Nos. 18-1334, 18-1496 & 18-1514

IN THE

# Supreme Court of the United States

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS (OTHER THAN COFINA),

*Petitioner,*

*v.*

AURELIUS INVESTMENT, LLC, *et al.*,

*Respondents.*

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

## BRIEF FOR THE PETITIONER OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS (OTHER THAN COFINA)


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## QUESTION PRESENTED

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. §2101 *et seq.*, to address the economic emergency facing the Commonwealth of Puerto Rico. The Act established a Financial Oversight and Management Board as an entity "within the territorial government" of Puerto Rico. 48 U.S.C. §2121(c)(1).

The question presented is whether members of the Oversight Board are "Officers of the United States" within the meaning of the Appointments Clause of the U.S. Constitution, Art. II, §2, cl. 2.

## PARTIES TO THE PROCEEDING

Petitioner, the United States of America, was an appellee in the court of appeals. Also appellees in the court of appeals were the following respondents: the Financial Oversight and Management Board for Puerto Rico; 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; Jose B. Carrion, III; Carlos M. Garcia; Arthur J. Gonzalez; Jose R. Gonzalez; Ana J. Matosantos; David A. Skeel, Jr.; 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

III 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.

Appellants in the court of appeals were the following respondents: Aurelius Investment, LLC; Assured Guaranty Corporation; Assured Guaranty Municipal Corporation; Aurelius Opportunities Fund, LLC; Lex Claims, LLC; and Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a)[1] is reported at 915 F.3d 838. The opinion and order of the district court (Pet. App. 46a) are published in the Federal Supplement at 318 F. Supp. 3d 537.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. A petition for rehearing was denied on March 7, 2019 (Pet. App. 83a). The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1). The petition for a writ of certiorari was granted on June 20, 2019.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article II, Section 2, Clause 2 of the Constitution of the United States provides in pertinent part that 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

1. Record citations in this brief are to the appendix accompanying the petition in No. 18-1334, the lead case in these consolidated matters.

> think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article IV, Section 3, Clause 2 provides:

> 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Pertinent statutory provisions are reprinted in an appendix to the petition for a writ of certiorari in No. 18-1334. *See* Pet. App., 85a-122a.

## STATEMENT OF THE CASE

1. Even before Hurricanes Irma and Maria devastated Puerto Rico, the Commonwealth's economy was in crisis.[2]

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2. *See* Michael Corkery and Mary Williams Walsh, "*Puerto Rico's Governor Says Island's Debts Are 'Not Payable,'*" The New York Times (June 28, 2015), https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html.; *see generally* N. P. Flannery, *Will Puerto Rico Find A Way To Survive Its Debt Crisis*?, Forbes Magazine (June 1, 2017 at 8:00 am), https://www.forbes.com/sites/nathanielparishflannery/2017/06/01/will-puerto-rico-find-a-way-to-survive-its-debt-crisis/#341c52a45b90; President Barack Obama, Remarks by the President at Bill Signings of the FOIA Improvement Act of 2016 and PROMESA (June 30, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/remarks-president-bill-signings-foia-improvement-act-2016-and-promesa.

In 2016, to address this crisis, Congress exercised the authority and the responsibility imposed on it by Article IV of the Constitution of the United States by passing the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA" or the "Act").[3] The centerpiece of PROMESA's design was a new "entity [established] within the territorial government"[4] of Puerto Rico called the Financial Oversight and Management Board (the "Oversight Board"). Among other tasks, Congress charged the Oversight Board with the responsibility to "provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. §2121(a).

2. The Oversight Board's authority and the law it administers are exclusively territorial. 48 U.S.C. §2121(c)(1). Congress created the Oversight Board "pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories." 48 U.S.C. §2121(b)(2). To accomplish its objectives, PROMESA gave the Oversight Board the authority to approve the Commonwealth's fiscal plans and budgets, and to commence a case on behalf of the territorial government and its instrumentalities in federal court under Title III of the Act to restructure their debt. 48 U.S.C. §§2141, 2164.

