Asociado de Puerto Rico, Comisión de Asuntos Laborales y Transformación del Sistema de Pensiones para un Retiro Digno de la Cámara de Representantes, *Informe Positivo*, P. de la C. 120, at 18 (Feb. 17, 2021), available at <https://sutra.oslpr.org/osl/esutra/medidareg.aspx?rid=136895>, link titled "1er Informe Comisión rendido con enmiendas" (on file with author).

<sup>280</sup> See P.R. H.B. 120 (the Law for a Dignified Retirement) (legislative history available at <https://sutra.oslpr.org/osl/esutra/prontuario.aspx?rid=136895>).

<sup>281</sup> See Senado para El Estado Libre Asociado de Puerto Rico Senate, Comisión de Hacienda, Asuntos Federales y Junta de Control Fiscal del Senado de Puerto Rico, *Informe Positivo*, P. de la C. 120, at 30 (May 3, 2021), (available at <https://sutra.oslpr.orgosl/esutra/prontuario.aspx?rid=136895>, link titled 1er Informe Conjunto Comisiones rendido con enmiendas (on file with author)).

<sup>282</sup> Yaritzza Rivera Clemente, *Aumentan la Presión por Medida de Retiro Digno*, EL VOCERO (Apr. 19, 2021), [https://www.elvocero.com/gobierno/aumentan-la-presi-n-por-medida-de-retiro-digno/article\\_c0f74474-a0a6-11eb-b127-3bb5ae330f34.html?fbclid=IwAR1qkctc6qluiL5wfx5m6eyr9ohB81jKa7PQWVw6qzqMiFuCeBs-jLqLc3I](https://www.elvocero.com/gobierno/aumentan-la-presi-n-por-medida-de-retiro-digno/article_c0f74474-a0a6-11eb-b127-3bb5ae330f34.html?fbclid=IwAR1qkctc6qluiL5wfx5m6eyr9ohB81jKa7PQWVw6qzqMiFuCeBs-jLqLc3I).

<sup>283</sup> See *supra* note 280 (citing legislative history); Maria Soledad Davila Calero, *Senado*

The governor of Puerto Rico now had a decision to make. He tried to walk a middle road during his election campaign: expressing support for retirees but rejecting the Law for a Dignified Retirement as the way to meet that goal.<sup>284</sup> In a strange legal maneuver, on June 3, 2020, the Junta sent a letter to the governor of Puerto Rico seeking to enjoin the government from enacting the Law for a Dignified Retirement as being inconsistent with the fiscal plan; this letter was sent before the governor had even signed House Bill 120 into law.<sup>285</sup> On June 8, the governor announced that he agreed with the Junta's analysis that Act 7 was substantially inconsistent with the fiscal plan.

He then presented two alternative bills to Act 7 and called for a special session of the legislature to convene.<sup>286</sup> On June 9, 2021, the governor signed House Bill 120 into law as Act 7-2021, over a year and a half after the National Convention of Pensioners had taken place.<sup>287</sup> On June 18, 2021, pursuant to PROMESA § 204(a)(2), the governor put his position into writing by providing the Junta with a certification that stated Act 7 was "significantly inconsistent" with the 2021 fiscal plan. The certification also stated that Act 7's pension system conflicts with the fiscal plan and the assumptions underlying the current plan of adjustment in the Commonwealth's title III proceeding.<sup>288</sup> The signed statement concluded

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*Aprueba a Viva Voz el Proyecto de Retiro Digno*, MICROJURIS (May 13, 2021), <https://aldia.microjuris.com/2021/05/13/senado-aprueba-a-viva-voz-el-proyecto-de-retiro-digno/>.

<sup>284</sup> NotseisPR, *Gobernador Asegura Que No es Necesario Litigar por la Ley de Retiro Digno*, WIPR (Jul. 2, 2021), <https://wipr.pr/gobernador-asegura-que-no-es-necesario-litigar-por-la-ley-de-retiro-digno/> (Governor of Puerto Rico stating that it is not necessary to litigate over the Law for a Dignified Retirement).

<sup>285</sup> See Letter from Natalie Jaresko to Gov. Pedro Pierluisi, FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO (June 3, 2021), <https://drive.google.com/file/d/1Ot6e9Et447K6vx8cE3BnqV3ZAzqgZU6l/view>.

<sup>286</sup> *Pierluisi presenta dos medidas como alternativa a la Ley de Retiro Digno*, ELNUEVODIA.COM (July 8, 2021), <https://www.elnuevodia.com/noticias/gobierno/notas/pierluisi-presenta-dos-medidas-como-alternativa-a-la-ley-de-retiro-digno/>.

