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

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION, Plaintiff, v. ALEJANDRO GARCÍA PADILLA, JUAN C. ZARAGOZA GOMEZ, and LUIS F. CRUZ BATISTA, Defendants.	CIVIL NO. 16-02101 (FAB)

MOTION TO DISMISS

TO THE HONORABLE COURT:

COME NOW, co-defendants Hon. Alejandro García Padilla, Hon. Juan C. Zaragoza Gómez, and Hon. Luis F. Cruz Batista, in their respective official capacities (collectively "defendants"), specially appearing and without submitting to the jurisdiction or venue of this Court, hereby state and pray as follows:

I. INTRODUCTION

This Court is well aware of the unprecedented financial crisis facing the Commonwealth of Puerto Rico ("Commonwealth") and the efforts that the Government of Puerto Rico has undertaken to address that crisis. More than a year ago, this Court confronted one of those efforts, the Puerto Rico Public Corporation Debt Enforcement and Recovery Act, and held it preempted by federal law, a decision later affirmed by the Supreme Court. See Franklin California Tax-Free Trust v. Puerto Rico, 85 F. Supp. 3d 577 (D. P.R. 2015), aff'd, 805 F.3d 322 (1st Cir. 2015), aff'd, 579 U.S. __ (2016). Since that time, the Commonwealth's financial situation has only worsened. Just a few months ago, this Court concluded that the Commonwealth "is insolvent and no longer able to pay its debts as they become due." Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez, 2016 WL 1183091 at *1 (D.P.R. March 28, 2016). And the Government has now declared that "Puerto Rico does not have sufficient resources to comply with debt service obligations as originally scheduled and, additionally, to continue providing essential services to the people." Dkt. 22-1 at 50.

Faced with that hard reality, the Commonwealth exercised its police powers to ensure the protection of the life, health and general welfare of its people, P.R. Const. art II § 19, by enacting the "Puerto Rico Emergency Moratorium and Financial Rehabilitation Act" (Act 21-2016, hereinafter "Act 21"). Unlike the Recovery Act, Act 21 does not create any mechanism for the Commonwealth or its instrumentalities to restructure or discharge their debt. It has a different purpose and scope entirely: It empowers the Governor to declare a temporary state of emergency for any government entity and suspend the payment of that entity's debt obligations until January 2017. During that period, the Governor is able to prioritize the payment of essential services and make financial reforms so that the Commonwealth can meet its debt obligations in the future.

The Governor has exercised the power given to him in the Act. As relevant here, he signed executive orders declaring a state of emergency for the Government Development Bank, Compl. ¶¶ 26–28, the Puerto Rico Highways and Transportation Authority ("PRHTA), id. ¶ 29, and the Commonwealth, Executive Order 2016-30. The PRHTA Executive Order temporarily suspended the obligations of PRHTA to transfer Toll Revenues to any financial institution acting as the fiscal agent for bondholders and authorized PRHTA to instead use such funds to provide essential services for the people of Puerto Rico.

Not content to allow even these stop-gap measures, plaintiff is seeking to enjoin various provisions of Act 21 as unconstitutional. Though stopping short of challenging Act 21 as a whole, plaintiff contends that certain provisions within it violate the Contract and Takings Clauses of the federal and Puerto Rico Constitutions, are preempted by the Bankruptcy Code, and abridge some amorphous right to sue in federal court. None of those claims has merit, and the complaint should therefore be dismissed.

A. Procedural background

Plaintiff National Public Finance Guarantee Corporation ("National") is a monoline insurer that has provided financial guaranty insurance for more than $715 million of bonds issued by the Puerto Rico Highways and Transportation Authority ("PRHTA"); approximately $684 million of bonds issued by the Puerto Rico Sales Tax Financing Corporation ("COFINA"); $66 million of bonds issued by the Puerto Rico Industrial, Tourist, Educational, Medical, and Environmental Control Facilities Financing Authority ("AFICA"); and $985 million of general obligation debt issued by the Commonwealth. Dkt. No. 1, ¶¶ 3, 11, 41.

On June 15, 2016, plaintiff filed a Complaint against Hon. Alejandro García Padilla, in his official capacity as the Governor of the Commonwealth; Hon. Juan C. Zaragoza Gómez, in his official capacity as the Secretary of the Treasury of the Commonwealth; and Hon. Luis G. Cruz Batista, in his official capacity as the Director of the Commonwealth's Office of Management and Budget. See generally id. It sought a declaratory judgment that certain provisions of Act 21 were unconstitutional, along with a permanent injunction against enforcement of some of those provisions, attorney's fees, and costs. Id. One week later, on June 22, 2016, plaintiff filed a Motion for Partial Summary Judgment with respect to its claim that Sections 201(a), (b), (d), and (e) of Act 21 are preempted. Dkt. No. 21. This Court ordered defendants to respond to that motion by July 11, 2016.

Shortly thereafter, the President of the United States signed into law the *Puerto Rico Oversight, Management, and Economic Stability Act* ("PROMESA"), S. Res. 2328, Pub. L. No. 114-___ (2016), significantly altering the landscape of this litigation. PROMESA provides for an automatic stay of, among others, "the . . . continuation . . . of a judicial . . . proceeding against the Government of Puerto Rico that was . . . commenced before the enactment of this Act" with respect to a "Liability." *Id.* § 405(b)(1). That stay will continue until at least February 15, 2017.

Defendants filed a Notice of Automatic Stay of this case on July 7, 2016. Dkt. 28. The Court ordered plaintiff to respond to the notice no later than July 18, 2016, but stated that, "without the benefit of full briefing by the parties," the Court would not "'acknowledge that this litigation has been temporarily stayed by the [PROMESA] Act.'" Dkt. 29. The Court extended defendants' time in which to file this motion to dismiss until July 26, 2017, Dkt. 31, but denied a motion to extend the time in which to file defendants' opposition to plaintiff's motion for partial summary judgment, Dkt. 33. Reserving all rights to object to the continuation of this proceeding in light of PROMESA's automatic stay provisions, *see* Dkt. No. 28, defendants filed their opposition to plaintiff's Motion for Partial Summary Judgment as a protective measure, pending adjudication of the stay, Dkt. 35, and now file this motion to dismiss.

B. Act 21 and the provisions challenged by plaintiffs

At the heart of this case is the Puerto Rico Emergency Moratorium and Financial Rehabilitation Act (Act 21-2016, hereinafter "Act 21").[1] Enacted on April 6, 2016, Act 21 is a direct response to the fiscal crisis facing the Commonwealth. Prefaced with a detailed description

[1] At the motion to dismiss stage, the court may consider documents attached to the complaint and "documents the authenticity of which are not disputed by the parties; [] official public records; [] documents central to plaintiffs' claim; or [] documents sufficiently referred to in the complaint," without converting the dispositive motion into a motion for summary judgment. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). The documents referred to in this motion are official public records, many of which were attached to plaintiff's Statement of Undisputed Material Facts in Support of its Motion for Partial Summary Judgment. See Dkt. 22.

of the origins of the crisis, along with the extraordinary efforts that the Government of the Commonwealth had already taken to address the crisis, the Act represents an exercise of the Commonwealth's police powers "to meet the paramount public purpose of securing the health, safety and welfare of the people of Puerto Rico and averting the further deterioration of the humanitarian crisis in Puerto Rico." Dkt 22-1, p. 54.

