No. 18-1334

IN THE
Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AURELIUS AND ASSURED RESPONDENTS IN RESPONSE

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QUESTION PRESENTED

The Appointments Clause mandates that all principal Officers of the United States be nominated by the President and confirmed by the Senate. Under this Court's precedents, the Appointments Clause's requirements apply to every official that holds a continuing office and exercises significant authority pursuant to the laws of the United States.

The members of the Financial Oversight and Management Board for Puerto Rico ("Board") exercise extensive federal authority pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). 48 U.S.C. § 2101 *et seq*. The Board was created by federal statute, it is the only entity that administers, enforces, and executes that federal law (doing so in federal court), and its voting members are selected, overseen, and removable by the federal government alone. PROMESA empowers the Board to initiate and prosecute on behalf of the Commonwealth of Puerto Rico the largest municipal bankruptcy ever. The Board can also veto, rescind, or revise any Commonwealth laws it deems inconsistent with PROMESA. In carrying out these federal duties, the Board has the authority to hold hearings, take testimony, receive evidence, administer oaths, and issue subpoenas.

The Board members, however, were never confirmed by the Senate.

The question presented is:

Whether the appointments of members of the Financial Oversight and Management Board for Puerto Rico violated the Appointments Clause of the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. The parties to the proceedings below were as follows:

Petitioner the Financial Oversight and Management Board for Puerto Rico (the "Board") was an appellee in the court of appeals.

Respondents Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC (collectively, "Aurelius") are creditors of the Commonwealth of Puerto Rico and moved to dismiss case No. 17-bk-3283 (D.P.R.), initiated by Petitioner the Board, in the district court and were appellants in the court of appeals.

Respondents Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (collectively, "Assured") filed an adversary complaint seeking declaratory and injunctive relief and were appellants in the court of appeals.

Respondent Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER") filed an adversary complaint and was an appellant in the court of appeals.

Respondents the Commonwealth of Puerto Rico (the "Commonwealth"), José B. Carrión III, Andrew Biggs, Carlos M. García, Arthur J. González, Ana J. Matosantos, José R. González, and David A. Skeel, Jr. (collectively, the "Board members"), the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), the American Federation of State, County & Municipal Employees ("AFSCME"), the Official Committee of Retired Employees of the Common-

wealth of Puerto Rico ("Retirees"), the Official Committee of Unsecured Creditors ("Unsecured Creditors"), the COFINA Senior Bondholders Coalition ("COFINA"), Fideicomiso Plaza, Decagon Holdings 1, LLC, Decagon Holdings 2, LLC, Decagon Holdings 3, LLC, Decagon Holdings 4, LLC, Decagon Holdings 5, LLC, Decagon Holdings 6, LLC, Decagon Holdings 7, LLC, Decagon Holdings 8, LLC, Decagon Holdings 9, LLC, Decagon Holdings 10, LLC, GoldenTree Asset Management, LP, Old Bellows Partners, LP, Scoggin Management, LP, Taconic Capital Advisors, LP, Aristeia Capital, LLC, Canyon Capital Advisors, LLC, Tilden Park Capital Management, LP, Aristeia Horizons, LP, Canery SC Master Fund, LP, Capital Management, LP, Crescent 1, LP, CRS Master Fund, LP, Cyrus Capital Partners, LP, Cyrus Opportunities Master Fund II, Ltd., Cyrus Select Opportunities Master Fund, Ltd., Cyrus Special Strategies Master Fund, LP, Merced Capital, LP, Merced Partners IV, LP, Merced Partners Limited Partnership, Merced Partners V, LP, Pandora Select Partners, LP, Puerto Rico Electric Power Authority ("PREPA"), River Canyon Fund Management, LLC, SB Special Situation Master Fund SPC, Scoggin International Fund, Ltd., Scoggin Worldwide Fund, Ltd., Segregated Portfolio D, Taconic Master Fund 1.5, LP, Taconic Opportunity Master Fund, LP, Tilden Park Investment Master Fund, LP, Varde Credit Partners Master, LP, Varde Investment Partners Offshore Master, LP, Varde Investment Partners, LP, Varde Skyway Master Fund, LP, Whitebox Asymmetric Partners, LP, Whitebox Institutional Partners, LP, Whitebox Multi-Strategy Partners, LP, Whitebox Term Credit Fund I, LP, and Whitebox Advisors, LLC, all filed oppositions to the

motion to dismiss and/or were defendants or intervenors in the relevant adversary proceedings and were appellees before the court of appeals.

Respondent United States intervened to oppose the motion to dismiss and adversary proceedings and was an appellee before the court of appeals.

2. Counsel for Respondents certifies as follows:

Respondent Aurelius Investment, LLC, is a limited liability company. It is not a corporation.

Respondent Aurelius Opportunities Fund, LLC, is a limited liability company. It is not a corporation.

Respondent Lex Claims, LLC, is a limited liability company. It is not a corporation.

Respondent Assured Guaranty Corp. is a wholly owned indirect subsidiary of Assured Guaranty Ltd., which is a publicly traded corporation. No entity owns more than 10% of the outstanding stock of Assured Guaranty Ltd.

Respondent Assured Guaranty Municipal Corp. is a wholly owned indirect subsidiary of Assured Guaranty Ltd.

