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

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 OF THE OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF 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; Jose B. Carrion, III; Carlos M. Garcia; Arthur J. Gonzalez; Jose R. Gonzalez; 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 Electrica y Riego de Puerto Rico, Inc.

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JURISDICTION

The judgment of the court of appeals was entered February 15, 2019, and rehearing was denied March 7, 2019. The petition for a writ of certiorari was filed on April 23, 2019, and granted on June 20, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions involved in this case are set out in an appendix to this brief: U.S. Const. art. IV, § 3, cl. 2. and art. II, § 2, cl. 2.

Relevant provisions of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2101 *et seq.*, are reproduced at App. 85a-122a, No. 18-1334.

INTRODUCTION AND STATEMENT

Facing a fiscal emergency in Puerto Rico and the prospect of imminent economic chaos, Congress enacted PROMESA to stabilize Puerto Rico's economy, gain control over the Island's crushing debt, and establish a path for restructuring that Congress deemed essential for Puerto Rico's return to economic health. A centerpiece of the Act was the creation of the Financial Oversight and Management Board (the "Board"). Congress established the Board as an "entity within the

territorial government of Puerto Rico," with authority over Puerto Rico's financial affairs and a mission to achieve fiscal responsibility. The Board has worked with entities like Respondent Retiree Committee, which represents Puerto Rico's 167,000 retired teachers, police officers, firefighters, judges, and other government workers whose pensions are collectively underfunded by more than $50 billion. In addition to being the largest group of creditors in the Title III cases, the Committee represents the interests of long-term residents of the Commonwealth, who are personally invested in the Commonwealth's immediate welfare, financial recovery, and long-term stability.

The First Circuit's decision would stop PROMESA in its tracks and stymie the efforts to restore financial stability for the Commonwealth. The First Circuit held that the Board was subject to—and its appointment did not comply with—the Constitution's Appointments Clause. As the First Circuit would have it, the Board members are principal Officers of the United States, so Congress and the President had no choice but to appoint them as the President would appoint (for example) members of his Cabinet. That is incorrect. Congress created the Board pursuant to its expansive authority under the Territory Clause of Article IV of the Constitution "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. The Appointments Clause does not prevent Congress, acting pursuant to the Clause, from providing for the appointment of territorial officials

exercising authority in the territories without providing for advice and consent.

The briefs from the Board and the United States will amply demonstrate why that is so, and we will not repeat their arguments here. Instead, we make a focused though dispositive point: History refutes the First Circuit's position. From the early days of the Republic to the present, all three branches have recognized the authority of Congress to devolve such local autonomy to U.S. territories as Congress deems warranted in response to conditions on the ground, free from structural constraints such as the Appointments Clause.

Take Congress. From the start, after debating and rejecting the very constitutional concerns the First Circuit articulated, Congress authorized the President acting alone to immediately appoint and directly control territorial officials in newly annexed, and often far-flung, territories—rather than waiting for the lengthy Senate confirmation process or hastily calling a popular election. From the start, Congress allowed territories (including eventually Puerto Rico) to elect their own leaders rather than requiring appointment by the President and confirmation by the Senate. And from the start, Congress made clear its view that other structural separation-of-powers provisions (including, for example, Article III) simply do not apply when Congress legislates for the territories.

This Court's cases are to the same effect. The Court has consistently held that inter-branch structural separation-of-powers constraints do not apply in the territories, and the Court has upheld even a congressional delegation of legislative authority *to the*

President when Congress legislates for the territories. The Executive Branch has long held the same view. First expressed just decades after the Founding, the Executive Branch has made clear its understanding that territorial officers are not "officers of the United States" so far as the Constitution is concerned.[1]

This makes good sense. The Framers well understood that they could not possibly anticipate the unique local histories and needs of all territories the new Nation might acquire. Some territories would be destined for statehood, some not; some would be geographically close to existing States, some not; some would require emergency or temporary governments, some not; and some would have emergency fiscal crises, and some not. The Framers thus wrote the Territory Clause to give Congress broad leeway in its exercise of the full measure of legislative authority over these lands, freed from structural constraints such as the Appointments Clause.

As this Court recently confirmed, the Constitution gives Congress "broad latitude to develop innovative approaches to territorial governance" consistent with the need for "inventive statesmanship" for the territories. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016). The enactment of PROMESA to meet the emergency conditions in Puerto Rico shows the wisdom of that approach. Contrary to the First Circuit's

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[1] The controversial Insular Cases, taken at face value, would be consistent with this history. This brief, however, focuses principally on interpretations advanced by all three branches in the early days of the Republic, and the brief thus does not address those cases and any application they may or may not have here.

conclusion, the Appointments Clause does not limit Congress's authority here, and our history makes that clear. The Board was constitutionally appointed, and the court of appeals' holding on the Appointments Clause should be reversed.

SUMMARY OF ARGUMENT

Starting from the earliest days of our Nation and continuing through today, all three branches of the federal government have considered whether structural constitutional constraints apply to Congress when it acts in the territories. Reflecting the need for flexibility and innovation in territorial governance, all three branches have concluded that those constraints do not apply.

