IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING, *et al.*, *Plaintiffs*, v. NEIL S. WOLIN, in his official capacity as Acting United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council, 1500 Pennsylvania Avenue, NW, Washington, DC 20220, *et al.*, *Defendants*.	Case No. 1:12-cv-01032 (ESH) Judge: Hon. Ellen S. Huvelle

STATE PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

By delegating immense power to the Treasury Secretary and Federal Deposit Insurance Corporation ("FDIC"), freeing them from the well-established rules and rights of bankruptcy law, and insulating them against meaningful congressional and judicial oversight, Title II of the Dodd-Frank Act[1] violates the Constitution. It violates the Constitution's separation of powers, the Fifth Amendment right to due process, and the constitutional requirement that the nation's bankruptcy laws be "uniform." Am. Compl. ¶¶ 226-255.[2]

The State Plaintiffs have standing to litigate those constitutional claims in this court because, in addition to violating the Constitution, Title II expressly abridges the rights and interests that the State Plaintiffs previously enjoyed under the federal bankruptcy laws.

Specifically, Title II superseded the Bankruptcy Code with a new legal regime for the "liquidation" of financial companies, controlled by the Treasury Secretary and the FDIC. As part of this revision to the bankruptcy laws, Title II expressly eliminated the federal guarantee that similarly situated creditors will receive equal treatment, by empowering the FDIC to depart from the ordinary rules of bankruptcy law and to discriminate among similarly situated creditors. Dodd-Frank § 210(b)(4), 12 U.S.C. § 5390(b)(4).

Put simply, upon its enactment, Title II modified the rights that creditors previously had under federal law, implicitly amending them to add, "… *except in 'orderly liquidations' of financial companies, at the Treasury Secretary's and FDIC's discretion*."

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[1] The Act's official title is the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). This memorandum, like the Government's, refers to it as "Dodd-Frank" or "the Act." But for ease of reference, it will cite by reference to both the original Act and its codification in the U.S. Code.

[2] Throughout this memorandum, citations to "Am. Compl." refer to the Second Amended Complaint, the currently operative Complaint filed on Feb. 19, 2013 (ECF No. 24).

The State Plaintiffs have been and continue to be directly and actually injured by Title II's modification of the bankruptcy laws. The States—including state workers' pension funds—invest in the debt of financial companies that could be liquidated under Title II. Am. Compl. ¶ 169. And as to their injury—Title II's abridgement of their rights under federal law as creditors—they explicitly and specifically alleged this point in their Complaint:

> On its face, Section 210(b)(4) of the Act abrogates the rights under the U.S. Bankruptcy Code of creditors of institutions that could be liquidated, destroying a valuable property right held by creditors—including the State Plaintiffs—under bankruptcy law, contract law, and other laws, prior to the Dodd-Frank Act. Section 210(b)(4) exposes those creditors to the risk that their credit holdings could be arbitrarily and discriminatorily extinguished in a Title II liquidation, and without notice or input. Title II's destruction of a property right held by each of the State Plaintiffs harms each State, and is itself a significant, judicially cognizable injury that would be remedied by a judicial order declaring Title II unconstitutional.

Am. Compl. ¶ 170. The Complaint further noted that future financial injury could arise "*in addition to*" the injury that Title II already imposes, *id.* ¶ 171 (emphasis added), but the actual basis of the State Plaintiffs' standing—Title II's abrogation of the State Plaintiffs' statutory rights—was plainly stated on the face of the Complaint. The Government simply ignored the State Plaintiffs' theory of standing and instead criticized a theory of standing that the State Plaintiffs never advanced.

The bankruptcy code's pre-Dodd-Frank guarantee to creditors was an immensely valuable right under federal law, for reasons stressed repeatedly by the Supreme Court, lower courts, and myriad bankruptcy scholars. "Equality of distribution among creditors is a *central policy* of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property." *Begier v. IRS*, 496 U.S. 53, 58 (1990) (citing 11 U.S.C. § 726(b)) (emphasis added). To that end, bankruptcy law "prevents the debtor from favoring one creditor over others" by prohibiting "preferential payments" on the eve of

bankruptcy, *see id.* (citing 11 U.S.C. § 547(b)); it imposes an "automatic stay" to prevent individual creditors from racing to recoup their investment from the debtor before others do, *see* Douglas G. Baird, *Elements of Bankruptcy* 191 (5th ed. 2010) (citing 11 U.S.C. § 362); and it includes various other protections to ensure equitable pro rata treatment of creditors, under the supervision of the bankruptcy courts, district courts, and courts of appeals. *See infra* pp. 6, 15-16.

Most important for present purposes, those bankruptcy laws are "statutes creating legal rights, the invasion of which"—by Title II, in this case—"creates standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). The Government argues that the State Plaintiffs lack standing, but that argument mischaracterizes both the nature of the State Plaintiffs' injury and the requirements of standing.

The Government asserts that the State Plaintiffs' alleged injury is limited to financial loss that they could suffer in a future liquidation under Title II's Orderly Liquidation Authority. *See* Mot. to Dismiss at 44-49. But that is *not* the present injury that the State Plaintiffs have alleged; rather, the State Plaintiffs already have been injured by Dodd-Frank's abridgement of their valuable statutory right to be treated equally among similarly situated creditors, a right guaranteed to them by pre-Dodd-Frank bankruptcy law. Am. Compl. ¶¶ 169-170. True, future financial losses may someday be a *further* result of Title II's abrogation of the State Plaintiffs' rights, *see id.* ¶ 171, but that future injury would be in addition to the injury that already occurred—the destruction of the State Plaintiffs' pre-Dodd-Frank statutory rights.

The Government further argues that the State Plaintiffs must defer litigation of their constitutional claims unless and until a long chain of events occurs: namely, when the Government uses Title II to liquidate a company of which the State Plaintiffs are creditors, *and* the FDIC treats the State Plaintiffs differently from other similarly situated creditors, *and* the

State Plaintiffs receive less than they would have received in a purely hypothetical "chapter 7" bankruptcy scenario, *and* the State Plaintiffs exhaust their administrative remedies at the FDIC. Only then, according to the Government, can the State Plaintiffs litigate their constitutional claims. *See* Mot. to Dismiss at 49 & nn. 24-25.

But the Government, in ignoring the injury that the States already suffer by Title II's very terms and proposing that much-delayed route to judicial review of the State Plaintiffs' constitutional claims, fails to note that Dodd-Frank expressly *prohibits* the States from litigating these claims once the Treasury Secretary initiates a "liquidation." Specifically, Title II bars the State Plaintiffs from litigating those issues in judicial review of the Treasury Secretary's decision to begin a liquidation; it bars the State Plaintiffs from litigating those issues in judicial review of the FDIC's execution of the liquidation process; and it purports to bar the State Plaintiffs from litigating those issues in other courts once a liquidation occurs. *See infra* pp. 28-30. Simply put, the choice is not between the Court hearing these claims before a liquidation occurs and hearing them after the FDIC completes its work, as the Government suggests. Rather, Dodd-Frank forces the courts either to hear these claims before a Title II liquidation occurs, or never at all.