<sup>287</sup> *Id.*

<sup>288</sup> Letter from Natalie Jaresko to Gov. Pierluisi, FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO at 23 (June 22, 2021),

that Act 7 “modifies billions of dollars of debt to retirees without the approval of the Oversight Board” and “might require reprogramming budgeted resources” to support it.<sup>289</sup> At least one group viewed the governor’s action as one of betrayal to the viability of Act 7.<sup>290</sup>

The Junta sent a letter to the governor and the legislature documenting its conclusion that Act 7 was inconsistent with the fiscal plan and stating that it “cannot be corrected to eliminate the inconsistency, nor can the government provide an explanation for the inconsistency that the Oversight Board will find reasonable and appropriate.”<sup>291</sup> The Junta demanded that the governor confirm that Act 7 will not be implemented and that the legislature confirm that it “will undertake the repeal of Act 7 in its entirety.”<sup>292</sup> Interestingly, the Junta did not attempt to address the public about what it called “The Deceit of the Dignified Retirement Act” until *after* the governor had signed the bill into law.<sup>293</sup> Shortly after the governor signed this act into law, the Junta, on July 30, 2021, proposed the Seventh Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, which included cuts to certain pensions and negotiated levels of recovery for bondholders, as well as a deathtrap for retirees, thus setting up a showdown between all parties involved.<sup>294</sup>

D. What were the Junta and retirees engaging in *lucha* over? A summary of the Law for a Dignified Retirement.

The Junta called Act 7 an act of deceit, and yet the legislature passed it.

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<https://drive.google.com/file/d/1TsizM5RbKPGbV1or57mqNIR0tdAeDawj/view>.

<sup>289</sup> *Id.*

<sup>290</sup> *Federación de Maestros Acusa al Gobernador Pedro Pierluisi de Traición al País por Ley de Retiro Digno*, UNIVISION (July 11, 2021), <https://www.univision.com/local/puerto-rico-wlii/federacion-de-maestros-acusa-al-gobernador-pedro-pierluisi-por-traicion-al-pais-por-ley-de-retiro-digno-pr>.

<sup>291</sup> *See supra* note 288, at 3.

<sup>292</sup> *Id.*

<sup>293</sup> Antonio Medina, *The Deceit Of The “Dignified Retirement” Act* (June 22, 2021), <https://oversightboard.pr.gov/op-ed-the-deceit-of-the-dignified-retirement-act/> (last accessed Dec. 28, 2022).

<sup>294</sup> *See generally* Seventh Amended Title III Joint Plan of Adjustment of the Commonwealth of Puerto Rico, et al., *In re* Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-3283 (D.P.R. July 30, 2021), ECF No. 17627.

The Senate did so on the back of a Senate report that went into great detail concerning why the legislature possessed the legal authority to enact that statute. In order to evaluate that claim against the earlier section outlining the powers of the Junta, this article will have to provide a summary of the admittedly lengthy and complex bill.

The Law for a Dignified Retirement Act declares a state of emergency in chapter 1 that embraces the full restoration and preservation of public employee pension rights.<sup>295</sup> The Law for a Dignified Retirement proposed, *as a condition for approval of a plan of adjustment*, a return to a defined-benefit public employee pension structure funded by money on debt service if certain bond issues that had been challenged during the court proceedings were invalidated as having been issued as ultra vires under Puerto Rico's Constitution.<sup>296</sup> The Law for a Dignified Retirement declared that Puerto Rico would uphold a public policy requiring full payment of retirement benefits with respect to the treatment of retirees in any plan of adjustment. It required the government to reject any plan that did not conform with the law's policies.<sup>297</sup> The Law for a Dignified Retirement also forbade the government of Puerto Rico and its instrumentalities from devoting funds to supporting or implementing the Junta's proposed plan of adjustment unless it aligned with the goals of the law.<sup>298</sup>

Chapters 3 and 4 of Act 7 outlined what the elected representatives of Puerto Rico wanted to see in an alternate plan of adjustment and made their inclusion an express condition for enacting legislation to issue new bonds. This was the central bargain. The legislature was seeking to bargain pension protection for workers in exchange for issuing the bonds that the Junta needed to close its proposed settlements and financial restructurings with its financial creditors. Specifically, the legislature sought a new retirement system for public employees that would protect their benefits at 100%.<sup>299</sup> It would replace the current retirement system and allow for potential

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<sup>295</sup> P.R. Act 7 of 2021 at art. 1.04.

<sup>296</sup> *Id.* at art. 1.05(r)(4).

<sup>297</sup> *Id.* at art. 2.01(b).

<sup>298</sup> *Id.* at art. 2.14.

