Case Nos. 23-2036, 23-2049, 23-2050, 23-2052, 23-2053, 23-2054, and 23-2057

In the

United States Court of Appeals

For the First Circuit

IN RE: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO SALES TAX FINANCING CORPORATION, a/k/a Cofina; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE COMMONWEALTH OF PUERTO RICO; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY; THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY (PREPA); THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY,

Debtors.

(*For continuation of caption see inside cover*.)

On Appeal from the U.S. District Court for the District of Puerto Rico, San Juan, No. 19-00319-LTS (Swain, J.)

MOTION OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION TO FILE BRIEF AS AMICUS CURIAE

(*Counsel listed inside cover.*)

December 18, 2023

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of the Puerto Rico Electric Power Authority; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS,

Plaintiffs-Appellees/Cross-Appellants,

CORTLAND CAPITAL MARKET SERVICES LLC, as Administrative Agent; SOLA LTD.; SOLUS OPPORTUNITIES FUND 5 LP; ULTRA MASTER LTD; ULTRA NB LLC; UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO INC. (UTIER); SISTEMA DE RETIRO DE LOS EMPLEADOS DE LA AUTORIDAD DE ENERGIA ELECTICA (SREAEE),

Plaintiffs-Appellees,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee; ASSURED GUARANTY CORP.; ASSURED GUARANTY MUNICIPAL CORP.; GOLDENTREE ASSET MANAGEMENT LP; SYNCORA GUARANTEE, INC.; ALLIANCEBERNSTEIN L.P.; ARISTEIA CAPITAL, L.L.C.; CAPITAL RESEARCH AND MANAGEMENT COMPANY; COLUMBIA MANAGEMENT INVESTMENT ADVISORS, LLC; DELAWARE MANAGEMENT COMPANY, a series of Macquarie Investment Management Business; ELLINGTON MANAGEMENT GROUP, L.L.C.; GOLDMAN SACHS ASSET MANAGEMENT L.P.; INVESCO ADVISERS, INC.; MACKAY SHIELDS LLC; MASSACHUSETTS FINANCIAL SERVICES COMPANY; RUSSELL INVESTMENT COMPANY; SIG STRUCTURED PRODUCTS, LLC; T. ROWE PRICE; TOWER BAY ASSET MANAGEMENT,

Defendants-Appellants/Cross-Appellees.

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; BLACK ROCK FINANCIAL MANAGEMENT, INC.; FRANKLIN ADVISERS, INC.; NUVEEN ASSET MANAGEMENT, LLC; TACONIC CAPITAL ADVISORS L.P.; WHITEBOX ADVISORS LLC,

Defendants-Appellees.

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Counsel for Amicus Curiae Securities Industry and Financial Markets Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), the Securities Industry and Financial Markets Association ("SIFMA") states that it has no parent corporation and that no publicly held corporation owns more than ten percent of its stock.

The Securities Industry and Financial Markets Association ("SIFMA") respectfully moves under Federal Rule of Appellate Procedure 29(a) for leave to file the accompanying amicus curiae brief in support of Appellants and urging reversal of the U.S. District Court for the District of Puerto Rico's Opinion & Order, Dkt. No. 147 (Mar. 22, 2023) (the "Lien Decision") and Order, Dkt. No. 315 (June 26, 2023) (the "Estimation Decision").

All Appellants, the Ad Hoc Group of PREPA Bondholders, the Majority Member of the Ad Hoc Group of PREPA Bondholders, Cortland Capital Market Services LLC, SOLA LTD, Solus Opportunities Fund 5 LP, Ultra Master LTD, and Ultra NB LLC have consented to the filing of the accompanying amicus curiae brief. The Official Committee of Unsecured Creditors of All Title III Debtors has stated that it does not object to the filing of the accompanying amicus curiae brief if timely filed. The remaining parties have not yet expressed a position on whether they consent to the filing of the accompanying amicus curiae brief.

As required by Rule 29(a), SIFMA is both interested in the outcome of this appeal and well-equipped to add value to this Court's resolution of the case. *See Worman v. Healey*, 922 F.3d 26, 32 (1st Cir. 2019) (noting value of amici in case of significant public importance) *abrogated on other grounds by N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 19 n.4 (2022). SIFMA represents the shared interests of hundreds of securities firms, banks, and asset managers—including many that actively participate in the municipal revenue bond market. SIFMA serves as the regional member of the Global Financial Markets Association for the United States. It maintains offices in New York, New York and Washington, D.C.

SIFMA advocates for the promotion of fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. Relevant here, SIFMA aims to foster a robust, stable, and lasting municipal bond market. Such a market enables SIFMA's members to confidently invest in and finance infrastructure, vital services, and other projects that empower local municipalities to compete on a global scale.