As the Supreme Court reiterated just three years ago, "a separation of powers violation may create a 'here-and-now' injury that can be remedied by a court." *Free Enterp. Fund v. PCAOB*, 130 S. Ct. 3138, 3164 (2010). And in this case, the enactment of Dodd-Frank's Title II caused precisely such an injury, by modifying the federal bankruptcy laws to abridge the State Plaintiffs' rights as creditors. The State Plaintiffs have standing to bring these claims. Their claims are ripe. The Government Defendants' motion to dismiss should be denied.

STATUTORY AND REGULATORY BACKGROUND

I. Bankruptcy Law Prior To Dodd-Frank

Prior to Dodd-Frank's enactment, the liquidation or reorganization of failed financial companies, such as bank holding companies and nonbank financial companies, was covered by two chapters of the Bankruptcy Code: chapter 7 for "liquidations" (that is, winding down the company) and chapter 11 for reorganizations. *See* 11 U.S.C. §§ 701 *et seq.* (chapter 7), §§ 1101 *et seq.* (chapter 11); *see generally* Hollace T. Cohen, *Orderly Liquidation Authority: A New Insolvency Regime To Address Systemic Risk*, 45 U. Rich. Law Rev. 1143, 1143-44 (2011) ("Title II … replaces the long-established means for the liquidation of such companies under Chapter 7 or Chapter 11 of the Bankruptcy Code").[3]

Under traditional bankruptcy law, the proceedings are commenced by the filing of a petition in federal bankruptcy court—either a petition filed by the debtor company, or a petition filed by the company's creditors. 11 U.S.C. §§ 301, 303. Once commenced, the process is managed by the bankruptcy court, subject to review by the district court, court of appeals, and Supreme Court. *Id.* § 105, 28 U.S.C. § 158. In both chapter 7 and chapter 11 bankruptcies, the trustee elected by the creditors' committee and the United States trustee have broad powers to ensure that the creditors' rights are protected. *See, e.g.*, 11 U.S.C. §§ 341 & 705 (creditors' committee meeting), §§ 702 & 1104 (election of trustee), §§ 704 & 1106 (trustee's duties), §§ 307, 705(b), & 1102 (United States trustee). The trustees' actions are also subject to judicial oversight: A chapter 11 reorganization cannot be finalized without the court's approval, *id.*

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[3] As the Motion to Dismiss notes, other laws govern the liquidation of other financial companies, such as bank subsidiaries that are insured depository institutions; insurance companies; and broker-dealers. *See* Mot. to Dismiss at 13 n.8; *see id.* at 13 n.9. Those types of financial institutions, and those alternative resolution regimes, are not at issue in this case.

§ 1129; and a chapter 7 liquidation is completed either by the court discharging the debtor or converting the proceeding into a chapter 11 reorganization. All of this occurs in open and transparent judicial proceedings. In sum, "traditional bankruptcy law reflects a balance of power in which the debtor in possession (DIP), the creditors' committee, the DIP lender, and the bankruptcy judge play discrete roles[.]" Douglas G. Baird & Edward R. Morrison, *Dodd-Frank For Bankruptcy Lawyers*, 19 Am. Bankr. Inst. L. Rev. 287, 287-88 (2011).

In addition to those procedural protections, creditors retain critically important substantive rights. Most importantly, similarly situated creditors are entitled to equal treatment, the pro rata payment on their claims. 11 U.S.C. §§ 726(b), 1123(a)(4). And the "automatic stay" reinforces that right, by preventing individual creditors and other stakeholders from seeking preferential treatment from the company. *Id.* § 362.

In sum, the bankruptcy code's prohibition against selective favoritism or discrimination among creditors solves the problem central to credit markets: absent an *ex ante* definition of rights among creditors, bankruptcy would force each creditor into an *ex post*, eve-of-bankruptcy "race for assets, not necessarily just to grab more than his share but also simply to avoid being left with nothing. Accordingly, creditors need a mechanism to bind them to their presumptive ex ante agreement and to foil the attempts of each creditor to welsh on the agreement for individual gain." Thomas H. Jackson, *Avoiding Powers In Bankruptcy*, 36 Stan. L. Rev. 725, 758-59 (1984). Federal bankruptcy law provided that very "mechanism" to the State Plaintiffs and other creditors, until Dodd Frank's Title II was enacted.

II. Dodd-Frank Title II: "Orderly Liquidation Authority"

Dodd-Frank's Title II altered the longstanding protections guaranteed to creditors of financial companies. While the Government's Motion to Dismiss stresses the circumstances that preceded Dodd-Frank, *see* Mot. to Dismiss at 12, its narrative neglects to mention that the

Act's changes come at great cost to the rights of financial companies' creditors, including the State Plaintiffs, whose rights "are significantly more limited under the orderly liquidation authority[.]" Hollace T. Cohen, *Orderly Liquidation Authority: A New Insolvency Regime to Address Systemic Risk*, 45 U. Rich. L. Rev. 1143, 1150 (2011).

A. The Treasury Secretary's Liquidation Determination

Upon the recommendations of the FDIC Board of Directors and the Federal Reserve Board of Governors, the Treasury Secretary may order the liquidation of a covered financial company that he finds to be "in default or in danger of default," Dodd-Frank § 203, 12 U.S.C. § 5383, and commit the company to the FDIC's receivership, *id.* § 204(b), 12 U.S.C. § 5384(b).

For this liquidation determination, the Secretary makes several findings with respect to the company's threat to financial stability and the ability of Title II liquidation to mitigate that threat. Specifically, the Secretary must find, *inter alia*, that the targeted company is "in default or in danger of default"; that the company's default, absent the Dodd-Frank liquidation process, would have "serious adverse effects on financial stability in the United States"; that no "viable" private-sector alternative to Title II liquidation is "available"; that Title II liquidation would "avoid or mitigate" the "adverse effects" that the company's default would have on financial stability;[4] and finally, that the company to be liquidated is, in fact, a "financial company" as defined by Dodd-Frank. *Id.* § 203(b)(1), (2), (3), (5), (7), 12 U.S.C. § 5383(b)(1), (2), (3), (5), (7).

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[4] The Amended Complaint indicated that this finding refers to the avoidance or mitigation of "adverse effects" on creditors. Am. Compl. ¶ 160. That erroneously *overstated* Dodd-Frank's protection of creditors: the statutory finding actually refers to the "adverse effects" on *financial stability* referenced in the first finding, not adverse effects on *creditors*. *See* Dodd-Frank § 203(b)(5), 12 U.S.C. § 5383(b)(5).

To place a financial company into liquidation under Title II, the Treasury Secretary also must make a finding with respect to creditors and other stakeholders: namely, that "any effect on the claims or interests of creditors" and other stakeholders is "appropriate" in light of the liquidation's impact on financial stability. *Id.* § 203(b)(4), 12 U.S.C. § 5383(b)(4). But what is "appropriate," like so many of the other factors considered by the Treasury Secretary, is left to the Secretary to define and enforce without the oversight of judicial review, as explained below.

