Nos. 18-1334, -1496, -1514

In the Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPENING BRIEF FOR PETITIONER THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

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QUESTION PRESENTED

Whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.

PARTIES TO THE PROCEEDING

Petitioner and Cross-Respondent here, Appellee below, is the Financial Oversight and Management Board for Puerto Rico.

Petitioners and Cross-Respondents here, also Appellees below, are the United States; the Commonwealth of Puerto Rico; the American Federation of State County and Municipal Employees; the Official Committee of Retired Employees of the Commonwealth of Puerto Rico; the Official Committee of Unsecured Creditors; Puerto Rico Electric Power Authority (PREPA); the Puerto Rico Fiscal Agency and Financial Advisory Authority; Andrew G. Biggs; José B. Carrión, III; Carlos M. García; Arthur J. González; José R. González; Ana J. Matosantos; and David A. Skeel, Jr.

Respondents and Cross-Petitioners here, Appellants below, are Assured Guaranty Corporation; Assured Guaranty Municipal Corporation; Aurelius Investment, LLC; Aurelius Opportunities Fund, LLC; Lex Claims LLC; Ad Hoc Group of General Obligation Bondholders; Cyrus Capital Partners, L.P.; Taconic Capital Advisors, L.P.; Whitebox Advisors LLC; Scoggin Management LP; Tilden Park Capital Management LP; Aristeia Capital, LLC; Canyon Capital Advisors, LLC; 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; Fideicosmiso Plaza; Jose F. Rodriguez-Perez; Cyrus Opportunities Master Fund II, Ltd.; Cyrus Select Opportunities Master Fund, Ltd.; Cyrus Special Strategies Master Fund, L.P.; Taconic

Master Fund 1.5 LP; Taconic Opportunity Master Fund LP; Whitebox Asymmetric Partners, L.P.; Whitebox Institutional Partners, L.P.; Whitebox Multi-Strategy Partners, L.P.; Whitebox Term Credit Fund I L.P.; Scoggin International Fund, Ltd.; Scoggin Worldwide Fund Ltd.; Tilden Park Investment Master Fund LP; Varde Credit Partners Master, LP; Varde Investment Partners, LP; Varde Investment Partners Offshore Master, LP; Varde Skyway Master Fund, LP; Pandora Select Partners, L.P.; SB Special Situation Master Fund SPC; Segregated Portfolio D; CRS Master Fund, L.P.; Crescent 1, L.P.; Canery SC Master Fund, L.P.; Merced Partners Limited Partnership; Merced Partners IV, L.P.; Merced Partners V, L.P.; Merced Capital, LP; Aristeia Horizons, LP; Golden Tree Asset Management LP; Old Bellows Partners LLP; and River Canyon Fund Management, LLC; Union de Trabajadores de la Industria Eléctrica y Riego de Puerto Rico, Inc.

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JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. A petition for rehearing en banc filed by respondent Union de Trabajadores de la Industria Eléctrica y Riego de Puerto Rico, Inc. ("UTIER") was denied on March 7, 2019. This Court granted certiorari on June 20, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV of the Constitution provides, in relevant part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl.2.

Article II of the Constitution provides, in relevant part: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Relevant provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq*., are reproduced at Pet. App. 85a-122a.

INTRODUCTION

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq*., to address a fiscal and humanitarian crisis in Puerto Rico. To meet Puerto Rico's immediate need for debt restructuring as well as its longer-term need for fiscal reform, Congress created a new, independent entity within Puerto Rico's government—the Financial Oversight and Management Board ("Board")—and gave it broad authority to work with the Governor and Legislature of Puerto Rico to pursue debt restructuring and fiscal reforms. In the three years since its inception, the Board has prosecuted debt restructuring proceedings on behalf of the Commonwealth and its instrumentalities that represent over $100 billion in claims. The Board has also instituted significant fiscal and governance reforms designed to restore Puerto Rico to financial stability.

In enacting PROMESA, Congress could not have been clearer that the Board was to be an entity within the government of Puerto Rico that would act for the benefit of the people of Puerto Rico. Congress invoked its authority under Article IV of the Constitution to make all needful laws for the territories, not its Article I enumerated powers; PROMESA expressly states that the Board is a part of the territorial government of Puerto Rico, not the federal government; the Board is funded entirely by Puerto Rico; the Board's authority is strictly limited to dealing with Puerto Rico's fiscal crisis; and the substantive law the Board administers is strictly territorial in

scope. Board members are therefore officers of the government of Puerto Rico.

The First Circuit nevertheless held that it was free to disregard Congress's express judgments and deem the Board members "Officers of the United States" who must be appointed in the manner set forth in the Appointments Clause. That unprecedented ruling invalidating the Board members' appointments—which throws into doubt the legality of the Board's actions and threatens the progress that Puerto Rico has made to this point—is irreconcilable with this Court's precedents, bedrock separation-of-powers principles, and the historical practices of the political Branches.

For two centuries, this Court has held that when Congress legislates for the territories, it "may * * * exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973); *McAllister* v. *United States*, 141 U.S. 174, 184-185 (1891); *American Insurance Co.* v. *356 Bales of Cotton ("Canter")*, 26 U.S. 511, 546 (1828). Congress is therefore free to organize (and has organized) territorial governments in ways that depart from the Constitution's structural requirements for the federal government—including the Appointments Clause. That is what Congress did here in providing that Board members are officers of the territorial government with purely territorial authority to address a pressing matter of territorial concern. The First Circuit thus lacked any basis for declaring the Board members' appointments unconstitutional.

STATEMENT

1. a. By 2016, Puerto Rico was "in the midst of a fiscal crisis." *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016). The Commonwealth was "being crushed under the weight of a public debt that [was] larger" than its gross national product, "it ha[d] started to default on its debt obligations," and it had lost access to external funding. *Wal-Mart Puerto Rico, Inc.* v. *Zaragoza-Gómez*, 174 F. Supp. 3d 585, 602 (D.P.R. 2016); H.R. Rep. No. 114-602, at 40 (2016). A humanitarian crisis loomed for the people of Puerto Rico. As the Treasury Secretary observed, the Commonwealth's ability to provide "basic healthcare, legal, and education services" was in serious doubt. Letter from Jacob L. Lew, Secretary of the Treasury, to Paul Ryan, Speaker, U.S. House of Representatives (Jan. 15, 2016).[1]

To address this "fiscal emergency," Congress enacted PROMESA, 48 U.S.C. § 2101 *et seq*., which establishes two primary mechanisms for restoring Puerto Rico to financial stability. *Id*. § 2194(m). Title III of PROMESA addresses Puerto Rico's immediate financial straits by providing for bankruptcy-like debt restructuring proceedings that would enable the Commonwealth and its government entities to address their insolvency. *Id*. § 2161. PROMESA provides for an automatic stay of other litigation during the pendency of Title III proceedings, thus staving off creditor suits seeking billions of dollars from the Commonwealth. *Id*. § 2170; 11 U.S.C. § 362. Title II of the statute addresses longer-term fiscal-

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[1] https://www.treasury.gov/connect/blog/Pages/Secretary-Lew-Sends-Letter-to-Congress-on-Puerto-Rico.aspx.

management issues by establishing annual budgetary controls and a process for developing fiscal plans designed to restore fiscal solvency. 48 U.S.C. §§ 2141-2145.

b. PROMESA also established a Financial Oversight and Management Board. *Id*. § 2121(b)(1). The Board is "an entity within the territorial government," rather than a "department, agency, establishment, or instrumentality of the Federal Government." *Id*. § 2121(c)(1), (2); see also *id*. § 2194(i)(2) ("Government of Puerto Rico" includes the Board for purposes of that section); *id*. § 2127(b) (the Board is funded exclusively by the territorial government). Congress rested its exercise of authority on "article IV, section 3 of the Constitution"—the Territories Clause—"which provides Congress the power to dispose of and make all needful rules and regulations for territories." *Id*. § 2121(b)(2). The Board's stated purpose is not to benefit the United States as a whole, or to deal with problems of national applicability and scope, but instead "to provide a method *for a covered territory [i.e., Puerto Rico]* to achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a) (emphasis added).

The Board is made up of seven voting members, and Puerto Rico's Governor or his designee serves as an *ex officio* member. *Id*. § 2121(e). The President appoints the seven voting members; one may be selected in his "sole discretion," and the other six "should be selected" from lists compiled by congressional leadership. *Id*. § 2121(e)(2)(A).[2] If the Presi-

[2] PROMESA's appointments structure was modeled on, and closely resembles, the structure Congress adopted for the D.C. Financial Control Board. See District of Columbia Financial

(footnote continued)

dent selects a member from a congressional list, no Senate confirmation is required. If the President instead selects someone not on a list, the person must be confirmed by the Senate. *Id*. § 2121(e)(2)(E).

c. The Board implements PROMESA's two primary fiscal-relief measures. First, the Board oversees the certification of annual "Fiscal Plans" and "Budgets" for the Commonwealth and covered instrumentalities. *Id*. §§ 2141-2152. The budget sets forth the expected revenues and permissible spending for the relevant fiscal year, *id*. § 2142, while the fiscal plan delineates fiscal, legal, and governance reforms designed to achieve fiscal responsibility, *id*. § 2141(b) (setting forth required content of fiscal plan). PROMESA directs the Governor and Legislature to develop the budget and fiscal plan in the first instance, and provides for an iterative negotiation process among the Board, Governor, and Legislature. The Board has ultimate authority to certify both the budgets and fiscal plan. *Id*. §§ 2141-2142.

Second, the Board acts on behalf of debtor instrumentalities to petition for debt restructuring under Title III. In these proceedings, the Board steps into the shoes of the debtor entity, and may "take any action necessary on behalf of [a debtor-instrumentality] to prosecute the case." *Id*. § 2175(a). The Board negotiates with the debtor-instrumentality's creditors and presents a proposed plan of adjustment to the court. The creditors then vote on the plan, which the court may confirm consensually or, if it satisfies certain requirements, non-

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Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, § 101(b), 109 Stat. 97.

consensually. 11 U.S.C. §§ 901(a), 1125-1126; 48 U.S.C. § 2161. Once the plan is confirmed by the court, it becomes binding on creditors. 48 U.S.C. §§ 2172-2174.