Below, the District Court found that: bondholders' interests in present and future revenues of the Puerto Rico Electric Power Authority are secured only to the extent those moneys are deposited into specified funds; bondholders have recourse only to moneys deposited into specified funds; and bondholders had an unsecured claim to Net Revenues that the Court reduced to $2.388 billion. These conclusions upended a fundamental market expectation: that a pledge of revenues in connection with a municipal-bond issuance secures the repayment of principal and interest on those bonds, and that this pledge is valid when the municipality obligated on the bonds receives the revenues (as opposed to when the revenues are deposited into a secured bank account). If the Court affirms the decisions below, it may upset and harm the municipal revenue bond market and issuing municipalities. But if the Court reverses the decision below, it will confirm market-wide expectations and beliefs about the security and predictability of municipal revenue bonds. Accordingly, the outcome of this appeal is critically important to SIFMA's mission and membership.

SIFMA has filed amicus briefs in countless similar actions and can provide the Court with the unique perspective of its membership. Indeed, SIFMA's membership brings to the Court's resolution of this appeal decades of experience in municipal bond markets. SIFMA is thus well-positioned to explain the well-settled market understanding of how municipal revenue bonds operate and situate this dispute in the broader market context, thereby illustrating for the Court the significant effects that may flow from the Court's decision.

This is a case of national importance. SIFMA can match that national importance with its national expertise. Because SIFMA is intensely interested in the resolution of this dispute, and because SIFMA has the expertise to materially aid the Court's deliberative process, SIFMA respectfully requests leave to file the attached amicus brief.

[*Signature follows on next page.*]

Date: December 18, 2023

RESPECTFULLY SUBMITTED,

/s/ Laura E. Appleby

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 654 words. I further certify that this motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionately spaced typeface using Times New Roman 14–point font.

Date: December 18, 2023

/s/ Laura E. Appleby
Laura E. Appleby
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 18, 2023

/s/ Laura E. Appleby
Laura E. Appleby
Counsel for Amicus Curiae

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On Appeal from the U.S. District Court for the District of Puerto Rico, San Juan, No. 19-00319-LTS (Swain, J.)

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' BRIEFS AND REVERSAL

(*Counsel listed inside cover.*)

December 18, 2023

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of the Puerto Rico Electric Power Authority; PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS,

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Counsel for Amicus Curiae Securities Industry and Financial Markets Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), the Securities Industry and Financial Markets Association ("SIFMA") states that it has no parent corporation and that no publicly held corporation owns more than ten percent of its stock.

RULE 29 STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), SIFMA states that a motion for leave to file accompanies this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), SIFMA states that: no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than amicus curiae, contributed money that was intended to fund preparing or submitting the brief.

Dated: December 18, 2023

/s/ Laura E. Appleby
Laura E. Appleby
Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association ("SIFMA") represents the shared interests of hundreds of securities firms, banks, and asset managers—including many that actively participate in the municipal revenue bond market.[1] SIFMA serves as the regional member of the Global Financial Markets Association for the United States. It maintains offices in New York, New York and Washington, D.C.

SIFMA advocates for the promotion of fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. Relevant here, SIFMA aims to foster a robust, stable, and lasting municipal bond market. Such a market enables SIFMA's members to confidently invest in and finance infrastructure, vital services, and other projects that empower local municipalities to compete on a global scale.

Stated differently, a robust bond market allows municipalities across the United States and its territories—including Puerto Rico—to fund projects and services despite many demands on those municipalities' finite resources. A robust municipal bond market is thus critical to the financial stability of local governments.

[1] The SIFMA Asset Management Group ("AMG") is the voice of buy-side participants in the securities industry and broader financial markets. AMG's members are management firms with more than $62 trillion in assets under their control. The clients of AMG member firms include government pension funds, ERISA plans, registered investment companies, and individual accounts.

But to be robust, the municipal bond market must inspire investor confidence. And to inspire investor confidence, the municipal bond market must be reliable.

With two- to three-decade repayment periods, municipal revenue bonds provide holders with steady, fixed payments from a guaranteed stream of revenues. This allows investors both to invest with the assurance that their repayment is not directly tied to a municipality's finances and, similarly, to focus their diligence efforts on a particular project rather than an entire municipality. This also means that any court decision contrary to investor expectations can have a long-term detrimental impact on the market. Because of the nature of municipal debt and that it is widely held among individual investors, amending pre-existing municipal bond documents is a difficult endeavor. And that is to say nothing of what would happen to municipalities' borrowing costs, which would necessarily increase if the security and predictability on which revenue bonds are premised improvidently disappears.