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BRIEF OF AURELIUS AND ASSURED RESPONDENTS IN RESPONSE

Respondents Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, Lex Claims, LLC, Assured Guaranty Corp., and Assured Guaranty Municipal Corp. (collectively, "Respondents") respectfully submit that the petition for a writ of certiorari filed by the Financial Oversight and Management Board for Puerto Rico (the "Board") warrants this Court's review.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-45a, is reported at 915 F.3d 838. The opinion of the district court in No. 17-bk-3283 (D.P.R.), Pet. App. 46a-82a, is reported at 318 F. Supp. 3d 537. The district court's stipulated judgment in Adversary Proceeding No. 18-00087 is unreported.

STATEMENT

This case presents questions of exceptional importance regarding the applicability of the Appointments Clause and its liberty-preserving functions for the people of Puerto Rico. In 2016, Congress created the Board as a federal overseer charged with managing Puerto Rico's financial affairs and prosecuting its historic bankruptcy in federal court. The Board's organic statute, the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq.*, purports to authorize the President of the United States to appoint the Board members by selecting names from secret lists compiled by individual members of Congress without Senate confirmation.

Respondents own or insure Puerto Rico debt that is at issue in the bankruptcy proceedings. For nearly two years, they have challenged the Board's authority on the ground that the Board members are principal Officers of the United States who were appointed in violation of the Appointments Clause of the United States Constitution. Both the Board and the United States have opposed Respondents' challenges, arguing that the Appointments Clause does not apply when Congress legislates for the territories pursuant to Article IV of the Constitution.

A panel of the United States Court of Appeals for the First Circuit unanimously agreed with Respondents. The panel correctly held that Congress is bound by the requirements of the Appointments Clause even when it acts under Article IV. The panel also correctly held that the Board members are principal Officers of the United States because they hold "continuing" office and are vested with "significant authority" exercised "pursuant to the laws of the United States." *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018); *see also Freytag* v. *Comm'r*, 501 U.S. 868, 880-82 (1991); *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Because the Board members were undisputedly never subject to Senate confirmation, the panel declared PROMESA's appointments provisions unconstitutional and severed them from the rest of the statute. The panel, however, also applied the so-called "*de facto* officer doctrine" to declare all of the Board's unconstitutional acts—both in the past, and for 90 days into the future and then for an additional 60 days—"valid," thereby depriving Respondents of the right to a bankruptcy process that is prosecuted by officers subject to the Appointments Clause's mechanisms for ensuring accountability.

Respondents fully support the First Circuit's analysis and holding on the merits, but respectfully disagree with its remedy holding. Accordingly, Respondents have filed, together with this brief, a petition for a writ of certiorari seeking this Court's review of the remedial question presented. Because the merits and remedies are inextricably intertwined, and because this case as a whole presents questions of the highest importance that should be definitively resolved by this Court, Respondents acquiesce in the Board's petition for a writ of certiorari.

1. Enacted by Congress in 2016, PROMESA created a new federal entity: the Financial Oversight and Management Board for Puerto Rico. 48 U.S.C. § 2121. "Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island achieve fiscal responsibility and access to the capital markets." Pet. App. 6a (quotation marks omitted).

To achieve this objective, Congress vested the Board with "significant authority" under "the laws of the United States," including "the power to veto, rescind, or revise Commonwealth laws and regulations that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed pursuant to it." Pet. App. 31a-32a. The Board reviews and approves all Puerto Rico budgets. 48 U.S.C. § 2142. The Board has broad federal investigative and enforcement powers, including authority to hold hearings, take testimony, subpoena and receive evidence, and administer oaths. *Id*. § 2124(a), (f). It is the sole entity that "may seek judicial enforcement of its authority to carry out its responsibilities under [PROMESA]," and it does so in Article III courts. *Id.*

§ 2124(k). Congress also charged the Board with carrying out numerous other significant responsibilities "in its sole discretion." *See*, *e.g.*, *id.* §§ 2121(d)(1)(A)-(E), (d)(2)(A); 2124(i)-(j); 2127(b)(3); 2141(b)-(c)(3).

As relevant here, the Board has authority to initiate a bankruptcy-like proceeding in federal court under Title III of PROMESA, allowing for the adjustment of debts of the Commonwealth and its various instrumentalities. 48 U.S.C. § 2164. In these proceedings, known as Title III cases, the Board is the sole representative of, and decision-maker for, the Commonwealth and its instrumentalities. *Id*. § 2175(b).

While PROMESA labels the Board "an entity within the territorial government," 48 U.S.C. § 2121(c)(1)-(2), the Board is an independent federal overseer of the Commonwealth and its finances, statutorily immune from "any control, supervision, oversight, or review" by the government or people of Puerto Rico. *Id*. § 2128(a)(1). Board members are subject to federal ethics laws, *id*. § 2129, and enjoy numerous other trappings of federal power, *see*, *e.g.*, *id.* § 2122 (use of federal facilities); *id.* § 2124(c) (use of federal information); *id.* § 2124(n) (support from General Services Administration). They are also subject to ongoing federal supervision, and are removable only by the President, for cause. *Id*. § 2121(e)(5)(B).

Although the Board members indisputably hold continuing office established by federal law and exercise "significant authority pursuant to the laws of the United States," *Lucia*, 138 S. Ct. at 2051 (quotation marks omitted); *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126, PROMESA does not require the Board's members to be nominated by the President and confirmed by the Senate.

