UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FRANKLIN CALIFORNIA TAX-FREE TRUST, et al., Plaintiffs, vs. THE COMMONWEALTH OF PUERTO RICO, et al., Defendants.	Case No. 14-1518 (FAB)

THE PUERTO RICO ELECTRIC POWER AUTHORITY'S MOTION TO DISMISS THE AMENDED COMPLAINT

COMES NOW, Defendant Puerto Rico Electric Power Authority ("PREPA"), through the undersigned counsel, and very respectfully states and prays:

Upon the Memorandum of Law in Support of PREPA's Motion to Dismiss the Amended Complaint, dated July 17, 2014, Defendant PREPA hereby moves this Court for an order, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), dismissing the Amended Complaint because Plaintiffs lack standing and their purported claims are unripe, and thus the Court lacks subject matter jurisdiction. PREPA also joins in the Motion to Dismiss the Amended Complaint filed by The Commonwealth of Puerto Rico, Governor García Padilla and the Government Development Bank for Puerto Rico.

WHEREFORE, PREPA prays this Honorable Court dismiss the Amended Complaint.

Dated: July 21, 2014

RESPECTFULLY SUBMITTED,

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MEMORANDUM OF LAW IN SUPPORT OF THE PUERTO RICO ELECTRIC POWER AUTHORITY'S MOTION TO DISMISS THE AMENDED COMPLAINT

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The Puerto Rico Electric Power Authority ("PREPA") respectfully submits this memorandum of law in support of its motion for an order, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), dismissing the Amended Complaint because Plaintiffs lack standing and their purported claims are unripe, and thus the Court lacks subject matter jurisdiction. To the extent Plaintiffs allege that their constitutional rights under the Bankruptcy Clause, the Contract Clause or the Takings Clause are violated by the application of the Puerto Rico Public Corporation Debt Enforcement and Recovery Act, Act No. 71 of June 28, 2014 (the "Recovery Act") to PREPA, Plaintiffs lack standing to make those allegations, because neither PREPA – nor any other Puerto Rico public corporation – has sought relief under the Recovery Act. Plaintiffs' allegations are therefore also premature and unripe. To the extent Plaintiffs claim that the Recovery Act is unconstitutional on its face, they also lack standing and their claims are premature and unripe, and will remain so unless and until PREPA seeks relief under the Recovery Act. PREPA also joins in the motion by The Commonwealth of Puerto Rico, Governor García Padilla and the Government Development Bank for Puerto Rico, for an order, pursuant to Fed. R. Civ. P. 12(b)(6), dismissing the Amended Complaint because Plaintiffs' allegations fail to state a claim upon which relief can be granted. PREPA adopts and incorporates by reference its co-defendants' memorandum of law in support of their motion.

INTRODUCTION

For the last six years, the Commonwealth of Puerto Rico has been caught in a severe financial crisis. Despite significant budget and other systemic reforms, many of the Commonwealth's major public corporations continue to experience significant operating deficits, potentially putting their ability to perform their own critical public functions at risk and also jeopardizing the fiscal condition of the Commonwealth. As part of a response to this

unprecedented fiscal challenge, the Commonwealth prudently enacted the Recovery Act, in order to preserve the viability of the Commonwealth's public corporations and allow them to continue to perform their functions that are vital to the public interest, while at the same time safeguarding the interests of their creditors. Indeed, among the Recovery Act's express purposes are to: allow public corporations to (1) "adjust their debts in the interest of all creditors affected thereby," (2) "provide procedures for orderly enforcement and if necessary, the restructuring of debt," and (3) "maximize[] returns to all stakeholders by providing them going concern value based on each obligor's capacity to pay." Recovery Act, Statement of Motives, § D (emphases added). The Recovery Act provides a framework to allow certain Puerto Rico public corporations, including PREPA – which are ineligible for bankruptcy relief under chapters 9 and 11 of the U.S. Bankruptcy Code – to restructure their debts.

Within 24 hours of the Recovery Act's passage, before any public corporation had invoked the Recovery Act, Plaintiffs, all of them purporting to be PREPA bondholders, filed a baseless and premature complaint challenging the Recovery Act's constitutionality. To date, it remains the case that no public corporation has sought relief under the Recovery Act. Accordingly, Plaintiffs have suffered no harm from the Recovery Act's passage. Their claims are wholly hypothetical, and predicated upon an invocation of the Recovery Act by PREPA that may never occur. Plaintiffs therefore lack standing to sue and their claims that a particular prospective invocation of the Recovery Act by PREPA may not be constitutional are not ripe, and thus the Court should dismiss the Amended Complaint for lack of subject matter jurisdiction.