Below, the District Court found that: bondholders' interests in present and future revenues of the Puerto Rico Electric Power Authority ("PREPA") are secured only to the extent those moneys are deposited into specified funds; bondholders have recourse only to moneys deposited into specified funds; and bondholders had an unsecured claim to Net Revenues that the Court reduced to $2.388 billion. These conclusions upended a fundamental market expectation: that a pledge of revenues in connection with a municipal-bond issuance secures the repayment of principal and interest on those bonds, and that this pledge is valid when the municipality obligated on the bonds receives the revenues (as opposed to when the revenues are deposited into a fund).

The outcome of this appeal is thus of core importance to SIFMA's membership. If the Court affirms the decisions below, it will harm the municipal revenue bond market and the issuing municipalities by raising questions about the security and predictability of those investments, thereby raising municipalities' borrowing costs and complicating an otherwise reliable funding source. An affirmance would also harm the entities and individuals who bought the bonds years ago based on the well-settled belief that a pledge of revenues attaches at the time the revenues are collected and is the equivalent of the lien. On the other hand, if the Court reverses the decisions below, it will confirm longstanding, fundamental market-wide expectations about municipal revenue bonds.

SUMMARY OF ARGUMENT

Municipal bonds are essential public-finance tools and have operated in a consistent, universally understood manner for more than two centuries: on the one hand, because revenue bonds are secured by and paid through the revenue stream from the projects they finance, or through a dedicated tax stream, they give comfort to investors, who know that they will be repaid even if the issuing municipality experiences broader financial difficulties. On the other, holders of revenue bonds and issuing municipalities both know that holders typically cannot pursue the issuing municipality's general revenues in the event of a default.

Despite that widely held understanding, the District Court found that the Trustee acquired a security interest in PREPA revenues only when those revenues were actually deposited in specified funds.[2] This conclusion grossly misreads the underlying bond documents—and grossly misunderstands the function of the municipal bond market and the expectations of its participants. In doing so, the District Court has contravened decades, if not centuries, of market precedent and thrust confusion upon the $4 trillion revenue bond market. That confusion, in turn, threatens to raise municipalities' borrowing costs (or reducing the financing available to them) and to upset the expectations of bondholders—more than two-thirds of whom are individuals—by thrusting the predictability and stability of revenue bonds into question.

In short, the District Court's Lien and Estimation Decisions are wrong as a matter of law and bad as a matter of policy. The Court should not let them stand.

[2] *See, e.g.*, *In re The Fin. Oversight & Mgmt. Bd. for Puerto Rico, as representative of The Commonwealth of Puerto Rico*, Case No. 19-391-LTS, Opinion & Order, Dkt. No. 147 at 36–40 (Mar. 22, 2023) (the "Lien Decision"), Order, Dkt. No. 315 at 28 (June 26, 2023) (the "Estimation Decision").

ARGUMENT

I. REVENUE BONDS ARE A LONG-ESTABLISHED, AND EXCEPTIONALLY COMMON, FORM OF MUNICIPAL FINANCE

> Call it municipal exceptionalism: this market is different. More than corporate debt or securities, municipal bonds are a means to an end; they promote the general welfare and improve quality of life . . . To the issuers, dealers, counsel, consultants and regulators, the municipal market is something to be passionate about.
>
> —Dr. Kenneth Durr[3]

A. Revenue Bonds are a Necessary Source of Municipal Financing.

Municipalities may feel stuck between a rock and a hard place as of late. Across the country, populations are becoming more urbanized. These populations demand that municipalities provide greater, better services. Essential infrastructure requires costly upkeep. Municipalities have only a few sources from which to draw the funding necessary for the services they provide. Municipalities can raise taxes. They can receive federal and state aid. They can impose fees and other charges.

And, importantly, municipalities can also sell financial instruments such as bonds—including those that use future revenues to pay for needed infrastructure

[3] *The Municipal Securities Rulemaking Board Gallery on Municipal Securities Regulation—Introduction*, SEC Historical Society (Dec. 1, 2015), http://www.sechistorical.org/museum/galleries/mun/index.php (last accessed Dec. 9, 2023).

projects today.[4] Revenue bonds are an equalizing force—so long as the revenues or dedicated taxes pledged to support a project (whether it, for instance, is a sewer system, electrical grid, or a municipal health center) are sufficient, the income level of the demographic served does not matter. But all of this depends on a consistent, predictable market, which, in turn, depends on consistent legal application of principles accepted by revenue market participants.

