

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COMMONWEALTH OF PUERTO RICO, :

4 ET AL., :

5 Petitioners : No. 15-233

6 v. :

7 FRANKLIN CALIFORNIA TAX-FREE :

8 TRUST, ET AL., :

9 Respondents. :

10 - - - - - x

11 and

12 - - - - - x

13 MELBA ACOSTA-FEBO, ET AL., :

14 Petitioners : No. 15-255

15 v. :

16 FRANKLIN CALIFORNIA TAX-FREE :

17 TRUST, ET AL., :

18 Respondents. :

19 - - - - - x

20 Washington, D.C.

21 Tuesday, March 22, 2016

22

23 The above-entitled matter came on for oral
24 argument before the Supreme Court of the United States
25 at 11:11 a.m.

1 APPEARANCES:

2 CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf of
3 Petitioners.

4 MATTHEW D. MCGILL, ESQ., Washington, D.C.; on behalf of
5 Respondents.

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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 15-233, the Commonwealth of Puerto Rico v.
5 Franklin California Tax-Free Trust and the consolidated
6 case.

7 Mr. Landau.

8 ORAL ARGUMENT BY CHRISTOPHER LANDAU

9 ON BEHALF OF THE PETITIONERS

10 MR. LANDAU: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 This case presents the question whether
13 Congress has stripped Puerto Rico of access to any legal
14 mechanism to restructure the debts of its public
15 utilities which provide essential services to its
16 citizens, like electricity and water.

17 Respondents contend that Congress denied
18 Puerto Rico access to Chapter 9 altogether, but left
19 Puerto Rico subject to Chapter 9's preemption provision.
20 That anomalous result can't be squared with the
21 statute's text and structure.

22 Congress, in 1984, defined the word "State"
23 in the Bankruptcy Code generally to include Puerto Rico,
24 except for the purposes of determining who may be a
25 debtor under Chapter 9. But that's just another way of

1 saying that Puerto Rico's outside the scope of
2 Chapter 9. A State's only role in the Chapter 9 regime
3 is to authorize its municipalities to be debtors.

4 Indeed, Chapter 9 can't apply to Puerto Rico
5 in light of the 1984 amendment. That amendment
6 categorically precludes Puerto Rico from passing through
7 the gateway into Chapter 9, which is located in
8 Chapter 1 in Section 109(c)(2).

9 JUSTICE GINSBURG: Mr. Landau, that's true.
10 Don't you run up against, with respect to the Puerto
11 Rico -- Puerto Rico's legislation, the Contract Clause,
12 the -- the bar against impairing contracts; that Puerto
13 Rico can't impair the lenders' contracts?

14 So apart from -- so if there's -- if we're
15 dealing only with the Puerto Rico legislation, doesn't
16 that, in -- in requiring nonconsenting lenders to give
17 up or have their claims reduced, Puerto Rico is
18 violating the Contract Clause?

19 MR. LANDAU: Your Honor, the Respondents
20 here have certainly brought Contract Clause claims. And
21 if this Court decides the preemption issue in our favor,
22 then they would certainly be allowed to litigate those
23 contract claims issues on appeal -- excuse me -- on
24 remand.

25 The -- this Court has never addressed the

1 question whether the Contract Clause applies to Puerto
2 Rico, which, as this Court is aware, is in a somewhat
3 unique position in our Federal structure. That being
4 said, the First Circuit has traditionally assumed that
5 the -- without deciding that the Contract Clause applies
6 to Puerto Rico. And again, that is an issue for remand.

7 The question presently before this Court is
8 the antecedent question on which the courts below ruled
9 against us, which is to say that the -- Congress's
10 exclusion of Puerto Rico from Chapter 9 nonetheless left
11 them subject to Chapter 9's preemption provision.

12 CHIEF JUSTICE ROBERTS: Why would Congress
13 preclude Puerto Rico from Chapter 9? In other words,
14 what -- what is the background of this provision?

15 MR. LANDAU: Sure, Your Honor. It is a
16 black box -- to answer your question directly, there is
17 no legislative history directly on point either way. So
18 either side here is going to be limited to speculation
19 on that score.

20 The one thing that we do know for sure is
21 that the mere exclusion of an entity from Chapter 9 is
22 not typically deemed to be a representation of intent by
23 Congress to preclude a State law.

24 And to answer your question more directly --
25 again, I am admitting this is speculation just as their

1 position is speculation -- one thing that Congress could
2 have been wanting to do is to put Puerto Rico and D.C.
3 in the same boat for Chapter 9 purposes as Guam and the
4 Virgin Islands, the other Territories that are not even
5 within the definition of "State" in the Bankruptcy Code
6 in the first place. In other words, two somewhat
7 unusual things happened in -- when this provision was
8 added.

9 And again, to go back to your question, I
10 think, Mr. Chief Justice, this came about after 1978
11 when the definition of "State" that had been in the
12 Bankruptcy Code going all the way back to 1898 fell out
13 of the Code. That definition broadly defined "State" to
14 include Territories and possessions.

15 In 1978, there was an overhaul of the
16 Bankruptcy Code, and there was no definition of "State."
17 I think Congress recognized pretty quickly, as early as
18 1979. There were amendments to fix that omission of the
19 Bankruptcy Code. And the initial -- the initial fix
20 that was proposed by Senator DeConcini in 1979 went back
21 to the old definition. It says, "All Territories and
22 States are included" and had no exclusion. Okay, then.

23 In 1981, though, a -- a new definition
24 was -- that didn't go anywhere.

25 In 1981, Senators Dole, Heflin, and

1 DeConcini proposed a definition of "State" that defined
2 "States" to include Puerto Rico and D.C. only, but then
3 to exclude them from Chapter 9. The exclusion --

4 JUSTICE SOTOMAYOR: Is there any compact
5 with those other Territories that precludes them from
6 using their Territorial power to reorganize their debts?

7 MR. LANDAU: There is not, Your Honor. So
8 in other words, precisely because Guam, let's say, or
9 the Virgin Islands, by, I think, pretty basic principles
10 of exclusio unius, when Congress, which had long defined
11 "States" to include all Territories and possessions,
12 suddenly in this definition, 1984, says "State" means --
13 includes Puerto Rico and D.C., I think there's really no
14 way to understand that other than to say that "State"
15 doesn't include Guam and the Virgin Islands.

16 JUSTICE SOTOMAYOR: I know that Guam and the
17 Virgin Islands have Federal courts.

18 MR. LANDAU: Yes.

19 JUSTICE SOTOMAYOR: And they have Federal
20 judges. Are they subject to constitutional provisions?
21 Is it an open question of whether they are subject to
22 the Contract Clause as well? To the contract provision
23 limitation, I should say?

24 MR. LANDAU: I think that, yes, Your Honor,
25 it is. In other words, I -- this Court has never

1 answered that question, as to whether or not they fall
2 more on the Federal government-like side of that, where
3 there's no contract laws with respect to the Federal
4 government, or on the State-like side of that line,
5 where there is a conflict --

6 JUSTICE SOTOMAYOR: Well, that's the open
7 issue that --

8 MR. LANDAU: Yes, that is --

9 JUSTICE SOTOMAYOR: -- has to go on remand.

10 MR. LANDAU: -- an open issue. Yes.

11 So again, going back, in a sense, to the
12 Chief Justice's question, which I think is really the
13 question that everyone asks when they pick up this case:
14 Why would Congress have done that? And again, I think
15 one answer that's as plausible as any other that we've
16 been able to come up with is that Puerto Rico and D.C.,
17 at least, even though they are included in the
18 definition of "State," at least for Chapter 9 purposes
19 are in the same boat as the other Territories, which
20 don't -- which don't fall within the scope of Chapter 9
21 and thus don't have to -- aren't subject to the
22 Chapter 9 preemption provision.