<sup>299</sup> *Id.* at art. 3.01–3.02.

increases in pension benefits if certain funding requirements were met.<sup>300</sup> Chapter 4 outlined terms for a model plan of adjustment that the legislature would be willing to provide enabling legislation for. The terms included proposed payouts for creditors which were substantially different than the RSA's that the Junta had entered into with creditors.<sup>301</sup>

E. The Junta demands that the elected government again engage in entrega.

After the governor certified that the Law for a Dignified Retirement was inconsistent with the Junta's fiscal plan, the Junta sought to compel the governor to withhold implementation.<sup>302</sup> However, those efforts were unsuccessful and, on July 2, 2021, the Junta brought a declaratory suit against the governor, the Senate President, and the House Speaker of Puerto Rico along the lines set out in their earlier letter. Elected leaders, labor unions, and the local bar association of Puerto Rico, either sought direct intervention or sought leave to file as amicus in defense of the statute. Those intervenors, along with the legislative defendants, argued that Law 7 set out a detailed position statement concerning the conditions that Puerto Rico wanted on both its debt load and pension treatment that was contingent on a plan of adjustment being filed, and that it was setting out the terms upon which the legislature of Puerto Rico would be willing to enact legislation to allow for the issuance of new bonds that were needed to implement the plan.<sup>303</sup> The local bar association additionally argued that PROMESA neither preempted the local government's authority to raise the taxes needed to support repayment of its debt nor its authority to issue bonds.<sup>304</sup>

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<sup>300</sup> *Id.* at art. 3.04.

<sup>301</sup> *Id.* at art. 4.01(a), (b).

<sup>302</sup> See Letter from Natalie Jaresko to Gov. Pedro Pierluisi, FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO (June 22, 2021), <https://drive.google.com/file/d/1TsizM5RbKPGbV1or57mqNIR0tdAeDawj/view> (last accessed June 19, 2022).

<sup>303</sup> See generally Memorandum in Support of the Financial Oversight and Management Board's Motion for Summary Judgement Pursuant to Bankruptcy Rule 7056, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 21-00072, Dkt. Nos. 39 (filed Aug. 27, 2021), 61 (filed Sep. 8, 2021), and 69 (filed Sept. 10, 2021).

<sup>304</sup> Amicus Brief on Behalf of Colegio de Abogados y Abogadas de Puerto Rico at 11-14, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 21-00072 (D.P.R. Sept. 10,

The court entered its memorandum order ruling on the summary judgment motion in favor of the Junta on October 13, 2021.<sup>305</sup> After first holding that the Junta had standing to bring suit because the matter presented a live case or controversy, the court nullified Act 7 in its entirety.<sup>306</sup> The court's holding is worth quoting at length:

It is undisputed that Act 7 is inconsistent with the Fiscal Plan, thus no additional evidence is required to support the Oversight Board's determination. Further, it is clear that Act 7 fundamentally interferes with the Fiscal Plan by prohibiting the Commonwealth government from complying with a Fiscal Plan that is in conflict with Act 7. See Act 7 art. 2.04; Vázquez Garced II, 616 B.R. at 248 (nullifying act when "it [[was]] patently obvious" that its provisions were inconsistent with the yearly fiscal plan). The Act also instructs the government to divert resources to prepare for the implementation of Act 7's provisions in violation of the current Fiscal Plan. Act 7 further threatens to upend the current financial operations of the Commonwealth by impeding the Oversight Board's advancement of its plan of adjustment, which the Oversight Board has certified is consistent with the Fiscal Plan. See Act 7 art. 2.01(n) (requiring "that no part of the funds and resources of the state government earmarked for activities related to the participation of the [[Commonwealth]] . . . in the processes under Title III of PROMESA, shall be directed towards the achievement of any Adjustment Plan inconsistent with the provisions of this Act").<sup>307</sup>

The court was unpersuaded by the defendants' argument that Act 7 contained only contingent policy proposals that have no current impact on

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2021), ECF No. 69.

<sup>305</sup> *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Urrutia, et al.*, 634 B.R. 187 (D.P.R. 2021).

<sup>306</sup> *Id.* at 196–199.

<sup>307</sup> *Id.* at 202.



the Oversight Board's responsibilities or the Commonwealth's finances, and therefore the Act cannot "impair or defeat" the purposes of PROMESA.<sup>308</sup> On the contrary, in its view, many provisions of Act 7 were immediately operative and explicitly interfering with the Junta's ability to achieve PROMESA's purpose by restricting the Commonwealth's compliance with fiscal plans and budgets and limiting the Junta's pursuit of a plan of adjustment.<sup>309</sup>

F. The retirees continue to engage in lucha and win.

Clearly, the court's decision in this case dealt a major blow to the proponents of the Law for a Dignified Retirement and legislators who sought to use 48 U.S.C. § 2174(b)(3) to further an ambitious piece of legislation. However, an earlier part of the court's decision appears to lay out a roadmap for what happened next with the passage of Law 53, the law that ultimately led to the conclusion of the proceedings for the Commonwealth. To quote the court in its own words:

The provisions governing the formulation and confirmation of plans of adjustment under PROMESA further reflect this division of responsibilities between the Oversight Board and the Commonwealth government. "Only the Oversight Board" may file a plan of adjustment. PROMESA § 312(a), 48 U.S.C. § 2172(a). Yet, the statute also provides that a plan of adjustment cannot be confirmed unless the Oversight Board obtains "legislative, regulatory, or electoral approval necessary under applicable law in order to carry out any provision of the plan" or confirmation is "expressly conditioned on such approval." PROMESA § 314(b)(5), 48 U.S.C. § 2174(b)(5). *This provision gives the Commonwealth government the ability to "obstruct implementation" or "complicate" the Oversight Board's efforts to produce a confirmable plan of adjustment. Rosselló Nevares, 330 F. Supp. 3d at 701. The Oversight Board, on the other hand, has at its disposal its "budgetary tools," other statutory powers, and negotiations in seeking "to elicit any*

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<sup>308</sup> *Id.* at 205.