B. The Municipal Bond Market "Represents an Increasingly Important Part of the U.S. Capital Markets."

Perhaps because they provide essential financing to state and local governments—including U.S. territories, like Puerto Rico—municipal bonds play an important role in our country's economy. Municipal bonds are "debt securities issued by states, cities, counties and other governmental entities to fund day-to-day obligations and to finance capital projects such as building schools, highways or sewer systems." SEC, *What are Municipal Bonds*, https://www.sec.gov/munied (last accessed Dec. 9, 2023); *see also* SEC, *Report on the Municipal Securities Market* at 5, https://www.sec.gov/files/munireport 073112.pdf (July 31, 2012) (last accessed Dec. 9, 2023) (the "Municipal Securities Report"). Municipalities traditionally offer two types of bonds: general obligation bonds and revenue bonds.

[4] Revenue bonds are also a useful tool insofar as they permit a municipality to build needed infrastructure without disproportionately burdening current residents with the project's entire costs where the project will also benefit future populations.

See H.R. Rep. No. 100–1011, at 3 (Sept. 14, 1988), *reprinted in* 1988 U.S.C.C.A.N. 4115, 4118 (the "House Report"). This appeal concerns the latter type.

The municipal bond market has been referred to drolly as the "newest old market." Dr. Kenneth Durr, *The Municipal Securities Rulemaking Board Gallery on Municipal Securities Regulation—The Newest Old Market*, SEC Historical Society, https://www.sechistorical.org/museum/galleries/mun/mun_06a_emma.php (last accessed Dec. 9, 2023). One of the earliest issuances of a revenue bond happened in 1407, when the Casa di San Giorgio was formed to save the Republic of Genoa from financial ruin. *See, e.g.*, Clayton P. Gillette, *Can Public Debt Enhance Democracy?*, 50 Wm. & Mary L. Rev. 937, 939 (Dec. 2008).

Closer to home, municipal "[d]ebt securities were the earliest financial instruments to trade in America." Dr. Kenneth Durr, *The Municipal Securities Rulemaking Board Gallery on Municipal Securities Regulation—Two Centuries of Municipal Finance, Share in the Growth*, SEC Historical Society, https://www.sechistorical.org/museum/galleries/mun/mun02a_share_growth.php (last accessed Dec. 9, 2023). Massachusetts, in 1751, was the first to issue a municipal bond. *Id.* But "[b]y the end of the American Revolution, the continent was awash in colonial bonds[.]" *Id.* "Municipal securities were popular since they gave bondholders a way to share in the growth of their towns and regions." *Id.*

Municipal bonds have remained popular for more than two-and-a-half centuries. Issuances helped build "roads, canals, railroads, and waterworks" across the country—including the Erie Canal—in the nineteenth century. *Id.* Not much later, the 16th Amendment to the U.S. Constitution and the Revenue Act of 1913 gave municipal bonds another advantage by making the interest income on them tax-exempt. *Id.* The market boomed through the early twentieth century, ballooning from $2 billion in issuances in 1900 to $12.8 billion in issuances in 1928. *Id.*

Municipal bonds remained a relatively safe investment even during the Great Depression, with only a 7 percent default rate during that period (as compared with a 30 percent default rate for industrial bonds). *Id.* In fact, in discussing the importance and safety of revenue bonds in 1936, A.M. Hillhouse, the Director of Research for the Municipal Finance Officers Association, noted that with revenue bonds, municipal officials "may be mandamused . . . to see that moneys received are actually applied for debt service and not diverted for general purposes." A.M. Hillhouse, Municipal Bonds: A Century of Experience, at 296 (1936).

Following the Great Depression, and over the twentieth century, municipal revenue bonds grew in popularity and use. Dr. Kenneth Durr, *The Municipal Securities Rulemaking Board Gallery on Municipal Securities Regulation—Two Centuries of Municipal Finance, Mortgaging the Future*, SEC Historical Society, https://www.sechistorical.org/museum/galleries/mun/mun02b_mortgage_future.ph p (last accessed Dec. 9, 2023). "[R]evenue bonds became increasingly popular because they relieved city leaders from issuing referenda ***and provided investors with more certainty about the source of their proceeds***." *Id.* (emphasis added).

Buoyed by predictability over the source of repayment and their tax-exempt status, municipal "revenue bonds represented nearly half of all issue[d]" bonds by 1975. Dr. Kenneth Durr, *The Municipal Securities Rulemaking Board Gallery on Municipal Securities Regulation—Remaking the Market, Speaking to the Market*, SEC Historical Society, https://www.sechistorical.org/museum/galleries/mun/mun04a_speaking_market.php (last accessed Dec. 9, 2023). Issuances remain strong. Revenue bonds are the most common issuance by municipalities, representing nearly 60 percent of the current market. SIFMA, *US Municipal Bond Statistics*, https://www.sifma.org/resources/research/us-municipal-bonds-statistics/ (noting year-to-date 2023 statistics).[5] Individual investors hold more than half of municipal bonds issued in the United States. *See* J. Applesom, E. Parsons, & A. F. Haughwout, *The Untold Story of Municipal Bond Defaults*, Fed. Reserve Bank of N.Y., (Aug. 15, 2012), https://libertystreeteconomics.newyorkfed.org/2012/08/the-untold-story-of-municipal-bond-defaults.html (last accessed Dec. 9, 2023).