B. Judicial Review Of The Treasury Secretary's Liquidation Determination

If the targeted financial company does not "acquiesce or consent to" the Treasury Secretary's liquidation determination, then the Treasury Secretary petitions this court, the U.S. District Court for the District of Columbia, to authorize the company's liquidation. *Id.* § 202(a)(1)(A)(i), 12 U.S.C. § 5382(a)(1)(A)(i). Although the targeted company is to be notified of the Treasury Secretary's petition,[5] the case is filed under seal, with criminal penalties for anyone who "recklessly discloses" either the Treasury Secretary's determination or his petition to the district court; the court reviews the case on a "strictly confidential basis, and without any prior public disclosure[.]" *Id.* §§ 202(a)(1)(A)(ii) (under seal), 202(a)(1)(A)(iii) ("confidential" judicial review "without any prior public notice"), 202(a)(1)(C) (criminal penalties), 12 U.S.C. §§ 5382(a)(1)(A)(ii), 5382(a)(1)(A)(iii), 5382(a)(1)(C).

Despite the scope and impact of the Treasury Secretary's determination, the district court's review is limited to only two of the Secretary's seven findings: namely, that the

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[5] The district court's local rules suggest that the case may proceed without the company receiving actual notice that the case has begun: in commencing the case, the Treasury Secretary must certify either that the company received "actual notice" of his petition to the court, or that he made "*efforts* . . . to give such notice and furnish such copies" of the petition. Local Cv. R. 85(c) (emphasis added).

company is a "financial company" and that it was "in default or in danger of default," and both findings are reviewed under the lenient arbitrary-and-capricious standard. *Id.* § 202(a)(1)(A)(iii), 12 U.S.C. § 5382(a)(1)(A)(iii).

And the court's review is limited not just in scope, but also in time—and strictly so. If the court does not make a final decision on the merits of the case within *twenty-four hours* of receiving the Treasury Secretary's petition, the Government wins by default. *Id.* § 202(a)(1)(A)(v), 12 U.S.C. § 5382(a)(1)(A)(v). That 24-hour period cannot be stayed; the court must make a "determination"—a final decision on the merits accompanied by a judicial opinion—before the deadline expires, or the targeted company automatically loses. *See id.* § 202(a)(1)(A)(iii) & (v), 12 U.S.C. § 5382(a)(1)(A)(iii) & (v).

In light of that strict deadline, this court has promulgated a local rule governing the management of such cases, instructing the Treasury Secretary to give the court 48 hours' notice, under seal, before filing the case. That rule is itself extraordinary, for it imposes requirements not found in—and, indeed, in tension with—Dodd-Frank's own terms; in any event, the Local Rule prescribes no penalty or other enforcement mechanism for its advance-notice provision. Local Cv. R. 85.

If the district court affirms the Treasury Secretary's determination, or if it fails to issue a decision within 24 hours, then the Treasury Secretary may begin the liquidation by appointing the FDIC as receiver. *See, e.g.*, *id.* § 204(b), 12 U.S.C. § 5384(b). The liquidation "shall not be subject to any stay or injunction pending appeal." *Id.* § 202(a)(1)(B), 12 U.S.C. § 5382(a)(1)(B).

Creditors are completely excluded from the district court's review of the Treasury Secretary's determination. Neither Dodd-Frank's judicial review provisions nor this court's local

rules allow parties other than the Government and the targeted company to participate in the 24-hour appeal. Dodd-Frank § 202(a)(1)(A)(iii), 12 U.S.C. § 5382(a)(1)(A)(iii); Local Cv. R. 85. In fact, the aforementioned confidentiality requirements, backed by the threat of criminal liability for those who disclose the Treasury Secretary's determination and the district court's review, ensure that creditors will not even know about the liquidation determination until the district court's review has ended.

Furthermore, the creditors' exclusion from judicial review applies even if the targeted company "acquiesces or consents" to the Government's liquidation decision, in which case there is no judicial review of the Treasury Secretary's determination at all. *See id.* § 202(a)(1)(A)(i), 12 U.S.C. § 5382(a)(1)(A)(i). If the targeted company does not challenge the Treasury Secretary's decision, then *no* court will review the Treasury Secretary's decision, no matter how the resultant Title II liquidation process affects creditors and other stakeholders.

In sum, creditors have no ability to secure an injunction against the Secretary's liquidation determination under any circumstances; such relief is unavailable to creditors no matter what the liquidation's "effect on the claims or interests of creditors" might be. *See id.* §§ 203(b)(4), 210(b)(4), 12 U.S.C. §§ 5383(b)(4), 5390(b)(4).

C. The FDIC's Powers In Liquidating The Company

Once appointed as the company's "receiver," the FDIC has broad powers to liquidate the company. The FDIC "succeed[s] to … all rights, titles, powers, and privileges of the covered financial company and its assets, and of any stockholder, member, officer, or director[.]" *Id.* § 210(a)(1)(A), 12 U.S.C. § 5390(a)(1)(A).

Unlike in chapter 7 bankruptcies, the Title II "liquidation" process is not limited to breaking up and winding down the company. The FDIC can merge the company with another company, or sell its assets "without obtaining any approval, assignment, or consent with respect

to such transfer." *Id.* § 210(a)(1)(G), 12 U.S.C. § 5390(a)(1)(G). It can transfer assets and claims to a "bridge financial company" owned and controlled by the FDIC. *Id.* § 210(h)(1)(A), 12 U.S.C. § 5390(h)(1)(A). It can repudiate any contract or lease that it finds to be "burdensome." *Id.* § 210(c)(1), 12 U.S.C. § 5390(c)(1). The liquidation process is funded not by congressional appropriations, but instead by the FDIC's own unilateral acts of selling the liquidated company's assets or levying "assessments" on other financial companies. *Id.* § 214(b), 12 U.S.C. § 5394(b). This non-appropriations funding is accomplished by Treasury's establishment of an "Orderly Liquidation Fund" available to be loaned to the FDIC, which repays the loans through asset sales or through assessments. *Id.* § 210(n)-(o), 12 U.S.C. § 5390(n)-(o).

Finally, as noted above, Dodd-Frank empowers the FDIC to depart from the ordinary rules of bankruptcy by discriminating among similarly situated creditors to the extent that the FDIC deems necessary to achieve its objectives in the liquidation. *Id.* § 210(b)(4), 12 U.S.C. § 5390(b)(4).

D. Judicial Review Of The FDIC's Liquidation Actions

A creditor dissatisfied with the FDIC's resolution of its claims may file an appeal in U.S. District Court, in the district of the liquidated company's principal place of business. Dodd-Frank § 210(a)(4), 12 U.S.C. § 5390(a)(4). That court's jurisdiction over such claims is exclusive. *Id.* § 210(a)(9)(D), 12 U.S.C. § 5390(a)(9)(D).