BACKGROUND

Founded in 1941, PREPA[1] is a public corporation of the Commonwealth and the primary provider of power to the 3.6 million residents of Puerto Rico. Plaintiffs purport to be holders of PREPA bonds. Am. Compl. ¶¶ 3-4.

On June 25, 2014, the Commonwealth's Senate voted to approve the Recovery Act. Am. Compl. ¶ 11. The next day, the House of Representatives did so too, and on June 28, 2014, the Governor of Puerto Rico signed the Recovery Act into law. Id. The Recovery Act explicitly strives to "maximize[]" value to creditors while ensuring that the valuable services provided by Puerto Rico's public corporations remain uninterrupted. Recovery Act, Statement of Motives, § D. To that end, the Recovery Act provides for two procedures for the restructuring of public debt. Chapter 2 of the Recovery Act sets forth a consensual amendment procedure that requires approval by a supermajority of holders of Affected Debt Instruments, as the Act defines that term. Recovery Act, Statement of Motives, § E. Chapter 3 contemplates the creation of a court-supervised debt enforcement plan much like the judicial mechanisms created by chapters 9 and 11 of title 11 of the United States Code, for which Puerto Rico's public corporations, including PREPA, are ineligible. Id. Under both provisions, the Recovery Act seeks to put creditors in a better position than they would otherwise occupy in the absence of an orderly debt restructuring process.

No public corporation, including PREPA, has invoked the Recovery Act or indicated that it will do so. Yet Plaintiffs launched a broad constitutional attack on the Recovery Act within hours of its passage. Their claims are explicitly based on sheer speculation and are therefore unripe. For example, much of the Amended Complaint is expressly couched in hypotheticals. Plaintiffs allege that the Recovery Act will cause them harm "if enforced," Am.

[1] The official Spanish name of PREPA is Autoridad de Energía Eléctrica ("AEE").

Compl. ¶ 2, that constitutional violations will follow "[i]f the Governor or the GDB Agent authorizes" invocation of the Recovery Act, id. ¶ 18, and that the Governor or GDB Agent "would be" furthering constitutional violations by such authorization, id. ¶ 42 (emphases added). None of these events has occurred.

Further, because PREPA has not invoked the Recovery Act and thus has caused no effect on Plaintiffs' PREPA bonds, Plaintiffs have suffered no concrete injury and lack standing to sue. Indeed, the Oppenheimer Plaintiffs publicly admitted after they filed the Amended Complaint that "[a]ll scheduled principal and interest payments that were due on July 1" were made "on time and in full," and that any discussion about whether the Recovery Act may weaken Puerto Rico's willingness to repay obligations "is just speculation and, in our opinion, likely premature." Oppenheimer Funds, The Puerto Rico Story: Hard Facts v. Speculation (July 3, 2014), available at, https://www.oppenheimerfunds.com/articles/article_04-27-11-134834.jsp (last visited July 16, 2014) (emphasis added). Not only have Plaintiffs admitted that they have suffered no harm, they have publicly proclaimed that the Recovery Act has not devalued their bond holdings at all: "[M]any of the Puerto Rico bonds we hold are insured and many were distressed already. While prices of Puerto Rico securities have recently declined and market conditions have been challenging, the [Oppenheimer] team believes that the distressed securities have far more upside than downside in the long term." Id. (emphasis added).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS

Plaintiffs assert standing to challenge the Recovery Act as PREPA bondholders. Yet PREPA has not sought protection under the Recovery Act, and it has not even indicated an

intention to do so. Accordingly, Plaintiffs have suffered no cognizable injury and therefore lack standing to assert claims against PREPA.

Plaintiffs' claims fail at the outset because they cannot satisfy the "irreducible constitutional minimum" standing requirements necessary to invoke this Court's jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Indeed, "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) (internal quotation marks omitted).[2] The standing doctrine derives from the case-or-controversy requirement of Article III and "serves to prevent the judicial process from being used to usurp the powers of the political branches." Id. Thus, while standing is always "an indispensable part of [a] plaintiff's case," Lujan, 504 U.S. at 561, courts undertake an "especially rigorous" inquiry where, as here, the constitutionality of a legislative act is at stake. Clapper, 133 S. Ct. at 1147 (internal quotation marks omitted); see also Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541-42 (1986) (noting "strict[] adhere[nce] to the standing requirements" "when a constitutional question is presented").