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[5] This amount can fluctuate depending on how a researcher classifies revenue bonds, with some placing revenue bonds at 68 percent of the market. *See* Cooper Howard, Charles Schwab, *Choosing Municipal Bonds: GO or Revenue?* (Jan. 18, 2023), https://www.schwab.com/learn/story/choosing-municipal-bonds-go-or-revenue (last accessed Dec. 9, 2023).

Simply put, the market for municipal revenue bonds is significant. In 2020, when municipalities issued more bonds than at any other time in history—an astonishing $485 billion in face amount—revenue bonds accounted for more than half those issuances ($261.3 billion in face amount). SIFMA, *Fixed Income Issuance*, https://www.sifma.org/resources/research/fixed-income-chart/ (last accessed Dec. 9, 2023). In short, as the SEC has noted, the municipal securities market, including the market for municipal revenue bonds, "now represents an increasingly important part of the U.S. capital markets." *Municipal Securities Report* at 1.

In addition to the features that make revenue bonds attractive to investors, such as stability, predictability, and reliability, revenue bonds are popular now for largely the same reasons they were popular around the time of the American Revolution. Municipal revenue bonds enable investors to take a literal stake in the growth and development of towns and regions. Stated more pointedly, revenue bonds help maintain our country's competitive advantage and standard of living by facilitating municipal projects, services, and infrastructure. Congressional encouragement facilitates this competitive advantage today, through tax exemptions for municipal bonds and through special Bankruptcy Code provisions applicable to certain revenue bonds. *See* 11 U.S.C. §§ 902(2), 922, 926–928 (the "Special Revenue Provisions"). However, these Congressional acts require courts to recognize what Congress accepted: the revenue pledge attaches ***when those revenues are collected and remains in place before, during, and after a bankruptcy proceeding***.

Highlighting its competitive advantage, the United States contains the most extensive public works system in the world, comprised of 4,171,125 miles of highways, 617,084 bridges, 19,919 airports, more than 25,000 miles of inland and intercoastal waterways, 91,896 dams, more than 2 million miles of pipe in water supply systems and more than 16,000 wastewater treatment plants.[6] Municipal entities provide nearly all of this infrastructure. And municipal entities must also care for it.

The American Society of Civil Engineers has estimated the cost to maintain infrastructure at a passable level will be $5.937 trillion by 2029, which is nearly six times the annual tax revenues for all state and local governments. Infrastructure Report Card at 6; U.S. Census Bureau, *2023 Quarterly Summary of State and Local Government Tax Revenue Tables*, https://www.census.gov/data/tables/2023

[6] *See* Bureau of Transp. Statistics, *Nat'l Transp. Statistics* (2021), https://www.bts.gov/sites/bts.dot.gov/files/2021-12/NTS-50th-complete-11-30-2021.pdf (last visited Dec. 9, 2023); U.S. Army Corps of Eng'rs, *Nat'l Inventory of Dams*, https://nid.sec.usace.army.mil/#/ (last accessed Dec. 9, 2023); U.S. Envtl. Prot. Agency, EPA 815–R–09–001, *Community Water System Survey* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1009JJI.txt (2006) (last accessed Dec. 9, 2023); Am. Soc'y of Civil Eng'rs, *Infrastructure Report Card*, National_IRC_2021-report.pdf (infrastructurereportcard.org) (2021) (last accessed Dec. 9, 2023) (the "Infrastructure Report Card").

/econ/qtax/historical.html (2023) (last accessed Dec. 10, 2023). Inattention to our country's infrastructure needs will cause this number to increase and further deferral of needed infrastructure improvement could have devastating results.[7]

Revenue bonds will be needed to fund many of these improvements. And, once revenue bonds are issued, those revenue bonds (or bonds issued to refinance those bonds) may stay outstanding for decades under existing documents. For instance, the Boston Water and Sewer Commission adopted a bond resolution in 1984 to help maintain its water system and that bond resolution, as supplemented, continues to govern sewer system bonds that are outstanding today. *See* https://emma.msrb.org/ES1159023-ES906400-ES1307641.pdf (last accessed December 17, 2023) (the "Boston Water Official Statement").[8]

The critical role of revenue bonds to America's infrastructure and municipal services requires stability and market certainty that a municipal pledge will not be defeated on the decision of a local government to divert pledged funds for other

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[7] *See* Am. Soc'y of Civil Eng'rs, *Failure to Act: Closing the Infrastructure Investment Gap for America's Economic Future*, https://www.infrastructurereportcard.org/wp-content/uploads/2016/05/2016-FTA-Report-Close-the-Gap.pdf (2016) (last accessed Dec. 10, 2023).