The Board is both limited and empowered by PROMESA's substantive provisions, which concern only territorial affairs and the fiscal health of the Commonwealth; neither PROMESA nor the Oversight

3. Pub. L. No. 114-187, 130 Stat. 549, codified at 48 U.S.C. §2101 *et seq.* (2016).

4. 48 U.S.C. §2121(c)(1).

Board it created have any authority outside the territories. *Id.* §2121(a). The Oversight Board and its activities are funded entirely by Puerto Rico (and not the federal government), *id.* §2127(b), and its life span will be measured by Puerto Rico's ability to produce a balanced budget for four consecutive years and to obtain "adequate access to short-term and long-term credit markets at reasonable interest rates to meet the borrowing needs . . . ." *Id.* §2149(1).

3. The Oversight Board is composed of seven voting members, and the Governor or his designee serves as an eighth, 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). If the President selects a member from a congressional list, no Senate confirmation is required. If the President selects someone not on a congressional list, that person must be confirmed by the Senate. *Id.* §2121(e)(2)(E).

4. The Oversight Board commenced a case as authorized under Title III of PROMESA on May 3, 2017, in order to achieve the financial stability the Act promised to the people of Puerto Rico. *See* 48 U.S.C. §2164(a). Apparently dissatisfied with this and other hard choices the Oversight Board has made in an effort to resolve the ongoing financial crisis, a hedge fund that had invested heavily in distressed Puerto Rican bonds called Aurelius Investment, LLC, *et al.* ("Aurelius"),[5] moved to dismiss the lawsuit.

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5. Including Aurelius Opportunities Fund, LLC, and Lex Claims, LLC.

Aurelius argued that Congress had acted unconstitutionally when it adopted a plan for staffing the Oversight Board that differs from the process of appointment and Senate confirmation set out in the Appointments Clause, U.S. Constitution art. II, §2, cl. 2 — the method selected by the Framers for designating "principal federal officers [of the United States' own government] — ambassadors, ministers, heads of departments, and judges." *Freytag v. C.I.R.*, 501 U.S. 868, 884 (1991). Respondents Union de Trabajadores de la Industria Eléctrica y Riego ("UTIER") and a municipal bond insurer called Assured Guaranty Corporation ("Assured") filed Adversary Complaints premised on the same Appointments Clause theory advanced by Aurelius.[6]

5. The district court denied Aurelius' motion to dismiss and dismissed the UTIER and Assured adversary proceedings, concluding that the Appointments Clause does not constrain Congress' choices for governmental design when it legislates for the territories. The court observed that since the earliest days of the republic, this Court has held that "Congress's power under [the Territories] clause is both 'general and plenary.'" Pet. App. 57a; *see*, *e.g.*, *Sere v. Pitot*, 10 U.S. 332, 337 (1810) (Congress possesses an "absolute and undisputed power of governing and legislating" for the territories — those possessions of the United States that lie outside of the individual States").

Recounting this Court's precedents, the district court observed that territorial governments are "the creations,

6. Unless the context requires otherwise, for the sake of convenience, Petitioner refers to Aurelius, Assured, and UTIER collectively as "Aurelius" in this brief.

exclusively, of [Congress], and subject to its supervision and control." Pet. App. 57a, *quoting Benner v. Porter*, 50 U.S. 235, 242 (1850). Thus, "[i]n dealing with the territories . . . Congress in legislating 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." Pet. App. 64a, *quoting Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323 (1937).

Further, the district court observed that "Congress occupies a dual role with respect to the territories of the United States: as the national Congress of the United States, and as the local legislature of the territory." Pet. App. 58a *citing Cincinnati Soap Co.*, 301 U.S. at 317. "A [territory] has no government but that of the United States, except in so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible." Pet. App. 58a, *quoting Cincinnati Soap*, 301 U.S. at 317.