To meet their threshold standing requirements, Plaintiffs must allege (1) they have personally suffered an injury, (2) caused by or traceable to the defendants' actions, (3) that is likely redressable by the relief requested. Lujan, 504 U.S. at 560-61. If Plaintiffs fail to meet any one of these requirements – as they do – "the court lacks jurisdiction to decide the merits of the case and must dismiss the complaint." Williams v. Puerto Rico, 910 F. Supp. 2d 386, 390

[2] The standing and ripeness doctrines both derive from the case-or-controversy requirement, and to some extent they overlap. However, "[d]espite their natural imbrication," the two doctrines are distinct: "the standing doctrine is concerned with who may bring a particular suit, while the ripeness doctrine is concerned with when a party may bring suit." Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 533 n.6 (1st Cir. 1995).

(D.P.R. 2012) (Besosa, J.) (emphasis added); see Orta Rivera v. Congress of United States of Am., 338 F. Supp. 2d 272, 276 (D.P.R. 2004) (same).

The Court has no jurisdiction over any of Plaintiffs' claims because Plaintiffs cannot satisfy the threshold standing requirement that they have suffered an injury-in-fact, one that is "concrete and particularized" and "actual and imminent." Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011) (internal quotation marks omitted); see Bingham v. Massachusetts, 616 F.3d 1, 5 (1st Cir. 2010) (affirming dismissal of takings claim because plaintiffs failed to show personal injury and therefore had no standing to sue). Plaintiffs' only ground for asserting standing is their status as PREPA bondholders, Am. Compl. ¶¶ 3-4, but PREPA has not sought relief under the Recovery Act, nor indicated that it will do so, thus rendering any purported harm to Plaintiffs arising from the Recovery Act entirely speculative.

Indeed, Plaintiffs explicitly concede that all of their claims – and any harm they may suffer – hinge on a string of future contingencies that might take place at some unknown future date. See, e.g., Am. Compl. ¶ 18 ("If the Governor or the GDB Agent authorizes a Commonwealth public corporation to seek relief under the Recovery Act, this will perpetuate the constitutional violations described herein.") (emphasis added); id. ¶¶ 2, 42 (alleging that "if enforced," the Act would be unconstitutional) (emphasis added). Thus, under no reading of the Amended Complaint are Plaintiffs' purported injuries "certainly impending"; rather, they are mere "allegations of possible future injury" which, under well-settled Supreme Court precedent, do not suffice. Clapper, 133 S. Ct. at 1147 (emphases added and internal quotation marks omitted).

Moreover, certain Plaintiffs have publicly conceded that they have suffered no injury due to the Recovery Act and that it has not devalued their bond holdings. Specifically, even after filing this lawsuit, Oppenheimer Funds told its investors:

- The "hard facts" are that "[a]ll scheduled principal and interest payments that were due on July 1 on Oppenheimer Rochester's Puerto Rico debt – including payments on our Puerto Rico Electric Power Authority (PREPA) holdings – were made on time and in full."
- "[I]n [Oppenheimer's] opinion," chatter that the debt-restructuring law may weaken Puerto Rico's willingness to repay all obligations, "is just speculation and, in our opinion, likely premature."
- "[M]any of the Puerto Rico bonds we hold are insured and many were distressed already. While prices of Puerto Rico securities have recently declined and market conditions have been challenging, the [Oppenheimer] team believes that the distressed securities have far more upside than downside in the long term."

Oppenheimer Funds, The Puerto Rico Story: Hard Facts v. Speculation (July 3, 2014), available at, https://www.oppenheimerfunds.com/articles/article_04-27-11-134834.jsp (last visited July 16, 2014) (emphases added).

Finally, even if PREPA had sought protection under the Recovery Act, it would still be far from clear that Plaintiffs could satisfy their standing requirements by demonstrating a "concrete and particularized injury." For example, if PREPA seeks relief under the Recovery Act, any potential injury to Plaintiffs would still be contingent on whether PREPA invokes Chapter 2 or Chapter 3, whether Plaintiffs' bonds are scheduled as Affected Debt Instruments or Affected Debt, whether any amendments under Chapter 2 obtain the requisite supermajority consent of creditors and court approval, or whether PREPA adopts a Recovery Program. Most importantly, any relief sought by PREPA pursuant to the Recovery Act is likely to enhance the value of Plaintiffs' bonds, rather than harm Plaintiffs, and thus would not cause any injury. Indeed, one of the explicit purposes of the Recovery Act is to "maximize[] returns to all

stakeholders" and put creditors in a better position than they would otherwise occupy absent an orderly process for the restructuring of public debt. Recovery Act, Statement of Motives, § D.

Accordingly, because PREPA has not invoked the Recovery Act, and certainly has not caused Plaintiffs any injury, Plaintiffs lack standing, and the Court therefore must dismiss the Amended Complaint for lack of subject matter jurisdiction.