[8] Indicative of the municipal industry's understanding, The Boston Water Official Statement that was issued to potential investors described the security for such bonds as a pledge and security interest in all revenues of the Boston Water and Sewer Commission. At no point does the Bost Water Official Statement describe a "lien" or a "charge" as being a part of the security interest granted. *See* Boston Water Official Statement, 8.

projects or systems. With this as a backdrop, the District Court's Lien and Estimation Decisions create significant uncertainty in the municipal revenue bond market, which can increase municipalities' borrowing costs (or reduce the financing available) and thereby cause further repair and modernization delays that municipalities can't afford.[9]

C. The Market Understands and Expects That Revenue Streams Secure Revenue Bonds.

As noted above, municipalities issue two types of bonds: general obligation bonds and revenue bonds. In contrast to a general obligation bond, which a municipality secures with its full faith and credit (*i.e.*, its general taxing power), a revenue bond is secured by and repaid from a municipality's pledge of specific revenues generated from the project the bond supports (such as a municipal sewer system). *See, e.g.*, *Municipal Securities Report* at 7 (describing the types of

[9] While in the short-term municipalities are unlikely to see an increase in borrowing costs, any question of the security of revenue bonds could have detrimental effects to municipalities in financial distress—the very entities that bonds secured by a revenue pledge are most designed to protect. *See, e.g.*, Matthew Whitaker, *If Puerto Rico Bankruptcy Ruling Stands, It Could Devastate Municipal Borrowing*, Fox Business, https://www.foxbusiness.com/financials/puerto-rico-bankruptcy-ruling-stands-could- devastate-municipal-borrowing (Sept. 5, 2023) (last accessed Dec. 9, 2023).

municipal securities); *see also, e.g.*, SEC, *Municipal Bonds: Understanding Credit Risk* at 2 (Dec. 2012) ("Understanding Credit Risk").[10]

Revenue bonds are project specific, enabling municipalities to finance infrastructure and other improvements without saddling residents with higher taxes. They also provide financing for projects where debt limits or other restrictions imposed on municipal general-obligation financing make such debt unavailable. Because state laws typically do not permit bondholders to have a lien on a physical asset of a municipality, such as its water plant or utility system, revenue bonds are typically secured by the revenue stream derived from the project or system financed by the bonds. *See, e.g.*, House Report at 4118.[11] These dedicated revenue streams also mean that the riskiness of a revenue bond is pegged to the particular project it funds rather than to the general creditworthiness of the issuing municipality.

Because of the unique nature of revenue bonds, Congress has recognized the importance of these mechanisms and has legislated to ensure that certain revenue

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[10] *Available at* https://www.sec.gov/files/municipalbondsbulletin.pdf (last accessed Dec. 10, 2023).

[11] In other situations, revenue bonds may be secured by a dedicated stream of tax revenues whose use may be limited to payment of the bonds in question or to the particular project—such as taxes levied specifically to pay the obligations of a public hospital district. Similar to a pledged revenue stream, the market relies on dedicated tax pledges and the state-law requirements that such tax revenues will be used only as dictated by state law when making investment decisions. *See, e.g.*, Cal. Health & Safety Code Ann. § 32312.

pledges are protected. *See, e.g.*, 11 U.S.C. §§ 902(2), 922, 926–928. Courts that have addressed revenue protections in municipal insolvencies have similarly recognized the importance of such mechanisms and Congress's intent to protect them. *See, e.g.*, *In re Jefferson Cnty., Ala.*, 474 B.R. 228, 263–67 (Bankr. N.D. Ala. 2012) (discussing revenue pledges and treatment of same in bankruptcy).

Thus, for long before the District Court issued its Lien and Estimation Decisions, investors have relied on revenue pledges as security and for assurance that they will continue to be paid regardless of a municipality's financial distress or bankruptcy, so long as the underlying project generated sufficient revenues. Stated differently, the pledged revenue stream secures the repayment of the principal and interest due on the bond; the market treats it as equivalent to a lien.

This security is essential because holders usually lack the ability to pursue the taxing power or assets of the issuing municipality in the event of default. This structure additionally allows interest rates to be tied to the risk of a revenue stream rather than the strength of a municipality's coffers.