Of particular application in the Appointments Clause context, the court observed that this Court had twice held that the Constitution's structure-of-government provisions, which mark out the roles of the three branches of the *federal* government, do not similarly constrain Congress when it acts in the territories:

> In *Cincinnati Soap Co.*, the Supreme Court held that the non-delegation doctrine did not preclude Congress from delegating its legislative

> authority to the territorial government of the Philippines. 301 U.S. 308, 57 S.Ct. 764. The Court explained that Congress's plenary power over the territories "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." *Id.* at 323, 57 S.Ct. 764. Similarly, in *United States v. Heinszen*, the Supreme Court rejected the argument that Congress was unable to delegate its legislative authority, under the Territories Clause, to the President. 206 U.S. 370, 384–85, 27 S.Ct. 742, 51 L.Ed. 1098 (1907).

Pet. App. 64a.

Finally, the court rejected the notion, advanced by Aurelius, that "the only officers who may be considered 'territorial' are those who are popularly elected by the residents of a federal territory" — that any individual who serves in an office created by a federal statute becomes an "officer of the United States" for Appointments Clause purposes:

> Any time Congress exercises its Article IV power it does so by means of a federal statute, and all local governance in Puerto Rico traces back to Congress . . . . The fact that the Oversight Board's members hold office by virtue of a federally enacted statutory regime and are appointed by the President does not vitiate Congress's express provisions for creation of the Oversight Board as a territorial government entity that "shall not be considered

> to be a department, agency, establishment, or instrumentality of the Federal Government."

Pet. App. 72a.

6. The court of appeals reversed for two reasons. First, it held that the Appointments Clause applies undiminished to constrain Congress's choices when it structures the mechanisms of territorial governance under Article IV. The Court conceded that this conclusion — that for Appointments Clause purposes, officers in a territorial government are no different from the U.S. Secretary of State or a Justice of this Court — was "difficult to explain [in light of] *United States v. Heinszen*." Pet. App. 25a. There, as the district court noted, this Court held that under Article IV, Congress can delegate its power to legislate to the President, unfettered by separation of powers concerns. The court of appeals, however, appeared to have some difficulty believing that the *Heinszen* Court meant what it said about the breadth of Congress's Article IV powers: "*Heinszen* . . . has no progeny that might shed light on how reliable it might serve as an apt analogy in the case before us." Pet. App. 26a.

Second, the court of appeals concluded that Oversight Board members are "officers of the United States," and thus subject to Senate confirmation because (a) "PROMESA provides for their appointment"; and (b) they "can only employ [their] powers because a federal law so provides," Pet. App. 31a, a test that would turn *every* employee of a territorial government into an "officer of the United States," because all governmental authority in the territories is exercised "because federal law so provides." *See, e.g., Puerto Rico v. Sanchez Valle*,

136 S. Ct. 1863, 1874 (2016) (all governmental authority in Puerto Rico derives from federal law); *Ngiraingas v. Sanchez*, 495 U.S. 182, 204 (1990) ("the Government of [a Territory] owes its existence wholly to the United States . . . . The jurisdiction and authority of the United States over [the territories and their] inhabitants, for all legitimate purposes of government, is paramount.") (citation omitted; brackets provided).

In reaching this conclusion, the court of appeals largely ignored the carefully circumscribed nature and scope of the Oversight Board's territorial mission, responsibilities, and funding. Instead, the court thought its determination was controlled by this Court's decisions in *Lucia v. SEC*, ––– U.S. ––––, 138 S.Ct. 2044 (2018); *Freytag*, 501 U.S. 868; and *Buckley v. Valeo*, 424 U.S. 1 (1976). Pet. App. 30a. None of these cases involved a territory, however. Each involved a question not at issue here: whether a federal employee[7] with responsibilities applicable across the nation is also included within the small class of individuals the Constitution denominates as "officers of the United States." By relying on these cases, the court of appeals assumed away the threshold question that decides this case: whether *territorial* officials nonetheless become *federal officers*, subject to the Appointments Clause, simply because federal law "provides for their appointment."

7. The employees at issue in *Freytag* were special trial judges for the federal Tax Court, in *Buckley* they were Commissioners of the Federal Election Commission, and in *Lucia* they were Security and Exchange Commission administrative law judges.