II. PLAINTIFFS' CLAIMS THAT THE RECOVERY ACT VIOLATES THE CONTRACT CLAUSE AND THE TAKINGS CLAUSE ARE UNRIPE

The Amended Complaint seeks declaratory judgments that the Recovery Act is unconstitutional because, "if enforced," it purportedly "would inflict constitutional injuries" in violation of the Contract Clause of Article I, Section 10, of the U.S. Constitution, and the Takings Clause under the Fifth and Fourteenth Amendments. Am. Compl. ¶ 2 (emphases added). Those claims are substantively meritless. More immediately, the Court should dismiss them because neither of them is ripe for adjudication, and thus neither of them presents a justiciable controversy that is within the Court's subject matter jurisdiction.

No public corporation – not PREPA nor any other – has sought relief under the Recovery Act. And Plaintiffs explicitly concede that none of the purported Constitutional violations they allege in the Amended Complaint has occurred or actually will occur unless and until a public corporation does seek relief under the Recovery Act. See Am. Compl. ¶ 2 ("[S]pecific provisions of the Recovery Act, if enforced, would inflict further constitutional injuries in violation of the Fifth and Fourteenth Amendments and Article I, section 10 of the Constitution."); id. ¶ 18 ("If the Governor or the GDB Agent authorizes a Commonwealth public corporation to seek relief under the Recovery Act, this will perpetuate the constitutional violations described herein.") (emphasis added); id. ¶ 41 ("The operation of the Recovery Act . . . threatens to impair Plaintiffs' rights under the PREPA Bonds in contravention to the

Bankruptcy Clause, the Takings Clause, and the Contract Clause."); id. ¶ 42 ("[B]y authorizing a public corporation to seek relief under the Recovery Act, the Governor or the GDB Agent would be furthering [the claimed] violations of the Bankruptcy Clause, the Takings Clause, and the Contract Clause.") (emphases added).

Likewise, because the Recovery Act has not yet been invoked, Plaintiffs' claimed contract and property interests have not been impaired in any respect, constitutionally or otherwise, due to the Recovery Act. Indeed, in the Amended Complaint, Plaintiffs contend only that the Recovery Act would impair their interests in violation of the Constitution "if enforced . . . ," Am. Compl. ¶ 2 (emphasis added), because certain of its "mechanisms" could deprive creditors of their contractual rights to payment of their claims in violation of the Contract Clause and could deprive secured creditors of their security interests in violation of the Takings Clause. Id. ¶¶ 35-36. But to date, none of these "mechanisms" of the Recovery Act actually has been enforced. They certainly have not been enforced in a manner that has impacted Plaintiffs in their capacity as PREPA bondholders, because PREPA has not yet sought any relief under the Recovery Act.

To the extent Plaintiffs claim that the Recovery Act is unconstitutional on its face because it is preempted, or because it violates the Contract Clause or the Takings Clause, or due to the automatic stay provision of Section 304 of the Recovery Act, PREPA does not dispute that such purely facial claims would be ripe for review if PREPA were to seek relief under the Recovery Act. But obviously, that has not occurred.

Thus, under both traditional ripeness principles and the specialized ripeness jurisprudence applicable to Takings Clause claims, Plaintiffs' claims are not ripe for adjudication, and as a result, this Court has no subject matter jurisdiction to address those claims.

A. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims Because They Are Unripe Under Traditional Ripeness Principles

Article III, section 2 of the U.S. Constitution limits federal subject matter jurisdiction to actual "cases" and "controversies" and prohibits the "render[ing] of advisory opinions." Flast v. Cohen, 392 U.S. 83, 96 (1968). Consequently, the Court can address only a "live dispute," one that is ripe for adjudication because it involves actual injury, and not speculative injury or no injury at all. See Milliman, Inc. v. Health Medicare Ultra, Inc., 641 F. Supp. 2d 113, 118 (D.P.R. 2009) (citing D.H.L. Assocs. v. O'Gorman, 199 F.3d 50, 53 (1st Cir. 1999)). Further, ripeness is a constitutional jurisdictional requirement that "has roots in both the Article III case or controversy requirement and in prudential considerations." Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013) (internal quotation marks omitted). The ripeness doctrine functions to prevent federal courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Id. (internal quotation marks omitted). As the Supreme Court has ruled, "a claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580-81 (1985)).