In fact, in approving the Special Revenue Provisions in 1988, Congress, perhaps recognizing the market's understanding of the equivalency of a revenue pledge to a lien noted:

> [s]pecial revenue bonds . . . are usually backed by and repaid only from the revenues generated from the physical asset built with the money raised by the bond offering. ***A lien in favor of the bondholders exists on this revenue stream***, but not on the physical

> asset itself; it would violate public policy to permit the possibility of a foreclosure on a public facility. In the event of a default, bondholders cannot look to any other assets of the municipality for repayment. ***Only the income stream generated by the asset or the income specifically pledged as security by the municipality can be used***. Special revenue bonds are issued so that if the asset financed fails, repayment will not come out of general treasury funds—meaning the taxpayer will not have to foot the bill.

House Report at 4118 (emphases added). Likewise, the accompanying Senate Report noted that "[r]evenue bonds generally are ***secured by revenues*** derived from the project or by a specific tax levy because applicable municipal law generally prohibits the encumbrance of municipal property with mortgages." S. Rep. No. 100–506, at 5 (Sept. 14, 1988) (emphasis added).

As described in more detail below, in finding that Appellants had a security interest only in revenues deposited into specified funds rather than on the revenue streams themselves, the District Court's Lien and Estimation Decisions go against and undermine this longstanding framework. Simply put, the language contained in the underlying bond documents with respect to the revenue pledge reflected the long-standing understanding of the municipal market, as codified by Congress, that a revenue pledge is the equivalent to a lien on the applicable stream of revenues, and remains in place even following the filing of a bankruptcy petition.

II. THE DECISIONS BELOW UPEND A LONGSTANDING, FUNDAMENTAL MARKET EXPECTATION ABOUT REVENUE BONDS

A. The Market Understands and Expects That Revenue Pledges Secure Revenue Bonds as of When the Revenues are Collected

Quite simply, the market has long understood that a municipality secures a revenue bond through a pledge of the revenue derived from the project the bond supports as of when the revenues are collected. *See, e.g.,* Hillhouse, Municipal Bonds: A Century of Experience at 296 (noting that even in the 1930s, revenue bonds were understood to be an obligation payable out of revenues derived from a particular project). Even further to the point, the market has long understood that a pledge of revenues is the equivalent of a lien. Indeed, one of the preeminent bankruptcy treatises, Norton Bankruptcy Law and Practice, states simply that "[r]evenue bonds are ***secured*** by a pledge of a specific stream of income—most often a particular tax or fees generated by the project the bonds financed." 5 Norton Bankr. L. & Prac. § 90:13 (3d ed. Oct. 2023 Update) ("Norton's") (emphasis added). Norton's goes on to state that "[s]pecial revenue bonds are the ***most common form of secured debt*** in a Chapter 9 [bankruptcy] case" and that the "lien" attaches to the relevant "revenue stream." *Id.* (emphasis added).

Norton's is not alone in understanding that a municipality secures a revenue bond by pledging to holders the revenue stream from the project the bond supports. The Securities and Exchange Commission, for one example, consistently writes in numerous publications that revenue bonds are "backed by . . . revenues from a specific project or source[.]" *See, e.g.*, *Understanding Credit Risk*, *supra*; SEC, *What are Municipal Bonds?*, https://www.investor.gov/introduction-investing/investing-basics/investment-products/bonds-or-fixed-income-products-0 (last accessed Dec. 9, 2023); SEC, *Investor Bulletin: Municipal Bonds—An Overview*, https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-37 (Feb. 28, 2021); SEC, *Focus on Municipal Bonds*, https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/focus (Sept. 21, 2010) (last accessed Dec. 10, 2023).

As another example, the Municipal Securities Rulemaking Board (the "MSRB") also describes revenue bonds as "backed by revenues from specific projects, such as toll roads or bridges, airports, electric and water utilities, public or private colleges, and hospitals, among other projects." MSRB, *Municipal Bond Basics* at 2, https://www.msrb.org/sites/default/files/2023-11/Municipal-Bond-Basics.pdf (Oct. 2023) (last accessed Dec. 10, 2023). The MSRB goes on to describe "revenues from a project" as "security for the bonds" and states that this consideration is "key to assessing credit risk" of the bonds. *Id.* at 3. State and local government publications similarly describe the revenue stream from the project a revenue bond funds as the "security" for those bonds. *See, e.g.*, Office of the

California State Treasurer, *California Bonds: 101* at 1 (2017) and Colorado General Assembly, *Funding Ideas and Sources* at 8 (Apr. 2010).[12]

In fact, legal commentators consistently describe revenue bonds as being "backed" or "secured" by pledged revenue streams arising from the underlying projects. *See, e.g.*, Gillette, *Can Public Debt Enhance Democracy?*, 50 Wm. & Mary L. Rev. at 980; Richard Briffault, *Foreward: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 913, 918–19 (Summer 2003); Comment, *Commercial-Bank Underwriting of Municipal Revenue Bonds: A Self-Regulatory Approach*, 128 U. Pa. L. Rev. 1201, 1202 n.6 (May 1980) (citing L. Moak & A. Hillhouse, Concepts & Practices in Local Government Finance 320 (1975)).