PROMESA instead provides for the President to select six of the Board's seven voting members—the "List-Members"—from secret lists submitted to the President by House and Senate leaders. 48 U.S.C. § 2121(e)(2)(A)-(B). The seventh may be selected "in the President's sole discretion," also without Senate confirmation. *Id.* § 2121(e)(2)(A)(vi).

PROMESA requires Senate confirmation only if the President makes "off-list" nominations. 48 U.S.C. § 2121(e)(2)(E). But PROMESA further required that if the Senate did not confirm an off-list nominee by September 1, 2016—only two months after PROMESA's enactment (during most of which time the Senate was on its summer recess)—then the President must appoint "from the list." *Id.* § 2121(e)(2)(G); *see* Pet. App. 12a ("[B]ecause the Senate was in recess for all but eight business days between enactment of the statute and September 1, one might conclude that, in practical effect, the statute forced the selection of persons on the list."). Congress then cemented that procedure in place by mandating that any vacancy on the Board "shall be filled in the same manner in which the original member was appointed." 48 U.S.C. § 2121(e)(6). The purpose of PROMESA's appointment scheme, as a House Report candidly stated, was to "ensure[] that a majority of [the Board's] members [were] effectively chosen by Republican congressional leaders on an expedited timeframe." H.R. Rep. No. 114-602, pt. 1, at 42 (2016).

The dubious constitutionality of this scheme was obvious from the beginning. While the bill was being debated, Senator Cantwell stated: "The appointments clause requires that these officers, who are being appointed under the authority of Federal law, be ap-

pointed by the President and confirmed by the Senate," yet the bill would create "board members who have significant authority over Federal law" and "are not appointed by the President and ... are not confirmed by the Senate." 162 Cong. Rec. S4687 (daily ed. June 29, 2016). "[I]t is going to be challenged constitutionally," Senator Cantwell warned. *Ibid.* Senator Reid similarly observed: "I take issue with the oversight board and their excessive powers and appointment structure." *Id*. at S4685.

Once PROMESA was enacted, the President acceded to its appointment procedure and chose all six List-Members from the congressional lists, appointing the seventh himself. None of the Board members was Senate-confirmed. Pet. App. 13a-14a.

2. In May 2017, the Board authorized Title III petitions on behalf of the Commonwealth and its instrumentalities, including the Puerto Rico Highways and Transportation Authority ("PRHTA"), in the United States District Court for the District of Puerto Rico under 48 U.S.C. §§ 2164(a) and 2166(a). Pet. App. 14a.

Respondents Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC ("Aurelius") are beneficial holders of substantial amounts of outstanding general obligation bonds that were issued by the Commonwealth and backed by a pledge of Puerto Rico's good faith, credit, and taxing power, and which benefit from a first-priority claim and lien on all of the Commonwealth's "available resources," P.R. Const. art. VI, § 8. Respondents Assured Guaranty Corp. and Assured Guaranty Municipal Corp. ("Assured") insure general obligation bonds issued by the Commonwealth and bonds issued by PRHTA. On August 7, 2017, the Aurelius Respondents timely sought

to "dismiss the [Board's Title III] petition" because the Board members' appointments violated the Appointments Clause and the Constitution's separation of powers. Aurelius's Obj. and Mot. to Dismiss, No. 17-bk-3283 (D.P.R.), Doc. 913.[1]

The Board, the United States, and five interested parties opposed Aurelius's motion to dismiss, arguing that the Board members are not Officers of the United States because Congress purported to create the Board as part of Puerto Rico's territorial government. Pet. App. 14a-15a. The United States also urged the court to employ the "constitutional avoidance" doctrine to spare the President from having to comply with PROMESA's list procedure when making *future* Board appointments. U.S. Br. 34 n.15, No. 17-bk-3283 (D.P.R.), Doc. 1929.

The district court denied Aurelius's motion. Congress had stated "that it was acting pursuant to its Article IV" authority in enacting PROMESA, and that assertion, the court concluded, "is entitled to substantial deference." Pet. App. 67a-68a. Accordingly, "the Oversight Board is an instrumentality of the territory

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[1] The timeliness of Petitioners' challenges has never been disputed. Indeed, Aurelius moved to dismiss on August 7, 2017, 25 days *before* PROMESA even *permitted* the district court to dismiss that action. Aurelius's Obj. & Mot. to Dismiss at 5. Respondent Unión de Trabajadores de la Industria Eléctrica y Riego de Puerto Rico ("UTIER") filed an adversary complaint hours earlier on the same date. Pet. App. 17a. On July 23, 2018, Assured filed a similar adversary complaint against the Board, seeking a declaration that the Board members' appointments violated the Appointments Clause and the separation of powers, dismissal of the Commonwealth and PRHTA Title III cases, and an injunction against the Board's continued operation until its members were properly appointed. Pet. App. 17a-18a.

of Puerto Rico, established pursuant to Congress's plenary powers under Article IV of the Constitution," and therefore "its members are not 'Officers of the United States'" under the Appointments Clause. Pet. App. 81a. Aurelius timely appealed under 48 U.S.C. § 2166(e), and the district court also certified its Order for interlocutory review under 48 U.S.C. § 2166(e)(3)(A). Order Certifying Op. and Order, No. 17-bk-3283 (D.P.R.), Doc. 3721. Additionally, the district court entered a stipulated final judgment against Assured, Stipulated Judgment, No. 18-ap-87 (D.P.R.), Doc. 14, which Assured timely appealed. UTIER also timely appealed. The First Circuit allowed the certified appeal and consolidated all appeals. Order of Court, No. 18-1671 (1st Cir. Aug. 15, 2018), Doc. 117326747.