23 JUSTICE KAGAN: Mr. Landau, could I ask you
24 to focus on the text here a little bit? Because this
25 gateway theory of yours, I'm not sure it matches up with

1 the text very well. I mean, you could have a gateway
2 provision which said something like, Puerto Rico is a
3 State for all purposes except Chapter 9, or except for
4 any provision in Chapter 9, or something like that. But
5 Chapter 9 -- but this provision, 101(52), is written
6 much more specifically. It says except for the purpose
7 of defining who may be a debtor under Chapter 9. So
8 it's not any provision in Chapter 9; it's just for the
9 purpose of defining who may be a debtor.

10 MR. LANDAU: That is an absolutely critical
11 point, Your Honor, and that goes to an interesting point
12 of the structure of the Code. The eligibility criteria
13 for the various substantive provisions of the Code, be
14 it Chapter 9, Chapter 11, Chapter 7, are not located in
15 those substantive chapters. They are located up in
16 Chapter 1. So in other words, if Congress were to have
17 said Puerto Rico is not a State for purposes of
18 Chapter 9, that would actually not solve the problem at
19 issue here, because the authorization, the gateway
20 provision into Chapter 9, is not in Chapter 9. It's in
21 Chapter 1.

22 It's this somewhat unusual structure of the
23 statute that I -- I really think we can't emphasize
24 strongly enough that -- that to say that Puerto Rico is
25 outside of Chapter 9 wouldn't have stopped Puerto Rico

1 from authorizing its municipalities under Chapter 1 to
2 get into the Chapter 9 regime, and then they're off to
3 the races under Chapter 9, because then all they have to
4 do -- all the Chapter 9 --

5 JUSTICE SOTOMAYOR: Mr. Landau, I'm not sure
6 I understand that argument, so you're going to have to
7 back up a minute.

8 MR. LANDAU: Okay. I'm sorry. Yeah,
9 because it really is an important argument.

10 JUSTICE SOTOMAYOR: It's, I think, critical
11 to your point, which is, Justice Kagan asked a direct
12 question: Why couldn't Congress have said much more
13 directly, under 101, the term "State" includes the
14 District of Columbia and Puerto Rico except for
15 Chapter 9?

16 MR. LANDAU: Because --

17 JUSTICE SOTOMAYOR: If Puerto Rico is not a
18 State for Chapter 9, then it couldn't have authorized
19 its municipality to file under 109. It would have
20 reached the same end, but more clearly saying that
21 Puerto Rico is not a State.

22 MR. LANDAU: That 109 provision that Your
23 Honor just referenced is not located in Chapter 9. It's
24 located in Chapter 1. So for Congress to say "except
25 for Chapter 9," it actually would not have reached that

1 109 provision.

2 The way to close the gateway was to say
3 Puerto Rico is not a State for purposes of authorizing
4 its municipalities to be debtors under Chapter 9. That
5 closes the door, which is not located in Chapter 9.
6 Once you close that door, then you don't reach --
7 chapter -- the provisions of Chapter 9 on which they
8 rely and base their entire case don't come into play,
9 because their whole argument is based on
10 subsection 9031.

11 9031 is a proviso to 903. If you look --
12 and these now are within Chapter 9, as opposed to
13 109(c)(2), the gateway provision, which is not in
14 Chapter 9. If you look at Chapter 1 -- excuse me --
15 Section 903, it says, "This chapter" -- i.e.,
16 Chapter 9 -- "shall not limit or impair the power of a
17 State."

18 If a State -- or if a jurisdiction like
19 Puerto Rico is categorically barred by Congress from
20 authorizing its municipalities to enter into Chapter 9,
21 then that reservation of power makes no sense. It -- it
22 has no conceivable applicability to Puerto Rico. And so
23 therefore, the 101 -- 9031 proviso, which refers back to
24 "such municipality" in 903, doesn't work either.

25 In essence, Your Honor, Respondents are

1 asking you to look at that proviso in 9031 in isolation,
 2 as opposed to understanding how there is a decision tree
 3 here. Basically, the statutory definition in 101(52)
 4 sends you to 109(c)(2), which is in Chapter 1, and then
 5 that's the gateway provision. And that says that Puerto
 6 Rico, we know, is not a State for purposes of
 7 authorizing its municipalities to enter into Chapter 9.

8 Once you understand that that gateway is
 9 categorically closed to Puerto Rico, unlike any of the
 10 States of the union, then 903, which is the next step in
 11 the decision tree, makes no sense as -- as it
 12 purportedly applied to Puerto Rico, because what 903
 13 says is, "This chapter shall not limit or impair the
 14 power of a State to control its municipalities."

15 JUSTICE BREYER: But then it has two other
 16 clauses which are the key clauses.

17 MR. LANDAU: That's correct, Your Honor.

18 JUSTICE BREYER: And the trouble that I have
 19 is where it says -- the same problem that Justice Kagan
 20 raised. I mean, you have a statute that prohibits
 21 importing a vegetable that isn't a fish, and we can't
 22 read "vegetable" as "fish." I mean, it just isn't. And
 23 what I'm having is the problem of the language.

24 MR. LANDAU: No -- but, Your Honor --

25 JUSTICE BREYER: Let -- let me show you.

1 The term "State," just as she said it, includes the
2 District of -- of Columbia and Puerto Rico.

3 MR. LANDAU: Right.

4 JUSTICE BREYER: Where do we find that? In
5 the first part of Title 11, which has to do with
6 bankruptcy. So what it seems to be doing is it's the
7 whole Bankruptcy Code. It's 11. So when I see the word
8 "State," that includes Puerto Rico.

9 And then it says, "except for the purpose of
10 defining who may be a debtor under Chapter 9." So I go
11 back, I look at it, and it says -- one of the things, it
12 says, well, a State law prescribing a method of
13 composition of indebtedness. That is not for the
14 purpose of defining who is a debtor under -- under
15 Chapter 9. So what am I supposed to do about that?

16 MR. LANDAU: Again, Your Honor, if you look
17 at this as the decision tree, you're already looking
18 down here at the third -- at the third --

19 JUSTICE BREYER: What the first part of the
20 tree says is, State, nothing we say really stops you
21 from controlling your municipality, except in one
22 important respect.

23 MR. LANDAU: Right.

24 JUSTICE BREYER: And the important respect
25 is that you cannot have your own bankruptcy law.

1 MR. LANDAU: But logically, that 9031 part
2 that you were referring to --

3 JUSTICE BREYER: Yeah.

4 MR. LANDAU: -- doesn't make any sense.

5 JUSTICE BREYER: But I read it as a decision
6 tree. What am I supposed to say?

7 MR. LANDAU: Okay. So the decision tree
8 starts, as you -- as you recognize, with 101(52), the
9 definitions. It says Puerto Rico is not a State for
10 purposes of determining who may be a debtor under
11 Chapter 9. That sends us to Chapter 1, to 109(c)(2).
12 That provision, 109(c)(2), says that an entity must --
13 in order to get into Chapter 9, you must have that
14 authorization from a State.

15 So we know that Puerto Rico is categorically
16 precluded from authorizing its municipalities to enter
17 into Chapter 9.