So do financial advisors and financial advisory firms. *See, e.g.*, Robert W. Baird & Co. Inc., *Important Information About Municipal Bonds* at 1, 5, https://content.rwbaird.com/RWB/Content/PDF/Help/Important-info-Municipal-Bonds.pdf (2020) (last accessed Dec. 10, 2023) (describing revenue bonds as "backed by . . . revenues from a specific project or source, such as highway tolls, lease fees, or usage charges"); Cooper Howard, *Understanding Municipal Revenue*

[12] *Respectively available at* https://www.treasurer.ca.gov/publications/bonds101_revenue.pdf (last accessed Dec. 10, 2023) and https://leg.colorado.gov/sites/default/files/ncsc_091117_checklist_of_court_facility_funding_sources_revised.pdf (last accessed Dec. 10, 2023).

Bonds, Charles Schwab, https://www.schwab.com/resource-center/insights/content/under standing-revenue-bonds (Sept. 12, 2019) ("Most revenue bonds are backed by a . . . pledge on the enterprise's revenue.").

B. Upholding the Decision Below Will Upset the Market

At no point have any of these market participants contemplated that a revenue pledge would not attach ***until*** the revenues at issue were transferred by a municipal obligor to specified funds, or that a bankruptcy court could discharge that pledge through a plan of adjustment. And yet, the District Court ignored and split from this market consensus and the considerable authorities that share the same understanding of how revenue bonds work. In relevant part, it found that bondholders lacked an interest in pledged revenues unless and until those revenues were deposited in specified accounts. *See, e.g.*, Lien Decision at 13–14, 27, 35–40, 41–42, 44. Stated differently, the District Court limited the Master PREPA Bond revenue pledge to moneys *already deposited* into specified funds.

In this sense, the District Court's Lien and Estimation Decisions invite creditor subversion: they enable debtors to deprive bondholders of pledged revenues by diverting those revenues from the specified accounts and potentially making such revenues available for the general use of the municipality. The municipal revenue bond market, however, takes as a basic premise that bondholders obtain enforceable property rights on the pledged revenue streams arising from the projects the bonds finance. If the municipal market would have contemplated that a municipal obligor could defeat bondholders' liens by simply failing to transfer pledged revenues, or by repurposing those pledged revenues for another project, it would not enjoy the stability and low cost of financing that exists in it today.

Put differently, the market that municipalities have relied on to dig out of bad times and function in good times could be considerably chilled. That's especially so for distressed municipalities who may need this market the most. The District Court's decision could therefore cause investors to treat revenue bonds and general obligation bonds similarly, increasing borrowing costs for those municipalities (including the distressed municipalities most in need of financing). That problem may not be solved by simply drafting revenue bonds differently: once the belief that revenue bonds are stable, relatively safe, and predictable recedes, it may never regain the same prominence and predominance.

The decision below thus upends fundamental, longstanding, well-settled expectations about the security that assures municipal revenue-bond investors that they will be repaid—to say nothing of general rule-of-law concerns about the need to enforce parties' bargains as written and understood. The uncertainty that the District Court's decisions could send across the $4 trillion municipal revenue bond market may cause investors to seek higher interest rates from municipalities (especially those with the greatest risk of nonpayment), thereby increasing municipalities' borrowing costs (if not decreasing the financing available to them).

In other words, municipalities may have to pay bondholders for perceived risk caused by the Lien and Estimation Decisions where before they would not, and it will be the municipalities in most need of financing that will feel these effects the hardest. *See, e.g.*, Cooper Howard, *Muni Outlook: Focus on the Big Picture*, https://www.schwab.com/learn/story/muni-outlook-focus-on-big-picture (Dec. 7, 2023) (last accessed Dec. 10, 2023) (cautioning investment in lower-credit bond issuers, which "tend to have less-stable revenue streams and lower reserves [and] credit ratings [that] may be more susceptible to an economic slowdown"). In sum, the gravity of these consequences and the longstanding nature of the market expectations upended by the decisions below reinforce the conclusion that the District Court erred as a matter of law and that its Lien and Estimation Decisions should be reversed.

CONCLUSION

For the reasons described above and in Appellants' Opening Briefs, the Court should reverse the District Court's Lien Decision and Estimation Decision.

[*Signature follows on next page*.]

Date: December 18, 2023

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,874 words. I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionately spaced typeface using Times New Roman 14–point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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