2. On August 31, 2016, the President announced the appointment of the seven Board members, six of whom he had selected from lists prepared by congressional leadership and one of whom he had selected himself.[3] As permitted by PROMESA, the President did not seek Senate confirmation of any of the appointees. *Id*. § 2121(e)(2)(E), (e)(2)(A)(vi).

The Board set to work immediately. At the time, the Commonwealth had $74 billion of debt, $49 billion of pension liabilities, and nowhere near the resources needed to satisfy those obligations. The crisis deepened in September 2017 after Hurricane Maria destroyed much of the island's infrastructure. Puerto Rico has estimated that recovery from Hurricane Maria will cost more than $139 billion.[4] Against that backdrop, the Board has engaged in three cycles of fiscal plan and budget development, working with the Governor and Legislature to craft plans that lay the groundwork for future financial stability. Most re-

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[3] *President Obama Announces the Appointment of Seven Individuals to the Financial Oversight and Management Board for Puerto Rico*, The White House Office of the Press Sec'y (Aug. 31, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/08/31/president-obama-announces-appointment-seven-individuals-financial.

[4] Puerto Rico Central Office of Recovery, Reconstruction, and Resiliency, *Transformation and Innovation in the Wake of Devastation* 15 (Aug. 8, 2018), http://www.p3.pr.gov/assets/pr-transformation-innovation-plan-congressional-submission-080818.pdf.

cently, for Fiscal Year 2020, the Board has certified fiscal plans and budgets for the Commonwealth and four instrumentalities. In connection with those processes, the Board pressed for, and the Governor and Legislature have undertaken, a number of significant legal and governance reforms, including an operational and structural transformation of the island's electric grid, measures to increase the government's financial transparency, and budgetary controls. FOMB, Annual Report, Fiscal Year 2018, at 8-11.[5]

The Board also has filed five Title III cases on behalf of the Commonwealth and its instrumentalities to restructure tens of billions of dollars in bond debt and over fifty billion dollars of unfunded pension obligations. Those proceedings have required a considerable investment of resources by the parties and the Judiciary. In one such proceeding, the Board has recently accomplished an $18 billion restructuring of sales-tax bonds issued by COFINA, a government corporation. The restructuring will save Puerto Rico over $17 billion in debt service. Creditors have filed 42 adversary proceedings in connection with the restructuring cases, reflecting the degree to which the financial stakes have motivated creditors to challenge the legality of the Board's actions.

3. Respondent Aurelius Investment, LLC ("Aurelius") is a hedge fund that invested heavily in distressed Puerto Rican bonds. On August 7, 2017, Aurelius moved to dismiss the Title III case the Board had initiated on behalf of the Commonwealth,

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[5] https://caribbeanbusiness.com/wp-content/uploads/2018/07/FOMB-Annual-Report-FY-2018-and-Annex-A.pdf.

arguing that the Board was appointed in a manner inconsistent with the Appointments Clause. Pet. App. 53a. Assured Guaranty Corporation, a municipal bond insurer, and UTIER, a labor organization that represents employees of the government-owned Puerto Rico Electric Power Authority, also filed adversary complaints challenging the Board members' appointments. *Id*. at 14a-16a.

The Board opposed the motions on the ground that Board members are territorial officers, not "Officers of the United States" subject to the Appointments Clause. The United States joined the Board in defending the constitutionality of the Board members' appointments, as did the Puerto Rico Fiscal Agency and Financial Advisory Authority (an independent entity within the government of Puerto Rico that serves as the government's fiscal agent and financial advisor) and several creditor groups and labor unions.

The district court denied Aurelius's motion to dismiss, holding that the Appointments Clause did not govern the Board members' appointments. Pet. App. 55a-81a. The district court also dismissed Assured's and UTIER's adversary complaints on the same grounds. *Id.* at 14a-16a.

4. The court of appeals reversed. *Id.* at 1a-45a.

The court began from the premise that officials of territorial governments are "federal officers within the territories" if Congress created the office to which they were appointed. *Id.* at 25a; see *id.* at 21a. The court therefore thought that the Appointments Clause must govern unless it was "displace[d]" by the Territories Clause. *Id.* at 3a. Invoking the maxim that the "specific" must "govern[] the general," the

court held that the Territories Clause did not displace the Appointments Clause. *Id.* at 21a.

The court of appeals then held that Board members are principal "Officers of the United States" who require Senate confirmation under the Appointments Clause. *Id.* at 30a (citing *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018)); *id.* at 38a-40a. The court distinguished Board members from other high-ranking territorial officials, such as the Governor of Puerto Rico, asserting that such officials "are not federal officers" because their authority arises from the Commonwealth's constitution. *Id.* at 37a. The court recognized, however, that the Puerto Rico constitution itself represents "a federal grant" of authority from Congress. *Ibid.*

Turning to the appropriate remedy, the court of appeals invalidated the "provisions [of PROMESA] allowing the appointment of Board members in a manner other than by presidential nomination followed by the Senate's confirmation," and severed them from the remainder of the statute. *Id.* at 42a. The court declined to dismiss all of the Title III petitions, according de facto validity to the Board's previous actions. *Ibid.* The court emphasized that any other approach would have "negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now," and would "likely introduce further delay into a historic debt restructuring process that was already turned upside down * * * by the ravage of the hurricanes." *Id.* at 43a.

5. The Board sought a stay of the First Circuit's mandate pending final disposition in this Court. The Board explained that without a stay, it would be compelled to stop prosecuting the ongoing Title III

cases. Creditors would then seek to dismiss those proceedings and race to the courthouse to file suits against the Commonwealth seeking tens of billions of dollars, effectively ending the orderly restructuring process. See 48 U.S.C. § 2170; 11 U.S.C. § 362(c). On July 2, 2019, the First Circuit stayed the mandate pending final disposition in this Court.

6. In an abundance of caution, on June 18, 2019, the President nominated the current Board members to serve in their current positions.[6] The Senate has not yet acted on the nominations.

SUMMARY OF ARGUMENT

The Board members' appointments are constitutional. The Appointments Clause governs the appointments of officers "of the United States"—in other words, officers in the federal government, who exercise national authority pursuant to statutes enacted in the exercise of Congress's Article I authority to structure the national government. The Board members are not officers of the United States; instead, they are territorial officers whose offices Congress created pursuant to its Article IV authority to legislate for the territories. Longstanding precedent, historical practice, and fundamental separation-of-powers principles establish that territorial offices created by Congress under Article IV need not be filled in conformance with the Appointments Clause.

I. The Appointments Clause does not govern Congress's exercise of its Article IV authority to establish

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[6] *Seven Nominations Sent to the Senate*, June 18, 2019, https://www.whitehouse.gov/presidential-actions/seven-nominations-sent-senate-3/.

territorial offices that exercise the authority of the territory, within the territory.

For two centuries, this Court has held that the Territories Clause of Article IV confers on Congress plenary authority to "legislate for [the territories] as a State does for its municipal organizations." *First Nat'l Bank* v. *Yankton Cty.*, 101 U.S. 129, 133 (1879). In establishing a territorial government, Congress does not exercise its Article I authority to organize the national government; instead, it acts pursuant to the "plenary *municipal* authority" conferred by Article IV. *McAllister*, 141 U.S. at 184-185 (emphasis added). As a result, Congress confers on the territorial government only the local authority *of the territory*—not any national authority to act on behalf of the United States. *Palmore*, 411 U.S. at 407.

Congress's actions in organizing a territorial government therefore are "not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 323 (1937). For example, Congress need not abide by the structural protections of Article III when creating territorial courts because such courts do not exercise the national judicial power "of the United States." *McAllister*, 141 U.S. at 184-185. The nondelegation doctrine likewise does not prevent Congress from delegating broad legislative power to govern the territory to territorial governments—or even to the President. *Cincinnati Soap*, 301 U.S. at 323; *United States* v. *Heinszen*, 206 U.S. 370, 384-385 (1907). And because territorial officials do not exercise any part of the national Executive power, Article II's Vesting Clause does not prevent Congress from delegating executive power to govern the territory to

territorial officials who are not subject to presidential control. *Snow* v. *United States*, 85 U.S. 317, 321-322 (1873).

For the same reasons, the Appointments Clause does not constrain Congress's organization of territorial governments under the Territories Clause. The Appointments Clause governs the appointment of "Officers *of the United States*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). It therefore applies only when Congress creates an office *of the United States—i.e.*, an office in the federal government that exercises the authority of the federal government on behalf of the Nation as a whole. Territorial officers do not exercise any national Executive authority within the meaning of Article II, and they do not exercise significant authority pursuant to the laws of the United States "considered as a political body of states in union." *Cincinnati Soap*, 301 U.S. at 323.

As a result, the structural separation-of-powers concerns animating the Appointments Clause—in particular, constraining the President's exercise of the appointment power, and ensuring dual accountability with respect to the most "important" Executive officers—are not implicated when Congress creates an Article IV territorial office. *Edmond* v. *United State*s, 520 U.S. 651, 659-660, 662 (1997). Given that Congress's plenary authority under the Territories Clause enables it to grant the President *more* authority with respect to the territories than Article I permits with respect to the national government, *Heinszen*, 206 U.S. at 385, there is no reason that Congress may not vest the power to appoint territorial officials in the President alone.

Historical practice confirms this understanding. Since the Northwest Ordinance of 1789, Congress has

employed a variety of procedures for appointing territorial officers that do not conform to the Appointments Clause. Territorial legislative officers have always been popularly elected, and while territorial governors generally were appointed by advice and consent, some high-level territorial officials were appointed by the President alone, and numerous other territorial and D.C. executive officials were appointed by other territorial officials. For the past seventy years, moreover, Congress has followed a policy of territorial self-governance, pursuant to which territorial officials are popularly elected or locally appointed. If the Appointments Clause applied to territorial officers, all current territorial governments would be invalidly constituted.