As relevant here, Act 21 authorizes the Governor to declare a moratorium and stay creditor remedies with respect to certain covered obligations of government entities. Id. Section 201(a) authorizes the Governor to take such action by executive order, declaring a governmental entity to be in a state of emergency, id. § 201(a), and Section 201(b) identifies some consequences of such an order, including that no act shall be done and no action shall be commenced that may result in recovery from or a judgment against the governmental entity for which the emergency period has been declared, id. § 201(b). Relatedly, Section 201(b) provides that no person asserting claims or rights may exercise any remedy under any contract or applicable law as a result of non-payment, breach, or accrual of other relates related to covered obligations or the moratorium during the emergency period. Id. It also empowers the Governor to expropriate property related to covered obligations as necessary to preserve the Commonwealth's ability to provide essential public services, but only in a constitutionally permitted manner, with just compensation to be obtained in the courts. Id. Any emergency period declared by the Governor expires on January 31, 2017, unless extended through Executive Order for a period not to exceed two months. Id. § 103(m). Section 201(c) declares that actions in violation of the moratorium will be void and that persons may be held liable for the same. Id. § 201(c). Finally, Section 201(d) authorizes the Governor to declare suspended or modified until the end of the covered period any statutory or other obligation to appropriate money to pay, secure or transfer money to pay or secure, any covered obligation. Id. § 201(d).

Section 202 imposes conditions on the emergency period for the protection of holders of covered obligations. Section 202(a) provides that, throughout the emergency period, interest will accrue on covered obligations as provided in any applicable agreement, holders of public debt will receive at least the minimum public debt payment, and holders of other principal and interest obligations will be entitled to have those obligations accrue interest and be paid at the end of the covered period. Id. § 202(a). Section 202(c) further confirms that, unless otherwise paid before the end of the covered period, any payments due on covered obligations will be paid on the last day of that period. Id. § 202(c). Meanwhile, Sections 202(b) and (d) carve out a narrow exception to these rules for the benefit of holders of public debt, providing that holders of non-public-debt may not receive those payments so long as any public debt is due, owing, and unpaid. Id. §§ 202(b), (d). Finally, Section 202(e) authorizes holders of covered obligations to apply in a court of the Commonwealth for enforcement of the other provisions of the section, following 30 days' notice to the government entity, unless such order "would unreasonably endanger the health, safety and welfare of the residents of the Commonwealth." Id. § 202(e).

Plaintiff has brought a host of constitutional challenges to these provisions. It claims that Sections 201 and 202 of Act 21 violate the Contracts and Takings Clauses of the Constitutions of the United States and Puerto Rico. Id. at ¶¶ 73–74, 77. It alleges that Sections 201 (a), (b), (d), and (e) are preempted by the Bankruptcy Clause and the Bankruptcy Code. Id. ¶ 70. Finally, it asserts that Section 201(b) violates a supposed right to open access to the federal courts. Id. at ¶ 82.

Plaintiff's complaint must be dismissed, for a number of reasons. As a threshold matter, plaintiff has not met its burden to establish that it has standing to challenge any of the Act's provisions or that such claims are ripe. And even if it had, well-recognized principles of abstention would counsel restraint in this case. Finally, plaintiff's complaint fails on its own terms. Plaintiff has not stated a plausible claim for relief under any of the relevant constitutional provisions.

II. STANDARD OF REVIEW

Federal courts are courts of limited subject-matter jurisdiction, and "the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998). Pursuant to Fed. R. Civ. P. 12(b)(1), a defendant may challenge subject-matter jurisdiction in a Motion to Dismiss, "including ripeness, mootness, the existence of a federal question, diversity, and sovereign immunity," Valentin v. Hosp. Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001), as well as standing, *id*. at 362-63.

"In deciding a motion to dismiss, the court must 'assume the truth of all well-pleaded facts in the complaint, drawing all reasonable inferences in the plaintiffs' favor." Fitzgerald v. Harris, 549 F.3d 46, 52 (1st Cir. 2008) (citation omitted). Although it must accept as true a plaintiff's well-pled facts, the court is not required to accept a plaintiff's legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009). Indeed, a complaint must be dismissed if the facts as pled do not state a claim for relief that is "plausible" on its face. See, Iqbal, 556 U.S. at 679. A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 555 (2007). Factual allegations in a complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (internal citations and emphasis omitted).

"While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion." González v. United States, 284 F.3d 281, 288 (1st Cir. 2002). Even in the context of a Rule 12(b)(6) motion, however, the court may consider documents "the authenticity of which are not disputed by the parties; [] official public records; [] documents central to the plaintiffs' claim; or [] documents sufficiently referred to in the complaint." Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001).

III. ARGUMENT

A. Plaintiff lacks standing to bring any of its challenges.

Article III standing is an "indispensable part" of any case that must be present at every stage of litigation. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). "If a party lacks Article III standing to bring a matter before the court, the court lacks subject matter jurisdiction to decide the merits of the underlying case." Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996) (citation omitted). As aptly summarized by the U.S. Court of Appeals for the First Circuit, Article III requires plaintiffs to establish an injury in fact fairly traceable to the conduct complained of and likely to be redressed by a favorable decision:

> To satisfy the constitutional component of standing, a plaintiff must have suffered an "injury in fact," i.e., an invasion of a legally protected interest. That injury must be "concrete and particularized"; the latter term means the injury must be personal to the plaintiff. It may be shared by many others, but may not be common to everyone. The injury must also be "actual or imminent, not conjectural or hypothetical," and it must be "distinct and palpable." The latter requirement may be satisfied by environmental or aesthetic injuries. The injury need not be "significant"; a "small" stake in the outcome will suffice, if it is "direct." In addition, the injury must be fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Id. (citations omitted).

Plaintiff has not satisfied this bedrock constitutional requirement. Plaintiff is a monoline insurer, not a bondholder. Yet it seeks to bring this suit to vindicate the rights of bondholders. See, e.g., Compl. ¶ 49 ("Sections 201(a), (d), and (e) of the Moratorium Act effectuate a taking of the bondholders' property interest in payment priority."); id. ¶ 50 ("Section 201(a) of the Moratorium Act also substantially impairs bondholders' contractual rights to payment as and when due . . . ."); id. ¶ 52 ("Section 201(d) impairs COFINA, PRHTA, and AFICA bondholders' liens . . . ."). That it cannot do. It must sue on its own rights, not "on the legal rights or interests of third parties.'" Wright & Miller, 33 Fed. Prac. & Proc. Judicial Review § 8413 (1st ed.) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); see also Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014). Because plaintiff has not alleged that it is a third-party beneficiary of the bondholders' contracts, or that it has been subrogated to the rights of bondholders based on payment on those contracts, plaintiff has not pleaded an injury-in-fact that would afford it standing to sue.

To the extent plaintiff seeks to represent its own interest in avoiding the "hundreds of millions of dollars in damages" that it will allegedly be forced to pay on suspended bonds, see Compl. ¶¶ 40, 42, that interest is insufficient to ground Article III standing. The Supreme Court has made clear that injury in fact must be actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Here, plaintiff alleges that it "will stand to suffer hundreds of millions of dollars in damages" if the defendants "acting under color of the Moratorium Act, cause the Commonwealth or other Issuers to default," Compl. ¶ 42. But it has alleged no default on the part of PRHTA, COFINA, AFITA, or the Commonwealth, nor any payments—imminent or otherwise—as a result. Plaintiff's speculation about the likelihood that it will in fact make such payments is not sufficient to support an injury in fact for Article III purposes.

See Sea Shore Corp. v. Sullivan, 158 F.3d 51, 56 (1st Cir. 1998) ("Future injury must be imminent to qualify as injury-in-fact" in order to ensure that the "alleged injury is not too speculative."). Indeed, that plaintiff has not amended its complaint to allege payment on any bonds following the recent Executive Orders declaring a State of Emergency for the Commonwealth appears to confirm the premature and speculative nature of its complaint.

B. Plaintiff's claims are not ripe.

For similar reasons, plaintiff's claims are not ripe. "'[R]ipeness has roots in both the Article III case or controversy requirement and in prudential considerations.' The 'basic rationale' of the ripeness inquiry is 'to prevent the courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 79 (1st Cir. 2013) (alteration in original) (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 59 (1st Cir. 2003)). "When the injury is not actual but threatened, the concepts of standing and ripeness merge. A litigant may lack standing because what has happened to him has not developed into an injury in fact and that is the core of the ripeness doctrine." Phillips Puerto Rico Core, Inc. v. Almodovar, 681 F. Supp. 119, 122 (D.P.R. 1988). To the extent that plaintiff's claims are based on the impairment of supposed contractual or property interests of bondholders, those claims fail because it does not yet stand in the shoes of those bondholders (and, in any event, none of those rights have yet been impaired). To the extent that plaintiff's claims are based on a fear that it will be forced to make payments on obligations suspended pursuant to Act 21, that fear is speculative. The Court cannot adjudicate plaintiff's claims at this point.