## SUMMARY OF THE ARGUMENT

1. The structure-of-government provisions of the Constitution exist to ensure the separation of powers the Framers thought necessary for our national government. That system, however, does not apply — and has never applied — in the territories, where "Congress alone [possesses] a complete power of government . . . ." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64–65 (1982) (citing *Am. Ins. Co. v. Canter*, 26 U.S. 511 (1828) (Marshall, C.J.)). Rather, the Constitution permits Congress to structure local governments for the territories (or delegate to the people of the territories the power to structure them) in a manner "that would exceed [Congress's] powers, or at least would be very unusual, in the context of national legislation enacted" for the States. *Palmore v. United States*, 411 U.S. 389, 398 (1973) (discussing power of Congress to legislate for the District of Columbia).

The Court has twice applied this principle directly, holding that separation of powers concerns, which lie at the heart of the Appointments Clause, do not constrain Congress when it legislates for the territories. *See Cincinnati Soap Co.*, 301 U.S. 308; *Heinszen*, 206 U.S. 370. The court of appeals erred when it ignored the holding in one of those cases and refused to apply the other.

2. Because a territory like Puerto Rico "has no government but that of the United States, except in so far as the United States may permit[, the] national government may do for one of its [territories] whatever a state might do for itself or one of its political subdivisions." *Cincinnati Soap Co*, 301 U.S. at 317. In our constitutional

scheme, states can adopt (and have, in fact, adopted) for themselves and their political subdivisions methods of government that depart dramatically from the structural design the Framers thought best for our *national* government.

Thus, Nebraska was unencumbered by the Constitution when it established a unicameral legislature, rather than the bicameral design demanded by Article I, Section 1 for Congress. In the same way, Congress used its Article IV Territorial Clause powers to delegate legislative authority to unicameral legislatures in Guam and the Virgin Islands, unencumbered by the Constitution's structure-of-government provisions. See 48 U.S.C. §§1423, 1571. As Justice Scalia said in *Freytag*, when using its Article IV powers, Congress "may endow territorial governments with a plural executive; it may allow the executive to legislate; [and] it may dispense with the legislature or judiciary altogether."[8] Thus, when Congress chose the appointment scheme codified in PROMESA, it merely exercised the "broad latitude [Article IV gives it] to develop innovative approaches to territorial governance. . . ." *Sanchez Valle*, 136 S. Ct. at 1876.

3. Even if the Court had not already concluded, twice, that the structure-of-government provisions of the Constitution are inapplicable when Congress legislates for the territories, the test routinely applied by the Court for sorting among the constitutional provisions that do constrain Congress in the territories and those that do not would clearly place the Appointments Clause

8. 501 U.S. at 914 (Scalia, J., concurring in part and concurring in the judgment).

in the latter group. As recently as *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (internal citation omitted), this Court reaffirmed the long-established rule that only those "guaranties of . . . fundamental personal rights declared in the Constitution" limit Congress when it exercises its Article IV powers.

The Appointments Clause does not represent such a guarantee of personal, fundamental rights. The "[s]tructural protections such as those embodied in the Appointments Clause stand on a different footing from personal constitutional rights." *Samuels, Kramer & Co. v. C.I.R.*, 930 F.2d 975, 984 (2d Cir. 1991). The latter category of rights is comprised solely of those that are "so basic as to be integral to free and fair society." *Tuaua v. United States*, 788 F.3d 300, 308 (D.C. Cir. 2015) (internal citation omitted), *cert. denied*, 136 S. Ct. 2461 (2016). The Appointments Clause, conversely, is merely one tool adopted by the Framers for creating structures of the national government, and though that feature of the Constitution is "justly revered[, it is] nonetheless idiosyncratic to the American social compact or to the Anglo–American tradition of jurisprudence." *Id.* The Appointments Clause is not essential to liberty, or even a common feature of state and local governments, and they are nonetheless able to provide "a free and fair society" for their people. *Id.* The numerous alternative, effective mechanisms for structuring governments adopted outside the national government blueprint — including executive branch appointment models that do not provide for legislative confirmation — are models Congress is free to use under Article IV.