II. In enacting PROMESA, Congress made plain that the Board is an entity within the territorial government, and its members are territorial officers who need not have been appointed in accordance with the Appointments Clause. Congress created the Board pursuant to its plenary Article IV power over the territories; established the Board as an independent agency located within, and funded by, the territorial government; and delegated to it strictly local authority with respect to territorial finances and fiscal policies. *Palmore*, 411 U.S. at 407-408.

In purpose and effect, Congress altered the structure of Puerto Rico's government, taking some of the authority over territorial finances and policies that previously had belonged solely to the Governor and the Legislature, and placing it in the Board. If control over the Commonwealth's finances could be constitutionally exercised by Puerto Rico's popularly elected Governor and Legislature, there is no reason why Congress could not transfer some of that author-

ity to the Board. Congress has "broad latitude to develop innovative approaches to territorial governance," *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016), and it exercised that power here to craft an effective and critically needed response to Puerto Rico's unprecedented financial and humanitarian crisis.

ARGUMENT

I. THE APPOINTMENTS CLAUSE DOES NOT CONSTRAIN CONGRESS WHEN IT CREATES TERRITORIAL OFFICES UNDER ARTICLE IV.

The Appointments Clause provides in relevant part that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * all other Officers *of the United States*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The Clause governs only when Congress establishes an office *of the United States—i.e.*, an office *in* the federal government that exercises the national authority *of* the federal government. Territorial offices established pursuant to Congress's authority to "make all needful Rules and Regulations respecting the Territor[ies]," U.S. Const. art. IV, § 3, cl. 2, are not within the federal government. Those who fill territorial offices exercise primarily or exclusively local authority, not national authority under the laws of the United States.

In an unbroken line of authority beginning with Chief Justice Marshall's decision in *Canter*, 26 U.S. at 546, this Court has held that when Congress exercises its Article IV authority to structure a territorial government, it exercises, and delegates to the territory, "plenary municipal authority" to govern the territory. *McAllister*, 141 U.S. at 184-185. The resulting

government is local, not national, in character. That local character has a critical consequence: When Congress is deciding how to structure territorial offices or territorial governments, it generally is "not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union." *Cincinnati Soap*, 301 U.S. at 323. Congress therefore need not provide that territorial offices be filled in the manner prescribed by the Appointments Clause, any more than a State need do so when deciding how municipal offices will be filled. And, indeed, beginning in 1789, Congress has created many territorial offices that are not filled in the manner that the Appointments Clause prescribes for offices of the national government. This Court's precedents and centuries of historical practice thus refute the court of appeals' conclusion that the Appointments Clause governs the manner in which territorial offices are filled.

A. Territorial governments established under Article IV need not conform to structural separation-of-powers constraints that dictate how the federal government must be organized.

1. The Territories Clause empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. When Congress acts under the Territories Clause or its parallel authority under the District of Columbia Clause, *id.* art. I, § 8, cl. 17, "Congress has the entire dominion and sovereignty, national and local, Federal and state." *Simms* v. *Simms*, 175 U.S. 162, 168 (1899); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 106-107 (1953). The territories are "politi-

cal subdivisions * * * of the United States," such that their "relation to the general government is much the same as that which counties bear to the respective States." *First Nat'l Bank*, 101 U.S. at 133. With respect to legislation directed to such territories, in contrast to legislation directed to the nation as a whole, Congress "may * * * exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore*, 411 U.S. at 397.

Since the Founding, Congress has enacted organic statutes that establish and organize territorial governments and delegate to them the authority to govern the territory. *Canter*, 26 U.S. at 546; *Binns* v. *United States*, 194 U.S. 486, 491-492 (1904); *First Nat'l Bank*, 101 U.S. at 130. When Congress does so, it does not exercise its Article I authority to make "laws *for the United States considered as a political body of states in union*." *Cincinnati Soap*, 301 U.S. at 322-323 (emphasis added). Instead, Congress acts pursuant to the "plenary *municipal* authority" conferred by Article IV. *McAllister*, 141 U.S. at 184-185 (emphasis added). The resulting statute is thus not considered a statute of "nationwide application," but instead addresses, and confers authority only with respect to, "matters of strictly local concern." *Palmore*, 411 U.S. at 406-407.

Territorial governments are therefore designed to exercise "municipal authority," *McAllister*, 141 U.S. at 184-185, rather than the national authority *of the United States*. See William Baude, *Adjudication Outside Article III*, at 15-18 (forthcoming 133 Harv. L. Rev.) (Baude).[7] As Chief Justice Marshall ex-

[7] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194945.

plained in 1828, when Congress creates a territorial government under Article IV, that entity is not part of the "general government" of the United States. *Canter*, 26 U.S. at 546. Rather, it is a local body that exercises the executive, legislative, and judicial "power *of the Territory*."[8] Baude, *supra*, at 15; *McAllister*, 141 U.S. at 184 ("courts in the territories, created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts *of the United States*" (emphasis added)).

That understanding is no different today than when Chief Justice Marshall articulated it in 1828. As Members of this Court have explained, "Congress's power over the Territories allows it to create governments in miniature, and to vest those governments with the legislative, executive, and judicial powers, *not of the United States*, but of the Territory itself." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2197 (2018) (Alito, J., joined by Gorsuch, J., dissenting) (emphasis added); accord *id.* at 2177 (opinion of the Court) (describing D.C. courts as "local"); *Freytag*, 501 U.S. at 913 (Scalia, J., concurring in part) (Territorial courts "do not exercise the national executive power" or "any national judicial power" because they "are neither Article III nor Article I courts, but Article IV

[8] The organic statutes establishing territorial governments often made the limited nature of territorial authority explicit, providing that the territorial government would exercise only the executive, legislative, and judicial "power *of the territory*," not of the United States. 3 Stat. 493, 494, §§ 5, 7 (Mar. 2, 1819) (Arkansas) (emphasis added); see also, *e.g.*, 5 Stat. 10, 11, § 2 (Apr. 20, 1836) (Wisconsin); 13 Stat. 85, 86-87, §§ 2, 4 (May 26, 1864) (Montana).

courts—just as territorial governors are not Article I executives but Article IV executives.").

2. It is for this reason that this Court has consistently reaffirmed Congress's "broad latitude to develop innovative approaches to territorial governance." *Sanchez Valle*, 136 S. Ct. at 1876. Congress may make choices in structuring territorial governments that "would exceed [Congress's] powers, or at least * * * be very unusual, in the context of national legislation." *Palmore*, 411 U.S. at 398; *Ortiz*, 138 S. Ct. at 2197 (Alito, J., dissenting) (historical congressional delegations to territorial governments "would be incompatible with the Vesting Clauses of the Federal Constitution if those Clauses applied"). It is no coincidence, then, that from the time the Constitution was first adopted, and continuing to the present, Congress has repeatedly exercised its plenary Article IV power to organize territorial governments in ways that do not comply with separation-of-powers limits on how the federal government may be structured, and this Court has uniformly upheld Congress's actions.

For example, Congress need not abide by Article III's tenure and salary protections when it establishes territorial courts that have general jurisdiction to hear cases under both local and federal law. *McAllister*, 141 U.S. at 184-185. That is because territorial courts exercise only the judicial power of the territory—not the "judicial Power *of the United States*" within the meaning of Article III. U.S. Const., art. III, § 1 (emphasis added); *Canter*, 26 U.S. at 512; *Clinton* v. *Englebrecht*, 80 U.S. 434, 447 (1871) (Territorial courts are not "courts of the United States."). That is true even though territorial judges hold offices created by "act[s] of Congress," and adjudicate

claims under federal as well as territorial law. *Clinton*, 80 U.S. at 447. This Court has never found these characteristics sufficient to require that territorial courts be treated as "national" courts subject to Article III for purposes of the separation-of-powers analysis. *Palmore*, 411 U.S. at 406, 408.

Similarly, the nondelegation doctrine, which prohibits Congress from delegating its legislative power to a coequal Branch, imposes no constraint on how Congress may govern territories and structure territorial governments. *Cincinnati Soap*, 301 U.S. at 322-323. In *Cincinnati Soap*, for example, Congress conveyed the proceeds of a tax to the Philippine government, "with no direction as to the expenditure thereof." 301 U.S. at 312. Congress could not have made such an unbounded delegation to a federal executive officer in a statute pertaining to federal governance of the Nation as a whole. See *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). But this Court held that the delegation to the Philippine government raised no constitutional issue.

As with Article III, the inapplicability of the nondelegation doctrine follows from the recognition that when Congress enacts a statute delegating territorial authority pursuant to Article IV, it is not delegating any part of Congress's Article I authority to enact laws of nationwide application and national concern. When Congress enacts a statute with a purely territorial focus for the purpose of advancing the welfare of a territory's population, therefore, it is "not subject to the same restrictions which are imposed in respect of laws *for the United States considered as a political body of states in union*." *Cincinnati Soap*, 301 U.S. at 322-323 (emphasis added). This Court has even held that Congress may delegate its legislative authority

under Article IV to the President, to enable the President alone to make law for a territory. *Heinszen*, 206 U.S. at 385.[9]

Finally, Article II's Vesting Clause does not limit Congress's ability to delegate executive responsibility for governing a territory to officials whom the President does not control. In *Snow*, the Court upheld the ability of territorially elected prosecutors to prosecute offenses under the laws of the territory, even though such offenses were "[s]trictly speaking" offenses against the United States, and even though such prosecutions would preclude later prosecution by the United States. 85 U.S. at 321-322. The Vesting Clause did not prohibit these prosecutions because territorial executive officials "do not exercise the national executive power." *Freytag*, 501 U.S. at 913 (Scalia, J., concurring); *Ortiz*, 138 S. Ct. at 2196 (Alito, J., dissenting) ("When exercising [power under the Territories Clause], Congress is not bound by the Vesting Clauses of Articles I, II, and III"). Congress may thus authorize territories to elect their own leaders without raising any concern that doing so would impermissibly diminish the President's Article II authority.