18 JUSTICE BREYER: I know that.

19 MR. LANDAU: Okay. So that -- that's the
20 second step in the tree.

21 JUSTICE BREYER: They can't be a debtor.

22 MR. LANDAU: Okay. And so then we get to
23 the third step, which I think is exactly what Your Honor
24 is asking. The third step in that decision tree says
25 this chapter, i.e., Chapter 9, does not limit or impair

1 the power of a State to control. So the question right
2 there, I think, Your Honor, is what you put your finger
3 on, which is to say: Does that make any sense at all,
4 to think that in this provision, when Congress is
5 talking about "State," this chapter doesn't limit the
6 part of the State, that Congress would have intended
7 that to apply to a jurisdiction that Congress has not --
8 has categorically precluded from even authorizing its
9 municipalities.

10 That's the key question, in other words.
11 And, Your Honor, it's a very big deal to assume that
12 Congress categorically precluded Puerto Rico from access
13 to anything.

14 JUSTICE BREYER: So -- so then where --
15 where -- where in the Code, except for this provision --
16 are there dozens of places? 20? A thousand? -- where
17 the word "State" is used outside of Chapter 9's debtor
18 provisions where then it makes sense to read Puerto Rico
19 into it?

20 MR. LANDAU: There's about 40.

21 JUSTICE BREYER: About 40?

22 MR. LANDAU: And in fact, if you look at the
23 legislation --

24 JUSTICE BREYER: And you have them in your
25 brief?

1 MR. LANDAU: I don't know that we have
2 tallied them up in our --

3 JUSTICE BREYER: No, no, but I -- is there
4 some reference? I can get them?

5 MR. LANDAU: I -- I believe, yes, Your
6 Honor, they -- they -- we --

7 JUSTICE SOTOMAYOR: But in all those
8 provisions, debtor, creditor, State play active roles in
9 implementing the provisions of those chapters.

10 MR. LANDAU: Correct.

11 JUSTICE SOTOMAYOR: So in all the other 40
12 places, the State is involved --

13 MR. LANDAU: Correct.

14 JUSTICE SOTOMAYOR: -- by -- inherent in the
15 definition of what a debtor and what a creditor is,
16 the State has rights and responsibilities under those
17 provisions.

18 MR. LANDAU: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: What you -- what I'm
20 understanding you to say is, Puerto Rico has been kicked
21 out of Chapter 9 altogether. It doesn't even get into
22 the gateway.

23 MR. LANDAU: Exactly, Your Honor. And I
24 think --

25 JUSTICE SOTOMAYOR: And so to read it as

1 being involved as a State, the only other place that's
2 used is here.

3 MR. LANDAU: Correct.

4 JUSTICE SOTOMAYOR: In 903, you have to be
5 part of it in some way.

6 MR. LANDAU: That's exactly right, Your
7 Honor. It's nonsensical to think that Congress having
8 categorically shut the door on Puerto Rico, that -- that
9 then it would mean for this to apply, Your Honor.
10 Again, the only thing a State does under this entire
11 Chapter 9 regime, which is not located exclusively in
12 Chapter 9, but also in that eligibility provision up in
13 Chapter 1 in 109(c)(2), then you just -- the question
14 then arises -- and, Justice Breyer, if this actually did
15 something, this would be a different case. But all this
16 says, again, is this chapter does not limit or impair
17 the power of a State to control.

18 When you're talking about a jurisdiction
19 like Puerto Rico that is not allowed to be authorizing
20 its municipalities, then there's nothing to be preserved
21 here.

22 JUSTICE SOTOMAYOR: Mr. Landau, this is
23 not very different from what we did in -- last year in
24 Utility Air Regulatory Group v. the EPA. We had one
25 general definition of a statutory term, and then we

1 looked at it and its play within other sections, and we
2 said can't be given the same meaning, because the
3 definition applies to one generalized feature of the
4 Act, and the use here is in a more specialized way.

5 MR. LANDAU: Absolutely, Your Honor. And
6 that's --

7 JUSTICE SOTOMAYOR: But you didn't cite
8 Utility Air. Is there a reason you didn't?

9 MR. LANDAU: Well, Your Honor, I think we
10 cited King v. Burwell, and there -- there are many cases
11 for the proposition that you can't just look at one
12 isolated provision in context and not understand --
13 excuse me, one isolated provision and not understand how
14 that fits into the context.

15 Again, I think Respondents are asking you to
16 just pick up this case, read 903(1) and say, here it is.

17 JUSTICE BREYER: All I have to do is to get
18 myself to do the following thing: I could dress it up
19 so people couldn't understand it. But what I would be
20 doing is saying the following: It says a State law, and
21 it says the chapter does not limit or impair the power
22 of a State, okay, et cetera, et cetera.

23 MR. LANDAU: Right.

24 JUSTICE BREYER: Now, all I have to say is
25 that word "State" right there does not include Puerto

1 Rico.

2 MR. LANDAU: Because Puerto --

3 JUSTICE BREYER: My only problem with
4 writing those words is somebody is going to direct me to
5 the provision a little bit later where it says the word
6 "State" in Title 11, of which this is part, means Puerto
7 Rico. Okay?

8 MR. LANDAU: Well, Your Honor --

9 JUSTICE BREYER: Now, that -- that's hard
10 for me to do because of that language.

11 MR. LANDAU: But, Your Honor, I would --
12 Your Honor has always been so sensitive to the
13 contextual approach to --

14 JUSTICE BREYER: That may be, but I can't
15 say that an "airplane" means a horse.

16 (Laughter.)

17 MR. LANDAU: And I totally -- no, but, Your
18 Honor, if -- if somebody is saying this doesn't apply to
19 driving, and then this one is about a -- a subsequent
20 provision is about a right turn on red regulation, you'd
21 say, no, but driving has been taken completely out of
22 the statute.

23 In other words, you are in a position -- by
24 the time you get to -- this is kind of a truism. This
25 is basically a federal -- 903, when I'm saying "this,"

1 is an important federalism limitation on Chapter 9.
2 It's actually stated more descriptively than anything
3 else.

4 It says, "This chapter does not limit or
5 impair the power of a State." If we know by definition
6 that Congress has shut the door, there is no door for
7 Puerto Rico and no key for Puerto Rico. Then to -- to
8 come along and say, well, it says "State" here, then I
9 have to apply the power of State. I think you can --
10 the definition of "State," but I think you have to
11 understand that when Congress has given a definition of
12 "State" that -- that categorically closes the door in
13 the antecedent portion of the decision tree; you don't
14 even reach this sensibly.

15 JUSTICE KAGAN: So, Mr. Landau, I -- I think
16 I get what you're saying now, which I didn't when I
17 started with. You're saying they couldn't just say it's
18 a State, except for purposes of Chapter 9, because, in
19 fact, there's something that's outside of Chapter 9 that
20 determines who gets into Chapter 9.

21 So what they did was they said it's a State,
22 except for purposes of this gateway, and then they
23 assumed that that meant that all of Chapter 9 wouldn't
24 apply either. That's your basic argument.

25 MR. LANDAU: Precisely, Your Honor.

1 JUSTICE KAGAN: So -- but before 1984,
2 before this amendment, this 903(1) did apply to Puerto
3 Rico; wasn't that right?

4 MR. LANDAU: Yes, Your Honor, that is
5 correct.

6 JUSTICE KAGAN: So you're saying that the
7 really super significant change, which is 903(1) applies
8 to Puerto Rico before 1984, and then doesn't apply after
9 1984 because of this definitional move that they made
10 here in 101(52).