3. A panel of the First Circuit unanimously reversed.

First, the court "reject[ed] [the] notion that Article IV" created an exception to the Appointments Clause, just as there is no Article IV exception to the Presentment Clause. Pet. App. 20a-22a. Rather, the Appointments Clause applies "to *all* Officers of the United States." Pet. App. 21a (quotation marks and ellipsis omitted).

The court then "ha[d] no trouble in concluding" that in light of the text, history, and relevant Supreme Court precedent, "[i]t [could not] be clearer or more unequivocal that the Appointments Clause" applies to the Board members. Pet. App. 21a, 28a. The Board members easily meet the test for "Officers of the United States" under *Lucia*, *Freytag*, and *Buckley* because they (1) "occup[y] … 'continuing' position[s] established by federal law"; (2) "exercise[] significant authority"; and (3) do so "pursuant to the laws of the

United States." Pet. App. 30a. This conclusion was confirmed by "the teaching of founding era history" in the territories. Pet. App. 25a.

Next, the court concluded that the Board members were principal officers because they are "answerable to and removable only by the President." Pet. App. 39a. Additionally, they possess "vast duties and jurisdiction," with the power to "formulate policy for the Government" over the entire "economy of Puerto Rico." Pet. App. 40a. The court therefore held that the Board members "should have been appointed by the President, by and with the advice and consent of the Senate," but were not, thus rendering their appointments "unconstitutional." *Ibid*. The court accordingly severed the offending provisions of PROMESA. Pet. App. 42a.

Finally, the court invoked "the *de facto* officer doctrine" to declare all of the Board's past actions "valid," as well as all future actions taken by the Board until the Court of Appeals issues its mandate, which it stayed for 90 days "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause," Pet. App. 44a, and then for a further 60 days, Order, No. 18-1671 (1st Cir. May 6, 2019), Doc. 117435465.[2] While the President has announced an intention to nominate the current occupants of the Board to be its Senate-confirmed members, as of this date, the President has yet to submit any such nominations to the Senate.

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[2] A petition for rehearing en banc by respondent UTIER was denied on March 7, 2019. Pet. App. 83a-84a.

The Board filed its petition for a writ of certiorari on April 23, 2019. Today, together with this brief, Respondents filed a petition for a writ of certiorari, contending that the First Circuit's application of the *de facto* officer doctrine warrants this Court's review.

ARGUMENT

The First Circuit correctly held that the Board members are principal Officers of the United States who were not appointed in conformity with the Appointments Clause, and that PROMESA's appointments provisions are thus unconstitutional. Although Respondents strongly disagree with the contrary arguments set forth in the Board's petition for a writ of certiorari, Respondents do not dispute that this case presents important questions about the separation of powers that require this Court's review, together with the remedial issues separately presented by Respondents.

I. THE FIRST CIRCUIT CORRECTLY HELD THAT THE BOARD MEMBERS ARE PRINCIPAL OFFICERS OF THE UNITED STATES.

The Appointments Clause is the exclusive means for appointing "*all* Officers of the United States," and "[n]o class or type of officer is excluded because of its special functions." *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (emphasis added). As relevant here, the Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all principal "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The First Circuit correctly held that the Board members are principal Officers of the United States, and that the Appointments Clause applies even when

Congress creates federal offices to exercise significant federal authority in the territories.

A. The Board Members Are Principal "Officers Of The United States."

1. The Appointments Clause "is among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997). After being subjected to the British Empire's "manipulation of official appointments" to offices in the American territories, the Constitution's framers restrained that "insidious and powerful weapon of eighteenth century despotism" by "carefully husbanding the appointment power." *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991). The Appointments Clause vests the President with the appointment power to "prevent[] congressional encroachment," while "curb[ing] Executive abuses" by requiring Senate confirmation of principal officers. *Edmond*, 520 U.S. at 659 (citing U.S. Const. art. II, § 2, cl. 2). This balanced appointment procedure "was designed to ensure public accountability" for all appointments, *id.* at 660, and it applies to "all Officers of the United States," *Buckley*, 424 U.S. at 132.

This Court has recognized a single test for determining whether officials are "Officers of the United States" within the meaning of the Appointments Clause: Do the officials occupy a "continuing" position established by law and "exercis[e] significant authority pursuant to the laws of the United States"? *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018); *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126. Officials exercise "significant authority under the laws of the United States" when they "administer," "execute," or "enforce[]" federal law. *Buckley*, 424 U.S. at 132, 138;

see also Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 77, 87 (2007).

There is no dispute that the Board members hold a continuing office established by federal law, and PROMESA's broad grant of authority makes clear that the Board members exercise significant federal authority. First, the Board members administer PROMESA using powers functionally indistinguishable from those possessed by the judges in *Lucia* and *Freytag*. *Compare Lucia*, 138 S. Ct. at 2053 (Administrative Law Judges of the Securities and Exchange Commission are "Officers of the United States" because they "take testimony," "receive evidence," and "administer oaths" to "witnesses" at "hearings" (alterations omitted)), *with* 48 U.S.C. § 2124(a), (f) (granting the Board the power to "take testimony," "subpoena" and "receive evidence," and "administer oaths or affirmations to witnesses appearing before it").