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[9] Although not a structural separation-of-powers provision, the uniformity requirement pertaining to taxes that Congress levies "to provide for * * * the general Welfare *of the United States*," U.S. Const. art. I, § 8, cl. 1 (emphasis added), also does not apply to Congress's action with respect to a territory. When Congress levies a tax for the benefit of a particular territory, it "act[s] as the local legislature" in enacting a territorial tax, and it is therefore "unrestricted by constitutional provisions" that apply when it acts in its capacity as the national government. *Binns*, 194 U.S. at 492.

B. The Appointments Clause does not govern Congress's establishment of territorial offices under Article IV.

1. The Appointments Clause is indistinguishable from the constitutional requirements that this Court has already held do not constrain the ways that Congress may organize territorial governments. The Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * all other Officers *of the United States*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The Clause thus applies only when Congress creates an office *of the United States—i.e.*, an office in the federal government that exercises the national authority *of* the federal government on behalf of the people as a whole.

The textual phrase "of the United States" means the same thing in the Appointments Clause as it means in Article III: In both, it refers to the authority of the national government acting on behalf of the people of the United States as a whole.[10] It is well-established that territorial courts do not exercise the "judicial power of the United States," but instead exercise only the "judicial power of the territory." *Ortiz*, 138 S. Ct. at 2196 (Alito, J., dissenting); *Palmore*, 411 U.S. at 407-408; *McAllister*, 141 U.S. at 184; Baude, *supra*, at 15. Thus, in the context of

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[10] Indeed, this Court has expressly linked the inapplicability of Article III to Congress's appointment authority, stating that because territorial courts are not "courts of the United States," "[t]here is nothing in the Constitution which would prevent Congress from conferring the jurisdiction which they exercise, if the judges were elected by the people of the Territory, and commissioned by the governor." *Clinton*, 80 U.S. at 447.

Article III, the phrase "of the United States" refers to the national power of the United States—as opposed to the purely local power of the territory itself. *Cincinnati Soap*, 301 U.S. at 322-323.

In like manner, the Appointments Clause's reference to "officers *of the United States*" refers to those officers who exercise national power that is vested in the President under Article II, or in the Judiciary under Article III.[11] See *United States* v. *Germaine*, 99 U.S. 508, 510 (1878) (the Appointments Clause was intended to apply to "all persons who can be said to hold an office under *the government about to be established under the Constitution*" (emphasis added)); *Benner* v. *Porter*, 50 U.S. 235, 242 (1850) (territorial governments "are not organized under the Constitution," but instead "are the creations, exclusively, of the legislative department"). Territorial officers appointed pursuant to the Territories Clause do not fall within the Appointments Clause's ambit, because they exercise no part of the national Article II or Article III power "of the United States." Instead, they exercise only the local power of the territory. For that reason, territorial executive officers need not be subject to presidential control under Article II, just as territorial judges need not enjoy tenure protection under Article III. *Freytag*, 501 U.S. at 913 (Scalia, J., concurring) ("Article IV executives" do not exercise the "national executive power"); accord *Snow*, 85 U.S. at 321-322.

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[11] National legislative officers who exercise Article I legislative power must attain their offices through the separate mechanisms that the Constitution provides for national legislative officers. See U.S. Const. art. I, § 2, cl. 5; *id*. art. I, § 3, cl. 5.

The conclusion that the Appointments Clause does not apply to territorial officers is reinforced by this Court's traditional definition of an "officer of the United States": one who occupies a continuing position exercising "significant authority pursuant to the laws *of the United States*." *Lucia*, 138 S. Ct. at 2051 (emphasis added). Statutes enacted in the exercise of Congress's municipal authority under the Territories and District of Columbia Clauses should not be considered "laws of the United States" in the relevant sense. This Court has repeatedly held that for purposes of applying separation-of-powers constraints, congressional statutes organizing territorial governments are not to be treated as "laws for the United States considered as a political body of states in union." *Cincinnati Soap*, 301 U.S. at 322-323. Instead, they are treated as laws that address matters of purely local concern. In *Palmore*, for instance, this Court rejected the argument that "the District of Columbia Code, having been enacted by Congress, is a law *of the United States*," such that the D.C. courts administering the statutes had to be Article III "courts of the United States." 411 U.S. at 400, 405-407 (emphasis added). The Court explained that the D.C. Code was "applicable to the District of Columbia alone," and therefore should be considered a "local law" that delegated local authority, rather than a "law of national applicability," for purposes of the separation-of-powers inquiry. *Id*. at 407-408.

Stated in terms of the Appointments Clause, a statute enacted under the Territories or District of Columbia Clauses is not a "law[] for the United States" as a national body, *Cincinnati Soap*, 301 U.S. at 322-323, and it does not delegate any portion of the national power "of the United States," *Palmore*, 411 U.S. at 408. The person who holds an office created

in the exercise of this power therefore is not an "officer of the United States," because he does not exercise delegated national authority pursuant to the laws of the United States as a political body. His principal (here exclusive) responsibility is instead to attend to matters of local concern by applying laws specific to the territory.

2. The separation-of-powers principles that animate the Appointments Clause are not implicated when Congress exercises its Article IV power to decide how a territorial government should be organized. Just as Article III protects the Judiciary from congressional encroachment, *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1944 (2015), the Appointments Clause "prevents congressional encroachment upon the Executive" by ensuring that the President maintains authority to choose and direct those who are to assist him in executing federal law. *Edmond*, 520 U.S. at 659; see generally *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-498 (2010). That concern is not implicated by territorial appointments because territorial officials exercise only the authority of the territory, not any part of the national executive authority that Article II's Vesting Clause vests in the President. Article II therefore does not require that the President supervise territorial officials or have a role in their appointment. See *Snow*, 85 U.S. at 321-322; accord *Ortiz*, 138 S. Ct. at 2196 (Alito, J., dissenting). Indeed, it is for this reason that Congress may constitutionally provide for local self-government in the territories.

At the same time, the Clause's requirement of Senate confirmation for principal Executive officers is designed to constrain the President's exercise of the

appointment power, and ensure dual accountability, with respect to the most "important" Executive officers. *Edmond*, 520 U.S. at 659-660, 662; see 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1524, at 376 (1833) (the Senate's "consent" function is a "precaution" against presidential overreach—a "salutary check" on the power to appoint "those, who are in conjunction with himself to execute the laws"); accord *The Federalist No. 76*, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). But Congress's plenary authority under the Territories Clause enables it to grant the President *more* authority with respect to the territories than Article I permits with respect to the national government. *Heinszen*, 206 U.S. at 385. If Congress may vest the President with complete authority to govern (and legislate for) a territory, there is no reason that Congress may not vest the power to appoint territorial officials in the President alone. In addition, the grant of plenary police power to Congress in the Territories Clause itself reflects a recognition that separation-of-powers "requirements" that "are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Palmore*, 411 U.S. at 408.

C. Historical practice confirms that the Appointments Clause does not apply to territorial officials.

Centuries of historical practice confirm that territorial offices created by Congress in the exercise of its Article IV power need not be filled in the manner that the Appointments Clause prescribes. This historical

practice is strong evidence of constitutional meaning because the Court presumes that the political Branches act in conformance with their understanding of what the Constitution requires. See *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("[T]he longstanding 'practice of the government' can inform [a] determination of 'what the law is.'" (citations omitted)); *McAllister*, 141 U.S. at 185 ("Congress would not have assumed, in the act providing for courts in the territories * * * to limit the terms of the judges in the modes indicated if it had supposed that such courts were courts of the United States" under Article III).

Beginning in 1789, Congress repeatedly filled territorial offices in ways that would have violated the Appointments Clause had it applied. While Congress provided that some territorial offices—particularly, territorial governors and judges—were to be filled using advice and consent procedures, many other territorial and D.C. officials were appointed by other territorial officials, popular election, or Executive Branch officials, including the President alone. These offices were created by federal statutes, their authorities derived from federal statutes, and the officers who filled them often administered federal statutes that prescribed substantive law for the territory (or the District of Columbia). And for the past seventy years, Congress has followed a policy of territorial self-determination, pursuant to which almost *all* territorial officials are popularly elected or locally appointed. All of these methods of filling territorial offices would have violated the Appointments Clause if it applied.

1. *Since the Founding, Congress has structured territorial governments without regard to the Appointments Clause.*

a. Founding-era legislation for the territories and what is now the District of Columbia provided that many territorial offices would be filled in ways that did not conform to the Appointments Clause. That history is especially strong evidence that territorial officers have never been considered "Officers of the United States" within the meaning of the Appointments Clause. See *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 412 (1928).

In the Northwest Ordinance of 1789, Congress delegated to a legislature elected by the residents of the territory the authority to make all laws for the Northwest Territory, including criminal laws that would govern the conduct of U.S. citizens in the territory. 1 Stat. 50, 51 & n.a (Aug. 7, 1789) (incorporating 1787 Northwest Ordinance §§ 8, 9, 11). These legislative officers exercised substantial authority over the territories, and that authority was conferred by federal statute. Yet the first Congress did not consider them to be "Officers of the United States" who were exercising Article II executive power and thus needed to be appointed in the manner prescribed by the Appointments Clause. Nor did the 1789 Congress consider them to be officials exercising the Article I legislative power who had to obtain their offices through the Constitution's appointment provisions for national legislative officers. See U.S. Const. art. I, § 2, cl. 5; *id*. art. I, § 3, cl. 5. They were instead territorial officials exercising municipal authority that Congress had conferred on them in the exercise of its Article IV power. These officers therefore did not

need to be appointed in the manner prescribed by the Appointments Clause.

The Ordinance further provided that the governor of the territory would appoint the territory's "magistrates and other civil officers." 1 Stat. 51 (incorporating 1787 Northwest Ordinance § 7). The officers so appointed included justices of the peace (*i.e.*, magistrates), probate and common-pleas judges, and surveyors. 3 *The Territorial Papers of the United States: The Territory Northwest of the River Ohio* 304-305, 307 (Clarence Edwin Carter ed. 1934). These officials would have been inferior officers had the Appointments Clause applied. Yet the first Congress prescribed methods of appointing them that did not conform to the Clause.