11 What you have to admit is -- I'm not quite
12 sure what the -- the word -- I mean, it's a -- it would
13 be a mysterious way, it would be an extremely kind of
14 cryptic odd way to make such a major change.

15 MR. LANDAU: Your Honor, but the major --
16 let me just -- I -- I would say --

17 JUSTICE KAGAN: I mean, it's almost like
18 somebody doesn't want everybody to recognize what a
19 major change is being made --

20 MR. LANDAU: Your Honor --

21 JUSTICE KAGAN: -- and figured out this way
22 that is -- where nobody would understand that that was
23 happening, including the judges who would have to decide
24 what this meant.

25 (Laughter.)

1 MR. LANDAU: The major -- Your Honor, the
2 major changes work both ways because the major -- the
3 one point I would just compliment what Your Honor said,
4 which is prior to 1984 --

5 JUSTICE KAGAN: Please.

6 MR. LANDAU: -- of course --

7 (Laughter.)

8 MR. LANDAU: -- Puerto Rico was within the
9 remedial scope of Chapter 9. In other words, Puerto
10 Rico -- Your Honor made the point that Puerto Rico was
11 within the preemption provision of Chapter 9, but it
12 also got the benefits of Chapter 9.

13 So until 1984, there was always complete
14 symmetry between those entities that Congress gave
15 access to Chapter 9 but then said, but you can't have
16 your State provisions. So the preemption provision.
17 There was never any situation in which you couldn't do
18 either. You couldn't have any access to a legal
19 mechanism.

20 Frankly, again, both sides have
21 elephant-in-a-mousehole provisions. The other
22 elephant-in-the-mousehole provision that Your Honor just
23 said, our elephant-in-the-mousehole provision, is
24 basically the same, to say it would be a huge elephant
25 in a mousehole if, for the first time, Congress, by

1 simply taking Puerto Rico out of the access provision of
2 Chapter 9, nonetheless wanted to preclude Puerto Rico to
3 leave Puerto Rico in the preemption provision of
4 Chapter 9.

5 CHIEF JUSTICE ROBERTS: Well, that's -- I
6 mean, that's your basic policy argument, and I'm not
7 sure it carries much weight. Why -- why would it be
8 irrational for Congress to say, all right, this is the
9 system we're going to apply to all the States, but when
10 it comes to Puerto Rico, if they want changes, we want
11 them to come to us, partly because Congress has a
12 different sort of relationship with Puerto Rico than it
13 has to all the other States?

14 MR. LANDAU: Well, again, Your Honor --

15 JUSTICE SOTOMAYOR: Why not treat it like --
16 why not treat it like every other Territory?

17 MR. LANDAU: Well, exactly right. I
18 think --

19 JUSTICE SOTOMAYOR: That's the mouse in --
20 that's the mouse in -- in the hole --

21 MR. LANDAU: It is. That --

22 JUSTICE SOTOMAYOR: -- which is if you're
23 going to treat it differently, wouldn't you expect them
24 to say that? We're going to treat it not like a State
25 and not like a Territory.

1 MR. LANDAU: Absolutely. And, frankly, it
2 would be very anomalous, Mr. Chief Justice, in response
3 to yours because that would be Puerto Rico in a worse
4 position, let's say, than Guam and the Virgin Islands,
5 and it --

6 CHIEF JUSTICE ROBERTS: And that's a very --
7 you came up with a very good answer, Mr. Landau, to my
8 question. But I wonder why it's absurd to treat the
9 District of Columbia and Puerto Rico different from Guam
10 and the -- the Virgin Islands. I mean, why would you
11 lump those two -- those four together?

12 MR. LANDAU: Well, again, Your Honor,
13 Congress made this decision. One of the things that is
14 somewhat unusual, and I think this Court is well aware
15 of the -- some of these constitutional status issues
16 regarding Puerto Rico from the pending Sanchez Valle
17 case. I mean, the one thing that everyone in that case
18 agreed on is that Congress, through the Puerto Rico
19 Constitution, has -- has recognized a status that gives
20 Puerto Rico an incredible degree of autonomy.

21 The -- the dispute in that case is not
22 whether Puerto Rico has this, you know, nearly
23 State-like status. It's -- does that come from the
24 people of Puerto Rico or from Congress? But everyone
25 agrees that Puerto Rico operates in that very unique

1 situation which is really almost the opposite extreme of
2 the spectrum from D.C. where D.C. has to have its laws
3 submitted to Congress, and they can -- and they can veto
4 it.

5 So, again, we don't know why Congress --
6 this goes back to the black box -- chose to lump these
7 two jurisdictions which are kind of at opposite ends of
8 congressional oversight. Certainly the other side came
9 up with a theory that the First Circuit embraced that
10 Congress was seeking to retain control over Puerto
11 Rico's municipalities here, which is a very strange
12 theory given that Congress has not had control over
13 Puerto Rico's municipalities since well before the
14 Puerto Rico -- the Commonwealth was created in 1952.

15 That's just not the structure of the Puerto
16 Rico government and its political relationship with the
17 United States.

18 JUSTICE SOTOMAYOR: Have you given up the
19 Government Development Bank's position and that of some
20 of the amici that the provision of 903(1) applies to
21 States only when a debtor is in a Chapter 9 proceeding
22 because of that provision use of creditor?

23 MR. LANDAU: Your Honor, we have not
24 advanced that argument. They make that argument. Our
25 position's even more fundamental, which is you don't

1 even have to reach that argument, which --

2 JUSTICE SOTOMAYOR: Are you rejecting the
3 argument?

4 MR. LANDAU: We just didn't reach it because
5 we don't need to get there. But we -- we don't reject
6 it.

7 Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. McGill.

10 ORAL ARGUMENT OF MATTHEW D. MCGILL

11 ON BEHALF OF THE RESPONDENTS

12 MR. MCGILL: Mr. Chief Justice, and may it
13 please the Court:

14 Everyone here agrees that in 1984, Congress
15 withdrew from Puerto Rico and the District of Columbia
16 the power to put their municipalities into Chapter 9
17 bankruptcy.

18 Petitioners' position is that by the same
19 enactment, Congress impliedly gave Puerto Rico and the
20 District a much greater power that no State has
21 possessed since 1946, the power to write its own
22 municipal laws.

23 JUSTICE SOTOMAYOR: Well, no State has
24 possessed the power to impair contract rights under the
25 Constitution. Nothing about the Bankruptcy Code changes

1 the application of the Contract Clause. They have to go
2 into Chapter 9 to impair contracts --

3 MR. MCGILL: Justice --

4 JUSTICE SOTOMAYOR: -- in a meaningful way,
5 correct?

6 MR. MCGILL: Yes, but Justice Sotomayor --

7 JUSTICE SOTOMAYOR: All right. So what
8 makes you think that Congress intended to let Puerto
9 Rico and the District of Columbia have free reign in
10 whatever they wanted to do?

11 Wouldn't they be subject, in your
12 judgment -- I'm sure you'd be arguing they're subject to
13 the Contract -- Impairment Clause.

14 MR. MCGILL: And they are.

15 JUSTICE SOTOMAYOR: Exactly.

16 MR. MCGILL: The Contract Clause applied
17 directly to Puerto Rico by dint of the Jones Act from
18 1917.

19 JUSTICE SOTOMAYOR: So you think Congress
20 intended to stop Puerto Rico and the District of
21 Columbia from passing emergency legislation that said
22 don't shut off the lights tonight; that -- that Congress
23 intended that that kind of temporary provision could
24 only be subject to Congress, who may be on recess, who
25 might be wherever it is, that it could not do that?