Moreover, the Board is the exclusive entity that can enforce PROMESA, and it does so in federal court. 48 U.S.C. § 2124(k). The Board has used that power to sue the Puerto Rico Governor in federal court to force him to comply with PROMESA, belying any claim that the Board is merely part of the territorial government. Compl. 17, No. 17-bk-3283 (D.P.R.), Doc. 1180. And the Board alone may initiate "Title III" bankruptcy-like proceedings, also in federal court (as it has done). 48 U.S.C. § 2164(a). Such "enforcement power," including "discretionary power to seek judicial relief" and "conduct[] civil litigation in the courts of the United States for vindicating public rights," is a unique trait of Officers of the United States. *Buckley*, 424 U.S. at 138, 140. The Board's broad swath of federal powers is more than sufficient to demonstrate

that its members exercise significant authority under the laws of the United States, and therefore satisfies this Court's test for Officers of the United States.

To be sure, local territorial officials that do not exercise significant federal authority are not Officers of the United States, and therefore need not be appointed in conformity with the Appointments Clause. But that does not mean that the Appointments Clause does not apply at all to *federal* officials who oversee the territories, as the Board incorrectly suggests. Pet. 13-14. Since the Founding, this Court has recognized that the Constitution's structural provisions apply even when Congress creates an office in a territory or the District of Columbia, if Congress gives the officer significant federal authority. *See*, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803) (Commissions Clause). Two centuries of historical practice confirm that commonsense conclusion. *See infra* Part I.B.2.

The Board also argues that *Lucia*, *Freytag*, and *Buckley* serve only to distinguish between "Officers" and employees, not between Officers of the United States and officials of another government. Pet. 14. This Court has never drawn such a distinction. On the contrary, this Court in *Freytag* reaffirmed the traditional test for Officers of the United States while explaining that certain territorial officials—namely, "clerks" of "non-Article III territorial courts"—were "'inferior Officers' within the meaning of the Appointments Clause." 501 U.S. at 889-92. And at least one other court—as well as the United States itself—has concluded that officials selected off of lists submitted by congressional leaders to serve in an office created pursuant to Congress's Article IV authority were "se-

lected in violation of the Appointments Clause" because, under the *Buckley* test, they exercised "significant federal authority" and therefore were Officers of the United States. *Hechinger* v. *Metro. Wash. Airports Auth.*, 845 F. Supp. 902, 909 (D.D.C.), *aff'd*, 36 F.3d 97 (D.C. Cir. 1994); U.S. Br. at 23, *Hechinger* v. *Metro. Wash. Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994) (No. 94-7036), 1994 WL 16776877 (agreeing that the scheme violated the Appointments Clause).

2. The Board does not dispute that its members are clearly Officers of the United States under the test articulated in *Lucia*, *Freytag*, and *Buckley*, so it announces a new test of its own creation. It suggests that courts should "place[] great weight on" (1) whether Congress "invoked its Article IV power," (2) whether Congress labeled the entity as "territorial" rather than federal, and (3) "whether the powers of the office and the law it enforces are strictly territorial." Pet. 26. But the first two prongs of the Board's novel test would simply call for courts to defer to Congress's label, and this Court has repeatedly admonished that the "separation-of-powers analysis does not turn on the labeling of an activity" when Congress legislates pursuant to Article IV. *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267 (1991) ("*MWAA*"); *see also Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."). A court's "inquiry into" an entity's "status under the Constitution" must be "independent" of Congress's pronouncements. *Dep't of Transp.* v. *Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1231 (2015).

The third prong of the Board's test asks whether the entity enforces "strictly territorial" laws, Pet. 26, a factor that the Board gleans from *Palmore* v. *United States*, 411 U.S. 389 (1973). In *Palmore*, the Court considered whether non-Article III judges could try criminal cases under the District of Columbia Code. *Id*. at 390. The Court had previously held in *O'Donoghue* v. *United States*, 289 U.S. 516 (1933), that the then-extant courts of the District of Columbia were Article III courts because they had authority "over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having nationwide application," *Palmore*, 411 U.S. at 406, and were "of equal rank and power with those other inferior courts of the federal system," *O'Donoghue*, 289 U.S. at 534. Those earlier courts' consideration of "purely local affairs [was] obviously subordinate and incidental," and therefore their judges were entitled to Article III's tenure and salary protections. *Id.* at 539. But after Congress narrowed the jurisdiction of the District's courts in 1970, the Supreme Court in *Palmore* distinguished the courts of that earlier era, and concluded that the new courts were "focus[ed]" on "matters of strictly local concern." 411 U.S. at 407. Because their work was "primarily" concerned with "local law," they were local courts, not Article III courts, and therefore could properly try criminal cases under the District of Columbia Code. *Ibid.*

Even if this *Palmore*-derived factor were the proper inquiry, it weighs decisively in Respondents' favor. In no way could the Board's powers plausibly be described as "strictly local," nor could PROMESA possibly qualify as a "local law." The Board was established by federal statute, it is the sole entity responsible for administering, enforcing, and executing

that federal statute, and its voting members are selected, overseen, and removable by the federal government alone. *See* Pet. App. 33a. ("Essentially everything [the Board members] do is pursuant to federal law under which the adequacy of their performance is judged by their federal master."). Moreover, "PROMESA empowers the Board Members to initiate and prosecute the largest bankruptcy in the history of the United States municipal bond market," a power that is "quintessential[ly] federal." Pet. App. 31a. Rather than administering and enforcing the local law of the Commonwealth, the Board members stand above the territorial government, overseeing it and wielding the authority to "veto, rescind, or revise Commonwealth laws and regulations that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed pursuant to it." Pet. App. 31a-32a (citing 48 U.S.C. §§ 2141, 2143, 2144). The Board is thus focused on "affairs of national concern." *Palmore*, 411 U.S. at 408. Even under the third prong of the Board's own test, it is undoubtedly part of the federal government.