C. The premature nature of this suit is confirmed by non-suit clauses in several bond resolutions at issue.

The jurisdictional inappropriateness of this suit is only highlighted by the fact that not even the AFICA or COFINA bondholders themselves would have standing to bring this suit. Those bondholders are subject to express no-suit clauses that require them to satisfy a number of preconditions before they may exercise any rights or remedies associated with their bonds. Section 808 of the AFICA Trust Agreement, for example, provides as follows:

> Section 808. Restrictions Upon Actions by Individual Bondholder. No holder of any of the Bonds shall have any right to institute any suit, action or proceeding in equity or at law on any Bond . . . or for any remedy hereunder unless such holder previously shall have given to the Trustee written notice of the event of default on account of which such suit, action or proceeding is to be instituted, and unless also the holders of not less than twenty-five percent (25%) in aggregate principal amount of the Bonds then outstanding shall have made written request of the Trustee after the right to exercise such powers or right of action, as the case may be, shall have accrued, and shall have afforded the Trustee a reasonable opportunity either to proceed to exercise the powers hereinabove granted or to institute such action, suit or proceeding in its or their name, and unless, also, there shall have been offered to the Trustee reasonable security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee shall have refused or neglected to comply with such request within a reasonable time; . . . It is understood and intended that, except as otherwise above provided, no one or more holders of the Bonds hereby secured shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the security of this Trust Agreement, or to enforce any right hereunder or thereunder except in the manner herein provided, that all suits, actions and proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the benefit of all holders of such outstanding Bonds, and that any individual right of action or other right given to one or more of such holders by law is restricted by this Trust Agreement to the right sand remedies herein provided.

Section 1106 of the Amended and Restated COFINA Bond Resolution imposes similar restrictions:

> 1. No Owner of any Bond shall have any right to institute any suit, action, mandamus or other proceeding in equity or at law hereunder, or for the protection or enforcement of any right under this Resolution unless such Owner shall have given to the Trustee written notice of the Event of Default or breach of duty on account of which such suit, action or proceeding is to be taken, and unless the Owners of not less than 25% in principal amount of the Bonds then Outstanding shall have made written request of the Trustee after the right to exercise such powers or right of action, as the case may be, shall have occurred, and shall have afforded the Trustee a reasonable opportunity either to proceed to exercise the powers herein granted or granted under the law or to institute such action, suit or proceeding in its name and unless, also, there shall have been offered to the Trustee reasonable security and indemnity against the costs, expenses (including legal fees

> and expenses) and liabilities to be incurred therein or thereby, and the Trustee shall have refused or neglected to comply with such request within a reasonable time; . . . It is understood and intended that no one or more Owners of the Bonds or other Beneficiary hereby secured shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the security of this Resolution, or to enforce any right hereunder or under law with respect to the Bonds, or the Resolution, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had any maintained in the manner herein provided and for the benefit of all Owners of the Outstanding Bonds. . . .

No-action clauses like these are "frequently are included in indentures to limit suits arising from those agreements" and "have been enforced in a variety of contexts in both federal and state courts." McMahon & Co. v. Wherehouse Ent't, Inc., 65 F.3d 1044, 1050 (2d Cir. 1995), cert. denied, 517 U.S. 1190 (citing cases).

Many of the bondholder rights that plaintiff purports to assert in this case are, therefore, not even enforceable by the bondholders. Those rights may be exercised only in accordance with the preconditions for suit outlined above, and plaintiff has not alleged that the bondholders have satisfied any of those preconditions. Thus, even if plaintiff could stand in the shoes of the AFICA and COFINA bondholders, its claims would be barred by the contracts governing those bonds. See Friedman v. Chesapeake & Ohio R. Co., 261 F. Supp. 728, 729–30 (S.D.N.Y. 1966), aff'd, 395 F.2d 663 (2d Cir. 1968).

D. This Court should abstain from hearing plaintiff's claims.

Looking beyond these initial justiciability concerns, plaintiff's complaint runs into well-settled abstention doctrines "designed to soften the tensions inherent in a system that contemplates parallel judicial processes." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987). Indeed, the constitutionality of Act 21 is a textbook case for abstention. First, the Act is a law of temporary application designed to give the Commonwealth some breathing room to survive a fiscal emergency and allow it to have sufficient liquidity to safeguard essential services and provide for the health, safety and welfare of the people of Puerto Rico. Second, the statute's driving force is inherently local, and it was enacted pursuant to the police powers of the "sovereign" Commonwealth. See Puerto Rico v. Sánchez Valle, 15-108, 2016 WL 3189527, at *8 (U.S. June 9, 2016); see also P.R. Const. art. II, §19. Finally, Act 21 is a complex law, containing provisions that have not yet been applied or enforced and about whose scope and validity Commonwealth courts have not yet had the chance to pass judgment. For those reasons, abstention is appropriate.

Under the doctrine of Thibodaux abstention, a stay of federal court adjudication is called for when there are "issues 'intimately involved with the States' sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) (quoting Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959)). The related doctrine of Burford abstention is appropriately applied where a case presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or where adjudication in a federal court "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" Id. at 726-27 (quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989)) (internal quotation marks omitted).[2] Adjudication of plaintiff's attempts to invalidate Act 21 falls squarely within that rubric.

Through the exercise of the Commonwealth's "inherent and broad powers to legislate for the protection of the general welfare of its citizens," Act 21 "empowers the Governor with narrowly tailored authority, within the bounds of our body of laws and our Constitution, to enable the Commonwealth and its instrumentalities to continue providing essential services to Puerto

[2] Neither of these two doctrines requires a pending state proceeding as a prerequisite for its application. See Stoe v. Flaherty, 436 F.3d 209, 213 (3d Cir. 2006) ("[T]he existence of an ongoing state proceeding is not inherent in the nature of abstention. *Burford*, *Pullman*, and *Thibodaux* abstention, as well as other forms of abstention, apply without regard to the existence of an ongoing proceeding.").

Rico's residents while addressing the critical need for structural and fiscal reform and debt restructuring." Act 21, Statement of Motives, Section F, Docket No. 52-1 at 54 (citation omitted). As such, Act 21 clearly involves issues intimately tied to Puerto Rico's "sovereign prerogative." City of Thibodaux, 360 U.S. at 28. Moreover, adjudicating the Act's constitutionality requires resolution of "unsettled questions of state law." Id. The Act (1) was passed into law less than four months ago; (2) most of its provisions have not been invoked or enforced; and (3) it has not been interpreted or tested by the Commonwealth's courts. Plaintiff's lawsuit asks this Court to speculate about potential applications of the statute and interfere with what is a paradigmatic local and sovereign concern: the Commonwealth's management of its economic affairs during a fiscal emergency. Abstention under Thibodaux is clearly justified in these circumstances.