## ARGUMENT[9]

### I. THE COURT HAS PREVIOUSLY HELD THAT SEPARATION OF POWERS CONCERNS ARE INAPPLICABLE WHEN CONGRESS LEGISLATES FOR THE TERRITORIES

"The Constitution enumerates and separates the powers of the three branches of [the national] Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers." *Miller v. French*, 530 U.S. 327, 341 (2000) (internal citation omitted).[10] The separation of powers doctrine reflects the "intent of the Framers that the powers of the three great branches *of the National Government* be largely separate from one another." *Buckley v. Valeo*, 424 U.S. at 120 (emphasis added). "While the boundaries between the three branches are not 'hermetically' sealed [the separation of powers doctrine] prohibits one branch from encroaching on the central prerogatives of another." *French*, 530 U.S. at 341 (internal citations omitted).

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9. Five petitions have been filed in these consolidated cases. The United States and the Oversight Board, as Petitioners, are separately briefing the merits, and Petitioner Official Committee of Unsecured Creditors (other than COFINA) does not attempt here to burden the Court with a redundant, plenary treatment of the Appointments Clause or the history of congressional governance of the territories. Rather, Petitioner focuses here on certain precedents of this Court and issues that may not otherwise be fully addressed.

10. *See also Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) ("separation-of-powers concept [is] embedded in the Appointments Clause"); *Weiss v. United States*, 510 U.S. 163, 188 (1994) (Court's Appointments Clause decisions are a specialized application of its more general separation-of-powers case law).

This case, however, does not concern the structure "of the National Government," but rather an agency Congress created for the *territorial* government of Puerto Rico. It does not turn, then, on Congress's authority to act within the constraints of "Articles I, II, and III"; the question presented here is whether the separation of powers structures that so carefully calibrate the responsibilities of each branch of the "*National Government*" also constrain Congress when it acts *for the territories* under Article IV. The answer to that question is "no"; as this Court has repeatedly held, this territorial role is fundamentally different from the one Congress assumes when it enacts "laws for the United States considered as a political body of states in union." *Cincinnati Soap*, 301 U.S. at 323 (emphasis added).

In fact, this Court has twice said that these separation of powers concerns have no application when Congress exercises its Article IV powers. In *Heinszen*, the Executive branch imposed a tariff applicable to the Philippines territory and specified "regulations for the collection of the same" pursuant to special authorization "conferred by [an] act of Congress." 206 U.S. at 378. The plaintiff there argued that "the power to levy tariff duties on goods coming into the United States from the Philippine Islands" belonged exclusively to Congress, which "was without authority to delegate [that] legislative power" to the President. *Id.* at 384.

The Court rejected the argument: "the premise upon which this proposition rests presupposes that Congress, in dealing with [a territory] may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select" including the President. *Id.* at 384–85.

*Cincinnati Soap* was to the same effect. That case concerned a revenue measure whose entire proceeds were to go to a territory (the Philippines) on the order of, and as specified by, the Executive Branch, without first having been appropriated by Congress. This was challenged as an improper delegation of Congress's exclusive appropriations authority under Article I, §8, cl. 12. 301 U.S. at 313-14.

In rejecting the assertion, the Court explained that Congress, "may do for one of [the territories] whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible." *Id.* at 317. Given the scope of these powers, the Court concluded that the Constitution's separation of powers concerns — there, the non-delegation doctrine —did not apply.

The court of appeals did not discuss, much less attempt to distinguish, *Cincinnati Soap*, and its discussion of *Heinszen* was more concession than explanation. Specifically, the court acknowledged that it was

> difficult to explain . . . *Heinszen* [given its Appointments Clause holding]. *Heinszen* . . . stated that Congress could [constitutionally] delegate[] the power to impose . . . tariffs to the President. . . . *Heinszen* [thus] seems to allow Congress to delegate legislative power to the President, citing the territorial context as a justification [even though such a delegation would plainly be unconstitutional if Congress were acting as the national legislature].

> *Heinszen*, though, has no progeny that might shed light on how reliable it might serve as an apt analogy in the case before us. Moreover, *Heinszen* concerned a grant of power by Congress, not a grab for power at the expense of the executive.

Pet. App. 25a.