<sup>309</sup> *Id.*

*necessary buy-in from the elected officials and legislators.”*<sup>310</sup>

In other words, the court made very clear that this law was much too broad, but that the Junta would have to obtain legislative approval of certain terms of a plan of adjustment under 48 U.S.C. § 2174(b)(5) if the judge were to have the ability to confirm the plan of adjustment under § 2174(b) generally. At this point, the judge, in handing a very serious legal defeat to proponents of this law, also made clear to the Junta that it would have to obtain buy-in from local legislators who were elected by the now organized retirees who live in Puerto Rico and were their constituents.

The proceedings were at a sensitive point as the judge issued this decision on October 13, 2021, and the Junta was ready to proceed with confirmation of its plan of adjustment after almost five years of litigation. The day after the judge granted summary judgment in favor of the Junta and gave it a clear victory, the Junta issued a letter stating that it would no longer seek cuts to pensions in exchange for legislation that would allow for the issuance of new bonds.<sup>311</sup> That letter also contained significant concessions to other demands that the legislators had made concerning the University of Puerto Rico and funding for municipal services, among other political priorities.

Unfortunately, the Junta continued to insist on the freezing of pensions benefits and participation for teachers and judges, as well as the elimination of cost of living adjustments, despite continued protests from affected sectors seeking that legislators vote down House Bill 1003.<sup>312</sup> The lucha continued, but eventually, the governor signed Law 53, which conditioned the issuance of new tax-exempt bonds on “cero” *[sic]* pension cuts.<sup>313</sup> Many

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<sup>310</sup> *Id.* at 194 (emphasis added).

<sup>311</sup> Letter from the Junta to Legislative Leaders, FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO (Oct. 14, 2021), <https://drive.google.com/file/d/1kg4K120T-FDNKceol2Xj1Do8ns2OYl4g/view>.

<sup>312</sup> *Id.*; see also *Así transcurrió la protesta celebrada en el Capitolio en contra de la ley habilitadora del PAD*, EL NUEVO DIA (Oct. 26, 2021), <https://www.elnuevodia.com/noticias/legislatura/fotogalerias/asi-transcurrio-la-protesta-celebrada-en-el-capitolio-en-contra-de-la-ley-habilitadora-del-pad/>.

<sup>313</sup> P.R. Act 53 of 2021, art. 605, <https://bvirtualogp.pr.gov/ogp/Bvirtual/leyesreferencia/PDF/2020/0053-2021.pdf>.

workers won and had done much better than expected, even as some lost.

Interestingly, when the title III court issued its memorandum confirming the proposed plan of adjustment, it borrowed significantly from the evidence that the COR put forward, and to which the Junta did not object. That evidence and language is much different from where matters started, and merits extended quotation to juxtapose the contrast. From the decision:

The treatment afforded to retirees classified in Classes 51A through 51F, 51K, and 51L, and active employees classified in Classes 51G through 51J pursuant to the Plan is fair and equitable and does not discriminate unfairly against other creditors in the Title III cases. Any cut to pensions of retired government employees would have a negative impact on Puerto Rico's economy because retirees comprise a significant component of local demand in Puerto Rico. Cutting pensions actually could destabilize Puerto Rico's economic prospects, lead to greater out-migration, and make it harder for Puerto Rico to obtain credit in the future, and the savings from pension cuts do not justify the damage those cuts would cause to the economy. Roughly half of the retirees have pensions that place them below the federal poverty level of \$11,880 per year for a single person household. Further, retirees have also already experienced substantial reductions in pensions, and, except for judges, government retirees have not received cost of living increases since 2008. Many retirees, such as retired police, teachers, and judges, do not receive federal social security payments. The gross income of the approximately 167,000 government retirees represents 6.4% of the total household expenditures on the Island and 5.8% of Puerto Rico's gross national income.

The macroeconomic impact of reducing the pensions of retirees on the overall Puerto Rican economy is significant. ... Given Puerto Rico's high level of out-migration, including the increase in out-migration of retirees since 2016, pension cuts may force many more retirees to move to the states to be with family members if they can no longer support themselves living

in Puerto Rico. Increased out-migration will have a further negative impact on the economy as pension dollars are then spent outside of Puerto Rico.<sup>314</sup>

The title III court used this justification to also deny unfair discrimination arguments. This chapter of the retirees' *lucha* was over. They had won despite significant obstacles.