3. Finally, the Board apparently has abandoned its argument, pressed below, that if the Board members are Officers of the United States, they should be deemed "inferior officers." Pet. App. 15a. This Court therefore may treat the issue as conceded. *See Snyder* v. *Phelps*, 562 U.S. 443, 449 n.1 (2011) (declining to address issue that was "never mentioned" in "petition for certiorari"). And in any event, the Board members are clearly principal, and not inferior, officers under the Appointments Clause, as even the United States conceded below. Gov't C.A. Br. 40-41 ("[T]he United States agrees that … the members of the Board likely would be principal (not inferior) officers if they were officers of the United States and the Appointments

Clause applied."). "Inferior" officers are those who are "directed and supervised at some level by other officers appointed by the President with the Senate's consent," whereas "principal" officers report only to the President. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (quotation marks omitted). The Board members are removable for cause by the President of the United States and answer to no other officer. 48 U.S.C. § 2121(e)(5)(B). Under *Free Enterprise Fund*, the Board members are principal officers, and because they were never confirmed by the Senate, their appointments are invalid. *See* Pet. App. 38a-40a.

Moreover, even if the Board members were inferior officers, their appointments would nonetheless violate the Appointments Clause. The Appointments Clause provides that appointments of inferior officers, if not made with the advice and consent of the Senate, may be made only by the "Courts of Law," the "Heads of Departments," or "the President alone." U.S. Const. art. II, § 2, cl. 2. But the Board members were not appointed by "the President alone." Rather, for six of the Board's seven voting members, the President selected their names from secret lists prepared by individual members of Congress. Pet. App. 13a. Even the United States conceded the unconstitutionality of this requirement and urged the district court and the First Circuit below to apply the "constitutional avoidance" canon to read PROMESA as "not hav[ing] any constraining effect on the President's authority going forward." Gov't C.A. Br. 46; U.S. Br. 34 n.15, No. 17-bk-3283 (D.P.R.), Doc. 1929. Therefore, even if the Board members could be considered inferior officers—and they cannot—their appointments would nonetheless violate the Appointments Clause and the separation of powers.

B. The Appointments Clause Applies When Congress Creates Federal Offices That Superintend Territories.

In attempting to avoid the clear implications of the Appointments Clause for the constitutionality of the Board's composition, the Board devotes much of its petition to emphasizing Congress's "plenary Article IV power to structure territorial governments." Pet. 12. However, this Court's precedents and more than two centuries of unbroken historical practice make clear that the Appointments Clause applies to any official who exercises significant authority pursuant to the laws of the United States, regardless of whether that authority is wielded in a territory or elsewhere.

1. The Board starts from the uncontroversial premise that Congress enjoys plenary authority under Article IV to structure territorial governments. Pet. 15-16 (citing *Binns* v. *United States*, 194 U.S. 486, 491-92 (1904); *First Nat'l Bank* v. *Yankton Cty.*, 101 U.S. 129, 130 (1879); *Am. Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)). But that premise does not imply that Congress "is 'unrestricted' by the separation-of-powers constraints" when it legislates with regard to a territory. Pet. 17. Quite the contrary, the Board's own cases confirm that Article IV does not confer on Congress those powers that "have been expressly or by implication reserved in the prohibitions of the Constitution." *First Nat'l Bank*, 101 U.S. at 133.

The Court already recognized that distinction in *MWAA*, which involved a constitutional challenge to a Review Board that Congress created pursuant to its Article IV power to oversee a regional airport authority. This Court concluded that Congress violated the

separation of powers by providing for members of Congress to serve on the Review Board. 501 U.S. at 277. In reaching this conclusion, the Court flatly rejected the contention that Congress's acts are "immune from scrutiny for constitutional defects" just because they were taken "in the course of Congress' exercise of its power" under "Art. IV, § 3, cl. 2." *Id.* at 270. Even when Congress legislates pursuant to Article IV, the Court "*must* … consider whether" the statute is "consistent with the separation of powers." *Id*. at 271 (emphasis added).

It is no answer to argue, as the Board does, that Article IV courts are not subject to Article III's tenure and salary protections. Pet. 17. Congress has created numerous non-Article III courts, yet the Appointments Clause applies to all of them: Tax Court judges, and the special trial judges working under them, *Freytag*, 501 U.S. at 880-82; military appellate judges, *Edmond*, 520 U.S. at 662; administrative law judges, *Lucia*, 138 S. Ct. at 2053-54; and more. Judges that exercise significant federal power are Officers of the United States, even if they do not serve on Article III courts. *Lucia*, 138 S. Ct. at 2053-54.