E. Plaintiff's complaint also fails to state a cause of action under the Contract Clauses.

Plaintiff's claims fare no better on their own terms. Plaintiff first alleges that Act 21 violates the Contract Clauses of the Constitutions of the United States and Puerto Rico, U.S. Const. art. I, §10; P.R. Const. art. II, §7, but its claim is foreclosed by decades of precedent.[3] It is by now well settled that the Contract Clause does not prevent a state from safeguarding the welfare of its citizens during economic crisis. See e.g., United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño, 633 F.3d 37, 41 (1st Cir. 2011); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434-35 (1934) (contract clause does not deprive state governments of "adequate authority to secure the peace and good order of society"). To the contrary, states have wide latitude

[3] Courts have long assumed—without deciding—that the Commonwealth is subject to the Contract Clause of the federal Constitution. See, e.g., Redondo Constr. Corp. v. Izquierdo, 662 F.3d 42, 48 n.3 (1st Cir. 2011); UAW v. Fortuño, 633 F.3d 37, 41 n.3 (1st Cir. 2011); Trinidad v. Commonwealth, 188 D.P.R. 828, 834 (2013) (per curiam). Defendants do not concede that the federal Contract Clause applies to Puerto Rico. But, that question is immaterial for present purposes, as plaintiff also challenges Act 21 under the Contract Clause of the Puerto Rico Constitution, which "is analogous to the Contract Clause of the United States Constitution." Franklin California, 85 F. Supp. 3d at 603; see also Trinidad, 188 D.P.R. at 834.

to pursue necessary fiscal measures, even measures that impair contracts. See United Auto., 633 F.3d at 48 ("[S]ince 1934, the Supreme Court has only once—in U.S. Trust Co.—struck down a state law that interfered with a government contract on Contract Clause grounds."). The Contract Clause bars state legislation only when (1) it **substantially** impairs a contractual obligation, and (2) that impairment is not reasonable and necessary to serve an important government purpose. See, e.g., United Auto, 633 F.3d at 41; see also Asociación de Maestros, 190 P.R. Dec. at 869. Plaintiff can meet neither prong of this test.

1. Act 21 does not impair plaintiff's alleged contracts and/or any impairment is not substantial.

Plaintiff bears the burden to establish a substantial impairment of its contractual rights, but here plaintiff asserts *bondholders'* contractual rights, not its own. See Compl. ¶ 50 ("Section 201(a) of the Moratorium Act also substantially impairs *bondholders' contractual rights* to payment as and when due—and, in the case of general obligation debt, to priority of payment above all other Commonwealth expenditures—by authorizing the Governor to delay payments during the covered period." (emphasis added)); id. ¶ 52 ("Section 201(b)(iv) of the Moratorium Act further impairs COFINA, PRHTA, and AFICA *bondholders' contractually guaranteed liens* by authorizing the Governor to expropriate property rights related to covered obligations. And Section 201(d) impairs COFINA, PRHTA, and AFICA *bondholders' liens* by empowering the Governor to suspend or modify the obligation to transfer money to secure covered obligations." (emphasis added)). In only two allegations does plaintiff even purport to assert its own contractual rights. See Compl. ¶ 57 ("By prohibiting Plaintiff from exercising its valid contractual rights to acceleration under the COFINA Bond Resolutions and the AFICA Trust Agreement, Section 201(b)(ii) has substantially impaired those contract rights."); id. ¶ 60 ("By permitting the Governor to interfere with COFINA's obligations under the COFINA Bond Resolutions, Sections 201(a), (b), and (d) also substantially impair Plaintiff's contractual right to be free from such interference."). And those allegations are wholly conclusory: the contractual provisions cited give rights only to bondholders. See Compl. ¶ 56 ("The COFINA Bond Resolutions and the AFICA Trust Agreement provide *holders of bonds* with certain remedies in the event of default, including the ability to accelerate payments."); id. ¶ 58 ("The COFINA Bond Resolutions incorporate the Commonwealth's pledge 'that, until the [COFINA] Bonds, of whichever date, together with the interest thereon, are totally paid and withdrawn, the Commonwealth will not . . . limit or restrict the rights that are . . . granted or the rights of [COFINA] to meet its obligations to its *Bondholders* . . .'" (emphasis added)). Plaintiff has therefore not stated a claim for impairment of *any* of its contractual rights.

And even assuming that plaintiff could identify any of its own contractual rights at issue, it would not be able to meet its burden to show substantial impairment of them. See, e.g., In analyzing the severity of the impairment, relevant considerations include (1) how heavily the plaintiff relied on the provision altered by legislation, (2) whether that reliance was reasonable, and (3) the damages incurred by the alteration. See, e.g., Allied Structural Steel v. Spannus, 438 U.S. 234, 244-47 (1978). "[T]he expectations of the parties to the alleged contract play an important role in determining the substantiality of the contractual impairment." Mercado-Boneta v. Ins. Com'r of P.R., 125 F.3d 9, 13 (1st Cir. 1997); Energy Reserves Grp. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983). In the context of an alleged impairment by a party to the contract, the existence of a remedy for breach-of-contract is also relevant. Redondo Const. Corp. v. Izquierdo, 662 F.3d 42, 48 (1st Cir. 2011). "If a state breaches a contract but does not impair the counterparty's right to recover damages for the breach, the state has not impaired the obligation of the contract." Id.; see also Horwitz–Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250 (7th

Cir. 1996) ("It would be absurd to turn every breach of contract by a state or municipality into a violation of the federal Constitution.").

Here, plaintiff challenges Sections 201 and 202. As described above, those provisions allow the Governor to declare a state of emergency for a government entity and provide for a temporary stay of payment on covered obligations of that entity until January 31, 2017. They direct the Governor to prioritize payment of essential services over covered obligations during that emergency to promote the health, safety, and welfare of residents. They further prohibit holders of covered obligations from accelerating payment and, instead, provide that such covered obligations will accrue interest and be paid on the last day of the covered period.

Plaintiff argues that these provisions impair the rights of COFINA, PRHTA, and AFICA bondholders to prompt payment as and when due, Compl. ¶ 50; of COFINA and AFICA bondholders to accelerate payment in the event of default, id. ¶ 56; and of COFINA bondholders, to noninterference with the rights granted in the COFINA bond resolutions, id. ¶ 60, but none of these provisions amounts to a substantial impairment of covered obligations. "Impairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it. The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired." Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 511 (1942). Thus, for example, the Supreme Court rejected a Contract Clause challenge in Faitoute even where municipal bonds at issue in that case were re-issued at a lower interest rate. Id. And courts around the country have repeatedly upheld moratorium statutes that merely extend the period of time for a debtor to pay but do not "impair the integrity of the … indebtedness." See, e.g., Blaisdell, 290 U.S. at 424–25; Ropico, Inc. v. City of New York, 425 F.

Supp. 970, 977 (S.D.N.Y. 1976); Des Moines Joint Stock Land Bank of Des Moines v. Nordholm, 253 N.W. 701, 708 (Iowa 1934); Trompeter & Co. v. Monaco, 125 P.2d 531, 533 (Cal. Ct. App. 1942).

Similarly, Act 21's stay provisions are not designed to avoid payment, but rather to provide enough liquidity for the Government of the Commonwealth to keep operating and eventually pay the obligations. The provisions accordingly do not reduce in any way the principal or interest due on covered obligations. To the contrary, covered obligations accrue interest during the covered period. Act 21, § 202(a), Docket No 22-1 at 69-70. If plaintiff does in fact make payments on covered obligations during the moratorium and become subrogated to bondholders' rights, it will be entitled to sue for the entire principal and interest amount at the expiration of the covered period. Indeed, Act 21 ensures this right to sue by tolling the statute of limitations and suspending the doctrine of laches for delay caused by the moratorium. See id. § 205. Unlike the characteristics of the Recovery Act that gave this Court concern, these stay provisions do not "permit[] the reduction of principal owed on [the] bonds" or "permit[] modifications to debt obligations beyond the extension of maturity dates and adjustment of interest rates," and any "affect[on] *secured* bonds" is merely temporary. See See Franklin California Tax-Free Trust v. Puerto Rico, 85 F. Supp. 3d 577, 606 (D. P.R. 2015), aff'd, 805 F.3d 322 (1st Cir. 2015), aff'd, 579 U.S. __ (2016). In that way, Act 21 is "beneficent" to creditors (and their insurers): It does no more than permit a temporary delay in payment on bonds to allow the government time to make the fiscal reforms necessary to be able to make those payments in the future. See Faitoute, 316 U.S. at 507, 515-16. Plaintiff cannot establish a substantial impairment of bondholders' obligations based on a mere extension of time for payment. See id.; City of El Paso v. Simmons, 379 U.S. 497, 515 (1965) ("Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.").