But Title II caps the amount that creditors can receive on their claims. Specifically, the creditor may not receive an amount greater than it "would have received if" the FDIC "had not been appointed receiver with respect to the" liquidated company and that company "had been liquidated under chapter 7 of the Bankruptcy Code [or other applicable state law]." *Id.* § 210(d), 12 U.S.C. § 5390(d). These recovery caps, based on a hypothetical chapter 7 wind-down of the company, apply even if the company likely would have been reorganized

under chapter 11 instead of being wound down and sold off under chapter 7. And those caps apply even if the company had been liquidated not because it was "in default" but, rather, because it was "in *danger* of default." *See* Dodd-Frank § 203(b)(1) (emphasis added), 12 U.S.C. § 5383(b)(1). This alternative-universe inquiry effectively requires the FDIC and the reviewing court to "imagine the liquidation value of the institution in an economy that is suffering an economic collapse. That liquidation value is likely to be close to zero." Douglas G. Baird & Edward R. Morrison, *Dodd-Frank For Bankruptcy Lawyers*, 19 Am. Bankr. Inst. L. Rev. 287, 316 (2011).

Taken together, this process replaces not just the ordinary bankruptcy process, but also the general availability of suits against the government for just compensation under the Tucker Act, 28 U.S.C. § 1491, which was created to ensure that government deprivations of property are fully compensated. *See* Dodd-Frank § 210(e), 12 U.S.C. § 5390(e) (providing that, "[e]xcept as provided in this subchapter, no court may take any action to restrain or affect the exercise of powers or functions of the receiver hereunder"); *see id.* § 210(a)(9)(D), 12 U.S.C. § 5390(a)(9)(D) ("[e]xcept as otherwise provided in [Title II], no court shall have jurisdiction over . . . any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of" the liquidated company).

And Title II effectively reverses the burden of proof in resolving creditors' claims against the company, in a manner that "differs significantly from that of the Bankruptcy Code." Hollace T. Cohen, *Orderly Liquidation Authority: A New Insolvency Regime To Address Systemic Risk*, 45 U. Rich. Law Rev. 1143, 1174 (2011). Under the Bankruptcy Code, a claim is deemed allowed unless a party in interest objects to the claim in bankruptcy court. 11 U.S.C. § 502(a). Under Title II, by contrast, the burden falls upon the creditor to "prove[]" his claim "to

the satisfaction of" the FDIC. Dodd-Frank § 210(a)(3)(D)(i), 12 U.S.C. § 5390(a)(3)(D)(i). Failing that, the creditor must then appeal to the district court, pursuant to the aforementioned process. *Id.* § 210(a)(4), 12 U.S.C. § 5390(a)(4).

Finally, Title II limits the district court's remedies to money damages, and only money damages, determined in accordance with Dodd-Frank's hypothetical rubric. *Id.* § 210(e), 12 U.S.C. § 5390(e). Aggrieved creditors cannot secure injunctive relief to block a liquidation, even if they seek not merely to increase their payout from the liquidated company, but to secure a judicial declaration that the FDIC and Treasury Secretary lack constitutional power to liquidate the company at all.

E. Title II's Blanket Prohibition Against All Other Lawsuits

After establishing those two narrow types of judicial review—tightly circumscribed and strictly confidential review of the Treasury Secretary's liquidation determination, followed by narrowly limited judicial review of the FDIC's payment to creditors—Title II closes all other courthouse doors. It prohibits all other courts from taking "any action to restrain or affect the powers or functions of the [FDIC as receiver]." *Id.*

STANDARD OF REVIEW

Plaintiffs bear the burden of proving that the court has subject matter jurisdiction to hear their claims. *Lujan*, 504 U.S. at 561. But "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975), *quoted in Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1105 (D.C. Cir. 2008).

Although States are entitled to "special solicitude" with respect to their standing to sue in defense of their own sovereign and quasi-sovereign interests (*i.e.*, to defend their

financial assets, including the viability of state pension funds), *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), the allegations set forth in the Amended Complaint already satisfy "the most demanding standards of the adversarial process," by identifying a justiciable injury. *Id.* at 521.

Finally, "[f]or each claim, if constitutional and prudential standing can be shown for at least one plaintiff, [the court] need not consider the standing of the other plaintiffs to raise that claim." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

ARGUMENT

I. The State Plaintiffs Have Standing To Challenge Title II, Because Title II Eliminates The Rights They Previously Retained Under Federal Bankruptcy Law

In criticizing the State Plaintiffs' standing to bring this suit, the Government mischaracterizes the State Plaintiffs' theory of standing (at Mot. to Dismiss at 44-45):

> the States speculate that one of the financial companies of which their pension funds are allegedly creditors may someday be subject to orderly liquidation under Title II, and that those pension funds will suffer a loss as a result of the Title II process that would be greater than the loss they would have suffered if the company had instead been liquidated under the Bankruptcy Code.

But that is not, in fact, the State Plaintiffs' theory of standing. The State Plaintiffs' standing is not based on the threat of future financial loss. Rather, the State Plaintiffs' injury is Dodd-Frank's express abrogation of the statutory rights that the State Plaintiffs previously retained under the Bankruptcy Code. *See* Am. Compl. ¶ 170.

As investors in the unsecured debt of financial companies, the State Plaintiffs were protected by the federal bankruptcy laws' guarantee of equal treatment of similarly situated creditors. By abridging that guarantee, Title II invades the State Plaintiffs' legally protected interests, injuring them and giving them standing to challenge Title II's constitutionality. The elimination of their statutory rights is "an invasion of a legally protected interest," which gives them standing to bring this case. *Lujan*, 504 U.S. at 560.

A. Prior To Dodd-Frank, Federal Bankruptcy Law Protected The State Plaintiffs' Right To Equal Treatment Among Similarly Situated Creditors

As noted earlier, the Bankruptcy Code guarantees that similarly situated creditors will receive equal treatment in their claims against the company, both in chapter 7 liquidations and in chapter 11 reorganizations. *See* 11 U.S.C. § 726(b), 1123(a)(4). That statutory guarantee is "a central policy of the Bankruptcy Code," a mechanism that "prevents the debtor from favoring one creditor over others[.]" *Begier*, 496 U.S. at 58.

This is a point the Supreme Court has reiterated time and time again. *See, e.g.*, *Mayer v. Hellman*, 91 U.S. 496, 501 (1875) ("The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt.").[6] The guarantee serves as a "cornerstone of the bankruptcy structure," supporting the weight of the entire system; its removal "would encourage a race among creditors, engender favoritism by the debtor, and result in inequality of distribution." Charles Seligson, *The Code and the Bankruptcy Act: Three Views On Preferences And After-Acquired Property*, 85 Banking L.J. 396, 396 (1968).

Perhaps most importantly, the guarantee of equal treatment "protect[s] the creditors from one another." *Young v. Higbee*, 324 U.S. 204, 210 (1945). For "while the creditors would agree to this system before they lent money, they face the usual problems of policing a deal after it is struck." Thomas H. Jackson, *Avoiding Powers In Bankruptcy*, 36 Stan. L. Rev.

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[6] *See also Boese v. King*, 108 U.S. 379, 385-86 (1883) ("the paramount force of the bankrupt act, the primary object of which, as this court has frequently announced, was to secure equality among the creditors of a bankrupt"); *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) ("historically one of the prime purposes of bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect creditors from one another"); *Buchanan v. Smith*, 83 U.S. 277, 294 (1872) ("the intention, aim, and object of bankrupt laws being the equal distribution of the insolven's [sic] estate among all creditors").