#### IV. *Lucha Si, Entrega No!*—Why Congress Should Leave 11 U.S.C. § 943(b)(4) Alone

The success of public employee retirees in Puerto Rico in rebuffing attempts to cut their pensions will reinvigorate those who have been arguing for stronger tools for dealing with pension costs and may reignite further literature along the lines discussed in Part I. It is beyond the scope of this article to explore all of the possible lines of further scholarly research that this case study implicates. However, there is one area that this article evaluates because the literature is truly sparse on the point, namely, the level of support from elected officials necessary to establish the feasibility of a plan of adjustment.<sup>315</sup>

As noted earlier, some scholars have specifically argued that courts supervising a municipal bankruptcy already have the power to institute governance reforms to deal with pension issues when a locality lacks the political will to do so. They closely examined Judge Rhodes's feasibility analysis in the *Detroit* case and argued that courts should examine governance reforms when evaluating whether a plan of adjustment is feasible. They are correct in pointing out that governance often constitutes a major factor underlying a distressed municipality's decision to file a bankruptcy petition. However, this article argues that courts should ensure that locations with control boards have the support of elected officials because failing to do so may render a plan unconfirmable on feasibility

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<sup>314</sup> *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 637 B.R. 223, 281–282 (D.P.R. 2022) (internal citations omitted).

<sup>315</sup> See, e.g., Gillette & Skeel, *supra* note 40 (arguing for granting greater power to control boards but containing no discussion about the feasibility requirement under the Bankruptcy Code).

grounds.<sup>316</sup>

The calls for governance reforms are supported by significant literature exploring costs related to prepetition public employee pensions. Some of that literature explores the interlocking web of constitutional and state statutory protections to explain why pensioners are usually immune from pension benefit cuts. That literature typically argues that underlying state law protections impede such an outcome and/or politicians are reticent to cut pension obligations.<sup>317</sup> Furthermore, if not for the state law protections on pensions, a debtor could argue that a pension is simply another unsecured claim with weak creditor protections, as in the private sector.<sup>318</sup> On the other side of the equation, scholars have argued that such reforms seeking to provide emergency managers with greater problems dispossess the voices of those who live in that municipality, and have proposed governance alternatives.<sup>319</sup>

One could anticipate that the reaction to the success of workers in Puerto Rico is that Congress may face calls to repeal § 943(b)(4) and its analogous language in PROMESA as a way of undermining political strategies in large public sector bankruptcies to the detriment of working

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<sup>316</sup> *Id.* at 1198–1206 (arguing for granting greater power to control boards but containing no discussion about the feasibility requirement under the Bankruptcy Code); see also Vincent S.J. Buccola, *Law and Legislation in Municipal Bankruptcy*, 38 CARDOZO L. REV. 1301, 1321–1322 (2017) (noting how Judge Rhodes overruled the unfair discrimination objections of bond insurers and holding that despite the plan’s vastly disparate treatment of equal priority claims, it did not unfairly discriminate against the politically weak tort victims, and that the judge’s own “experience, education, and sense of morality” counseled the result).

<sup>317</sup> See, e.g., Beermann, *supra* note 20; Vincent S. J. Buccola, *Who Does Bankruptcy - Mapping Pension Impairment in Chapter 9*, 33 REV. BANKING & FIN. L. 585, 606–608 (2014); Ellman and Merrett, *supra* note 227, at 376–383.

<sup>318</sup> See, e.g., Ellman and Merrett, *supra* note 227, at 402–403 (arguing that *In re Prichard II* provides support for the proposition that any pension benefit earned prior to the petition date, and potentially any other obligation earned under a prepetition agreement, is entitled to no more than general unsecured, nonpriority treatment).

<sup>319</sup> Juliet M. Moringiello, *Dispossessing Resident Voice: Municipal Receiverships and the Public Trust*, 53 U. MICH. J.L. REFORM 733 (2020); see also Lora Krsulich, Commentary, *Polluted Politics*, 105 CAL. L. REV. 501 (2017) (arguing that emergency financial managers have failed and should be replaced with other governance measures for correcting a municipalities finances).

communities, and to the benefit of financial creditors who live outside of the affected territories. To be clear, I am not aware of any writing that has made a call for eliminating these sections. However, if Congress chooses to amend chapter 9 to remove 11 U.S.C. § 943(b)(4) and 48 U.S.C. § 2171(b)(3), it may provide unelected judges with even more powers to enforce electoral type decisions over debtors, and leave implementation in the hands of elected officials, thus creating incentives for continued resistance to occur.