Nor can plaintiff establish a substantial impairment of bondholders' obligations based on Section 201(b)(iv), which authorizes the Governor to "expropriat[e] property or rights in property interests related to a covered obligation in a constitutionally permitted manner pursuant to the Commonwealth's power of eminent domain," Dkt. 22-1, Act 21, § 201(b)(iv). See Compl. ¶ 52. That provision is expressly qualified by the requirement "that if property is taken pursuant to this Act, just compensation or other relief may be sought in the Court of First Instance, San Juan Part notwithstanding any other provision in this Section of this Act." Dkt. 22-1, Act 21, § 201(b)(iv). That qualification defeats any claim for substantial impairment: Any lien on pledged revenues that these bondholders have is a guarantee against breach of payment on a covered obligation. But to the extent that Section 201(b)(iv) authorizes the modification of that remedy, it supplants it with an equally effective remedy: a claim for just compensation. Modifying or supplanting a contractual remedy in this way does not amount to an impairment of contract. See Blaisdell, 290 U.S. at 430 ("Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."); Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co., 300 U.S. 124, 128 (1937) (explaining that "[t]he Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation" and that a remedy "existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away"). And plaintiff's contention that this protection is inadequate because of the Commonwealth's distressed finances, Compl. ¶ 62, is a speculative contention that does not change the nature of the right afforded. See also infra Part. F.3.

2. Any impairment caused by Act 21 is reasonable and necessary to serve an important government purpose.

Assuming arguendo that plaintiff could show substantial impairment of its contractual rights, plaintiff would still be unable to show that such impairment violates the Contract Clause. As already discussed, the Contract Clause does not prevent a state from the appropriate exercise of its police power. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) ("[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States."); Manigault v. Springs, 199 U.S. 473, 480 (1905) ("This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."). To the contrary, states are entitled to enact reasonable and necessary measures to serve important governmental purposes. See, e.g., United Auto, 633 F.3d at 41. And they are entitled to "meaningful deference" as to their determinations that such measures are justified. Id. at 44; Loc. Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Com. of Mass., 666 F.2d 618, 643 (1st Cir. 1981) ("[W]here economic or social legislation is at issue, some deference to the legislature's judgment is surely called for."); see also Asociación de Maestros v. Sistema de Retiro, 190 P.R. Dec. 854, 868 and 870 (2014) (not every impairment of a contractual obligation is unconstitutional and the legislature's judgment is entitled to some deference). "[W]here plaintiffs sue a state—or in this case the Commonwealth of Puerto Rico—challenging the state's impairment of a contract to which it is a party, the plaintiffs bear the burden on the reasonable/necessary prong of the Contract Clause analysis," United Auto, 633 F.3d at 42, and plaintiff cannot meet that burden.

Act 21 plainly addresses a legitimate governmental purpose. As the Act itself explains, "the Government of Puerto Rico does not have sufficient resources to comply with debt service obligations as originally scheduled and, additionally, to continue providing essential services to the people." See Act 21, Statement of Motives, Section A, Docket No. 52-1 at 50. Therefore, "the Commonwealth needs tools to exercise its police powers in order to protect the health, safety and welfare of the people of Puerto Rico." Id. These statements are entitled to deference and are supported by the undisputed public record of Puerto Rico's current fiscal crisis. Indeed, a few months ago this Court concluded that the Commonwealth is "insolvent" and in the midst of a financial crisis that has "metastasized into a deep humanitarian crisis requiring immediate action." Wal-Mart Puerto Rico, Inc., 2016 WL 1183091 at *1 and *9. There can be no doubt that having enough liquidity to provide essential services is a legitimate, important, and compelling government purpose.

Act 21 is also a reasonable and necessary response to the fiscal crisis facing the Commonwealth. The Act does not relieve any governmental entity of its obligations, nor permit a governmental entity to discharge any debt. It simply declares a moratorium in payment and stays litigation during the covered period. And it limits the covered period to less than one year, thus encouraging expeditious efforts to reform Puerto Rico's financial system.

Courts have repeatedly upheld such measures against Contract Clause challenges. In Blaisdell, for example, the Supreme Court upheld a mortgage moratorium law in Minnesota as a reasonable and necessary response during the Great Depression. The Supreme Court explained that the law (1) was an emergency measure; (2) directed toward protecting a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency. Blaisdell, 290 U.S. at 444-47; see also United Auto, 633 F.3d at 46 (citing Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 410 n. 11 (1983) and Blaisdell). And in Ropico, a federal district court upheld the New York State Emergency Moratorium Act for the City of New York, which, among other things, suspended payment of principal on notes coming due in 1975 and 1976 for three years and reduced the interest rate after maturity. The court recognized the fiscal crisis facing New York City and found the reasoning of Blaisdell "directly controlling." Id. at 977. A fortiori, Puerto Rico's Act 21, which stays action on covered obligations for less time than the New York Moratorium and leaves interest intact, is a reasonable and necessary response to Puerto Rico's dire fiscal situation that does not offend the Contract Clause.

Plaintiff's only argument to the contrary is that the Commonwealth could have pursued other alternatives to the Act, See Dkt. 1 ¶ 64, but, plaintiff's proposed alternatives are myopic and speculative at best. For example, plaintiff asserts that "the Commonwealth (and COFINA, PRHTA, and AFICA) have not exhausted their ability to voluntarily restructure their debts," id., but ignores the fact that the Commonwealth continues to actively engage in such negotiations, Dkt. 22-1, p. 52. Given the scope of the humanitarian crisis facing the Commonwealth, the size of its debt burden, and the need for agreement by creditors to such restructuring, there can be no doubt that the Commonwealth could no longer wait before putting in place the legal framework to allow it to meet its essential responsibilities to the people. Id. at 52–53. Plaintiff's alternative assertion that the Commonwealth could have instead "reduce[d] its expenditures" and (along with other Issuers) "raise[d] revenues" to address its debt load is pure fantasy. The Government has been engaged in such efforts for the last three years, but its debt burden is, as the Krueger Report found, "unsustainable without significant economic growth." See Dkt. 22-1, p. 49–51. Relentless economic headwinds have prevented that growth. Id. at 49. Plaintiff cannot base a Contract Clause claim based on these unrealistic "alternatives." See United Auto, 633 F.3d at 45-47.

F. Plaintiff's complaint similarly fails to state a cause of action under the Takings Clause.

Plaintiff also alleges that Sections 201 and 202 violate the Takings Clause of the federal Constitution—which provides that "private property [shall not] be taken for public use, without just compensation," U.S. Const. amend. V, and applies to Puerto Rico, Fideicomiso de la Tierra del Caño Martin Peña v. Fortuño, 604 F.3d 7, 12 (1st Cir. 2010)—and the "substantially identical" Takings Clause of the Puerto Rico Constitution, P.R. Const. art. II, § 9. Plaintiff's claims under the Puerto Rico Constitution fail for the same reason their claims under the federal Constitution fail, and the two will not be treated separately.

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005). Government regulation amounts to a taking only when it is "so onerous that its effect is tantamount to a direct appropriation or ouster." Id. For example, regulation that "requires an owner to suffer a permanent physical invasion of her property" or that "completely deprive[s] an owner of all economically beneficial us[e] of her property" will satisfy this standard. Id. at 537–38 (internal quotation marks omitted). All other alleged "regulatory" takings are assessed against the "nuanced, three-pronged inquiry" outlined in Penn Central, with due respect for the understanding that the Takings Clause is not a means for federal courts to second guess the legislature's choices about the best mechanisms to achieve what are undeniably public policy goals. Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 153 (1st Cir. 2012); Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño, 604 F.3d 7, 19 (1st Cir. 2010).