The ripeness doctrine and the case or controversy limitation imposed by Article III "appl[y] with undiminished force to actions for declaratory judgment." Igartúa-De La Rosa v. United States, 417 F.3d 145, 153 (1st Cir. 2005); see also Verizon New Eng., Inc. v. Int'l Brotherhood of Elec. Workers, 651 F.3d 176, 188 (1st Cir. 2011) (finding that requests for declaratory judgment must arise in a controversy "ripe for judicial resolution"). The First Circuit has ruled that a claim for a declaratory judgment is ripe only if it satisfies both elements of a highly fact-dependent two-part test. See Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d

530, 535 (1st Cir. 1995). First, the plaintiff must demonstrate the fitness of the issue for review, which turns on whether the factual record requires further development and whether the requested judgment would have a conclusive effect on the parties' dispute. Id. Second, the plaintiff must demonstrate the hardship it claims, and whether it faces "direct and immediate harm." Id.; see also Verizon New Eng., Inc., 651 F.3d at 188. As shown below, Plaintiffs can satisfy neither of these requirements.

Moreover, because Plaintiffs seek declaratory judgments concerning constitutional questions, the Court should not rule "until consideration of those questions becomes necessary" and should not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Antilles Cement Corp. v. Acevedo Vila, 408 F.3d 41, 45 (1st Cir. 2005). Accordingly, the Court should refrain from deciding the constitutionality of a state statute:

> in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered.

Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 462 (1945); see also Hightower v. City of Boston, 693 F.3d 61, 77 (1st Cir. 2012) (rejecting as unripe a facial challenge to a state statute's constitutionality, noting that "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution").

Plaintiffs cannot meet their burden of demonstrating that there is a ripe, justiciable controversy with respect to their claims that the Recovery Act, as it would be applied in a particular prospective invocation by PREPA, violates the Contract Clause and the Takings

Clause. Rather, each of Plaintiffs' claims improperly seeks an advisory opinion on the constitutionality of the Recovery Act before it has even been invoked by any public corporation – let alone PREPA, the corporation through which Plaintiffs claim to have standing – before it has been applied or interpreted by any court, let alone the Commonwealth Court of First Instance that has jurisdiction over matters arising from or relating to the Recovery Act, and before Plaintiffs have been threatened with, let alone suffered, any injury, let alone the injury they identify in the Amended Complaint. The Court should therefore dismiss Plaintiffs' claims on the ground they are not ripe for adjudication, and thus the Court lacks subject matter jurisdiction over them.

1. Plaintiffs' Contract Clause and Takings Clause Claims Are Not Fit for Review Because They Are Based Solely on Contingent and Uncertain Events

A case is not "fit" for review if it "involves uncertain and contingent events that may not occur as anticipated or may not occur at all." Ernst & Young, 45 F.3d at 536. In the declaratory judgment context, a claim is unripe where "the anticipated events and injury are simply too remote to justify contemporaneous adjudication," and where a plaintiff demands that a court "spend [its] scarce resources in what amounts to shadow boxing." Id. at 537. Likewise, claims regarding the constitutionality of a law are unripe where the plaintiff is unable to allege facts demonstrating the extent, if any, it will suffer a burden resulting from the law. Roman Catholic Bishop, 724 F.3d at 91.

Plaintiffs' Contract Clause and Takings Clause claims are, by their own terms, "uncertain," "contingent" and merely "anticipated." See Am. Compl. ¶¶ 2, 18, 41, 42. Every single purported fact Plaintiffs allege as to why a future invocation of the Recovery Act by PREPA supposedly would infringe on their rights under the Contract Clause and Takings Clause may not occur at all or may not occur as Plaintiffs allege. Specifically, Plaintiffs allege that: the

Recovery Act provides that a debtor may, in a Chapter 3 proceeding, obtain credit "secured by a senior or equal lien on the petitioner's property that is subject to a previous lien," Am. Compl. ¶ 28; the provision of "adequate protection" in the Recovery Act may be inadequate, id. ¶ 30; creditors may, in a Chapter 2 proceeding, be forced to accept a modification of their debt based on a supermajority vote, id. ¶ 31; creditors may, in a Chapter 3 proceeding, be forced to accept partial payment on PREPA bonds after acceptance by a creditor class and court approval, id. ¶ 32; and, if a plan under Chapter 2 or Chapter 3 of the Recovery Act is approved, claims may be permanently enjoined, id. ¶ 33.

Whether or not any of these allegations will materialize into facts is completely speculative, and, if any of them does, the contours and context of their effects are entirely unknown and at this point unknowable. Each of the following events, and more, would need to take place before any of Plaintiffs' allegations relating to Chapter 2 of the Recovery Act could even conceivably approach a level of certainty that would permit the Court to analyze them in a manner exceeding "shadow boxing": (1) PREPA must obtain authorization by its governing body and by the Government Development Bank ("GDB") (or by the GDB upon the Governor's request) to seek consensual debt relief; (2) Plaintiffs' PREPA bonds must be among the Affected Debt Instruments; (3) PREPA must formulate a recovery program; (4) PREPA must obtain consent to any proposed amendments to Affected Debt Instruments by a supermajority of creditors; (5) PREPA must obtain court approval as required by the Recovery Act; and (6) Plaintiffs would need to have suffered some concrete and actual (not contingent) injury of constitutional magnitude as a result of that plan.