1 MR. MCGILL: Yes, Justice Sotomayor, because
2 in 1946 that was precisely the decision Congress made
3 when it decided to overrule this Court's decision in
4 Faitoute.

5 JUSTICE SOTOMAYOR: Well, it decided to
6 overrule it by giving States the opportunity to go into
7 bankruptcy, and that would be a temporary state to start
8 with.

9 MR. MCGILL: So -- so the question is, as I
10 understand it, Justice Sotomayor, is what was Congress
11 doing in 1984? Was it -- we all know that it removed
12 from the District and from Puerto Rico the opportunity
13 to put its municipalities into Chapter 9 --

14 JUSTICE SOTOMAYOR: And it never gave --

15 MR. MCGILL: -- everyone agrees --

16 JUSTICE SOTOMAYOR: And it never gave the
17 Territories that. So the Territories can pass a law
18 that stops the lights from going out today until
19 Congress comes into effect, 'cause it can't do a
20 permanent impairment of the contract.

21 MR. MCGILL: Justice Sotomayor, that's not
22 correct, I don't believe. It's not presented here, and
23 nothing turns on it, but let me explain why this
24 argument, which shows up for the first time in the
25 yellow brief, I think is wrong.

1 Puerto Rico was -- was considered a State.
2 It itself admits it was a quote/unquote State from the
3 period of 1978 to 1984 when there was no definition of
4 "State."

5 Prior to 1978, all States, Territories, and
6 possessions of the United States were States. After
7 1978, all States, Territories, and possessions continued
8 to be treated as States. And then in 1984, Congress
9 enacts 101(52) which says States include the District
10 and Puerto Rico except for this one purpose, which is to
11 defining who may be a debtor under Chapter 9.

12 That -- so the question is whether -- you
13 know, it doesn't say Ohio, it doesn't say "State"
14 includes Ohio, but clearly it does, because everyone
15 acknowledges old definition of State has essentially
16 carried through.

17 So I don't believe it's correct. And no
18 court I'm aware of has ever held that -- that the
19 district -- that the Virgin Islands or Guam or the
20 American Samoa are not States for purposes of -- of the
21 Bankruptcy Code.

22 What we have here, however, is a clear
23 textural provision that says Puerto Rico is a State, and
24 it is -- so is the District of Columbia, except for this
25 one purpose, which is defining who may be a debtor under

1 Chapter 9.

2 JUSTICE SOTOMAYOR: Doesn't the definitional
3 section of the Code tell you who qualifies as a debtor,
4 who qualifies as a creditor, who can go into what
5 chapter or not?

6 It tells you if you're this kind of
7 creditor, you go into that chapter. If you're that kind
8 of creditor, you go -- I'm sorry. If you're this kind
9 of debtor, you go to -- individual goes here, business
10 goes there, this one goes here. You have options.

11 Isn't it what he describes as a gateway that
12 tells you where you're a part or what you're a part of?

13 MR. MCGILL: Today that's true, but it
14 wasn't true when Chapter 9 was first enacted in 1934 and
15 1937.

16 In 1934, the gateway provision was
17 Section 83 -- I mean Section 81 of the '34 Act, which
18 was then known as Chapter X or Chapter 10, and it was
19 Section 83(a) again in 1937. So it was the
20 recodification of the Bankruptcy Code in 1978 that moved
21 all of the gateway requirements to Section 109. And no
22 one has ever contended that that was intended to be a
23 substantive change.

24 JUSTICE SOTOMAYOR: Oh, but it is, because
25 it tells you what kind of debtors can make use of what

1 kind of provision.

2 MR. MCGILL: But that was always true. I
3 mean --

4 JUSTICE SOTOMAYOR: It is always. That's
5 what the purpose of a gateway is.

6 MR. MCGILL: But -- no, no, but it was true
7 when it was part of Chapter 9 -- old Chapter X and old
8 Chapter IX. It was true then that the gateway -- the
9 gateway provisions defined who may be a debtor.

10 It -- it excludes today, for instance,
11 solvent municipalities, right? Solvent municipalities
12 may not invoke Chapter 9. That is a gateway
13 requirement. And it used to be that -- that the 1937
14 Act provided a laundry list of certain types of
15 municipalities that were eligible for Chapter 9. It
16 wasn't every municipality under the sun. It was a -- a
17 laundry list of, you know, six or seven categories.

18 JUSTICE SOTOMAYOR: So if the -- if the
19 definitional section defines "State" to include Puerto
20 Rico, and you say even though it's not a part of Chapter
21 9 by definition in 109, it still remains a State for
22 purposes of this reservation of State powers?

23 Why aren't we using "creditor" in 903 as
24 it's used in the Bankruptcy Code?

25 MR. MCGILL: As --

1 JUSTICE SOTOMAYOR: If you're going to be
2 literal as to "State," why aren't you literal as to
3 "creditor"?

4 MR. MCGILL: As the Commonwealth, I think,
5 here has acknowledged, it -- it has abandoned that
6 argument. And it's not clear to me that even the GDB
7 believes in it, because if you look at page 8,
8 footnote 2 of their reply brief, they acknowledge that
9 Puerto Rico's own bankruptcy laws were preempted, at
10 least until 1984, which could be true only if you
11 adopted our version or the plain meaning version of
12 "creditor."

13 JUSTICE SOTOMAYOR: But let's go back. If
14 you're going to take the literal meaning of "State"
15 definitionally, why aren't you taking the literal
16 meaning of "creditor"?

17 MR. MCGILL: Because we are applying a
18 principle that this Court laid down in Lawson and
19 unanimous reaffirmed in northwest Austin that when a
20 statutory definition mechanically applied will
21 annihilate a major purpose of the statute, then you
22 don't apply it. Or when it leads to absurd results, you
23 don't apply it.

24 JUSTICE SOTOMAYOR: So how do I read into
25 the statute?

1 MR. MCGILL: It would annihilate the major
2 purpose of the 1946 Act, which was to -- which was to
3 prevent States from enacting their own bankruptcy laws.
4 And that is your --

5 JUSTICE SOTOMAYOR: Well, you actually can't
6 do that, meaning you can't do that according to our
7 prior precedent. It is inherent in State sovereignty
8 that States have to have some method, their own method,
9 of controlling their municipalities.

10 You can have uniform bankruptcy laws, but if
11 you don't make them available to a municipality because
12 the State hasn't approved it, can you rob a State under
13 State sovereignty of all power to regulate its
14 municipality and to save it from -- from bankruptcy?

15 MR. MCGILL: Yes. I mean, that's always
16 been true. It was true in 1946 --

17 JUSTICE SOTOMAYOR: Actually, so why do so
18 many major commentators, bankruptcy writers, district
19 and circuit courts, the Sixth Circuit included, have
20 said that that's impossible; that you can't rob a State
21 of the power to regulate its municipalities if you're
22 offering it nothing in return?

23 MR. MCGILL: In 1946, the preemptive scope
24 of what is now Section 903(1) embraced any municipality.
25 It barred States from enacting -- it's essentially the

1 same language that exists today. Any -- it barred
2 States from binding, nonconsenting creditors to a
3 composition if they -- of holders of municipal debt.