Perhaps recognizing the difficult standard for establishing a regulatory taking, plaintiff here pleads only "direct" takings claims. Compl. ¶ 73. But even under that theory, plaintiff has failed to state a claim. It has not established any property interest at issue, any direct appropriation or physical invasion of that property interest, or any failure to provide just compensation for such taking. It therefore has failed to make out even a single element of its Takings Clause claim.

1. Plaintiff lacks a property interest subject to taking

As already discussed, plaintiff has not identified even a single contractual provision giving it the rights it asserts. Instead, plaintiff cites only bondholder agreements giving bondholders certain contractual rights. Plaintiff cannot ground a Takings Clause claim based on someone else's rights.

But even if plaintiff *were* attempting to assert its own rights, the contractual rights at issue would not be "property" within the meaning of the Takings Clause. Parella v. Ret. Bd. of Rhode Island Employees' Ret. System, 173 F.3d 46, 58 (1st Cir. 1999) ("[P]laintiffs must first establish an independent property right before they can argue that the state has taken that right without just compensation."). Courts have long distinguished between contractual rights to obtain payment on a debt—which are protected by the Contract Clause—and rights to particular property acquired through a contract—which are protected by the Takings Clause. See United States v. Security Industrial Bank, 459 U.S. 70, 75 (1982) (The "property right of the ... creditor in the collateral" is "quite different in legal contemplation" from the "contractual right of [the same] secured creditor to obtain repayment of his debt."); Peick v. Pension Ben. Guar. Corp., 724 F.2d 1247, 1276 (7th Cir. 1983) ("While the [Security Industrial Bank] Court noted that the 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple,' it clearly viewed that 'bundle' as being sufficiently identified with specific property that it merited the protection of the takings clause even if the simple contractual right of a creditor to be repaid would not."). Here, plaintiff alleges "takings" of the contractual rights of PRHTA, COFINA, and AFICA bondholders to timely payment; of COFINA and AFICA bondholders to accelerate; and of COFINA bondholders to enjoy a purported covenant of noninterference. See Compl. ¶¶ 49, 56, 59. As a matter of law, none of these rights constitutes a property interest.

Although the issue is closer with respect to the purported liens on revenue streams, the relevant bond documents make clear that such rights are not the sort of durable property interest that would give rise to a Takings claim. Money is fungible property that generally cannot be the subject of an unconstitutional taking. See Santiago-Ramos v. Autoridad de Energia Electrica de P.R., CIV. 11-1987 JAG SCC, 2015 WL 846750, at *3 (D.P.R. Feb. 26, 2015), report and recommendation adopted sub nom. Ramos v. Autoridad de Energia Electrica de P.R., CIV. 11-1987 JAG, 2015 WL 1416745 (D.P.R. Mar. 27, 2015) ("A further problem with the property interest that Plaintiffs identify is that, as a general matter, a requirement to pay money is not a taking."); U.S. v. Sperry Corp., 493 U.S. 52, 62 n. 9 (1989) ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible."). And the money at issue here is no different—it is but a pool of money for the benefit of bondholders generally, money that reverts to the issuing government entity upon satisfaction of the bonds. See, e.g., AFICA Trust Agreement § 509 ("After provision shall be made for the payment of all Outstanding Bonds issued under this Trust Agreement, . . . The Trustee shall pay . . . all amounts in any fund or account then held by it under this Trust Agreement to the University."); PRHTA 1998 Resolution § 401 ("The moneys in said Funds and Accounts shall be held by the Fiscal Agent in trust and applied as hereinafter provided . . . and, pending such application, shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Resolution . . . until paid out or transferred as herein provided."); Amended and Restated COFINA Bond Resolution § 1201(6) ("If any portion of the moneys deposited with the Trustee for the payment of the principal and premium, if any, and interest on

Option Bonds is not required for such purpose, the Trustee shall . . . pay the amount of such excess to the Corporation free and clear of any trust, pledge, lien, encumbrance or security interested created hereby."). That type of generalized interest in a pool of money is far from the concrete interest in an identifiable piece of property that ordinarily is required to state a Takings claim. See, e.g., United States v. Security Indus. Bank, 459 U.S. 70, 71, 76 (1982) (perfected lien on household furnishings and appliances is "property").

2. Act 21 does not effectuate a taking of any cognizable property interest.

Assuming that plaintiff possessed a cognizable property interest, it still would not be able to make out a Takings Claim. As noted above, plaintiff alleges only a *direct* taking, but cannot show "a direct government appropriation or physical invasion of private property." Lingle, 544 U.S. at 537. Contractual rights obviously cannot be physically invaded. And in contrast to the elimination of the "contractual right to seek the appointment of a receiver" that this Court found to be a direct taking in Franklin, 85 F. Supp. 3d at 612, Sections 201 and 202 do not permanently appropriate any of the contractual rights at issue; they merely suspend their operation for less than one year. See Dkt. 22-1, Act 21, §§ 201, 202. All payments and interest that are due or become due during the covered period—including payments that become due based on a right of acceleration—will be due to be paid on the last day of the covered period. Id. §§ 202(a), (c). And pledged revenue streams will once again be available to bondholders. See id. § 201. A temporary suspension of particular contractual rights simply does not amount to appropriation and therefore cannot form the basis of a direct takings claim. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002) ("The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then Penn Central was the proper framework. . . . [A] permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not."); see also Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 522 (2012) (explaining that temporary physical invasion of private property must be analyzed under a case-specific factual inquiry).

Although plaintiff did not specifically allege a regulatory taking, plaintiff could not have made out any such claim based on the Act. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). Thus, an alleged regulatory taking is analyzed under the "nuanced, three-pronged inquiry" outlined in *Penn Central*—considering (1) "the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations," (2) the "economic impact on the property owner," and (3) "the character of the government action." Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 153 (1st Cir. 2012); Franklin Memorial Hosp. v. Harvey, 575 F.3d 121, 126–27 (1st Cir. 2009). Plaintiff has not even attempted to make out a Takings Clause claim under these factors, but it is clear in any event that it could not do so.

None of the challenged provisions of Act 21 interfere with any reasonable investment-backed expectations of the plaintiff. Bondholders and financial guarantee insurers operate in a highly-regulated industry, significantly reducing any expectations that bonds would not be subject to additional regulation. Cioppa, 695 F.3d at 154 (citing Philip Morris, Inc. v. Reilly, 312 F.3d 24, 36 (1st Cir. 2002)) (recognizing that "expectations are substantially diminished" in highly regulated industries); see also Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (no reasonable investment backed expectation that property interest would not be subject to future regulation given "the heavily regulated nature of the healthcare industry"). And plaintiff in particular guaranteed the bonds during a recession, well aware of the possibility of default and of regulation to avoid such default. See Texaco Puerto Rico, Inc. v. Ocasio Rodríguez, 749 F. Supp. 348, 371-72 (D.P.R. 1990) ("It would be impossible, therefore, to find that the current regulation interferes with investments in a way that was anything but wholly foreseeable. Those who chose to invest in this market are or should be fully aware that price regulation is a part of the investment climate.").

Nor have the challenged provisions had any significant economic impact on the plaintiff. Plaintiff has not pleaded that it has yet paid any money on bonds whose principal and interest payments are suspended under the Moratorium. Any, even if it had, it would be subrogated to the rights of bondholders and thereby possess a claim for full payment of those bonds at the end of the covered period. The Act does not affect the value of this claim, but merely stays collection for a few months while interest continues to accrue.

The nature of Act 21 also weighs against finding a regulatory taking. See Cioppa, 695 F.3d at 157 (noting that a taking will be less readily found "when the interference arises from some public program adjusting the burdens and benefits of economic life to promote the common good"). The fiscal emergency faced by the Commonwealth is beyond dispute: "[T]he Government of Puerto Rico does not have sufficient resources to comply with debt service obligations as originally scheduled and, additionally, to continue providing essential services to the people." Docket No. 52-1 at 50. Act 21 serves the important purpose of maintaining the Government afloat in order to continue providing essential services without extinguishing core property rights of creditors. Sections 201 and 202 do not extinguish any rights of recovery but merely stay their enforcement for a relatively brief period of time. See Andrus v. Allard, 444 U.S. 51, 65-66 ("At least where an owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). As one court recognized when faced with similar legislation, "Even if this legislation provides for a taking of some contractual rights of the plaintiffs, given the pressing public emergency which the legislature found, such a limited taking of plaintiffs' rights without compensation or judicial review is a permissible exercise of the state's police power." Ropico, Inc., 425 F. Supp. at 977.