The Board also argues that this Court has not rigorously applied the nondelegation doctrine to restrict Congress's delegation of local territorial power to local actors. Pet. 18. But this Court's flexible application of the nondelegation doctrine in the territories does not imply that the Appointments Clause does not apply in the territories. As the First Circuit correctly recognized, Congress's delegation of local lawmaking authority was "strongly implicit in the notion of a territory as envisioned by the drafters of the Constitution," and "[n]one of [the] justifications" for limiting the nondelegation doctrine in the territories "applies

to the Appointments Clause." Pet. App. 24a. Congress may "delegate to a territory" power over only those local matters that, in a state, would be "regulated by the laws of the state." *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 106 (1953). And "in delegating power to the territories, Congress can only act insofar as 'other provisions of the Constitution are not infringed.'" Pet. App. 24a (quoting *Atl. Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435 (1932)).

2. The Board's position finds no support in historical practice. Pet. 20-22. Respondents agree that the "longstanding practice of the government" is a crucial guidepost for deciding separation-of-powers questions. *NLRB* v. *Noel Canning*, 573 U.S. 513, 524-26 (2014) (quotation marks omitted). The history, however, shows that the United States government has long treated territorial officials who exercise significant authority pursuant to the laws of the United States as Officers of the United States.

Every civilian territorial governor appointed to a continuing office was nominated by the President and confirmed by the Senate, or recess-appointed by the President alone. *See* Pet. App. 36a (noting "Congress's largely consistent adherence to Appointments Clause procedures in appointing territorial officials"). This continued treatment of territorial governors is "weighty evidence" that Congress "did not believe [it] had the power" to appoint these officials otherwise. *Alden* v. *Maine*, 527 U.S. 706, 743-44 (1999). Indeed, almost immediately after the Constitution's ratification, Congress amended the Northwest Ordinance to provide for presidential nomination and Senate confirmation of the territory's governor "so as to adapt the [Ordinance] to the present Constitution of the United

States." 1 Stat. 50, 51 (1789). The reason for this change was "to bring the Ordinance itself into conformity with Article II's requirement that federal officers be appointed by the President with Senate consent." David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829*, at 113 (2001); *see* Akhil Amar, *America's Constitution: A Biography* 264 (2006) (Congress was "'adapt[ing]' its territorial governance system to the Constitution's apparatus of presidential appointment and removal."). And Congress's "largely consistent compliance with Appointments Clause procedures in hundreds if not thousands of instances over two centuries" since then "belies any claim that adherence to those procedures impedes Congress's exercise of its plenary powers within the territories." Pet. App. 36a.

The only historical examples the Board can muster, meanwhile, are of local territorial officials who principally executed territorial laws and therefore did not exercise significant authority pursuant to the laws of the United States. *See*, *e.g.*, Pet. 20-21 (citing 31 Stat. 77, 81, 84, §§ 17, 18, 34 (1900) (permitting the Puerto Rico governor to appoint local officers and judges); 39 Stat. 951, 955-56, § 13 (1917) (same)). They "are not federal officers" because "[t]hey do not 'exercise significant authority pursuant to the laws of the United States'"; instead, "they exercise authority pursuant to the laws of the territory." Pet. App. 37a (citing *Lucia*, 138 S. Ct. at 2051). Of course, a federal statute is the "ultimate source" of sovereignty in territories. *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1867-68 (2016). "But that fact alone does not make the laws of Puerto Rico the laws of the United States, else every claim brought under Puerto Rico's laws would pose a federal question." Pet. App. 37a.

This is why the Appointments Clause is perfectly consistent with the long-standing practice of territorial self-government. As explained above, the Appointments Clause applies only to officials who hold continuing office and exercise significant authority under the laws of the United States. For this reason, and despite the Board's alarmist rhetoric, the Appointments Clause does not prohibit territorial home rule. The principal duties of territorial officials are to promulgate, administer, enforce, and apply local territorial laws, distinguishing them from their federal counterparts. *See Snow* v. *United States*, 85 U.S. (18 Wall.) 317, 322 (1873) (distinguishing territorial attorney general, who was empowered to prosecute cases arising under the "[t]erritorial laws," from the U.S. Attorney, whose "proper business" was to prosecute cases under federal law); *Clinton* v. *Englebrecht*, 80 U.S. (13 Wall.) 434, 448 (1871) (distinguishing territorial attorney and marshal from the U.S. Attorney and U.S. Marshal for the territory because the latter's duties "have exclusive relation to cases arising under the laws and Constitution of the United States"). Accordingly, Congress may delegate authority to the territorial electorate in the same way a state devolves power to a municipality, but it cannot delegate significant *federal* authority. "The Commonwealth's power" in Puerto Rico thus "emanates from the people" for purposes of local territorial government, *Sanchez Valle*, 136 S. Ct. at 1869, even though Congress remains the ultimate source of that power, *id*. at 1875. Thus, democratically elected territorial officials—whether in Puerto Rico, Guam, or the Virgin Islands, *see* Pet. 34 n.12—do not violate the Appointments Clause because they simply do not exercise significant authority under the laws of the United States.