4 JUSTICE SOTOMAYOR: And then we said in
5 *Faitoute* that you can't force States --

6 MR. MCGILL: This was --

7 JUSTICE SOTOMAYOR: -- to go into
8 bankruptcy.

9 MR. MCGILL: I believe that was *Ashton*.
10 And -- and -- and it was -- and of course, *Deacon*
11 subsequently readdresses *Ashton*, and -- and at least
12 narrows *Ashton*. But the Tenth Amendment problem that
13 was -- was raised in *Ashton* was that States -- that the
14 Federal government was giving municipalities too much
15 reign to go into bankruptcy themselves without the
16 supervision of their States. The -- the problem raised
17 in the *Ropico* decision, which is a 40-year-old district
18 court decision from the Southern District of New York,
19 is a very different problem, which is that the Federal
20 government is exercising too much power -- too much
21 bankruptcy power over municipalities.

22 And I would submit that simply, you know, to
23 the extent *Ropico* was concerned about that -- and it's
24 not a holding; it's just a straight statement at the
25 fifteenth page of the opinion -- it's wrong.

1 JUSTICE KAGAN: Mr. McGill --

2 MR. MCGILL: Sturges v. Crowninshield said
3 that -- that Congress's power under the Bankruptcy Code
4 is unlimited and supreme.

5 I'm sorry.

6 JUSTICE KAGAN: Can I talk to you about
7 Mr. Landau's textual argument? Because I came in here
8 thinking that your best argument is straight on the
9 text. It's not about purpose, because I don't know what
10 Congress's purpose here was; it's not on policy. It's
11 just straight on the text. But I now have a better
12 understanding of Mr. Landau's understanding of the text,
13 and so I just want to engage you on that, which is:
14 Look, Congress couldn't have just said "except for
15 purposes of Chapter 9" because of this flukey thing,
16 which is that the gateway provision is outside of
17 Chapter 9. So if it had just said "except for purposes
18 of Chapter 9," somebody could have said, oh, well, look,
19 I am entitled to be a debtor under Chapter 9, whether or
20 not I'm thought of as a State. And so they did it this
21 other way, which said -- which attacked the gateway
22 provision particularly. And then in doing that, they
23 assumed that all of Chapter 9 would follow in its wake.
24 Once you're not eligible for Chapter 9, none
25 of the provisions of Chapter 9 apply to you. That's

1 basically Mr. Landau's provision -- argument. So tell
2 me why that's wrong.

3 MR. MCGILL: It's -- it starts -- I think
4 the fundamental fallacy of the argument is that the
5 gateway requirement somehow excludes you from the scope
6 of Chapter 9 entirely. And we know that's wrong,
7 because if PREPA filed for Chapter 9 bankruptcy today,
8 it's Section 921(c) of the Code, a part of Chapter 9,
9 that would provide for the dismissal of that petition.
10 Chapter 9 applies to all persons, all people under the
11 compass of Federal law.

12 So I think that that's the fundamental
13 fallacy. Chapter 9 does apply. The textual argument --

14 JUSTICE BREYER: But it doesn't have to be
15 just that. He has some -- an additional string to the
16 bow; that is, what he wants us to do is to take the
17 words "a State" -- "this chapter does not limit or
18 impair the power of a State," which is in 903. Now, he
19 wants us to read that as if there were then a
20 parentheses, "a State that is a debtor under Chapter 9."
21 You see? And that a State -- what States? The States
22 that can be debtors under Chapter 9.

23 Now, that's how he wants us to read it, and
24 that means that that provision does not apply to Puerto
25 Rico or D.C. But it isn't just that no part of

1 Chapter 9 could apply to them. It is that if you look
2 at the first sentence of 903, is that what it says is
3 that those States that are referred to in that first
4 sentence maintain all the power to control by
5 legislation or otherwise a municipality.

6 And he says, what could that apply to?
7 Those entities that are not in Chapter 9 obviously have
8 all the powers they normally had, but the ones that are
9 in Chapter 9 might not. And so what this Section 903 is
10 addressed to are those States that are in Chapter 9,
11 because there's no need to apply that first sentence to
12 anyone else, and therefore it doesn't apply to Puerto
13 Rico, that first sentence. But since the key sentences,
14 one and two, are subparts of the first sentence, they
15 don't apply, either.

16 I think that's the whole argument. And it
17 isn't requiring us to really play that much -- you don't
18 play games with the words. All you do is say, this is
19 one of those parts of Chapter 9 -- not all, but one of
20 those parts -- that even though it doesn't use the word
21 "debtor" under Chapter 9, applies only to debtors under
22 Chapter 9. I think that's the argument I got, and is
23 that -- that's, I think, probably consistent with what
24 Justice Kagan was saying.

25 MR. MCGILL: I have two --

1 JUSTICE BREYER: You got it? Do you see
2 what I'm saying?

3 MR. MCGILL: Two -- two responses.

4 JUSTICE BREYER: Good. All right.

5 MR. MCGILL: The first is the -- the textual
6 response that you yourself, Justice Breyer, elaborated,
7 that Congress spoke with remarkable precision here in
8 101(52). It says you're not a State for one purpose
9 only, which is defining who may be a debtor under
10 Chapter 9, and that's an unmistakable textual reference
11 to Section 109. And so that tells you that Puerto Rico
12 is a State for every other purpose under the Bankruptcy
13 Code, because that's what Section 101 says.

14 JUSTICE BREYER: But not -- no. In -- my
15 guess is, if we go through Chapter 9, and the parts that
16 will -- do apply to debtors under Chapter 9 --

17 MR. MCGILL: But States are not debtors.

18 JUSTICE BREYER: -- whoa, whoa, whoa --
19 municipalities. State municipalities.

20 If we go through Chapter 9 and look at those
21 portions of Chapter 9 that do apply to municipalities
22 who are there legitimately as debtors, we will find some
23 sentences that clearly apply only to those who are in
24 there as debtors and clearly do not apply to anyone else
25 in the world. And he is saying this is one of those.

1 MR. MCGILL: So that misapprehends what
2 Section 903 does. What Section 903 is, is at the time
3 Congress is entering the field of municipal debt
4 adjustment in 1937, Section 903 is enacted to say that
5 Congress is not also entering the field of municipal
6 reorganization, reorganization that could occur under
7 Chapter 11. This was a very important point in both the
8 1934 and the 1937 debates. That adjustment was
9 something that was seen as within Congress's purview.
10 Reorganization of municipalities was seen as within the
11 States' purview.

12 So Section 903 says we are not entering the
13 field of reorganization when we're entering the field of
14 debt adjustment. And then *Faitoute* misreads
15 Section 903(1) -- 903, rather. At least in the judgment
16 of the subsequent Congress, *Faitoute* misread Section 903
17 to permit conflicting municipal bankruptcy laws.

18 And so Congress enacts Section 903(1). This
19 is now nine years later. And it enacts it for a very
20 different purpose than Section 903 was enacted. It
21 enacts a separate provision specifically to overrule
22 this Court's decision in *Faitoute*, and to make clear
23 that only under a Federal law should holders of
24 municipal bonds, which are widely held, be compelled to
25 accept a restructured debt.

1 JUSTICE GINSBURG: Mr. McGill, why would
2 Congress put Puerto Rico in this never-never land? That
3 is, it can't use Chapter 9, and it can't use a Puerto
4 Rican substitute for Chapter 9. It's locked out by the
5 provision on which you are relying, so it has to take
6 the bitter, but it doesn't get any benefit at all.

7 Why in the world -- what explains Congress
8 wanting to put Puerto Rico in this anomalous position of
9 not being able to restructure its debt?