725, 758 (1984). Without "collective enforcement of the creditors' bargain," a debtor company's financial troubles would spark chaos among the creditors, causing them to "race for assets, not necessarily just to grab more than his share but also simply to avoid being left with nothing." *Id.*

To solve that problem, the Bankruptcy Code's guarantee of equal treatment stands as the "mechanism to bind [creditors] to their presumptive ex ante agreement and to foil the attempts of each creditor to welsh on the agreement for individual gain," *Id.* at 758-59. It is a mechanism that federal law has protected for nearly a century and a half, if not more. *See* Act of Mar. 2, 1867, 39th Cong. ch. 176, § 27 ("all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever").

B. Dodd-Frank Abrogated The State Plaintiffs' Federal Statutory Rights, By Empowering The FDIC To Discriminate Among Similarly Situated Creditors

Dodd-Frank's Title II abruptly ended that longstanding history of federal protection of creditors rights, and the certainty fostered by the rules of bankruptcy law, by partially abrogating the Bankruptcy Code's guarantee of equal treatment for similarly situated creditors. *See* Am. Compl. ¶ 170. Creditors are now subject to the broad and largely unreviewable discretion of the FDIC, which may take "any action" to violate the rule of equal treatment, if it determines that discrimination among similarly situated creditors "is necessary" to satisfy any one of four factors set forth in the statute. Dodd-Frank § 210(b)(4), 12 U.S.C. § 5390(b)(4).

Specifically, the FDIC may discriminate among similarly situated creditors if it determines that discrimination "is necessary" to achieve any one of four considerations: to "maximize the value" of the liquidated company's assets; to "initiate and continue operations essential to implementation of" the FDIC's receivership or any FDIC-established bridge

financial company; to "maximize the present value return from the sale or other disposition of" the liquidated company's assets; or to "minimize the amount of any loss realized upon" the sale or disposition of the liquidated company's assets." *Id*.

In their motion to dismiss, the Government Defendants mischaracterize the nature of this injury to the State Plaintiffs' longstanding statutory rights. They suggest that this abrogation of the Bankruptcy Code's guarantee of nondiscrimination will not actually "harm[]" the State Plaintiffs "[u]nless the FDIC invokes one of these exceptions to treat the States' pension funds differently—and less favorably—than other similarly situated creditors[.]" Mot. to Dismiss at 49 n.24. But that argument misunderstands the nature, purpose, and value of the Bankruptcy Code's creditor protections, and the "harm" to creditors by abrogating those protections.

First, Title II's new system of Treasury Secretary and FDIC discretion fundamentally alters the Bankruptcy Code's rule of nondiscrimination, even if the Treasury Secretary and FDIC claim that they have no immediate plans to exercise their discretion to the creditors' detriment. *See* Mot. to Dismiss at 49 n.24 (downplaying the possibility of creditor discrimination as "purely speculative"). A "guarantee" subject to the Treasury Secretary's and FDIC's largely unreviewable discretion to change their minds is no guarantee at all. No matter how vigorously the Government Defendants assure that they are unlikely to use the power that Title II gives them, the fact remains that "the rights of creditors" under Title II "vary significantly from those under the Bankruptcy Code," and therefore creditors must henceforth "be aware that, if at some time in the future a determination is made to appoint the FDIC as receiver for the financial company, they will enjoy different, and in some cases substantially lesser, rights than if the liquidation were to proceed under the Bankruptcy Code." Cohen, 45 U.

Rich. L. Rev. at 1144. Whatever Title II ultimately provides creditors, it is by its own express terms less of a guarantee than what the Bankruptcy Code had provided them.[7]

Title II's elimination of the Bankruptcy Code's guarantee undercuts the very purpose of the rule of creditor nondiscrimination: namely, "to bind [creditors] to their presumptive ex ante agreement," assuring all that a financial threat to the debtor company will not force each creditor "to race for the assets, not necessarily just to grab more than his share but also simply to avoid being left with nothing." Jackson, 36 Stan. L. Rev. at 758.

Prominent scholars already have identified how Title II fosters precisely that form of dangerous uncertainty among creditors. Writing on the dangers of financial "contagion"—that is, the spread of bank "runs" and other ruinous behaviors among investors in financial institutions during financial turbulence—Harvard professor Hal Scott, director of the Committee on Capital Markets Regulation, concludes that the Orderly Liquidation Authority "may actually increase the likelihood of contagion because creditors know they are at risk." Hal S. Scott, *Interconnectedness and Contagion* 216 (Nov. 20, 2012).[8] And "because the regulators have significant discretion in determining the circumstances that constitute danger of default," Title II "adds another layer of uncertainty for creditors of financial companies who could run at an earlier point in time in order to avoid the impairment in the [Orderly Liquidation Authority] receivership." *Id.* at 217. In this and other writings, Professor Scott and other Dodd-Frank analysts recognize precisely what the Supreme Court and pre-Dodd-Frank bankruptcy scholars recognized long ago: to eliminate the Bankruptcy Code's creditor guarantees is to change how

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[7] Even the Government Defendants concede that Title II offers no more than a "strong *presumption*" that the Bankruptcy Code's statutory guarantee to creditors will be honored. Mot. to Dismiss at 12 (quoting S. Rep. No. 111-176, at 4 (2010)) (emphasis added).

[8] http://www.capmktsreg.org/pdfs/2012.11.20_Interconnectedness_and_Contagion.pdf.

debtors, creditors, and the Government *may* act tomorrow—which in turn changes how creditors *must* act today.

In all of this, the Government entirely overlooks the States' express pleading that their abrogated statutory rights *have value*. Am. Compl. ¶ 170 ("destroying a valuable property right…"); *id.* ¶ 171 ("destroying the State Plaintiffs' valuable property rights"). Viewing the States' property rights in their investments as a bundle of sticks, one of the "sticks" that the State Plaintiffs held before the Dodd-Frank Act was enacted was the statutory right to equal treatment in bankruptcy. When the Act became law, however, that "stick" was removed from the States' bundle. As the Complaint repeatedly alleges, the right the Act abrogated is a valuable one: a rational investor would prefer an investment that includes a guarantee of equal treatment in bankruptcy to an investment that does not include such a guarantee.[9] The State Plaintiffs have unquestionably pled a present injury in the form of the loss of this valuable statutory right.

C. The Government's Brief Ignores The Fact That Title II's Abrogation Of The State Plaintiffs' Statutory Rights Is An Actual, Immediate Injury—An "Invasion" Of The States' "Legally Protected Interest"

Title II's elimination of the Bankruptcy Code's guarantee of creditor nondiscrimination is an injury that gives the State Plaintiffs standing. The State Plaintiffs specifically alleged this in the Amended Complaint. *See* Am. Compl. ¶ 170. But the Government sidesteps this allegation, and instead focuses its motion to dismiss exclusively on the possibility of future financial loss, arguing that the State Plaintiffs' standing must rest on a present financial

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[9] And that statutorily protected certainty is all the more valuable to investors, such as the States, that invest in many financial companies: while there is little risk that any particular financial company may be liquidated, the State Plaintiffs' portfolios of financial-company investments face the compounded risk that any one of their many investments may be subjected to liquidation.

loss.[10] In making those arguments, and in refusing to address the injury that the State Plaintiffs actually alleged, the Government commits a fundamental error that the D.C. Circuit has warned against:

> Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute. Such an injury is concrete because it is of a form traditionally capable of judicial resolution, . . . and it is particular because, as the violation of an *individual* right, it affects the plaintiff in a personal and individual way[.]