Neither excuse given by the court of appeals for refusing to apply *Heinszen* satisfies. In *Heinszen* (and in *Cincinnati* Soap, which the court ignored), this Court held that elementary separation of powers principles that would constrain congressional action were it acting for the national government do not apply when it acts under Article IV for the territories. While no subsequent decision of this Court may rely directly on *Heinszen* or *Cincinnati Soap* for this proposition, neither are there any contrary decisions, from this Court or (until this case) from the other courts of appeals. The court was not entitled to ignore holdings this Court has reached twice because it hoped for more, and the court of appeals suggested no other reason why the results would be different here.

The court also dismissed *Heinszen* because it "concerned a grant of power by Congress, not a grab for power at the expense of the executive," but that is a distinction without a difference. Where it applies, the "Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992); *Clinton v. City of New York*, 524 U.S. 417, 451–52 (1998) ("It is no answer, of course, to say

that [one branch] surrendered its authority [to another] by its own hand . . . . That a . . . cession of power is voluntary does not make it innocuous.") (Kennedy, J., concurring);

## II. WHEN EXERCISING ITS ARTICLE IV POWERS, CONGRESS MAY ADOPT WHATEVER STRUCTURES OF GOVERNMENT THE STATES ARE FREE TO ADOPT FOR THEMSELVES AND THEIR LOCALITIES

Article IV gives Congress "broad latitude to develop innovative approaches to territorial governance. . . ." *Sanchez Valle*, 136 S. Ct. at 1876. In exploring these "innovative approaches," Congress "may do for [territories like Puerto Rico] whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible." *Cincinnati Soap Co.*, 301 U.S. at 317–18.

As a result, it should come as no surprise that the solutions Congress has adopted — or has approved in the context of allowing greater home rule — include structures of government "that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted" for the States. *Palmore v. United States*, 411 U.S. at 398 (discussing power of Congress to legislate for the District of Columbia). It may do so by directly or by "freely delegat[ing] its legislative authority to such agencies as it may select." *U.S. v. Husband R.*, 453 F.2d 1054, 1058–59 (5th Cir. 1971) ("With respect to the basic areas of civil government of the Canal Zone, Congress has delegated its plenary [legislative] authority to the executive branch

of our government. It has granted broad authority to the President, or directly to the Governor," a delegation that would have been unconstitutional were it acting for the national government) (citing *Heinszen*, 206 U.S. at 370)).

The Constitution's structure-of-government provisions did not constrain Nebraska when it established a unicameral legislature because the bicameralism requirement of Article I, Section 1 was entirely irrelevant. In the same way, Congress was able to delegate its territorial power to unicameral legislatures in Guam and the Virgin Islands when it granted those territories home rule. *See* 48 U.S.C. §§1423, 1571. If the court below were correct — if Congress's governance choices for the territories were constrained by the structure-of-government provisions of the Constitution when it ceded home rule to Guam and the Virgin Islands in a form desired by the people of those territories — these legislatures would be infirm.

Similarly, at the request of the people of Puerto Rico, Congress delegated its plenary power to legislate to a 27-member Senate and a 51-member House of Representatives, P.R.Const., Art. III, §2, but that number of legislators must *increase* if in any general election "more than two-thirds of the members of either house are elected from one political party or from a single ticket." *Id.* §7. This structure, of course, would be patently incompatible with the Constitution's structure-of-government blueprint *for the national government*, but that blueprint is irrelevant when Congress acts under Article IV.

More to the point, the States are free to adopt (and have, in fact, adopted) executive branch appointment schemes that would be unlawful if the Appointment Clause

were applicable to them. The Governor of New Jersey is entitled to appoint his or her Lieutenant Governor to serve simultaneously as Secretary of State, without any input or approval from the state legislature. *See* New Jersey Const. Art. V, §4, ¶ 4. An individual designated by the Governor of Arizona to be Director of Agriculture—a cabinet level position—is first screened by a five-member committee appointed by the Governor, but is not subject to state senate confirmation, or any other legislative approval. *See* Ariz. Rev. Stat. §3-103. In New Hampshire, the Attorney General is appointed by the Governor, not elected, and must be approved, not by the state senate or any legislative body, but by a five-member elected body called the Executive Council. *See* NH Const. Pt. 2, Art. 46.[11]