That the Appointments Clause applies to federal officials that oversee territories is confirmed by the long history of Presidents using their power under the Recess Appointments Clause to fill vacant territorial offices. A President may use his recess-appointment power to fill only those offices to which the Appointments Clause applies. "The relation in which [the Recess Appointments Clause] stands to the" Appointments Clause "denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment." *The Federalist Papers No. 67*, at 409 (Clinton Rossiter ed., 1961) (Hamilton). The Board and the United States have never offered a principled explanation for this unbroken practice, and suggested below that Presidents stretching from Thomas Jefferson to Harry Truman were acting in an "*ultra vires*" manner when they made recess appointments in the territories. Gov't C.A. Br. 36; Board C.A. Br. 30. In essence, then, the Board maintains that its preferred interpretation of the Constitution is supported by historical practice, yet at the same time argues that such practice was unconstitutional. And the Board *still* offers no explanation for this settled recess-appointment practice.

For all of these reasons, Respondents submit that the Board's arguments rest on a fundamental misunderstanding of the structural limits on Congress's ability to create continuing offices for the exercise of significant authority under the laws of the United States, and that the First Circuit's holding on the merits of the Appointments Clause issue was entirely correct as a matter of first principles and this Court's precedent. Nevertheless, in light of the exceptional importance of these issues and of Puerto Rico's bankruptcy proceeding, Respondents do not disagree with

the Board that this question warrants the Court's review.

II. THE JUDGMENT MAY BE AFFIRMED ON OTHER GROUNDS.

The First Circuit correctly analyzed this case under *Lucia*, *Freytag*, and *Buckley*, which offer the only framework for determining whether an individual is an Officer of the United States. But even if it were relevant to inquire whether the Board is part of the federal government or a territorial government, Respondents would still prevail because the Board is plainly a federal entity.

In *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court established a test for determining whether a particular entity is part of the federal government. The Court held that Amtrak was part of the United States government because Congress created Amtrak by a special law "for the furtherance of the governmental objectives," and the federal government "retains for itself permanent authority to appoint a majority of the" members of Amtrak's governing body. *Id*. at 394, 396, 399-400. Under this test, there is no question that the Board is a federal entity, as the Court of Federal Claims has already held. *Altair Glob. Credit Opportunities Fund (A), LLC* v. *United States*, 138 Fed. Cl. 742, 760 (Fed. Cl. 2018).

First, a "special law" is one that decides an entity's "incorporation, structure, powers, and procedures." *Altair*, 138 Fed. Cl. at 761 (citing *Lebron*, 513 U.S. at 397). PROMESA is just such a law, as it establishes the Board's "structure, powers, and procedures." *Ibid*. Moreover, PROMESA is meant to further a "governmental objective": namely, to establish "a method for a covered territory to achieve fiscal responsibility and

access to the capital markets." 48 U.S.C. § 2121(a); *see also Altair*, 138 Fed. Cl. at 761-62. Finally, the federal government retains permanent power to appoint not just a majority but *all* of the Board members. 48 U.S.C. § 2121(e); *see also Altair*, 138 Fed. Cl. at 762. Under the framework set forth in *Lebron*, the Board is a federal entity, and therefore even under the Board's reasoning, its members are subject to the Appointments Clause.

As Respondents have demonstrated above, the proper framework for determining whether the Board members are Officers of the United States under the Appointments Clause is the test this Court has established in *Buckley* and its progeny. But even if the proper inquiry were whether the Board itself was part of the federal government, the First Circuit's decision would still be correct. Under the *Lebron* test, the Board is undoubtedly a federal entity. As an entity that is part of the federal government, the Board's members must be appointed in accordance with the Appointments Clause, but were not.

III. RESPONDENTS ACQUIESCE IN THE BOARD'S REQUEST FOR THIS COURT'S REVIEW OF THE MERITS OF THE APPOINTMENTS CLAUSE QUESTION IN THIS EXCEPTIONALLY IMPORTANT CASE.

Although the First Circuit correctly held that the Board members' appointments violated the Appointments Clause, Respondents do not disagree that this case presents exceptionally important questions on both the merits and remedies that warrant this Court's review.

The Board's merits arguments rest on a fundamental misunderstanding of the structural limits on

Congress's ability to create continuing offices that exercise significant authority under the laws of the United States, whether Congress acts under Article I or Article IV. That issue is exceptionally important for all citizens—including millions of U.S. citizens in the territories and the District of Columbia who would be denied the Constitution's most basic structural protections if the Board's position prevails. Although the First Circuit's decision was correct, whether the people of Puerto Rico, and the citizens of other territories, are entitled to those liberty-promoting protections is doubtless an important question.

The issue presented in the Board's petition is also important because it is closely intertwined with the issue presented in Respondents' separate petition for a writ of certiorari. In that petition, Respondents seek review of the First Circuit's holding that the so-called "*de facto* officer doctrine" validated all of the Board's past actions, as well as its future actions for a total of 150 days following the court of appeals' judgment. *See* Pet. App. 40a-44a; Order, No. 18-1671 (1st Cir. May 6, 2019), Doc. 117435465. Because that holding deprived Respondents of the remedy they sought for the violation of their constitutional rights, Respondents have petitioned this Court to review the remedies question. If PROMESA violates the Appointments Clause, as Respondents believe it does, what that means as a practical matter is at least as important—if not *more* important—for separation-of-powers litigants than the merits question itself. Granting review of both petitions would permit the Court to review the entire judgment of the First Circuit, including both the merits and the remedies issues, in this important case.

CONCLUSION

The Court should grant the petition in No. 18-1334, and also grant Respondents' petition concerning the First Circuit's remedial holding.

Respectfully submitted.

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