10 MR. MCGILL: There are a few reasons, I
11 think. And as Mr. Landau has said, there is no
12 legislative history that sets this forth in detail, but
13 let me suggest a few reasons why Congress might have
14 done what it did.

15 First, Congress has for a long time
16 micromanaged Puerto Rico's debt. In the Jones Act, it
17 specifically limited the amount of debt Puerto Rico
18 could take on. That actually was kept and retained
19 through the Public Law 600. And it was only in 1961
20 that Congress ended its own restriction of Puerto Rico's
21 debt on the condition that the Puerto Rico -- Puerto
22 Rico include that restriction in its own constitution.
23 So there's a long history of Congress intervening on
24 Puerto Rico debt issues.

25 Second, Puerto Rico debt is uniquely triple

1 tax exempt. Congress has essentially told the nation
2 that -- and encouraged the nation all over to buy this
3 debt. So there is a -- this is -- this debt, even more
4 so than the average municipal bond, is widely disbursed
5 throughout the nation.

6 I think the -- third reason is that by 1984
7 Puerto Rico and D.C. are the two most indebted
8 Territories by a lot. Puerto Rico already had
9 \$9 billion of debt. The District owed 1.6 billion, and
10 it was about to hit the general obligation bond market
11 for the first time in its history.

12 So the question I -- I ask is, how would
13 Congress, at that moment in time, actually think that
14 this was the right time to abandon a 40-year-old policy
15 of uniformity and preemption in the field of municipal
16 bankruptcy, and -- and for the first time since 1946,
17 allow the District of Columbia and Puerto Rico to write
18 their own municipal-bankruptcy laws that may or may not
19 treat their nationwide creditors fairly, that may or may
20 not result in -- in decrees that are enforceable
21 nationwide?

22 There's no good reason or plausible reason
23 to think that Congress actually intended that result.
24 And under this Court's cases in *Timbers of Inwood* and
25 *Cohen v. de la Cruz*, when there is no clear indication

1 in the statutory text, no indication in the legislative
2 history --

3 JUSTICE KAGAN: Well, Mr. -- Mr. McGill, if
4 I could go back to Justice Breyer's question, because
5 Justice Breyer gave you a view of the way to read this
6 text, which is built on Mr. Landau's view, and said,
7 what's wrong with that? And you -- you go with the
8 gateway provision, and then even if not all of Chapter 9
9 follows in its wake, at least all the provisions in
10 Chapter 9 that refer to debtors follow in its wake.

11 And Justice Breyer said, what's wrong with
12 that, as a way to read this text. And then you answered
13 him, I think this is fair to say, by giving a -- a story
14 about what Congress meant to do in 903(1) in the wake of
15 *Faitoute*.

16 But, you know, both of you have stories
17 about this, and it's not -- just not clear which of you
18 is right. And I guess what I most want to think about
19 is this text. Why isn't Justice Breyer's, Mr. Landau's
20 view of the text just as good, if not better, than
21 yours? And I didn't come in here thinking that, but now
22 I kind of am thinking that.

23 So talk to me about the text, why that's not
24 just as good a view of the text?

25 MR. MCGILL: Because 101(52) is an

1 unmistakable textual reference to 109(c). And 109(c) is
2 telling us -- it's just -- it -- it says it's only for
3 this one purpose, except for the purpose of defining who
4 may be a debtor under Chapter --

5 JUSTICE KAGAN: But that's -- that's a
6 purpose that tells you whether you're now in Chapter 9
7 as a debtor.

8 MR. MCGILL: But -- but --

9 JUSTICE KAGAN: So what Mr. Landau is saying
10 is once you say you're -- you're -- you're not a State,
11 when it comes to who may be a debtor under Chapter 9,
12 that it's a pretty natural thing to say, and that means
13 that any provisions about being a debtor under Chapter 9
14 don't apply to you.

15 MR. MCGILL: Let's be clear that States
16 cannot be debtors, right? So it -- under Chapter 9. So
17 it's -- it's not that the State -- that the definition
18 of "State" can't possibly track the definition of
19 "debtor." It's the municipality that has to track the
20 definition of "debtor."

21 And 20-plus States categorically exclude
22 their municipalities from seeking Chapter 9 relief. So
23 they -- they are in the same boat, those municipalities,
24 as San Juan. There is no textual distinction to be
25 drawn from those municipalities under 109(c)(2).

1 De Moines is, just as much -- just as much as San Juan,
2 lacks the authorization understate law to file a
3 Chapter 9 petition.

4 JUSTICE GINSBURG: But that's up to the
5 State. It's up to the State to make that decision.
6 Puerto Rico isn't given that option.

7 MR. MCGILL: Well, that -- that is, of
8 course, true. It is an act of Congress that does that,
9 but -- but there are numerous exclusions that are solely
10 by dint of federal law. In fact, the rest of 109(c) are
11 exclusions that have been enacted by Congress of
12 municipalities from Chapter 9 entirely.

13 JUSTICE BREYER: All right. So you're
14 saying is -- I take it you're -- that you say -- you
15 say -- you're just used to this. So you don't
16 understand that I'm not used to it. And the -- the --
17 you -- you go look at 903. There -- there are three
18 separate sentences. And you're saying that the -- the
19 first sentence and second and third are really separate
20 things. That number 2 and 3, which are numbered 1 and
21 2, have a big objective.

22 If I read the cases you cite, I will say
23 Congress intended something very clear. They didn't
24 want those States who weren't in Chapter 9. They didn't
25 want those States who were not in Chapter 9. They

1 didn't want them to make rules for bankruptcy of
2 municipalities, not binding rules, anyway. That was
3 their purpose.

4 And there's just no reason to think that
5 when they had the specific thing before, they wanted
6 somehow to let Puerto Rico and District of Columbia do
7 it, do what the States couldn't do.

8 MR. MCGILL: It would have been --

9 JUSTICE BREYER: And you say, well, there is
10 a good reason. They said the good reason is the States
11 can come in to 9, and they can't. And you say, well,
12 that isn't a good enough reason.

13 Is that where -- have I got this?

14 MR. MCGILL: Well, it -- it certainly would
15 have been a momentous change in -- in the policy of
16 preemption that had existed uninterrupted since 1946
17 that had been reaffirmed in 1976 and in 1978. This was
18 battleground legislation in 1976 and 1978. It was --
19 the House had rejected. It had moved to remove the
20 preemption provision. And the Senate --

21 JUSTICE BREYER: Referencing that, can you
22 give me one more thing? Give me your best either Law
23 Review article, treatise, legislative history, whatever
24 it is, that will -- that will show me that, in your
25 view, look, these are separate things. This -- the

1 first sentence was not meant to be just a gateway
2 into -- into 1 and 2, that -- that it was designed to do
3 what you say. What do I --

4 MR. MCGILL: I would look at this Court's
5 cases in *Iraq v. Beaty*, *Alaska v. United States*, and
6 *Whitridge*. *Whitridge* is -- is an older opinion, but I
7 think it's very telling here because *Whitridge* is a case
8 that comes -- addresses how you read a proviso that was
9 enacted years after the antecedent provision. And what
10 *Whitridge* says is you look to the purpose of the proviso
11 and make sure that your -- your construction is
12 consistent with the purpose of the proviso.

13 *Iraq v. Beaty* is, of course, a unanimous
14 decision of this Court. And *Alaska v. The United States*
15 is -- is another not unanimous opinion of this Court.
16 So I don't think it's -- I think it's entirely possible
17 to read section 903(1) as a general independent
18 standalone rule, and that certainly is how Congress
19 enacted it when it was first enacted in 1946.