Zivotofsky v. Sec'y of State, 444 F.3d 614, 619 (D.C. Cir. 2006) (citations, brackets, and quotation marks omitted; emphasis in original) (quoting *Lujan*, 504 U.S. at 560 n.1).

For purposes of standing, an "injury" is "an invasion of a legally protected interest[.]" *Lujan*, 504 U.S. at 560. And that injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* at 578 (quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975), *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). While Congress may not simply manufacture standing out of whole cloth by "confer[ring] jurisdiction on Art. III courts to render advisory opinions," it certainly "may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.*, 410 U.S. at 617 n.3.

Applying that doctrine, the Supreme Court and lower courts repeatedly have held that a plaintiff had standing due to the elimination of a right or interest that a statute previously had conferred—even when the same governmental body that created that right later was the one that eliminated it.

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[10] *See, e.g.*, Mot. to Dismiss at 47 ("… unless and until the States receive less for their claims under Title II than they would have received under Chapter 7 …").

In *Hodel v. Irving*, 481 U.S. 704 (1987), the Supreme Court held that members of an Indian tribe had standing to challenge the constitutionality of a statute that eliminated Indians' prior statutory right to pass land on to their heirs. In the late 1800s, Congress enacted "a series of land Acts" that divided communal reservation land into allotments for individual Indians, and further empowered the individuals to divide and pass those allotments on to their heirs. *See id.* at 706-07. But in 1983, after the system proved to be unworkable, Congress passed the Indian Land Consolidation Act, which prohibited the further passing of property to heirs; instead, the property would revert to the tribe. *Id.* at 708-09. Individual tribe members brought a facial challenge to the 1983 Act's constitutionality, and the Court held that the plaintiffs had standing to bring the challenge, because the Act "deprived [the plaintiffs] of the fractional interests they otherwise would have inherited"—interests that existed only because of the *prior statute*. *Id.* at 711. In the same way, Title II deprived the State Plaintiffs of the right to creditor nondiscrimination, a right that existed only because of the pre-Dodd-Frank bankruptcy laws.

Similarly, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court held that although state law, including past legislative enactments, establishes the "background principles" defining a landowner's property rights, the state legislature's subsequent enactment of new legislation extinguishing some of those previously defined rights could itself constitute a "taking" of those property rights, for which just compensation would have to be paid. *See id.* at 1007-08 (recounting the original and subsequent legislative enactments), 1029 (holding that a "regulatory taking" could have occurred).

And these principles apply not just to Congress and other legislatures, but also to other branches of government, where the same governmental actor first defines a right, then later destroys it. In *Catholic Social Service v. Shalala*, 12 F.3d 1123 (D.C. Cir. 1994), the D.C. Circuit

held that a petitioner had standing to challenge a new regulation, because that regulation—defining a Medicare reimbursement methodology—was less favorable to the petitioner than the previous regulation's methodology had been. *See id.* at 1124-25. "It follows," the court recounted, that the new rule's substantive flaws, challenged by the petitioners, "*affect them* because if the rule were *void ab initio*" then the petitioners would enjoy the benefit of the previous reimbursement rule. *Id.* at 1125 (emphasis in original). This gave them standing to challenge the merits of the new rule. *Id.* at 1126.

Furthermore, the abridgement of such statutory rights constitutes an injury sufficient for standing even when the plaintiffs suffered no immediate financial impact from that abridgement. The D.C. Circuit has reaffirmed that point many times. The Freedom of Information Act, perhaps the most "common example of such a statute," gives requestors a right to information; in turn, the impairment of that right injures, and thus gives standing to, any requestor whose request for information is wrongly denied—regardless of whether he sought the information for purposes of financial gain. *See Zivotofsky*, 444 F.3d at 617-18 (citing, *inter alia*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.")). Another example is the federal statute entitling Jerusalem-born Americans to list "Israel" as their place of birth: an applicant denied such a passport by the State Department is injured by the Government's abrogation of his statutory right—even if the Government's abridgement of that right causes him no further "economic, physical, or psychological damage." *Zivotofsky*, 444 F.3d at 617-19. *See also FEC v. Akins*, 524 U.S. 11, 19-21 (1998) (federal campaign finance laws create a right to obtain certain information regarding political action committees' donors);

Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-74 (1982) (Fair Housing Act "establishes an enforceable right to truthful information concerning the availability of housing," regardless of whether the plaintiff intended to buy or rent the house); *cf. Lujan*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

All of these cases stand for the fundamental rule that when a statute creates a right, the elimination or abridgement of that right can itself cause an injury sufficient for standing. This is true when the legislature both creates and extinguishes the right (as in *Hodel* and *Lucas*), and it is true when the impairment of that statutory right implicated no immediate financial consequences (as in, *e.g.*, the aforementioned FOIA, campaign disclosure, and Fair Housing Act cases).[11] These examples are anchored to the same basic rule of law: when a statute creates a right, the "invasion" of that right is an injury in and of itself, *Lujan*, 504 U.S. at 560. Congress enjoys no special exemption from these rules: when it eliminates statutorily created rights and interests, that abrogation is not deemed less injurious simply because those rights and interests were themselves created by statute. *Hodel*, 481 U.S. at 711.

In the case before this Court, the State Plaintiffs' abrogated statutory right under the Bankruptcy Code was no less substantial than the statutory interests impaired in those cases. Prior to Dodd-Frank's enactment, the Bankruptcy Code protected the right of similarly situated creditors to receive equal treatment. This was not an accidental side effect of the Bankruptcy Code—it was "a *central policy* of the Bankruptcy Code." *Begier*, 496 U.S. at 58 (emphasis added). By eliminating that right, Dodd-Frank's Title II "inva[des]" the State Plaintiffs' "legally

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[11] *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (because "a cause of action is a species of property," a statute terminating that cause of action is an unconstitutional deprivation of property under the Fourteenth Amendment's Due Process Clause).

protected interest," giving them an injury sufficient for standing. *Lujan*, 504 U.S. at 560. The injury is caused by the enactment of Title II, and the relief requested by the State Plaintiffs would redress that injury. *Id.* at 560-61. Accordingly, the State Plaintiffs have standing to litigate the merits of their substantive constitutional claims against Title II.

To be clear, these doctrines go only to standing, not to the ultimate merits of the State Plaintiffs' claims. Congress can amend the bankruptcy laws, just as it can amend any federal statute, so long as those changes do not themselves violate the Constitution's substantive limits. But when Congress amends a law to eliminate pre-existing statutory rights, parties injured by Congress's elimination of those rights have standing to litigate whatever constitutional claims they may have against the substance of the newly enacted law. The Supreme Court has heard many constitutional challenges to the bankruptcy laws, sometimes striking down Congress's work, sometimes upholding it, and sometimes upholding it only after employing canons of constitutional avoidance.[12] Having suffered the loss of their longstanding rights as creditors, due to Dodd-Frank's very enactment, the State Plaintiffs ask merely that the court recognize their injury and allow them to litigate the merits of their own constitutional claims against this new modification of the bankruptcy laws.