Congress carried these provisions forward from the Northwest Ordinance of 1787, and at the same time amended the earlier statute to provide that the President, rather than the Confederation Congress, had authority to appoint (with the Senate's advice and consent) and remove the territorial governor. The ordinance stated that its purpose was to "adapt" the 1787 statute governing the Northwest Territories "to the present Constitution of the United States." 1 Stat. 51. That adaption was necessary because the Confederation Congress no longer existed. Notably, the 1789 Ordinance did not alter the 1787 Ordinance's provision for a popularly elected territorial legislature or lower-level officials appointed by territorial actors not mentioned in the Appointments Clause. Congress could not have permitted territorial appointment of those officers had it believed that the Clause applied.

Congress's treatment of the District of Columbia in the early nineteenth century also would have vio-

lated the Appointments Clause had it applied. In 1802, Congress provided that the Mayor of Washington would be appointed annually by the President alone—even though, as the District's highest official, the Mayor would have been a principal officer requiring Senate confirmation if the Appointments Clause applied. 2 Stat. 195, 196, § 5 (May 3, 1802). Congress gave the elected city council broad legislative authority, and provided that the Mayor had authority to approve city ordinances. *Id*. §§ 6, 7. Together with the council, the Mayor established the District's first public schools and its police and fire departments. See James Dudley Morgan, *Robert Brent, First Mayor of Washington City*, in 2 Records of the Columbia Historical Society 245-246 (1899).

The D.C. Mayor, in turn, was given the authority to appoint "all offices under the corporation." 2 Stat. 196, § 6. That included the office of tax collector, who was authorized to collect taxes pursuant to substantive standards set forth in the statute. *Id*. § 8. Tax collectors were thus not appointed in conformance with the Appointments Clause—yet they enforced and administered a federal statute. These subordinate officers would have been inferior officers if the Appointments Clause applied. Cf. *The Federalist No. 84*, at 585 (Alexander Hamilton) (tax collectors for the "national" government would be "federal officers"). Yet, as with the Mayor, Congress did not provide for their appointment in the manner that the Clause prescribes for "Officers of the United States."

b. Throughout the nineteenth and early twentieth centuries, Congress structured territorial governments in ways that would have violated the Appointments Clause had it applied. Congress authorized popularly elected legislatures for nearly all terri-

tories.[12] And in the majority of territories, Congress provided that many territorial officials, including high-ranking executive officers, would be appointed by other territorial officials, not by "the President alone, [by] the Courts of Law, or [by] the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. In the territory of Wisconsin, for instance, Congress directed that "[t]he Governor shall nominate, and, by and with the advice and consent of the Legislative Council, shall appoint, all judicial officers, justices of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for." 5 Stat. 10, 13, § 7 (1836).[13]

Although Congress generally provided that territorial governors were appointed by the President with the Senate's advice and consent, Congress did not follow the same practice with respect to the District of Columbia. After providing in 1802 that the Mayor would be appointed by the President alone, Congress proceeded to experiment with various forms of government in the District of Columbia, most of which did not comply with the Appointments Clause. In 1812, Congress provided that the Mayor would be

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[12] See, *e.g.*, 1 Stat. 549, 550, § 3 (Apr. 7, 1798) (Mississippi); 2 Stat. 58, 59, § 2 (May 7, 1800) (Indiana); 2 Stat. 514, 515, § 2 (Feb. 3, 1809) (Illinois); 2 Stat. 743, 745, § 6 (June 4, 1812) (Missouri); 9 Stat. 446, 448, § 4 (Sept. 9, 1850) (New Mexico); 26 Stat. 81, 83, § 4 (May 2, 1890) (Oklahoma); 31 Stat. 141, 144, § 13 (Apr. 30, 1900) (Hawaii); 37 Stat. 512, 513, § 4 (Aug, 24, 1912) (Alaska).

[13] See also, *e.g.*, 2 Stat. 514, 515, § 2 (Feb. 3, 1809) (Illinois); 2 Stat. 743, 744, § 2 (June 4, 1812) (Missouri); 12 Stat. 172, 174, § 7 (Feb. 28, 1861) (Colorado); 13 Stat. 85, 88, § 7 (May 26, 1864) (Montana); 15 Stat. 178, 180, § 7 (July 25, 1868) (Wyoming); 26 Stat. 81, 85, § 7 (May 2, 1890) (Oklahoma).

elected by two popularly elected municipal legislative bodies. 2 Stat. 721, 723-724, §§ 2, 3 (May 4, 1812). In 1820, Congress made the Mayor popularly elected, and maintained his authority to appoint and remove all officers "under the corporation." 3 Stat. 583, 584, § 3 (May 15, 1820). That structure persisted until 1871, when Congress provided that D.C. executive officials would be appointed with advice and consent—at least until 1973, when Congress conferred home rule authority on the District. See pp. 35-36, *infra*.

c. Congress's historical treatment of Puerto Rico followed a similar pattern. In the Foraker Act of 1900, which established Puerto Rico as a territory of the United States, Congress provided that the Governor and certain executive officials would be appointed by the President with advice and consent. But Congress simultaneously provided that one house of the Puerto Rico legislature would be popularly elected. And it directed that the judges of the territorial district courts would be appointed by the governor with the advice and consent of the territorial executive council. 31 Stat. 77, 81-82, 84, §§ 17, 18, 27, 33 (Apr. 12, 1900). Those judges unquestionably would have been "officers of the United States" if the Appointments Clause applied. *Lucia*, 138 S. Ct. at 2053.

In 1917, Congress gave Puerto Rico more self-governance authority. The Jones Act altered the structure of the local executive by providing that four of the six executive heads of departments—including the treasurer and the commissioner of the interior—would be appointed by the governor, with the advice and consent of Puerto Rico's Senate. 39 Stat. 951, § 13 (Mar. 2, 1917). The Jones Act also conferred a number of authorities and duties on territorially

appointed executive officials, including authorizing the treasurer to collect, maintain, and disburse all public funds in the territory, and authorizing the commissioner of the interior to superintend all public works in the territory. *Id*. §§ 15-16, 18-19. These provisions would have been unconstitutional if the Appointments Clause applied because the territorial treasurer and commissioner of the interior, who would certainly qualify as inferior officers, were not appointed consistent with that Clause.

2. *Current territorial and D.C. governance regimes do not comply with the Appointments Clause.*

For the past seventy years, Congress has permitted the citizens of territories a considerable measure of self-government, including the right to select their own executive officers. This universal system of territorial home rule would be unconstitutional if territorial offices had to be filled in the manner prescribed by the Appointments Clause.

In 1947, Congress provided that the Governor of Puerto Rico would be elected by the people of Puerto Rico (rather than appointed by the President), and that the Governor would in turn appoint the heads of the executive departments with the advice and consent of the Senate of Puerto Rico. 61 Stat. 770, 770-771, §§ 1, 3 (Aug. 5, 1947). In 1950, Congress went further and authorized the people of Puerto Rico to adopt their own constitution. 64 Stat. 319 (July 3, 1950). The constitution, which went into effect in 1952 after it was approved by Congress, provides for popular election of the Governor and appointment of executive officers by the Governor with advice and consent of the Senate of Puerto Rico. *Sanchez Valle*, 136 S. Ct. at 1874-1875; P.R. Const. art. IV.

Congress has similarly provided for self-governance in every other existing territory. 48 U.S.C. §§ 1422, 1423 (Guam); *id*. §§ 1571, 1591 (Virgin Islands); Act of Feb. 20, 1929, § (c), 45 Stat. 1253; 42 Fed. Reg. 48,398 (Sept. 23, 1977) (American Samoa); 51 Fed. Reg. 40,399 (Nov. 3, 1986) (Northern Mariana Islands). In Guam and the Virgin Islands, Congress has not authorized territorial residents to adopt a constitution, so the territorial governments and their offices are established by federal organic statutes. The territories' governors are popularly elected, and other officials are appointed by the governor with the advice and consent of the territorial legislature. 48 U.S.C. §§ 1422, 1422c(a), 1591, 1597(c). With respect to Guam in particular, Congress has conferred extensive duties on the governor and legislature, including enforcing and supplementing a detailed territorial income tax scheme set forth in federal statutory provisions directed specifically to Guam. 48 U.S.C. § 1421i(a), (b). In delegating that authority, Congress made clear that while the governor is charged with enforcing a federal statute, he is not an officer of the Executive Branch, but is instead obligated to act on behalf of Guam in particular. 48 U.S.C. § 1421i(c), 1421i(d)(2) ("The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax.").

For American Samoa, Congress delegated complete authority to govern the territory (including appointing and removing officials) to the President, who in turn delegated to the Department of the Interior. 48 U.S.C. § 1661(c); see *Heinszen*, 206 U.S. at

385. The Secretary approved a territorial constitution providing for a popularly elected governor and gubernatorial appointment for other officials. 42 Fed. Reg. 48,398. Territorial judges, however, are appointed and removable for cause by the Secretary. Rev. Am. Sam. Const., art. III, § 3; Am. Samoa Code § 3.1001. For a time, the attorney general was appointed by the Secretary and was responsible for carrying out duties with respect to the territory assigned by the Secretary. 42 Fed. Reg. 58,580 (Nov. 10, 1977).

Finally, in the District of Columbia, the D.C. Home Rule Act, a federal statute, establishes the District's government and its instrumentalities, and provides that the mayor and city council will be popularly elected. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (Home Rule Act). The Home Rule Act imposed substantive duties on the Mayor, including administering the District's finances in accordance with detailed standards set forth in the Act, and administering existing "legislation enacted by Congress" governing the District. *Id*. §§ 422, 448.

Congress has subsequently altered the District's governmental structure when necessary to meet pressing local needs. In 1995, for instance, Congress responded to the District's financial crisis by establishing the District of Columbia Financial Responsibility and Management Assistance Authority as an independent fiscal agency within the D.C. government. District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, § 101(b), 109 Stat. 97. That statute served as the model for PROMESA; the D.C. Board was simi-

larly appointed by the President alone, and it was responsible for crafting fiscal plans and budgets for the D.C. government.