Because plaintiff has not alleged sufficient facts to establish a regulatory taking, plaintiffs' takings claims should be dismissed. Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 315 (1st Cir. 2005) ("Given the absence of a full-scale taking and the presence of a traditional regulatory interest, it is enough to defeat the takings claim that no reasonable investment-backed expectation is present at all.").

3. Plaintiffs have not been deprived of just compensation

Even if this Court were to conclude that Act 21 works a taking, the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation." Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985). The requirement of "just compensation" necessitates that a party "be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." Brown v. Leg. Found. of Washington, 538 U.S. 216, 236 (2003) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

"[A]ny pecuniary compensation must be measured by [plaintiff's] net losses rather than the value of the government's gain." Brown, 538 U.S. at 237. But, in the instant cases, plaintiff will not ultimately suffer any losses as a result of Act 21's stay provisions: the Act does not reduce the principal paid by creditors and allows interest to accrue during the period when payments are delayed. See Act 21, §§ F-5, 203(b)-(d), 204(a). As a matter of law and logic, "if [a party's] net loss [i]s zero, the compensation due is also zero." Id.; see also Garcia-Rubiera v. Fortuño, 752 F. Supp. 2d 180, 188-89 (D.P.R. 2010) (plaintiff not entitled to any compensation where government took possession of excess car insurance premium payments but "[p]laintiff's property rights over the duplicate premiums remain[ed] unaltered" and "[p]laintiffs have seven years to request full reimbursement"), overruled on other grounds, 665 F.3d 261 (1st Cir. 2011); Scheehle v. Justices of Supreme Court of Arizona, 508 F.3d 887, 893 n.6 (9th Cir. 2007) (attorney not entitled to just compensation for being required to serve as an arbitrator because just compensation is based on the property owner's loss and not on any benefit to the government). Accordingly, even assuming arguendo that the challenged portions of the Act work a taking, plaintiff's Takings claim fails because it cannot plead the deprivation of just compensation.

Plaintiff asserts that "[t]he Commonwealth's distressed finances raise serious concerns regarding the bondholders' ability to obtain any relief, much less 'just compensation' from the Commonwealth," Compl. ¶ 62, but elsewhere contends that the Commonwealth "ha[s] the necessary funds available to make the[] payments" that were due on July 1," id. ¶¶ 31, 38. Plaintiff cannot have it both ways. Either the Commonwealth has the resources to meet its debt obligations, or it does not. If it does, plaintiff should have no fears of its ability to collect just compensation. And in any event, the enactment of PROMESA has substantially changed the financial landscape and outlook for the Commonwealth, its bondholders, and their insurers.

G. Act 21 is not preempted by federal law.

Plaintiff's federal preemption claim is equally unavailing, flying in the face of two centuries of bankruptcy law and the statutory text of Section 903(1).

1. The Bankruptcy Clause Does Not Preempt Act 21.

At the broadest level, plaintiff appears to allege that the Bankruptcy Clause of the federal Constitution and the federal Bankruptcy Code preempt the entire field of restructuring. See Dkt. 1, at ¶ 70. This Court has already considered and rejected that argument in the Recovery Act case. See Franklin California, 85 F. Supp. 3d at 602. That decision is fully consistent with the Supreme Court's instruction, stretching back to the earliest days of the Republic, that there is no "dormant Bankruptcy Clause" that precludes States and Territories from enacting their own laws governing the restructuring of debts. See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-97 (1819); see generally Stephen J. Lubben, Puerto Rico & The Bankruptcy Clause, 88 Am. Bankr. L.J. 553, 563-68 (2014). To the contrary, State and territorial bankruptcy laws are "suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress," Stellwagen v. Clum, 245 U.S. 605, 613 (1918), or to the extent inconsistent with another provision of the Constitution, see Franklin California, 85 F. Supp. 3d at 602. States and Territories are otherwise permitted to fill in gaps left by the federal Bankruptcy Code. See, e.g., In re Cash Currency Exch., Inc., 762 F.2d 542, 552 (7th Cir. 1985); In re Bankers Trust Co., 566 F.2d 1281, 1288 (5th Cir. 1978); Israel-British Bank (London) Ltd. v. FDIC, 536 F.2d 509, 514 (2d Cir. 1976); In re Equity Funding Corp. of Am., 396 F. Supp. 1266, 1275 (C.D. Cal. 1975).

2. Section 903(1) does not preempt Act 21.

Perhaps recognizing the weakness of its preemption claim based on the Bankruptcy Clause, plaintiff also alleges that the challenged provisions of Act 21 are preempted by Section 903(1) of the Bankruptcy Code. See Compl. ¶ 70. That provision provides as follows:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—

> (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
>
> (2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

11 U.S.C. § 903. Its preemptive effect is limited to "a State law prescribing a method of composition of indebtedness of [a] municipality." 11 U.S.C. § 903(1).

To the extent plaintiff challenges Act 21 as applied to the Commonwealth's own debt, Section 903(1) is simply inapposite: Section 903(1) says nothing about a State's management of its *own* finances. See 11 U.S.C. §101(40) (defining "municipality" as a "political subdivision or public agency or instrumentality of a State."). Indeed, because States are ineligible to restructure under Chapter 9, see 11 U.S.C. §109(c)(1), there is no reason to to think that Chapter 9 has any effect on state-law attempts to restructure state debts. Any contrary result would raise serious questions about the constitutionality of Section 903. See United States v. Bekins, 304 U.S. 27, 51 (1938) (discussing the precursor to Section 903(1)) ("The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs.").

But even looking beyond this initial problem, plaintiff's preemption claim fails because Act 21 is unrelated to any "composition of indebtedness." A law works a "composition" only when it provides for a discharge of debt, under which creditors receive "less than their full claims in full satisfaction of their claims." Black's Law Dictionary 346 (10th ed. 2014); see also Black's Law Dictionary 381 (3d ed. 1933); Franklin, 85 F. Supp. at 597 (defining a "composition" as an "agreement between a debtor and two or more creditors for the adjustment or discharge of an obligation for some lesser amount"); Fed. Deposit Ins. Corp. v. Juron, 713 F. Supp. 1116, 1120 (N.D. Ill. 1989) ("A composition is an agreement between a debtor and several of his creditors in which the creditors agree to accept payment of a sum less than the debts owing to them in full settlement of their respective claims."); Richard E. Coulson, Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge, 62 Alb. L. Rev. 467, 487 (1998) (describing the "common law composition," under which "the agreement of the other creditors to take less than owed was the consideration for each creditor's releasing the debtor for less than payment in full."). By the same token, a mere extension of time for payment is not a composition. See Perry v. Commerce Loan Co., 383 U.S. 392, 398 (1966) (distinguishing "[e]xtension plans" from "wager-earner plans by way of composition" because the latter "contemplate only a partial payment of the wage earner's debts" while "under an extension plan, the wage earner who makes the required payments will have paid his debts in full and will not need a discharge"); In re Mayorga, 355 F.2d 89, 90 (9th Cir. 1966) ("Mayorga did not propose a composition of his debts by partial payment, but a payment of his debts in full during a three year extension of time for paying them."); Heldstab v. Equitable Life Assur. Soc. of U.S., 91 F.2d 655, 658-59 (10th Cir. 1937) ("Composition by creditors with their debtor in bankruptcy is an agreement between them that the latter will pay down and the former will accept a named per cent of their claims in full satisfaction. … An extension proposal is an agreement on the part of the creditors that they will extend the time within which their claims are probably to be paid, in full as to secured creditors...").