II. The State Plaintiffs' Challenges To Dodd-Frank's Title II Are Ripe

The Government Defendants challenge the ripeness of the State Plaintiffs' claims by reprising their standing arguments. *See* Mot. to Dismiss at 51 ("For reasons similar to the

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[12] *See, e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (affirming the Regional Rail Reorganization Act of 1973 against a Fifth Amendment Takings challenge, only because it implicitly preserved creditors' rights to sue the government for compensation under the Tucker Act); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (upholding Bankruptcy Reform Act of 1978 after construing it to not apply retroactively to pre-enactment property rights); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (striking down the New Deal's Frazier-Lemke amendments for violating the Fifth Amendment).

reasons they lack standing, Plaintiffs' challenges satisfy neither prong of the ripeness inquiry"). They argue that the State Plaintiffs' claimed injuries are insufficiently "imminent," *id.*, and that the State Plaintiffs have not "established that they would suffer hardship in the absence of judicial intervention," *id.* at 50.

The Government Defendants' mischaracterization of the "imminence" of the State Plaintiffs' injuries is rooted in their mischaracterization of the injury itself. As explained above, the State Plaintiffs' immediate injury is not the hypothetical financial losses that they could suffer in a future Title II liquidation, but rather the actual, immediate loss of their valuable statutory right to equal treatment among similarly situated creditors, which Title II already has destroyed. *See supra* pp. 19-24. That injury is more than "imminent"—it already has occurred.

Furthermore, while the Government Defendants introduce their ripeness argument by alluding to the seminal *Abbott Laboratories* test for ripeness, their argument fails to properly apply either prong of that two-part test: *i.e.*, " the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The State Plaintiffs' claims satisfy both factors.

A. The Case Presents Pure Questions Of Law, Fit For Immediate Review

The State Plaintiffs' claims are facial challenges to Dodd-Frank, arguing that Title II violates the Constitution's separation of powers, the Fifth Amendment's guarantee of due process, and the Bankruptcy Clause's guarantee of "uniform" bankruptcy laws. Am. Compl. ¶¶ 226-255. A facial challenge to a statute is a "purely legal claim," and thus is "presumptively reviewable." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (citing *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003)). In short, these constitutional claims are fit for judicial resolution.

The presumption of reviewability is not rebutted by the fact that a liquidation is not self-evidently imminent, as the Government suggests. *See* Mot. to Dismiss at 51. The State Plaintiffs' claims of Title II's facial unconstitutionality do not turn on how the Treasury Secretary and FDIC might ultimately carry out a liquidation; rather, they turn exclusively on the words of the statute and of the applicable constitutional provisions. "The questions presented are purely legal," and thus the occurrence of a liquidation would not "bring the issues into greater focus or assist [the court] in determining them." *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000).

In the case relied upon by the Government Defendants, by contrast, the legal issues before the Supreme Court *did* turn on further factual developments. *See Texas v. United States*, 523 U.S. 296, 300-01 (1998). In that case, Texas sought a judicial declaration that the "preclearance" requirements of Section 5 of the Voting Rights Act did not apply to the state's laws governing the appointment of "masters or management teams" to run school districts in lieu of elected school boards, *id.* at 297-98, because those laws were not "changes with respect to voting," *id*. at 299. Because Texas's claim inherently required the Court to ascertain whether the state laws would, in fact, affect voting, the Court concluded that the passage of time could reveal the state laws' actual effects on voting. *Id.* at 301. The Court also concluded that delay might allow the Texas courts to interpret the state laws, which would also be relevant to the substance of the plaintiffs' claims. *Id.*

The Government identifies no potential future developments in this case that would have an equivalent effect on the court's analysis of Title II's facial unconstitutionality. That omission is no surprise: the Government Defendants' actions administering the statute are irrelevant to the question of whether the statutory structure is, itself, unconstitutional. As the

Supreme Court stressed in an analogous constitutional challenge to a statutory structure, agencies cannot "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power"—the very suggestion is "internally contradictory." *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472-73 (2001). In this case, it would be no less "internally contradictory" for the Government to argue that its administration of the Title II framework could somehow cure the structural constitutional defects that the State Plaintiffs claim to be inherent in that very Title II framework.

B. The Balance Of Hardships Favors Immediate Review

The second prong of *Abbott Laboratories* is "the hardship to the parties of withholding court consideration." 387 U.S. at 149. At the outset, it must be stressed that this factor is relevant only "*if* the court has doubts about the fitness of the issue for judicial resolution[.]" *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 465 (D.C. Cir. 2006) (emphasis added, quotation marks and brackets omitted). Because the Government does not dispute that the State Plaintiffs' legal claims are purely legal, the Court should hold this case ripe without even reaching the hardship prong. But even if the Court considers *Abbott*'s "hardship" prong, the balance of hardships favors the State Plaintiffs.

The Government Defendants fail to identify *any* interests in favor of delaying review. *See* Mot. to Dismiss at 52. That failure alone resolves the hardship inquiry in favor of the State Plaintiffs, because "where, as is the case here, there are no significant agency or judicial interests militating in favor of delay, lack of hardship cannot tip the balance against judicial

review." *Nat'l Ass'n of Home Builders*, 440 F.3d at 465 (quotation marks and brackets omitted); *see also AT&T Corp. v. FCC*, 349 F.3d 692, 700 (D.C. Cir. 2003).[13]

The State Plaintiffs, on the other hand, would suffer immense hardship if judicial review were deferred. Title II's abrogation of the Bankruptcy Code's guarantee of equal treatment for similarly situated creditors deprives the State Plaintiffs and other creditors of their prior certainty that, in the event of financial turbulence, their claims against a failing financial company will be resolved equitably, in accordance with well-established *ex ante* rules for the nondiscriminatory treatment of similarly situated creditors. *See supra* pp. 14-24. This is an actual, immediate injury that will burden them every day until they receive a judicial remedy.

But even more importantly, denying judicial review of the State Plaintiffs' constitutional claims until after a Title II liquidation occurs would in fact prevent them from *ever* raising those constitutional claims. Dodd-Frank expressly prohibits the courts from reaching these constitutional issues after a liquidation occurs.

First, the State Plaintiffs would not be able to raise their constitutional claims in a challenge to the Treasury Secretary's liquidation determination. As previously noted, they are barred from even knowing about, let alone participating in, the district court's initial review of his determination. *See supra* pp. 8-10. Moreover, the *only* issues that the courts can review are whether the liquidated company was a "financial company" within the meaning of the statutory definition, and whether the company was "in default or in danger of default." *See* Dodd-Frank

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[13] If anything, immediate judicial review would *promote* the public interest, including the courts' and Government's own institutional interests, by clarifying the laws that govern the liquidation of financial companies before such a liquidation actually occurs. The FDIC itself, in first promulgating the regulations administering Title II's orderly liquidation authority, stressed the need to "provide clarity and certainty with respect to how key components of the orderly liquidation authority will be implemented . . . ." *See* FDIC, *Orderly Liquidation Authority*, 76 Fed. Reg. 16324, 16325 (Mar. 23, 2011) (notice of proposed rulemaking).