As this historical practice makes plain, Congress and the President have never believed that territorial and D.C. governments must be organized in a manner that meets the requirements of the Appointments Clause. Governors, who would be principal officers if the Clause applied, are popularly elected, not appointed by the President and confirmed by the Senate. Most subordinate territorial officials have been appointed by other territorial officials, not in the manner the Appointments Clause requires for inferior officers. And members of territorial legislatures, who exercise substantial authority, are obviously not selected in a manner that the Appointments Clause permits. All of these "innovative approaches to territorial governance," *Sanchez Valle*, 136 S. Ct. at 1876, from the earliest days of the Republic to the present, would have been unconstitutional if the Appointments Clause limited Congress's structuring of territorial offices.

D. The court of appeals' contrary arguments are irreconcilable with this Court's precedents and historical practice.

The court of appeals never grappled with the foundational distinction between Congress's nationwide Article I authority to create an office in the national government, and Congress's municipal Article IV authority to create an office within a territorial government. Instead, the court held that the Appointments Clause governs all offices created by Congress, particularly those that administer federal statutes. That view cannot be reconciled with this Court's precedents or with historical practice.

1. *The court of appeals' attempts to distinguish this Court's Article IV precedents are unavailing.*

The court of appeals believed that the Appointments Clause must apply to *any* office created by Congress unless Article IV "trumps" the Appointments Clause. Pet. App. 20a. That inquiry was misconceived. As explained above, structural separation-of-powers provisions such as Article III and the Appointments Clause *by their own terms* do not apply to Congress's establishment of a territorial government for the benefit of the territory's inhabitants. They apply only when Congress acts in its capacity as the national legislature legislating for the national government and polity—when, in the words of the Constitution's text, Congress establishes judicial or executive offices "of the United States."

The court of appeals' attempts to distinguish this Court's separation-of-powers precedents are unpersuasive. The court did not even attempt to reconcile its ruling with this Court's decisions holding that Article III does not limit Congress's authority to create local territorial and D.C. courts. Pet. App. 26a-27a. Aurelius, trying to paper over this deficiency, observes that the judges on numerous non-Article III courts are federal officers to whom the Appointments Clause applies. 18-1334 Opp. 19. But the courts Aurelius identifies are *Article I* courts that Congress placed in the national government and that exercise national authority. *Ibid.* (listing, *e.g.*, military and Tax Court judges). By contrast, Article III does not constrain Congress's authority to create territorial courts that primarily adjudicate "matters of strictly local concern," *Palmore*, 411 U.S. at 407, because those courts are not courts "of the United States"—a

rationale that applies equally to the Appointments Clause. *Freytag*, 501 U.S. at 913 (Scalia, J., concurring in part) (territorial courts do not "exercise any national judicial power" and "have nothing to do with" Article I and Article III courts).

With respect to the nondelegation doctrine, the court of appeals asserted that Congress was free to depart from this fundamental separation-of-powers principle because it was delegating authority to territorial governments in anticipation of their eventual statehood. Pet. App. 24a; 18-1334 Opp. 19-20. But this Court said no such thing; instead, the Court relied on the fact that Congress was not acting for the United States as a national body. *Cincinnati Soap*, 301 U.S. at 322-323.

Finally, the court of appeals purported to draw support from the fact that Congress must conform to the constitutional requirement of bicameralism and presentment when it exercises its Article IV power to legislate for the territories. Pet. App. 21a-22a. But that confuses the constitutionally prescribed *manner* by which Congress can enact laws to govern the territories with the permissible *substance* of such laws. Article I, Section 7 provides that "*[e]very* bill" must pass both the House and Senate and be presented to the President before it becomes a law, U.S. Const. art. I, § 7, cl. 2 (emphasis added), regardless of the source of Congress's authority to legislate in a particular instance. *INS* v. *Chadha*, 462 U.S. 919, 952 (1983). The Appointments Clause imposes substantive constraints when Congress legislates to prescribe the manner of choosing officers "of the United States." It does not, however, cabin Congress's exercise of its "police and regulatory powers" in making

rules for the governance of territories. *Palmore*, 411 U.S. at 397.

2. *Administration of a federal statute does not make Article IV officials "officers of the United States."*

Having concluded that the Appointments Clause applies to territorial officers, the court of appeals then applied this Court's test for "officer" status, simply assuming away the textually dispositive question whether they are officers "of the United States." Approaching the issue in that way, the court concluded that officials exercise "significant authority pursuant to the laws of the United States" any time they "carry out important functions under a federal law"; but they exercise only territorial authority when they enforce laws of the territory. Pet. App. 37a (citation omitted); accord 18-1334 Opp. 11. That reductive argument cannot be reconciled with this Court's precedents or historical and current practice.

As an initial matter, the court of appeals' exclusive focus on PROMESA's congressional provenance finds no support in *Lucia* or this Court's other Appointments Clause cases. All of those decisions concerned whether a position was an "officer," where it was undisputed that the position in question was "of the United States." It makes perfect sense that the Court would apply the "significant authority" test to determine whether particular officials who indisputably held federal offices were "principal officers," "inferior officers," or "employees." *Lucia*, 138 S. Ct. at 2051; *Freytag*, 501 U.S. 868; *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976). The Court had no occasion to address whether a *territorial* official should be considered an "officer of the United States" in light of the

Court's jurisprudence concerning the Territories and District of Columbia Clauses.

More importantly, the court of appeals' focus on the *source* of an entity's authority (Congress), without regard to the *nature* of the delegated authority (national or local), ignores that Congress is the source of *all* sovereignty in a territory, and retains ultimate control over all territorial law no matter what its direct source. *Sanchez Valle*, 136 S. Ct. at 1875. Territorial legislatures have the power to enact laws only because Congress delegated it to them, and thus territorial officials' authority to administer territorial laws is always traceable to Congress, and persists only so long as Congress maintains the delegation and does not countermand the territory's legislative choices. *Id.* at 1876. Examining only the source of an entity's authority would therefore lead to the conclusion that all territorial and D.C. entities are, and have always been, part of the federal government. But that is not how this Court has understood the authority that territorial governments exercise.

Instead, as *Palmore* makes clear, it is not the source but rather the nature and scope of an office's authority that matters in determining whether an office is "of the United States." 411 U.S. at 407. That principle follows from the distinction that this Court has long drawn between federal statutes enacted under Article I *for the United States as a national political body*, and federal statutes that are enacted under Article IV or the District of Columbia Clause for a territory or D.C. and that confer only local authority. See *Cincinnati Soap*, 301 U.S. at 322-323; *Palmore*, 411 U.S. at 407. An Article IV official exercising purely territorial authority granted by a federal statute directed to the territories does not exercise

significant (or any) national authority pursuant to the laws of the United States as a national body. See pp. 16-19, *supra*.

Taken to its logical conclusion, moreover, the court of appeals' decision renders unconstitutional the numerous instances in which Congress has conferred on territorial and D.C. officials the authority to administer federal statutes specifically focused on the concerns of the territories or D.C. In addition to the historical examples described above, see pp. 31-36, *supra*, any number of current territorial officials would suddenly find their appointments unconstitutional. Territorial judges have always adjudicated cases arising under federal law, even though they lack the tenure and salary protections of Article III, and have sometimes been locally selected. See, *e.g.*, 48 U.S.C. §§ 1611-1612 (federal and territorial courts of the Virgin Islands); *Clinton*, 80 U.S. at 447. The District of Columbia Omnibus Authorization Act of 2005 established the locally appointed office of the Chief Financial Officer and assigned him sweeping and detailed authorities over the District's finances. Pub. L. No. 109-356, 120 Stat. 2019, 2029-2039 (2006). Congressional appropriations statutes routinely confer substantive duties on local D.C. officials. See, *e.g.*, Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 348, 352 (2017). And in the territories, popularly elected governors exercise authority pursuant to, and administer, federal statutory provisions directed to the territories. See, *e.g.*, 48 U.S.C. §§ 1397, 1421i, 1421g(a), 1591.

3. *Historical practice refutes the court of appeals' decision.*

a. The court of appeals dismissed two centuries of historical evidence that the political Branches under-

stood the Appointments Clause not to govern the appointments of territorial officers, solely on the ground that Congress *sometimes* provided that territorial offices be filled through advice and consent procedures. Pet. App. 34a-36a. In particular, the court focused on the fact that until the mid-twentieth century Congress typically provided that territorial governors would be appointed by the President and confirmed by the Senate. *Id*. at 36a.[14] But that approach fails to account for the fact that Congress, as far back as 1789, provided both for territorial legislatures and for the appointment of inferior territorial officers in ways that do not conform to the procedures set forth in the Appointments Clause. If it applies at all, the Appointments Clause must apply equally to the appointment of principal officers and inferior officers. Therefore, if Congress had thought that territorial offices needed to be filled in the manner prescribed by the Appointments Clause, it would have provided that these inferior officers be appointed by the President alone, the heads of departments, or the courts. But that is not what Congress did. It instead provided that these inferior officers would be appointed by other territorial officers. And popularly elected territorial legislatures would have been wholly beyond Congress's authority to establish if officials

[14] The court of appeals also placed considerable weight on the fact that the Governor and inferior officers of Puerto Rico were appointed by the President with advice and consent between 1900 and 1917, under the Foraker Act. Pet. App. 34a-35a. But the court did not explain how the changes Congress enacted in the Jones Act (providing that several inferior officers, including the treasurer, would be appointed by the governor and confirmed by the territorial legislature) could be squared with its understanding of the Appointments Clause.

who exercise governing authority in the territories must be appointed in the manner the Appointments Clause prescribes. The only sensible conclusion that can be drawn from this history is that Congress did not believe that the Appointments Clause applied to territorial offices, and it chose advice and consent procedures for some officers because those procedures provided advantages even though they were not required. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116-117 (2007) ("*Officers of the United States*") (Congress often chooses to use Appointments Clause procedures for officials who are not "officers of the United States").