Likewise, each of the following events, and more, would need to take place before any of Plaintiffs' allegations relating to Chapter 3 of the Recovery Act could even conceivably

exceed mere speculation: (1) PREPA must be eligible for Chapter 3 and must file a petition for relief under Chapter 3; (2) Plaintiffs' PREPA bonds must be among the Affected Debt; (3) PREPA must invoke the specific provisions within Chapter 3 that Plaintiffs allege threaten to impact their property interests; (4) PREPA or the GDB must propose a plan; (5) such plan must be approved by at least one class of Affected Debt holders; (6) any plan must be confirmed by the court in accordance with the standards set forth in the Recovery Act; and (7) Plaintiffs would need to have suffered some concrete and actual (not contingent) injury of constitutional magnitude as a result of that plan.

These are precisely the sort of "contingencies" that render claims – including claims for declaratory relief – unfit for judicial review. Ernst & Young, 45 F.3d at 538. PREPA has not availed itself of the relief established by Chapters 2 or 3 of the Recovery Act, and it is uncertain whether it will do so at all, when it may do so, and, if so, which avenue of relief it would invoke, or if it would invoke both, and what scope of relief it would seek. Any proposed plan of relief could be rejected in the mandatory processes to obtain creditor approval and court approval. A plan proposed by PREPA may or may not contain the specific features – such as a senior lien – on which Plaintiffs base their allegations, and, moreover, any such features, if they exist, may include protections for creditors' property and contractual rights.

For example, the Recovery Act establishes – as Plaintiffs acknowledge – that an eligible obligor may provide adequate protection of any creditor's interest in property. See Recovery Act § 129. Pursuant to this process – which mirrors the notice and hearing process provided by Sections 361 and 363 of the Bankruptcy Code – the Court of First Instance may rule that the security interests of which Plaintiffs claim they may be deprived are adequately protected, or, alternatively, may set forth terms which do adequately protect those interests. See

id. §§ 207, 324. The means set forth by the Recovery Act for affording adequate protection of property are based on the parallel provision in the federal Bankruptcy Code, 11 U.S.C. § 361, and provide that a debtor may provide adequate protection "by any reasonable means, including – (1) cash payment or periodic cash payments; [or] (2) a replacement lien or liens (on future revenues or otherwise)." Recovery Act § 129(a). If PREPA were to provide adequate protection, Plaintiffs will sustain no taking (let alone a taking in violation of the Fifth Amendment), and no substantial impairment of contractual rights (let alone an impairment in violation of the Contract Clause). Thus, the provision of adequate protection would preclude Plaintiffs' claims under the Contract Clause or the Takings Clause. See S. Rep. No. 95-989, 95th Cong., 2d Sess. 49 (1978) (noting that "the concept of adequate protection is derived from the Fifth Amendment protection of property interests as enunciated by the Supreme Court"); Commonwealth of Penn. State Emps.' Ret. Fund v. Roane, 14 B.R. 542, 544 (Bankr. E.D. Pa. 1981) ("[T]he purpose of 'adequate protection' is to protect the property interests of secured creditors pursuant to the Fifth Amendment prohibition against takings without just compensation.").

Accordingly, any path to debt relief – if pursued by PREPA at all – could take innumerable directions and could result in innumerable outcomes. Plaintiffs' premature claims are thus quintessentially unripe: they are based on uncertain facts which may or may not occur; events may transpire that completely moot or dissipate the purported legal dispute without need for decision; and any adjudication at this stage would necessarily require the Court to address hypothetical questions and guess at the outcome of events. They are not fit for review.

2. Plaintiffs Can Demonstrate No Hardship

The Amended Complaint is unripe for a second, independent reason. The second prong of the traditional "ripeness" inquiry focuses on "the hardship that may be entailed in

denying judicial review." Ernst & Young, 45 F.3d at 536. This inquiry looks to whether there is a "direct and immediate dilemma" for the parties, Roman Catholic Bishop, 724 F.3d at 90, and, in a declaratory judgment action, hardship may be found where "the operation of a statute is inevitable," or where the "collateral effects [of the statute] may inflict present injuries." Ernst & Young, 45 F.3d at 536. Plaintiffs fail this requirement.