§§ 202(a)(1)(A)(iii) (district court), 202(a)(2)(A)(iv) (court of appeals), 202(a)(2)(B)(iv) (Supreme Court), 12 U.S.C. §§ 5382(a)(1)(A)(iii), 5382(a)(2)(A)(iv), 5382(a)(2)(B)(iv).

Second, courts reviewing the FDIC's subsequent actions carrying out a Title II liquidation would also be precluded from adjudicating Title II's constitutionality. The FDIC is empowered to determine creditors' claims against the liquidated company, Dodd-Frank § 210(a)(2)(A), 12 U.S.C. § 5390(a)(2)(A), and the district courts are given jurisdiction to review the FDIC's determinations, *id.* § 210(a)(4)(A), 12 U.S.C. § 5390(a)(4)(A), but Title II does not authorize either the FDIC or the court to adjudicate the very constitutionality of Title II itself.

Indeed, in appeals of the FDIC's determination of claims, Title II expressly limits claimants' remedies to "money damages determined in accordance with" the formula prescribed by Title II. *Id.* § 210(e), 12 U.S.C. § 5390(e). Therefore, creditors cannot obtain either injunctive relief to block operation of the statute or a *de novo* determination of the full loss of value due to the constitutional violation, pursuant to the Tucker Act, 28 U.S.C. § 1491.

Finally, once liquidation occurs, the State Plaintiffs cannot raise these claims in a collateral action in another court. Title II prohibits all courts from "tak[ing] any action to restrain or affect the exercise of powers or functions of the [FDIC]" in carrying out the liquidation, except for the aforementioned appeals of the FDIC's determinations. Dodd-Frank § 210(e), 12 U.S.C. § 5390(e). The aforementioned, limited appeals of the Treasury Secretary's determination and the FDIC's subsequent actions are the only means of judicial review available to creditors, and neither would provide the State Plaintiffs with the relief requested by their Complaint.

In sum, the choice is not between litigating these constitutional claims either before a liquidation occurs or after a liquidation occurs, as the Government Defendants suggest. *See* Mot. to Dismiss at 49. The "choice is between addressing the challenge in its current setting

or permanently *withholding* judicial review" of Title II's constitutionality. *Int'l Union v. Brock*, 783 F.2d 237, 252 (D.C. Cir. 1986) (emphasis in original). Faced with such a draconian choice, "the hardship of permanently foreclosing review is clearly sufficient to make the challenge ripe." *Id.* at 253; *see also Village of Bensenville v. FAA*, 376 F.3d 1114, 1120 (D.C. Cir. 2004).

The State Plaintiffs' injury is actual and urgent. Title II abrogates a bedrock protection that States and other creditors once enjoyed under law. That abrogation is an injury in and of itself, and it also casts substantial uncertainty over the States' funds, a precious resource for hardworking taxpayers and hardworking government employees who expect the States' monies to be invested, fostered, and above all else protected. To prevent judicial review of Title II at this time, and thus to expose the State Plaintiffs to an ongoing risk of immediate, immense financial loss in Title II proceedings without advance notice or adequate procedural protection, would impose immensely burdensome hardships on the State Plaintiffs.

CONCLUSION

The Government Defendants stress the benefits that Title II was intended to promote. *See* Mot. to Dismiss at 12. But they fail to acknowledge the corresponding costs that Title II imposed upon creditors, including the State Plaintiffs, who have been deprived of the Bankruptcy Code's long-guaranteed protections. Title II abrogated their statutory right to equal treatment among similarly situated creditors. The State Plaintiffs' purely legal claims are ripe, and they can be litigated only in the current pre-liquidation posture. The State Plaintiffs respectfully request that the court deny the Government's motion to dismiss and allow the parties to proceed to the merits of this case.

Respectfully submitted,

/s/ E. Scott Pruitt

E. Scott Pruitt
Attorney General of Oklahoma
Office of the Attorney General
313 NE 21st Street
Oklahoma City, Oklahoma 73105
scott.pruitt@oag.ok.gov
(405) 521.3921
(405) 522.0669 (fax)

Counsel for Plaintiff the State of Oklahoma

/s/ Luther Strange
Luther Strange
Attorney General of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36104
(334) 242-7300
(334) 353-8440 (fax)

Counsel for Plaintiff the State of Alabama

/s/ Samuel S. Olens
Samuel S. Olens
Attorney General of Georgia
Georgia Department of Law
40 Capitol Square SW
Atlanta, GA 30334-1300
(404) 656-3300
(404) 463-1519 (fax)

Counsel for Plaintiff the State of Georgia

February 27, 2013

(Signatures of counsel for State Plaintiffs continue on subsequent pages)

/s/ Derek Schmidt
Derek Schmidt
Attorney General of Kansas
Office of the Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
(785) 291-3767 (fax)

Counsel for Plaintiff the State of Kansas

/s/ Bill Schuette
Bill Schuette
Attorney General of Michigan
G. Mennen Williams Building, 7th Floor
525 W. Ottawa St.
P.O. Box 30212
Lansing, MI 48909
miag@michigan.gov
(517) 373-1110
(517) 373-3042 (fax)

Counsel for Plaintiff the State of Michigan

/s/ Timothy C. Fox
Timothy C. Fox
Attorney General of Montana
Office of the Attorney General
Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
(406) 444-3549 (fax)

Counsel for Plaintiff the State of Montana

/s/ Jon Bruning
Jon Bruning
Attorney General of Nebraska
Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2683
(402) 471-3297 (fax)

Counsel for Plaintiff the State of Nebraska

/s/ Michael DeWine
Michael DeWine
Attorney General of Ohio
Office of the Attorney General
30 E. Broad St., 14th Floor
Columbus, OH 43215
(614) 728-4948
(866) 452-0269 (fax)

Counsel for Plaintiff the State of Ohio

/s/ Alan Wilson
Alan Wilson
Attorney General of South Carolina
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201
AGAlanWilson@SCAG.gov
(803) 734-3970
(803) 734-4323 (fax)

Counsel for Plaintiff the State of South Carolina

/s/ Greg Abbott
Greg Abbott
Attorney General of Texas
Office of the Attorney General
300 W. 15th Street
Austin, TX 78701
(512) 936-1342
(512) 936-0545 (fax)

Counsel for Plaintiff the State of Texas

/s/ Patrick Morrisey
Patrick Morrisey
Attorney General of West Virginia
State Capitol Complex
Building 1 Room 26-E
Charleston, WV 25305
(304) 558-2021
(304) 558-0140 (fax)

Counsel for Plaintiff the State of West Virginia

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2013, a copy of the foregoing document was filed electronically via the Court's ECF system, through which a notice of the filing will be sent to all counsel of record.

/s/ Patrick R. Wyrick
Patrick R. Wyrick
Solicitor General, State of Oklahoma