20 I have elaborated already. I think 903
21 applies to every State in the sense that it demarcates
22 where Congress is not entering and where Congress is.
23 That is the role that 903 plays in this statutory
24 scheme.

25 JUSTICE SOTOMAYOR: So you believe that the

1 States that don't permit their municipality to become
2 debtors are limited in what they can do by 903? In
3 other words, their -- their municipalities are not
4 debtors? Their sovereign powers have been cut off?
5 They cannot reorganize the debt except through
6 Chapter 9?

7 Then we're talking about a coercive
8 provision. We're saying you can't do anything about the
9 composition of your debt. If 98 percent of the
10 creditors want to reorganize their debt with you and
11 those 2 percent vultures are saying no, and a Court
12 would say it's not an impairment of a contract to redo
13 this debt because of the need, everything else that
14 we've said in the past, you're saying States can't do it
15 if -- if -- they can only do it under Chapter 9?

16 MR. MCGILL: You have, in your hypothetical,
17 Justice Sotomayor, I believe, supposed that the -- that
18 the composition does not violate the contract clause.
19 And the question then would be one of statutory
20 construction whether the composition you have
21 hypothesized fits within the term of 901.

22 JUSTICE SOTOMAYOR: Assume -- I assume it
23 doesn't. Assuming. You're saying 903 intended to
24 preclude States, solvent States and solvent
25 municipalities, it -- it intended to stop States from

1 doing any reorganization of any debt, even if it doesn't
2 impair the contract clause, it can't do it until every
3 creditor approves, whether or not their municipality is
4 in Chapter 9 or not?

5 MR. MCGILL: Except under Chapter 9. And
6 what Congress --

7 JUSTICE SOTOMAYOR: All right. And what's
8 not coercive about that? What's the choice for States
9 that Congress is giving?

10 MR. MCGILL: The -- the choice for States
11 for -- that -- is Chapter 9 or nothing. And the choice
12 for Puerto Rico and the District is come to Congress.
13 And what is going on right now --

14 JUSTICE SOTOMAYOR: It's like the Tenth
15 Amendment right of States to deal with their
16 municipalities consistent with the Constitution. Where
17 does that leave -- you can make uniform-bankruptcy laws,
18 but nothing about that permits you to impair the rights
19 of States so drastically?

20 MR. MCGILL: Well, the contract clause, I
21 think, stands as an independent bar to any -- to any
22 impairment of the obligation of contracts. It was
23 recognized at the time of beacons that States were
24 powerless to act in this area. That was -- that comes
25 right out of Bekins.

1 Now, what's going on today with respect to
2 Puerto Rico and D.C. is Congress is addressing right
3 now, across the street, how to deal with Puerto Rico's
4 fiscal crisis. That's -- that is what's going on.
5 Puerto --

6 JUSTICE GINSBURG: Isn't there also
7 legislation to put Puerto Rico back in Chapter 9?

8 MR. MCGILL: May -- may I answer?

9 CHIEF JUSTICE ROBERTS: Yes.

10 MR. MCGILL: Yes, there is, Justice
11 Ginsburg, just like in -- Puerto Rico is -- Congress is
12 considering a range of options for Puerto Rico,
13 including Chapter 9, just as Congress considered a range
14 of options for the District of Columbia during its own
15 financial crisis in the 1990s, which resulted in a
16 financial control board rather than Chapter 9.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Landau, you have four minutes remaining.

19 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

20 ON BEHALF OF THE PETITIONERS

21 MR. LANDAU: Thank you, Mr. Chief Justice.

22 Very quickly, I'd like to make three basic
23 points.

24 First, I think we've seen an example of
25 selective textualism this morning. For their -- for

1 Respondents' argument to make any sense with respect to
2 the various Territories, they have to say that these
3 other Territories, such as the Virgin Islands and Guam,
4 are encompassed within the definition of the word
5 "State."

6 They just can't say that when Congress,
7 which had long-defined "State" to include all the
8 possessions and Territories, in 1984, in the very
9 provision that we are considering, said "State" includes
10 Puerto Rico and D.C. That is probably the clearest
11 expressio unius one can imagine. So for them to be
12 saying that, well, even though it said Puerto Rico and
13 D.C., it meant to include everything -- and again, Guam,
14 for instance, and the Virgin Islands, have also Triple A
15 tax-exempt bonds. So everything that is true for Puerto
16 Rico would be true of the Virgin Islands and -- and
17 Guam.

18 I guess the more fundamental point, though,
19 is when -- when you are asking them about how this --
20 their argument is, if you accept our position, then any
21 municipality that is not authorized to file under
22 Chapter 9 is also exempt from Chapter 9. They're trying
23 to talk about municipalities. But I think, as Justice
24 Ginsburg made the point, no, here we're talking about
25 States.

1 Massachusetts, for instance, always has the
2 power to authorize its municipalities to seek Chapter 9
3 relief. The door is open for Massachusetts, and -- as
4 it was for Michigan when Michigan, on the same day,
5 authorized Detroit to file for bankruptcy, and Detroit
6 in fact filed for bankruptcy. So the States that
7 haven't yet authorized just maybe haven't had a crisis
8 that requires them to do that.

9 But they are trying to say you have to
10 compare San Juan to Boston. Our point is, the relevant
11 comparison, since we're talking about the word "State,"
12 is you have to compare Puerto Rico to Massachusetts or
13 Michigan.

14 Unlike Massachusetts or Michigan, which have
15 the door -- excuse me -- the key to the doorway, to the
16 gateway in 109(c)(2), Puerto Rico categorically does
17 not. Thus, when you arrive at 903 -- and the word
18 "State" appears only three times in all of Chapter 9.
19 It appears twice in -- in Section 903, which is
20 reaffirming, saying this chapter, Chapter 9, does not
21 limit or impair the power of States to control their
22 municipalities.

23 So that makes no sense as applied to
24 jurisdictions like Puerto Rico that are categorically
25 excluded from coming through the gateway of 109(c)(2),

1 whereas it does make sense to apply that to the
2 Massachusettses of the world, regardless of whether to
3 date they have authorized their municipalities.

4 Finally, the last point I'd like to make is,
5 we've talked a lot about -- about legal principles, as
6 is appropriate, today. But this is also a
7 flesh-and-blood situation in Puerto Rico.

8 Puerto Rico enacted this Recovery Act
9 because it is facing a crisis in providing essential
10 services to its citizens. It is implausible at best to
11 think that Congress left -- by taking Puerto Rico out of
12 Chapter 9, meant to -- and that's all we knew. It took
13 Puerto Rico out of Chapter 9. To say that that
14 precludes Puerto Rico from dealing in any way with the
15 financial crisis for its public utilities, which in
16 this -- for its public utilities, which provide basic
17 services like electricity and water to its people --
18 that's the question: Whether people in a village in
19 Puerto Rico will be able to get clean water.

20 That -- this is something -- again, it's
21 fine to talk about the generalities of the law, but when
22 you're trying to think about congressional intent,
23 please don't lose sight of the fact -- of the
24 fundamental implausibility and the anomaly of saying,
25 when Congress took Puerto Rico out of Chapter 9, that it

1 meant to leave that Chapter 9 preemption provision in
2 place, and thus leave Puerto Rico in the dire situation
3 that led the Commonwealth to use its police powers to
4 enact this Recovery Act in the first place.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.

8 (Whereupon, at 12:12 p.m., the case in the
9 above-entitled matter was submitted.)

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