These sections are a key part of confirming a plan of adjustment because they operationalize feasibility by requiring local officials to internalize future execution of the confirmed plan of adjustment. In the case of Puerto Rico, it forced the Junta to get the necessary support from the elected government. Without it, there is no mechanism for the court to ensure that there is an operational path to feasibility. While the court in the Puerto Rico proceeding did not have to deal with this matter because of the grand bargain reached between the legislature and the Junta, another court exercising jurisdiction under title III of PROMESA in a future bankruptcy in a different territory may have to confront this reality.

A recent U.S. General Accounting Office report noted that all of the territories of the United States are experiencing fiscal distress due to COVID-related headwinds and pension expenses.<sup>320</sup> Congress may use reports of this nature to take the politically easier path and simply eliminate 48 U.S.C. § 2174(b)(3) under PROMESA, but not § 943(b)(4) of the Bankruptcy Code because the U.S. territories are colonies that do not have the right to vote in Congress.<sup>321</sup> Therefore, any political blowback would be muted. This type of congressional action would be unwarranted. The real difficulty lays in the structure of the Bankruptcy Code and the incoherence of PROMESA that arises out of Puerto Rico's status as a territory. At the root of the matter is the fact that the Bankruptcy Code requires that a court confirm a plan of adjustment only if it determines that

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<sup>320</sup> Government Accountability Office, *U.S. Territories: Public Debt Outlook – 2021 Update*, GAO-21-508, at 2 (June 30, 2021).

<sup>321</sup> Guam reached its borrowing limit in the past and had to have the Supreme Court decide between competing interpretations of its debt issuing authority under the Guam Organic Act. See *Limitcao v. Camacho*, 549 U.S. 483 (2007).

plan is “feasible” and in the best interest of creditors.<sup>322</sup>

Chapter 9 of the Bankruptcy Code does not define what makes a plan feasible.<sup>323</sup> “Courts hearing Chapter 9 cases understand that they have an independent duty to determine [[feasibility]] and to make specific findings of fact.”<sup>324</sup> Under PROMESA, a plan of adjustment must be supported by financial projections that are “reasonable and demonstrate a probability that [[the debtor]] will be able to satisfy its obligations under the Plan.”<sup>325</sup> Additionally, as in chapter 9, a PROMESA debtor, as a government entity, must show that it is “probable that [[the]] debtor can both pay post-petition debt and provide future public services at the level necessary to its viability as a [[territory]].”<sup>326</sup> The core inquiry has been articulated as follows: “is it likely that the [[debtor]], after the confirmation of the Plan of Adjustment, will be able to sustainably provide basic municipal services to the citizens of [[the debtor]] and to meet the obligations contemplated in the Plan without the significant probability of a default?”<sup>327</sup>

The title III court in Puerto Rico made extensive findings that the plan of adjustment was feasible, and specifically, addressed pensions and the fact that accrued pensions would not be cut. Specifically, the judge stated that:

The Plan nevertheless remains feasible, provided there are no other modifications to the Plan involving pensions. The elimination of the Monthly Benefit Modification is estimated to add an average of approximately \$87 million annually to the cost of the Commonwealth’s PayGo obligations for the first ten years, which represents less than five percent (5%)

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<sup>322</sup> 11 U.S.C. § 943(b)(7).

<sup>323</sup> Chapter 11 of the Bankruptcy Code governing private business restructurings does not use the word feasible when discussing procedures for reorganizing the debts of a business entity, but it does state that a chapter 11 plan may be confirmed only if “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan.” See 11 U.S.C. § 1129(a)(11).

<sup>324</sup> *In re City of Detroit*, 524 B.R. 147, 220 (Bankr. E.D. Mich. 2014).

<sup>325</sup> *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 361 F. Supp. 3d 203, 246 (D.P.R.), *judgment entered*, 366 F. Supp. 3d 256 (D.P.R. 2019).

<sup>326</sup> *In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 35 (Bank. D. Colo. 1999).

<sup>327</sup> *In re City of Detroit*, 524 B.R. at 222.

of the Commonwealth's estimated PayGo expenses for this period, and less than one percent (1%) of the Commonwealth's overall budget for this period. The additional cost will be payable from the surpluses projected in the Fiscal Plan during this period. Over the thirty-year period of Fiscal Plan projections, the aggregate cost of eliminating the Monthly Benefit Modification is approximately \$1.9 billion. The elimination of the Monthly Benefit Modification does not materially affect the feasibility of the Plan.<sup>328</sup>

The judge also noted that unfreezing pension accumulation would undermine feasibility. Specifically, the court stated that if Act 53 were interpreted to require the removal of the freeze and COLA elimination, and the plan of adjustment were modified to implement such changes, the plan would not be consistent with the fiscal plan. The court's conclusion that the plan is consistent with the fiscal plan is dependent on, among other things, the plan's inclusion of the pension freeze and elimination of COLAs.<sup>329</sup> Absent from her feasibility analysis was whether the failure to obtain legislation would have rendered the plan of adjustment unfeasible at that point because the legislation met the prerequisites of 48 U.S.C. § 2174(b)(3) and made any objections on that ground essentially moot.<sup>330</sup>