A mere extension of time over which to repay covered debts is all Act 21 entails: It explicitly "does not provide for a composition or discharge of debts," but preserves "all claims and priorities" for payment "at the end of any moratorium period to the extent permitted by otherwise applicable law." Act 21, at F-5; see also id. § 204(a) ("[N]othing in this Act shall be construed to limit the rights of a holder to any collateral, security interest, or lien that secures such obligation, and nothing in this Act authorizes any government entity to compromise any obligation over the objection of a creditor."). What is more, the Act ensures that covered obligations continue to accrue interest during any moratorium, id. § 202(a), and provides for "adequate protection" to be accorded to creditors "to the extent required by applicable constitutional law" to prevent diminution of value "resulting from actions taken or not taken in furtherance of this Act," id. § 203(b)-(d). The Southern District of New York properly rejected an analogous challenge to New York's moratorium law under the substantively identical precursor to Section 903(1). See Ropico, 425 F. Supp. at 978. The same result should obtain here.

Plaintiff's effort to resist this straightforward analysis fails. Its overwrought assertions that the stay provisions "convert[] secured debt into unsecured debt" or "convert senior debt into junior debt" by prioritizing essential services during the nine-month moratorium period are belied by the Act itself, which expressly protects creditors' rights to repayment. Compare Compl. ¶ 45 with Dkt. 22-1, Act 21. And its remaining arguments are wholly irrelevant to the question whether the Act prescribes a method of composition of indebtedness: The stay of proceedings and exercise of creditor remedies during the nine-month moratorium speaks not at all to the creditors' rights in their covered obligations at the end of that moratorium. And the authorization for the Governor to engage legal professionals for advice "on matters related to restructuring or adjusting any covered obligation" does not transform a moratorium law into a restructuring law. See Dkt. 22-1, Act 21, § 106. It merely reflects the reality that the Commonwealth continues to pursue voluntary restructuring agreements, just as Plaintiff says they should, Compl. ¶ 64. Taken in its entirety, there can be no doubt that the Act is a moratorium law, designed to give the Commonwealth breathing room to meet its debt obligations in the future, not a law prescribing any method of composition of indebtedness.

H. Plaintiff does not have a constitutional right to sue in federal court

Finally, plaintiff alleges that § 201(b) of Act 21 is unconstitutional because "a state (or the Commonwealth) cannot enjoin proceedings in federal court." *See* Dkt. 1 ¶¶ 82 (citing Donovan v. City of Dallas, 377 U.S. 408 (1964)). But that claim misunderstands the right of access to federal courts and the Supreme Court's decision in Donovan.

"The constitutionally-protected right of access to the courts is narrow in scope," Boivin v. Black, 225 F.3d 36, 42 (1st Cir. 2000), and is limited to vindicating "fundamental constitutional rights" under certain defined constitutional provisions not at issue here. Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Christopher v. Harbury, 536 U.S. 403, 415 n. 12 (2002) (collecting cases). Act 21 does nothing to bar a plaintiff from mounting a constitutional challenge to the Act—which plaintiff has attempted to do, without merit, in this federal action. Rather, the Act's stay applies narrowly to suits to recover covered obligations during the moratorium. See Act 21 § 201(b). And it protects the viability of such suits after the stay by tolling the statute of limitations and barring the application of the doctrine of laches to delays caused by the moratorium. Id. § 205. Because plaintiff has no constitutional right to judicial resolution of claims "within a prescribed period of time," it cannot state a claim for relief based on the Act's temporary stay of judicial proceedings. See Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 706 (9th Cir. 1992).

Donovan concerns a different matter entirely. The question presented in that case was "whether a state court can validly enjoin a person from prosecuting an action in personam in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter." 377 U.S. at 408. Needless to say, Act 21 is not an action of a "state court." See id. Nor does it purport to enjoin a person from prosecuting an action over which a federal court "has jurisdiction both of the parties and of the subject matter." See id. To the contrary, for the reasons explained below, a federal court would have no jurisdiction over an action to recover covered obligations from the Commonwealth of Puerto Rico where the Commonwealth has not waived its sovereign immunity for such suits. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III . . . ."). Donovan affords absolutely no support for plaintiff's claim.

Instead, plaintiff's claim runs squarely into the Commonwealth's sovereign immunity from suits to recover money from its fisc. The Commonwealth enjoys "enjoys the shelter of the Eleventh Amendment in all respects," and no right of access to federal courts requires the waiver of that shelter. See Torres-Alamo v. Puerto Rico, 502 F.3d 20, 24 (1st Cir. 2007). Because "[t]he Eleventh Amendment's primary concern is to minimize federal courts' involvement in disbursal of the state fisc," Puerto Rico is shielded from suit "when the action is in essence one for the recovery of money from the state." Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority, 991 F.2d 935, 939 (1st Cir. 1993). Here, all of these potential recovery claims threaten the public fisc, and they do so at a time of dire financial circumstances for Puerto Rico. The Commonwealth had the sovereign prerogative to exercise its Eleventh Amendment immunity to prevent suits to recover covered obligations from governmental entities in a state of emergency.[4] No individual right of the plaintiff could abrogate that prerogative.

[4] That the First Circuit previously determined that the Commonwealth had expressed an intention that PRHTA not be treated as an arm of the state entitled to share in its sovereign immunity, Redondo Constr. Corp. v. Puerto Rico Highway & Transp. Auth., 357 F.3d 124, (1st Cir. 2004), does not preclude this Court from concluding that the Commonwealth has now expressed the opposite intention during the moratorium period. The Supreme Court has made clear the Eleventh Amendment has twin aims: "protection of the fisc and the dignity of the states." Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico & Caribbean Cardiovascular Center Corp., 322 F.3d 56, 64-65 (1st Cir. 2003) (citing Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 49-50 (1994)). To accomplish these objectives, particularly in response to changing economic conditions, sovereigns must be able to expand and contract their waivers of sovereign immunity. See College Saving Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–76 (1999) ("[A] State's sovereign immunity is 'a personal privilege which it may waive at pleasure.' . . . . [Indeed,] a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit." (quoting Clark v. Barnard, 108 U.S. 436, 447 (1883))). Here, Act 21 did just that: contracting any waiver of Puerto Rico's sovereign immunity for these recovery claims threatening the public fisc during the moratorium period.

But assuming arguendo that plaintiff could identify a constitutional right of access implicated by the Act, plaintiff's claim would still fail. Courts have long upheld temporary stays of access to courts as an appropriate exercise of police power in the face of economic crisis. Blaisdell involved one such stay—a moratorium on actions for deficiency judgments in Minnesota courts during an economic crisis in the Great Depression. 290 U.S. at 440. Given that (1) an actual emergency existed; (2) the restrictions were "of a character appropriate to that emergency," id. at 445, and (3) the restrictions were temporary in operation, id. at 447, the Supreme Court upheld the stay, id. at 444. Ropico involved another such stay—a bar on noteholders "from bringing suit to obtain their principal until the expiration of the Act." 425 F. Supp. at 972, 975. Using the Blaisdell criteria, the court upheld that temporary stay of suit.

The same criteria justify the Act's temporary stay of recovery actions. The "fiscal situation of the Government of Puerto Rico is more dire than at any other point in its history," Dkt. 22-1, Act 21, at A; the Act's stay provisions "are narrowly tailored to meet the paramount public purpose of securing the health, safety and welfare of the people of Puerto Rico and averting the further deterioration of the humanitarian crisis in Puerto Rico," id. at F; and Section 201's stay of litigation is explicitly limited to "the emergency period," id. at § 201(b). In this case, that emergency period is due to expire in January of 2017, lasting less than a year in total. Id. § 103(M). Accordingly, the temporary delay it imposes on plaintiff's access to federal courts passes constitutional muster.

WHEREFORE, the appearing defendants respectfully request that the Court dismiss plaintiff's Complaint or abstain from hearing this case.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 26th day of July, 2016.

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