Plaintiffs have not even attempted to allege any present injury. The very terms of Plaintiffs' allegations make clear that the only injuries on which they base their claims are contingent, speculative and prognosticated. See Am. Compl. ¶¶ 2, 18, 41, 42. Moreover, for the same reasons detailed above, the operation of the Recovery Act is far from inevitable: it is not specific to PREPA; there is no certainty that PREPA will invoke it; and, even if PREPA were to invoke it, the Recovery Act does not provide a single path towards debt relief. For these reasons, Plaintiffs have failed to demonstrate any hardship that would result from withholding judicial review, and their claims are unripe.

B. Plaintiffs' Contract Clause and Takings Claims Are Also Unripe Because the Specialized Inquiries Required by Those Claims Cannot Yet Be Made

The ripeness principles presented above apply with particular force where, as here, the underlying challenges are highly fact-dependent. See Ernst & Young, 45 F.3d at 535 ("[The fitness branch of the ripeness test] typically involves subsidiary queries concerning finality, definiteness, and the extent to which the resolution of the challenge depends upon facts that may not yet be sufficiently developed."). Here, both the Contract Clause and Takings Clause analyses that are essential to Plaintiffs' claims require fact-specific, ad hoc inquiries that will be materially impacted by the resolution of the many contingencies that, as Plaintiffs concede, have yet to be addressed, let alone resolved.

Moreover, for their Takings Clause claims to be ripe, Plaintiffs also must overcome the added hurdle of the specialized Takings Clause ripeness doctrine. See SFW Arecibo, Ltd. v. Rodriguez, 415 F.3d 135, 139 (1st Cir. 2005); Deniz v. Municipality of Guaynabo, 285 F.3d 143, 146-47 (1st Cir. 2002). This special doctrine, which was articulated in Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985), provides that "[t]here must be a final decision to 'take,' and [that] the plaintiff must show that there is no other remedy to provide adequate compensation." 13B Fed. Prac. & Proc. Juris. § 3532.1.1 (3d ed.).

Here, Plaintiffs seek to bypass steps that must be completed before their as-applied Contract Clause or Takings Clause claims can be ripe, and without which the Court cannot determine whether there has been a violation of the Contract Clause or the Takings Clause and, if so, what remedy Plaintiffs may be entitled to receive. In particular, (1) PREPA has not even invoked the Recovery Act, and as such there has been no adjustment of any of PREPA's debt, including its debt to Plaintiffs, let alone a final adjustment, and (2) even if there were a final adjustment, Plaintiffs must seek and be denied just compensation for anything taken from them before their claim under the Takings Clause is ripe.

1. There Has Been No Final Adjustment of the Affected Debt

Plaintiffs' Takings Clause claims are unripe because "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson, 473 U.S. at 186. Plaintiffs' Contract Clause claims are likewise dependent upon a final application of the Recovery Act, if any, to their contractual rights. See Ernst & Young, 45 F.3d at 535. This sequencing is not mere

formalism; it reflects a practical recognition of the problems presented by premature claims. See Williamson, 473 U.S. at 191-92.

In particular, without a concrete understanding of how a regulation has definitively impacted an allegedly aggrieved party's property rights (or indeed whether it has impacted them at all), a court cannot meaningfully apply the factors that govern Contract Clause and Takings Clause claims. When considering whether a government action constitutes a regulatory taking, courts apply the three factors set forth in Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978): (1) the "economic impact" of the regulation on the claimant, (2) the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations, and (3) the "character" of the governmental action. See also CCA Assocs. v. United States, 667 F.3d 1239, 1244 (Fed. Cir. 2011). Further, Plaintiffs would bear the burden of proving that an unconstitutional taking has occurred. See CCA Assocs., 667 F.3d at 1245.

Obviously, these factors all involve "essentially ad hoc, factual inquiries," and seek to answer a question which "has proved to be a problem of considerable difficulty." Penn Cent., 438 U.S. at 123. Thus, the Penn Central test "cannot be evaluated until the [relevant governmental authority] has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property] in question." Williamson, 473 U.S. at 191. For example, before Plaintiffs can assert a claim, they will need to demonstrate that PREPA has taken an action that has an adverse "economic impact," which requires a comparison of "the value that has been taken from the property with the value that remains in the property." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). Similarly, Plaintiffs will also need to demonstrate interference with their reasonable investment-backed

expectations, which will require an analysis of the final disposition of property pursuant to a regulation. Penn Cent., 438 U.S. at 127-28.[3] None of that is alleged here; it may well never be possible to so allege; and it certainly cannot be alleged unless and until PREPA invokes the Recovery Act and there is a final adjustment of the Affected Debt that Plaintiffs own and it can be determined whether there is an economic impact or interference with investment-backed expectations at all.