Because Congress may constitutionally "do for [the territories] whatever a state might do for itself or one of its political subdivisions," *Cincinnati Soap Co.*, 301 U.S. at 317, variety also characterizes the appointment schemes Congress has adopted for the territories, usually as part of home rule initiatives. The Governor in Guam makes

11. The states have adopted various vehicles for dealing with economic crises analogous to the Oversight Board in this case, and none would pass Appointments Clause muster. Michigan created a nine-member Financial Review Commission to assist Detroit with its financial crisis, which was composed of several elected officials and a number of gubernatorial appointees, none of whom had to be confirmed legislatively. *See* Michigan Financial Review Commission Act, Act 181 of 2014, Section 141.1635(5). Similarly, the Pennsylvania Intergovernmental Cooperation Authority, created in 1991 to assist Philadelphia through its own financial crisis, consisted of five individuals, each designated by one of five elected officials in the state government without legislative confirmation. Philadelphia's Director of Finance was an *ex officio* member. *See* PICA Act of June 5, 1991, P.L. 9, 53 P.S. § 12720.101 et seq.

appointments to executive office subject to advice and consent, but by its unicameral legislature, not a "Senate." 48 U.S.C. §1422c(a). In the Virgin Islands, Congress has authorized the Governor to make those appointments without *any* form of legislative consent. *Id.* §1591. If the Constitution's structure-of-government design principles constrain Congress's choices when it legislates for the territories, all of the governments it has selected under Article IV, usually at the request of the territories themselves, are suspect.

## III. SENATE CONFIRMATION IS NOT A FUNDAMENTAL PERSONAL RIGHT INHERENT IN FREE AND FAIR GOVERNMENT

The court of appeals correctly observed that the "Appointments Clause serves as one of the Constitution's important structural pillars," a key element in the Framers' design for our national government. Pet. App. 28a. But that truism is not useful in this case because this case does not deal with the national government's design. As discussed above, the Court has already held that similarly critical components of the scheme adopted to separate the branches in our national government simply have no application when Congress legislates as a local assembly for the territories.[12]

12. The degree to which the Constitution applies to the territories historically has turned on the type of territory involved. When a territory was destined for statehood, it was considered an "incorporated" territory, and the Constitution constrained Congress's power to govern that territory just as it would if the territory had already become a state. In "unincorporated" territories such as Puerto Rico, on the other hand, for which statehood was not envisioned, some but not all of the Constitution's limits apply to Congress's power to govern.

A separate line of authority confirms that the structural provisions of the Constitution do not apply here. For more than a century and as recently as *Boumediene*, 553 U.S. at 758, this Court has said that only those "guaranties of . . . fundamental personal rights declared in the Constitution" limit Congress when it exercises its Article IV powers. 553 U.S. at 758 (internal citations omitted). The District of Columbia Circuit helpfully explained this "fundamental personal right" designation in *Tuaua*:

> "Fundamental" has a distinct and narrow meaning in the context of territorial rights. It is not sufficient that a right be considered fundamentally important in a colloquial sense or even that a right be "necessary to [the] American regime of ordered liberty." . . . [T]he designation of fundamental extends only to the narrow category of rights and "principles which are the basis of *all* free government."

788 F.3d at 308 (emphasis in original; internal citation omitted). The D.C. Circuit noted that this Court's precedents "distinguish as universally fundamental those rights so basic as to be integral to free and fair society. In contrast, we consider non-fundamental those artificial, procedural, or remedial rights that — justly revered though they may be — are nonetheless idiosyncratic to the American social compact or to the Anglo–American tradition of jurisprudence." *Id.* (citations omitted).

Thus, only rights that embody "the spirit of the Constitution [by guaranteeing the right] to be protected in life, liberty and property and not to be deprived thereof without due process of law" can pass this test. *Soto v.*

*United States*, 273 F. 628, 633–34 (3d Cir. 1921). This doctrine does not slight the citizens of those territories, but allows Congress, usually in consultation with the territories in the context of providing home rule, to make the case-by-case judgment whether non-fundamental provisions of the U.S. Constitution should nonetheless apply to a given territory, which may have very different legal traditions.