In doing so, the court implicitly acknowledged in its findings of facts and conclusions of law that, for a plan to be feasible, there needs to be political support or "buy-in." For example, the court stated, "To maintain and protect the integrity and feasibility of the Plan, while the Oversight Board is in existence, any and all governmental units and any officer or employee thereof shall neither recreate by statute, regulation, rule, policy, or executive order nor repay by any means, any debt discharged by the Plan without the Oversight Board's express prior written consent or except as may otherwise

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<sup>328</sup> See *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 637 B.R. 223, 306 (D.P.R. 2022). The judge also overruled SEIU and UAW's feasibility objection concerning Puerto Rico's debt load on a going forward basis that relied on data put out by Joseph Stiglitz on procedural grounds. *Id.* at 309, n.49.

<sup>329</sup> *Id.* at 314 (internal citations omitted).

<sup>330</sup> *Id.* at 302–311.



be provided by a certified fiscal plan or budget.”<sup>331</sup> This order also recognizes that, for the plan to continue in effect despite political resistance, the court had to use its powers to limit electoral authority to change the plan on a go-forward basis unless the Junta consents to it.

In many ways, the court used the political approval of Law 53 to bind future legislatures to the grand bargain that legislators of Puerto Rico made with the Junta. This was a surrender of its powers, but it shows at least a consent by the elected representatives of Puerto Rico, who are most responsive to those who live locally, to be bound by the plan of adjustment.

The absence of a robust discussion regarding § 943(b)(4) as a safeguard for democratic processes in chapter 9 cases is not surprising. Most times, chapter 9 cases feature municipal debtors that elect to file for bankruptcy. They file the plan of adjustment themselves. In most instances, the act of a democratically elected government filing a bankruptcy petition usually demonstrates that they are entering bankruptcy of their own free will and are committed to supporting the outcomes that arise out of the process.<sup>332</sup> In that way, Professor Vincent Buccola is correct when he observes that political economy is the appropriate lens through which to observe chapter 9 proceedings, and his article presciently observes what occurred in Puerto Rico, that legislators could block impairments to retiree benefits because they would act as essentially veto players.<sup>333</sup> However, he raises serious concerns that the political economy framework harms residents, employees, retirees. Specifically, he argues that when chapter 9 operates in the legislative and political economy models it hurts the residents, workers, and retirees most because they are most risk averse, and may suffer when they suffer the most when they do not know what their rights will be ex ante of a bankruptcy filing.<sup>334</sup> It is worth reviewing a few cases where the courts examined the politics behind approving a plan of adjustment and the results

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<sup>331</sup> *Id.* at 319.

<sup>332</sup> In fact, some commentators have suggested distressed municipalities should seek bankruptcy protection sooner. *See, e.g.*, Coordes, *supra* note 26; Vincent S.J. Buccola, *The Logic and Limits of Municipal Bankruptcy Law*, 86 U. CHI. L. REV. 817 (2019).

<sup>333</sup> Buccola, *supra* note 316, at 1335–1336 (explaining that Chapter 9 bankruptcies follow a political economy model rather than doctrinal analysis and that veto players distort legislation).

<sup>334</sup> *Id.* at 1336–1337.

for these constituencies *ex post*. For better or worse, these communities tended to accept the *ex post* results that they achieved.<sup>335</sup>

In the case of Stockton, the court noted that the city had obtained voter consent to raise taxes in order to fund the filed plan of adjustment, thus obtaining all necessary approvals as required by § 943(b)(4) of the Bankruptcy Code. The fact that voters voted to raise their taxes in California to fund the plan of adjustment demonstrated that the populace of that city had significantly bought into seeing the plan of adjustment through and bear the costs for protecting pensions.<sup>336</sup> In the case of Detroit, even though the government of Michigan had stripped the elected officials of Detroit of any power, and thus undermined the usage of § 943(b) as a technique to stop the imposition of pension cuts, the judge noted that the city would not act as a holdout. Despite mayoral support for the plan, the judge presiding over the Detroit bankruptcy still engaged in extensive analysis regarding the political will of Detroit in implementing the plan and explicitly incorporated that analysis into its finding that the proposed plan was feasible.<sup>337</sup> Additionally, the pensions classes in that case voted to accept an impairment to their pensions, and the judge overruled gerrymandering challenges by pensioners to the plan.<sup>338</sup>

In contrast, during the proceedings in *In re Pierce Housing Authority*, the court denied the motion to confirm the plan of adjustment without prejudice because it noted that the district had filed the petition in bad faith and did not appear committed to implementing the plan of adjustment.<sup>339</sup>

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<sup>335</sup> The results of these cases may have come out differently if these communities had organized as effectively as the retirees in Puerto Rico did. The examination of how social movements leading to holdout behavior developed in Puerto Rico, but not other places is a worthy subject of future examination and could add much to understanding how the forces of political economy play out in chapter 9 bankruptcies, and quite possibly sovereign debt restructurings as well.