Like ise, to state a Contract Clause claim, P to allege (1) a c a ge a e a a b a a a ed a e g c ac , a d (2) that the means employed by the law are not reasonable or necessary to accomplish a legitimate public purpose. Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). As with Plaintiffs' Takings Clause claim, for Plaintiffs ever to be able to assert a Contract Clause claim, they will need to make a fact-intensive allegation that their contractual rights have been impaired, that the impairment is "substantial," and that any such impairment is not reasonable and necessary to fulfill an important public purpose. See Parker v. Wakelin, 123 F.3d 1, 4-5 (1st Cir. 1997). No such allegation is made here and there is substantial reason to believe Plaintiffs may never be able to make one.[4]

[3] Although it is impossible to assess at this premature stage the merits of Plaintiffs' as-applied takings claim, it is difficult to ascertain how the Recovery Act could effect an unconstitutional taking of property, given that the entire purpose of the Recovery Act is to create an orderly recovery regime enabling the Commonwealth's public corporations to "address their particular fiscal and financial emergencies in a manner that maximizes value to creditors while protecting public functions important for the public health, safety and welfare, and positioning the Commonwealth to grow its economy for the benefit of all stakeholders collectively." See Recovery Act, Statement of Motives (emphasis added).

[4] Again, it is impossible at this stage to determine the merits of Plaintiffs' as-applied Contract Clause claim, but as with their Takings Clause claims, it is difficult to ascertain how the Recovery Act could be a violation of the Contract Clause, given the Supreme Court's ruling more than 70 years ago in Faitoute Iron & Steel Co. v. City of Ashbury Park, N.J., 316 U.S. 502 (1942), that the Contract Clause does not bar a state from enacting its own legislation impairing municipal contracts if that is required by a financial emergency. As is explained in an article that, ironically, Plaintiffs' counsel published on this subject, Faitoute and the lower court cases applying it "make clear that courts view state abrogation of contracts based on fiscal exigencies as a proper exercise of sovereign power without a correlative need to compensate the non-breaching parties, without any federal authorization and

Obviously, none of these determinations can be made before an impairment occurs, and before its substantiality can be assessed. The Recovery Act creates alternative processes for adjusting debts in each of Chapter 2 and Chapter 3, and for each, it is impossible to predict at this early stage what ultimate resolution will be achieved, assuming PREPA invokes the Recovery Act at all.

Moreover, the Recovery Act provides processes by which a creditor may object to any relief requested under Chapter 2 or 3, § 120, as well as an appeals process by which a creditor may appeal a final allocation or approval order, § 127. Chapter 2 requires that a public corporation seeking consensual debt relief commit to and formulate a recovery program, obtain court approval for proposed amendments, and subject itself to an oversight commission to review the corporation's compliance with the recovery program. Likewise, Chapter 3 provides for court supervision over debt enforcement and ultimately court confirmation of any proposed debt enforcement plan in accordance with specific statutory requirements.

Accordingly, even if PREPA had invoked Chapter 2 or Chapter 3 – which it has not and may not – there would be no way for any of the interested parties, whether Plaintiffs, other creditors of PREPA, PREPA itself or the Commonwealth, let alone the Court, to know whether any adjustment of Plaintiffs' contractual or property rights will actually occur, how it will occur, and what the extent or features of any such adjustment will be. It follows that Plaintiffs have not alleged – and cannot allege – the information needed to establish whether there has been a taking or impairment of contract. Indeed, that information does not yet exist, because the processes by which Plaintiffs' interests may be adjusted have not yet begun.

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with limited Contract Clause restraints." Thomas Moers Mayer, State Sovereignty, State Bankruptcy, and a Reconsideration of Chapter 9, 85 Am. Bankr. L.J. 363, 379 & n.84 (2011).

2. Plaintiffs Must Seek and Be Denied Just Compensation Before Their Takings Claims Can Be Ripe

Finally, Plaintiffs' Takings Clause claims will not be ripe – if at all – until they have unsuccessfully attempted to obtain just compensation for any deprivation of the value of their bonds through the procedures that the Recovery Act provides. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exi

subject matter jurisdiction. The Court should also dismiss the Amended Complaint for the reasons stated in support of the Motion to Dismiss filed by The Commonwealth of Puerto Rico, Governor García Padilla and the Government Development Bank for Puerto Rico.

WHEREFORE, PREPA prays this Honorable Court dismiss the Amended Complaint.

Dated: July 21, 2014 RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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 21st day of July 2014.

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