This case, then, asks the question whether the Appointments Clause creates some "personal right" that is "so basic as to be integral to free and fair society" that it forms "the basis of all free government." Under this standard, courts have held that the right of free speech[13] and the right to assemble freely[14] apply in the territories. So does the right to personal privacy undergirding reproductive choice,[15] the Fifth Amendment's guarantee of due process,[16] the right to confront one's accusers,[17] and the right to be protected from double jeopardy.[18]

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13. *Cintron v. State Bd. of Educ.*, 384 F. Supp. 674, 681 (D.P.R. 1974).

14. *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613 (D.P.R. 1973).

15. *Montalvo v. Colon*, 377 F. Supp. 1332 (D.P.R. 1974).

16. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

17. *Soto*, 273 F. at 634–35.

18. *United States v. Sanchez*, 992 F.2d 1143, 1148–52 (11th Cir.), *on reconsideration*, 3 F.3d 366 (11th Cir. 1993).

On the other side of the ledger are rights that courts have concluded fail this personal-rights/free-government test. For example, courts have held that territorial citizens are not entitled to "one man, one vote" apportionment in their legislatures where the territory's home rule charter does not so provide.[19] They have no constitutional right to a unanimous verdict.[20] Indeed, citizens of the unincorporated territories have no right to a trial before an Article III judge *at all*[21]; the territorial courts of Puerto Rico were created as *legislative* entities pursuant to Congress's Article IV power to govern,[22] and not under Article III, which would require life-tenured judges appointed by the President and confirmed by the Senate.

These cases make clear that the "rights" arising from the Appointments Clause do not impinge on Congress' Article IV authority. "Structural protections such as those embodied in the Appointments Clause stand on a different footing from personal constitutional rights." *Samuels, Kramer & Co.*, 930 F.2d at 984. The Appointments Clause, grounded in the separation of powers doctrine, creates no intimately personal rights comparable to the individual liberties that have been applied by the courts to the territories. As the Court has observed, "[i]n contrast

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19. *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139–40 (D. N. Mar. I. 1999), *aff'd sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000).

20. *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

21. *McAllister v. United States*, 141 U.S. 174, 180 (1891); *accord N. Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984); *Fournier v. Gonzalez*, 269 F.2d 26 (1st Cir. 1959).

22. *United States v. Perez Oviedo*, 281 F.3d 400, 403–04 (3d Cir. 2002).

to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the [three branches] within the constitutional design" for the national government. *French*, 530 U.S. at 350.[23]

It is impossible to imagine a "free government" that denies the right to speak freely, to assemble, or to pray. But one need not strain to imagine free governments that are structured in ways that are at odds with the structure selected by the Framers; examples abound. As the prior section of this brief showed, states have ensured liberty to their citizens without bicameral legislatures and without legislative confirmation of cabinet officers.

The court of appeals made the "erroneous assumption that the constitutional limitations of power which operate upon the authority of Congress when legislating *for the United States* are [just as] applicable and are controlling upon Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power" over Puerto Rico. *Bd. of Pub. Util. Comm'rs v. Ynchausti & Co.*, 251 U.S. 401, 406 (1920) (emphasis added). That mistake led the court of appeals, not to *honor* the Framers' constitutional design, but to frustrate it. By allowing Congress to do for the territories what the states can do for

23. *Bond v. United States*, 564 U.S. 211, 222 (2011), is not to the contrary. There, the Court recognized that the separation of powers doctrine was primarily intended "to protect each branch of [the National] government from incursion by the others," but concluded that this principally structural nature of the rights involved did not necessarily deprive individuals of standing to bring separation of powers challenges. *Id.*

themselves, the Framers gave Congress "broad latitude to develop innovative approaches to territorial governance [under] U.S. Const., Art. IV, §3, cl. 2." *Sanchez Valle*, 136 S. Ct. at 1876. With that latitude, Congress devised an "innovative" means for rescuing the Commonwealth of Puerto Rico from financial disaster, just as the Framers intended.

## CONCLUSION

The judgment of the court of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted,

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