<sup>336</sup> *In re City of Stockton, California*, 526 B.R. 35, 61–62 (Bankr. E.D. Cal.), *aff'd in part, dismissed in part*, 542 B.R. 261 (B.A.P. 9th Cir. 2015).

<sup>337</sup> *In re City of Detroit*, 524 B.R. 147, 241–246 (Bankr. E.D. Mich. 2014) (discussing at length the City of Detroit's elected leaders' commitment to the plan of adjustment filed by the state appointed emergency manager).

<sup>338</sup> *Id.* at 180–181.

<sup>339</sup> *In re Pierce Cnty. Hous. Auth.*, 414 B.R. 702, 720–721 (Bankr. W.D. Wash. 2009),

This demonstrates that courts are at least aware that the plan has to have the support of the elected officials because, even if they did not choose the plan, as was the case in Detroit and Puerto Rico, they still have to implement it. They still have “skin” in the game. These cases demonstrate that pensioners, or the elected officials to whom they answer, were satisfied with their outcomes *ex post* despite being unsure of their rights *ex ante*. Having a result where these populations are discontent *ex post* would only further the concerns about feasibility outlined in this section.

### CONCLUSION

The fact that retirees were able to sustain their *lucha* to protect their retirement benefits from reduction from November 19, 2019, when the legislature of Puerto Rico passed legislation authorizing COFINA to issue newly restructured bonds as proposed in its plan of adjustment, until November of 2021, despite the challenges wrought by the pandemic, hurricanes, earthquakes, and an unelected Junta that looked to cut retiree benefits early is nothing short of remarkable. Social movements are difficult to maintain over a period of years, especially during a period of climate shock (as aptly described by Naomi Klein in her books) and when waiting for the effects of that social movement to be felt through narrow, and seemingly perfunctory, legal provisions such as § 943(b)(3) of the Bankruptcy Code and § 2171 of PROMESA.

The social movement that led to retirees protecting their benefits from reduction occurred despite the fact that Congress granted broad powers and autonomy to the Junta, which were designed to mitigate the effect of such actions. While § 2174(b) of PROMESA certainly gave an opening, it remained inert for most of the proceedings because retirees, and other social groups, did not engage in effective mobilization until after the legislature of Puerto Rico approved the legislation that set the stage for the title III court to confirm the plan of adjustment. Once people saw that the legislature truly did have a role, they started to organize, but it took a great catalyst to demonstrate that massive, sustained, and continuous protest was necessary to effect change. The Rickyleaks scandal of 2019 provided fuel to

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*as amended* (Aug. 24, 2009).

turn the small fire that burned into a sort of raging inferno. As the energy from that scandal waned, retirees were able to keep up sustained pressure all over Puerto Rico until the legislature started to consider the Law for a Dignified Retirement.

Even though the Junta was able to successfully annul that legislation, the retirees were able to get a major part of the outcome they sought—protection of their livelihood from being cut when they could no longer easily re-enter the workforce to make up for lost benefits. In many ways, they could not engage in entrega because they were in the lucha to protect the rest of their lives. Perhaps that is why local police called for,<sup>340</sup> and Governor Pierluisi eventually signed into law, a new Law for a Dignified Retirement in December 2022, a little over a year after the title III court had annulled Act 7 of 2021, also known as the Law for a Dignified Retirement.<sup>341</sup>

No one should look at § 2174(b)(3) and argue that it somehow changed the colonial relationship between the United States and Puerto Rico. It did no such thing, and the legislative history and the imposition of the Junta make clear that Congress intended to use its power under the territorial clause in a manner that exacerbated those power dynamics. It took years of marching in the hot Puerto Rican sun by those who should have been enjoying their golden years in peace to secure the protection of their meager retirement benefits. Instead, this article argues that the reader should look at § 2174(b) as part of plan feasibility, and as a measure to ensure that a confirmed plan of adjustment works on a prospective basis for the implementors and their constituencies and does not lead to retiree unrest. The lesson that this case study provides should be heeded by elected decisionmakers who are considering how to handle fiscal distress in their own state or territory.

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<sup>340</sup> Maribel Melendez Fontan, *Cientos de Policías se Manifiestan para Exigir un Retiro Digno*, TELEMUNDO (Dec. 14, 2021), <https://www.telemundopr.com/noticias/puerto-rico/cientos-de-policias-se-manifiestan-para-exigir-un-retiro-digno/2288151/>.

<sup>341</sup> Gobernador da Paso a Ley de Retiro Digno para los Policías, EL SOL DE PUERTO RICO (Dec. 15, 2022), <https://periodicoelsolpr.com/2022/12/15/gobernador-da-paso-a-ley-de-retiro-digno-para-los-policias/>.