b. Aurelius, for its part, argues that the many territorial and D.C. officials who were not appointed in conformance with the Appointments Clause "principally executed territorial laws and therefore did not exercise significant authority pursuant to the laws of the United States." 18-1334 Opp. 21. But as discussed above, Aurelius's distinction between territorially enacted statutes and congressionally enacted statutes does not withstand scrutiny, because *all* sovereignty in the territories emanates from Congress, and Congress therefore always retains the authority to change whatever laws a territorial government adopts. See pp. 40, *supra*; *Sanchez Valle*, 136 S. Ct. at 1875. It is also bad history. Congress has often enacted federal statutes conferring substantive duties on territorial and D.C. officials. See p. 41, *supra*.

c. The court of appeals also failed to reconcile its decision with the seventy-year history of territorial home rule. The court asserted that current Commonwealth officials are not "officers of the United

States" because their authority arises solely from the Commonwealth's constitution. But as this Court explained in *Sanchez Valle*, Puerto Rico and other territories were able to promulgate constitutions only because Congress delegated to them the authority to do so. Even after Puerto Rico's "transformative constitutional moment," therefore, all sovereignty traces back to Congress, whose continued acquiescence is what ultimately determines whether a territorial law is authoritative: "[b]ack of the Puerto Rican people and their Constitution, the 'ultimate' source of prosecutorial power remains the U.S. Congress, just as back of a city's charter lies a state government." *Sanchez Valle*, 136 S. Ct. at 1875; *Snow*, 85 U.S. at 319-320. Because an official's authority *always* derives from Congress, whether the official is federal or territorial, the immediate source of that authority cannot possibly be a basis for distinction.

Moreover, the court of appeals' constitutional-authority rationale leads ineluctably to the conclusion that Congress has organized the governments of Guam and the Virgin Islands in an unconstitutional manner. Those territories lack constitutions; and their governors and other officials are elected, and exercise authority, pursuant to federal organic statutes. 48 U.S.C. §§ 1421a, 1422, 1541(b), 1591. For the same reason, Puerto Rico's pre-constitution elected government between 1947 and 1952 would also have been unconstitutional under the court of appeals' approach.

Perhaps recognizing the flaws in the constitution-based rationale, Aurelius argues (18-1334 Opp. 22) that popular election is enough to render officials territorial, even in the absence of a territorial constitution. But that argument fails for the same reason.

Puerto Rico's electorate has authority to elect territorial officials only by virtue of the federal statutes permitting and approving Puerto Rico's constitution. *Sanchez Valle*, 136 S. Ct. at 1875-1876; *Snow*, 85 U.S. at 319-320.

More fundamentally, the reading of the history proposed by Aurelius and the court of appeals cannot be reconciled with bedrock separation-of-powers principles. Under that view, pre-home rule territorial officials were "officers of the United States"—in other words, officers of the Executive Branch who exercised executive power on behalf of the President. But if that were the case, Congress's adoption of home rule would have raised significant constitutional concerns by transferring federal executive power from Executive Branch officers to popularly elected territorial officials. See *Printz* v. *United States*, 521 U.S. 898, 923 & n.12 (1997) (Congress may not transfer federal executive authority to state officers who act outside of "meaningful Presidential control"); *Officers of the United States* 100 n.10. Home rule does not raise these concerns about diminishing the President's executive power because territorial officials exercise only the municipal authority *of the territory*, not federal Executive authority. That was certainly Congress's understanding when it authorized home rule. Far from suggesting that the transition to home rule had significant constitutional implications, Congress instead emphasized that "[t]he changes which would be made by [the 1947 statute will] not alter Puerto Rico's political or fiscal relationship to the United States." H.R. Rep. No. 80-455, at 3 (1947).

II. THE BOARD MEMBERS ARE TERRITORIAL OFFICIALS WHO NEED NOT BE APPOINTED IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE.

When it enacted PROMESA, Congress altered the structure of Puerto Rico's government, taking some of the authority over territorial finances that previously had belonged solely to the Governor and the Legislature and placing it temporarily in the newly created Board. Congress plainly possesses the authority to take that step, even though it adjusts the structure of territorial government provided for in Puerto Rico's constitution. See *Sanchez Valle*, 136 S. Ct. at 1876. And Congress made clear that the offices it was creating were territorial offices, not offices of the United States. Congress created the Board pursuant to its plenary Article IV power over the territories, established the Board in the territorial government, and, most importantly, delegated to it strictly local authority to act on behalf of the people of Puerto Rico with respect to territorial fiscal policy and reorganization of the territory's massive debts.

A. Territorial offices created under Article IV and imbued with strictly local authority are not subject to the Appointments Clause.

As demonstrated above, whether the Appointments Clause governs the Board members' appointments turns on whether Congress created the Board as an Article IV territorial entity and delegated to it only the authority to deal with matters of local concern. See, *e.g.*, *Palmore*, 411 U.S. at 407; *Binns*, 194 U.S. at 494.

This Court last addressed whether an entity established by Congress is federal or local in *Palmore*.

There, the Court held that the D.C. superior court system established in 1970 was a local court and therefore not subject to Article III. 411 U.S. at 405-407. The Court relied on Congress's intent that the D.C. courts should function as local courts, and the purely local scope of the courts' authority. With respect to congressional intent, the Court explained that Congress had "expressly created" the D.C. courts "pursuant to the plenary Art. I power to legislate for the District of Columbia," and had also expressly distinguished the D.C. superior court system from the federal courts operating in the District. *Id*. at 407. The Court then concluded that the courts' authority was "strictly local" because they "handle criminal cases only under statutes that are applicable to the District of Columbia alone." *Ibid*. Because the D.C. Code was directed to the District and therefore lacked "nationwide application," the fact that it was enacted by Congress did not vitiate the court system's "local" nature. *Id*. at 406-408; accord *Binns*, 194 U.S. at 491, 494-495 (congressionally enacted taxes for territory of Alaska were "to be regarded as local taxes" for purposes of the Uniformity Clause because it "satisfactorily appears" that "the purpose of these taxes was to raise revenue in Alaska for Alaska" and "[t]hey were authorized in statutes dealing solely with Alaska").

Palmore therefore establishes the characteristics that determine whether Congress has created an entity within the territorial government with authority to act on behalf of the territory, as opposed to an entity within the national government of the United States. Specifically, the Court has placed great weight on (1) whether Congress it is acting pursuant to its Article IV power (or its similar plenary power over the District of Columbia), rather than its Article I powers; (2) whether Congress characterized the

resulting entity as federal or territorial; and, most importantly, (3) whether the powers of the office and the law that it enforces are of predominantly local concern or instead involve primarily laws of nationwide applicability and national concern.[15]

B. The Board members are territorial officers, not officers "of the United States."

1. The Board is a territorial entity within the government of Puerto Rico, and its members are territorial officers.

a. In Title I of PROMESA, Congress expressly identified "article IV, section 3," the Territories Clause of the Constitution, as the "Constitutional basis" for its enactment. 48 U.S.C. § 2121(b)(2). Congress therefore acted "respecting the Territory" rather than the national government. U.S. Const., art. IV, § 3, cl. 2. Though Congress could have used its Article I powers to create a federal fiscal oversight

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[15] Aurelius objects (18-1334 Opp. 14-15) that the first two considerations—both of which examine congressional intent—simply "call for courts to defer to Congress's label." Not so. Congress has "dual authority" in the territories and the District, such that it may act with respect to the nationwide government, or in its plenary local capacity to legislate as a State would for its municipalities. *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428, 442-443 (1923); *McAllister*, 141 U.S. at 184. The nature of Congress's action is therefore a matter of congressional intent in the first instance. Congress's invocation of Article IV signals its intent to act "respecting the territory," U.S. Const., art. IV, § 3, rather than with respect to the national government, and its express placement of an office within the territorial government confirms that intent. *Palmore*, 411 U.S. at 407; *Binns*, 194 U.S. at 494.

entity (for instance, within the Department of the Treasury), it instead opted to act in its Article IV capacity as a plenary municipal legislature. *Palmore*, 411 U.S. at 407; *Binns*, 194 U.S. at 494. That is strong evidence that Congress intended the Board to be a territorial entity. As in *Palmore*, Congress's intent is entitled to significant weight. 411 U.S. at 407.

b. In addition, PROMESA expressly provides that the Board is an "entity within the territorial government" that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. § 2121(c). That is equally strong evidence that Congress established the Board as a territorial entity. *Palmore*, 411 U.S. at 407; *Binns*, 194 U.S. at 494-495.

The designation of the Board as territorial has important substantive consequences. For instance, the Board's funding comes entirely from Puerto Rico, not the federal government. 48 U.S.C. § 2127(b)(1), (2)(A). Congress thus has no control over the Board's budget or finances. In addition, PROMESA's declaration that the Board is not a federal agency, *id*. § 2121(c), exempts the Board from the numerous federal laws that would apply if the Board were a federal agency and its members were officers of the United States. For instance, the Board is not subject to FOIA or the APA. See 5 U.S.C. § 551(1)(c) (FOIA applies to "each authority of the Government of the United States," but not "the governments of the territories or positions of the United States"); 5 U.S.C. § 701(b)(1)(c) (APA; same). Similarly, the Board's employees are not federal employees and are not protected by federal civil service protections. 48 U.S.C. §

2123(b), (c); 5 U.S.C. § 2301(a) (provisions apply to "the executive agencies").[16]

c. PROMESA's delineation of the Board's functions and powers leaves no doubt that the Board exercises purely local authority. PROMESA creates a Board only for Puerto Rico. 48 U.S.C. § 2121(a). The Board's responsibilities are purely territorial: it is tasked with "provid[ing] a method for a covered territory to achieve fiscal responsibility and access to the capital markets." *Ibid.* The Board's authority to help the Commonwealth achieve fiscal stability extends only to territorial instrumentalities, i.e., entities within the territorial government. *Id.* § 2121(d). The Board "shall terminate," moreover, when the "territorial government" has achieved access to credit markets and fiscal stability. *Id.* § 2149.

The Board has two primary responsibilities. First, the Board works with the Governor and Legislature of Puerto Rico to craft fiscal plans and budgets governing the finances of Puerto Rico's government and its instrumentalities. *Id*. § 2141-2144. The Board may review legislation, rules, regulations, contracts,

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[16] Conversely, PROMESA includes several provisions that would be wholly superfluous if the Board were a part of the federal government. For example, PROMESA provides that the Board's members and employees "shall be subject to the federal conflict of interest requirements" set forth in 18 U.S.C. § 208 and must "disclos[e] * * * their financial interests" in accordance with federal standards. 48 U.S.C. § 2129. If the Board members were officers of the United States, there would have been no need to refer to those statutes, because they would apply of their own force. 18 U.S.C. § 208 (applying to "an[y] officer or employee of the executive branch of the United States Government"); 5 U.S.C. App. 4 § 101 (applying to "each officer or employee in the executive branch").

and budgets for compliance with the fiscal plans, and may take steps to ensure compliance with the fiscal plan. *Id*. § 2144. These authorities consist of the sorts of fiscal planning and budgetary powers that previously were lodged exclusively in Puerto Rico's executive and legislative branches. See P.R. Const. art. III, §§ 1, 22 (legislative powers; establishment of office of Controller to audit all Commonwealth expenditures); art. IV, § 4; 23 L.P.R.A. §§ 62j, 62*l*, 104 (executive budgetary and long-term fiscal planning authorities). Before PROMESA, the Governor and Legislature engaged in long-term fiscal planning and crafted budgets in accordance with those plans. If that territorial authority may be exercised by popularly elected territorial officials, there is no reason the same type of authority may not be exercised by the Board.

Second, the Board institutes Title III cases in federal court on behalf of Commonwealth government instrumentalities to restructure their debts. 48 U.S.C. §§ 2164, 2172. The Board stands in the shoes of the debtor government entity in the proceeding, and proposes a plan of adjustment for judicial approval. 48 U.S.C. §§ 2162, 2175. In petitioning in federal court on behalf of governmental instrumentalities, the Board exercises litigation authority that has always belonged only to the Commonwealth's government. See, *e.g.*, 3 L.P.R.A. § 294y. If federal bankruptcy law had permitted the Commonwealth or its instrumentalities to petition for bankruptcy protection in the manner of a municipality under Chapter 9, see *Franklin*, 136 S. Ct. at 1944, the Governor would have had authority to invoke that procedure for the Commonwealth. Here too, the Board acts solely in a territorial capacity in invoking quasi-bankruptcy protection.

In addition, all of the Board's ancillary powers are territorial in nature. Its subpoena powers, for instance, are governed by Puerto Rican law, 48 U.S.C. § 2124(f), and any territorial employee who intentionally provides false or misleading information to the Board is subject to prosecution under Puerto Rico, not federal, law. 48 U.S.C. § 2124(l). The Board has no power to administer any law of nationwide application, nor can it bind the United States, or any governmental entities outside the territory, in any way.

As these provisions make clear, the Board's authority is limited to enforcing a federal statute of "strictly local concern," rather than any statute of "nationwide application." *Palmore*, 411 U.S. at 406-407. Like the D.C. court system at issue in *Palmore*, therefore, the Board is a local entity within the territorial government, and its members are territorial, not federal, officers.

2. Notwithstanding the Board's strictly local authority, the court of appeals concluded that the Board exercises oversight over the territorial government, and therefore must be federal. Pet. App. 31a-33a. But the characteristics identified by the court all relate to the Board's independence. The fact that the Board exercises authority that is *independent* from the rest of Puerto Rico's government—a critical feature in any fiscal management agency—does not make the authority exercised by the Board any less territorial in nature and scope.

First, the court of appeals placed great weight on the fact that the Board administers a federal statute. Pet. App. 31a-33a. But congressional enactment is not determinative; the nature and scope of the authority that Congress delegated is what matters. Indeed, if the court of appeals were correct that fed-

eral enactment is dispositive, then PROMESA's delegation of significant substantive responsibilities to Puerto Rico's Governor and Legislature would be unconstitutional. *See, e.g.*, 48 U.S.C. § 2142 (Governor and the Legislature must submit budgets); *id.* § 2143 (compliance with the certified budget); *id.* § 2144 (administration of certified fiscal plans). Those duties indisputably constitute "significant authority" pursuant to a congressionally enacted statute—yet the Governor and Legislature are not appointed in conformance with the Appointments Clause. *Lucia*, 138 S. Ct. at 2051 (quoting *Buckley*, 424 U.S. at 126). The court of appeals simply ignored this consequence of its holding.

Second, the court of appeals reasoned that the Board prosecutes a "bankruptcy proceeding," and bankruptcy is a "quintessential federal subject matter." Pet. App. 31a. But the fact that the Board invokes PROMESA's bankruptcy-like protection on behalf of Commonwealth instrumentalities does not make *the Board* federal. No one thinks that a State transforms itself into a federal entity when it authorizes a municipality to invoke Chapter 9 of the Bankruptcy Code, or that a municipality becomes a federal entity when it prosecutes a Chapter 9 case.

And in any event, PROMESA, while federally enacted, is not a part of the nationwide Bankruptcy Code enacted as an exercise of Congress's Article I authority. Rather, Congress had to create a special bankruptcy-like proceeding for Puerto Rico precisely because Puerto Rico was unable to avail itself of the national Bankruptcy Code. *Franklin*, 136 S. Ct. at 1942. Although PROMESA incorporates various provisions of the Bankruptcy Code, 48 U.S.C. § 2161, the proceeding it establishes is fundamentally differ-

ent in scope than what the Bankruptcy Code permits—and it is specifically tailored to the particular crisis Puerto Rico is facing. While Chapter 9 of the Bankruptcy Code permits a State to seek bankruptcy protection for its municipalities but not for itself, 11 U.S.C. § 109(c), PROMESA allows the Commonwealth itself to be the subject of a restructuring proceeding, 48 U.S.C. § 2162. PROMESA also contains numerous provisions that account for the unique circumstances of the territory. See, *e.g.*, 48 U.S.C. § 2163, 2174(b).

Third, the court of appeals observed that the Board members are appointed and removable for cause by the President. But appointment and removal by federal officials historically have been common attributes of territorial offices—including territorial judges. Those attributes have never been probative of an office's federal or territorial status. *Territorial Judges Not Liable to Impeachment*, 3 Op. Att'y Gen. 409, 410-411 (1839); *Clinton*, 80 U.S. at 447 ("The judges of the Supreme Court of the territory are appointed by the president under the act of congress, but this does not make the courts they are authorized to hold courts of the United States."); *McAllister*, 141 U.S. at 185-186, 189.

That conclusion is reinforced by the general principles of state-municipality relations to which this Court has long analogized Congress's relationship with the territories. See *Benner*, 50 U.S. at 242; *Waller* v. *Florida*, 397 U.S. 387, 393 (1970). This Court has explained that because "the whole municipal authority derives from the [state] legislature," it does not matter whether the mayor of a city is "elected by the people, or * * * appointed by the governor with the consent of the senate." *Barnes* v. *District of Co-*

lumbia, 91 U.S. 540, 545-546 (1875). Either way, the mayor's powers are municipal, because he is "invested with only such subordinate powers of local legislation and control" that pertain to the city. *Metropolitan R.R. Co.* v. *District of Columbia*, 132 U.S. 1, 8 (1889); *Barnes*, 91 U.S. at 545-546. The Court has therefore held that presidential appointment and removal of certain D.C. agency heads did not "abrogate" the agency's "character as a municipal body politic" or render it "a department of the United States government." *Metropolitan R.R.*, 132 U.S. at 7-8; accord *Barnes*, 91 U.S. at 549.

Thus, the Court has understood federal- and state-level appointment and removal to be a pragmatic tool to address the "exigencies of the situation," rather than a marker of federal or state (as opposed to local) authority. *Metropolitan R.R.*, 132 U.S. at 8; *id*. at 6 (municipal agency "was regarded as a mere branch of the District government, though appointed by the president, and not subject to the control of the District authorities"). PROMESA's provision for federal appointment and removal for cause flows from that tradition. In so providing, Congress ensured the Board's independence from the rest of the Commonwealth's government.

That makes sense: independence within the territorial government is critical to the Board's ability to perform its duties. Congress heard testimony that such independence was an important feature of the D.C. fiscal control authority on which the Board was modeled. *Need for the Establishment of a Puerto Rico Financial Stability and Economic Growth Authority: Hearing before the Subcomm. on Indian, Insular and Alaska Native Affairs of the Comm. on Natural Resources*, 114th Cong. 2d Sess. 7 (2016). Congress

therefore directed the Board to carry out its activities with "the greatest degree of independence practicable." 48 U.S.C. § 2121(h)(3). Federal appointment and removal is an important component of that independence. Indeed, at the federal level, Congress has engaged in similarly innovative design to ensure independent formulation of monetary policy, by structuring the Federal Reserve to be insulated from excessive presidential control. 12 U.S.C. § 241. At the same time, Congress wished to respect Puerto Rico's self-governance regime. Structuring the board as a territorial entity subject to federal appointment and removal enabled Congress to accomplish both objectives.

* * *

Since the Constitution was first adopted, Congress has repeatedly exercised its Article IV authority to structure territorial governments in ways that do not comply with the Appointments Clause or other separation-of-powers constraints that dictate the way the federal government must be organized. This Court has never invalidated a single such enactment on separation-of-powers grounds. PROMESA should not be the first. Faced with a financial and humanitarian crisis of unprecedented proportions in Puerto Rico, Congress exercised its "broad latitude" under Article IV to alter the territorial government by establishing the Board as a territorial entity with the independence needed to accomplish its objectives. *Sanchez Valle*, 136 S. Ct. at 1876. The Board members are therefore Article IV officers, not Article I officers of the United States. Invalidating the Board members' appointments would not only threaten the significant progress the Board has made toward alleviating the financial crisis, but would call into doubt Congress's

seventy-year-old policy of promoting popular sovereignty in the territories.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals concerning the Appointments Clause should be reversed.

Respectfully submitted,

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