I.A. In 1803, shortly after the Louisiana Purchase, Congress reckoned with the scope of its authority over newly acquired territories. At issue was proposed legislation permitting the President to appoint principal officers without Senate confirmation—notwithstanding the Appointments Clause—and to exercise legislative power—notwithstanding basic separation-of-powers principles. Members of Congress debated whether those structural restraints prevented Congress from acting. Congress concluded that they did not, and passed the measure. Over the ensuing century, Congress repeatedly passed measures with identical wording for other territories the Nation acquired.

B. Congressional practice has repeatedly confirmed that the Appointments Clause and related separation-of-powers constraints do not apply when it came to the territories. First, Congress has provided for the election of territorial officers, even though the Appointments Clause does not authorize that method of appointment

and even though providing for the election of (for example) the Secretary of Defense would plainly violate the Clause. Second, Congress has required the President to nominate territorial officials from short lists provided by other territorial officials, a practice that Aurelius has consistently claimed would violate the Clause if it applied. Third, Congress has frequently vested the appointment of *inferior* officers in territorial governors, not the President. Fourth, Congress has provided for the appointment of territorial governors (and the governor of the District of Columbia) without Senate confirmation, even though those officials would indisputably be principal officers under the Clause.

C. The First Circuit ignored this history and concluded that the Northwest Ordinance of 1789 indicates that Congress thought itself bound by the Appointments Clause. But that was wrong. The Northwest Ordinance contains numerous provisions incompatible with the text of the Clause, and thus the adoption of the Northwest Ordinance by the First Congress confirms rather than refutes that Congress believed the Appointments Clause simply did not apply in the territories.

II. This Court has confirmed Congress's freedom to legislate for the territories unconstrained by structural separation-of-powers principles. The Court first did so in 1828, holding that Article III does not constrain Congress when it acts for the territories. Since then, this Court has held that Congress may delegate its Article I legislative authority to territorial governments, even though Congress ordinarily cannot delegate legislative authority to entities (such as agencies) that it creates.

This Court has even allowed Congress to delegate its legislative authority *to the President* when he acts in the territories, even though that deviates from the most fundamental division of authority between the three branches of the federal government.

III. The Executive Branch has likewise consistently maintained that territorial officials' appointments are not subject to the Appointments Clause. As early as 1839, Attorney General Grundy opined that territorial judges were not "Officers of the United States" as that phrase is used in Article II's Impeachment Clause, the companion to the Appointments Clause. The logical consequence is that territorial officials are also not "Officers of the United States" subject to the Appointments Clause, a position the Executive Branch has held through the present day. Below, Aurelius pointed to an 1851 opinion by Attorney General Crittenden that Aurelius views as inconsistent with the Grundy opinion. But that opinion addressed a different issue not disputed here (and not disputed by Attorney General Grundy)—whether the President can remove territorial officials he has appointed. Unsurprisingly, the Executive Branch has consistently embraced Attorney General Grundy's opinion that directly addresses the constitutional status of territorial officers, including in litigation before this Court just three years after the Crittenden opinion was issued, correctly perceiving no conflict.

IV. Interpreting the Appointments Clause not to apply to territorial officials tracks not only these historical practices, but also the Constitution's design. Congress's broad, plenary power over the territories

was no accident. Informed by the nation's possession of the Northwest Territories, the Framers intended to bestow upon Congress the ability to manage the varied territorial possessions that the country might acquire. Exempting territorial officials from the strictures of the Appointments Clause grants Congress the flexibility it needs to meet the diverse governance challenges the territories present, unconstrained by certain federalism and structural protections essential for legislation affecting the sovereign States.

ARGUMENT

At the time of the founding, the United States held only one tract of land as a territory: the Northwest Territory. But the Framers understood that expansion was inevitable. Congress would soon have to develop innovative governance mechanisms for territories facing military threat, unrest, supply shortages, and economic or political instability. They therefore granted to Congress, in Article IV of the Constitution, a plenary authority to deal with the territories as Congress saw fit to address these varied exigencies.

That plenary authority means far more than just that structural constitutional restraints do not apply when Congress legislates for the territories. In the territories, "Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state." *Simms v. Simms*, 175 U.S. 162, 168 (1899); *see also Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) ("[I]n ordaining government for the territories … all the discretion which belongs to legislative power is vested

in congress; and that extends, beyond all controversy, to determining … the form of the local government in a particular territory, and the qualification of those who shall administer it."). Thus, the primary function of the Territory Clause is to grant Congress virtually total control over territorial governance, even if that authority is often delegated to local officers or via territorial constitutions, as in Puerto Rico. *Sanchez Valle*, 136 S. Ct. at 1876 (noting Congress's "foundational role in conferring political authority" in Puerto Rico, notwithstanding the Puerto Rico Constitution).

This, importantly, is how all three branches of the federal Government have understood the scope of Congress's authority under Article IV. Indeed, the arguments the First Circuit adopted and Aurelius has advanced are not new. As our Nation's reach expanded, issues of territorial governance were front and center, and Congress, this Court, and the Executive Branch all grappled with whether structural constitutional constraints like the Appointments Clause applied when Congress acted in the territories. In lines of decision extending from then to the present day, which the First Circuit largely ignored, all three branches concluded that they did not.

I. Early On, Congress Determined That It Was Not Bound By Structural Constitutional Restraints In Legislating For The Territories, And It Has Since Acted Consistent With That Determination.

Congressional practice confirms that the Appointments Clause does not apply to the appointment of territorial officials. In 1803, when it first passed

legislation dealing with a territory obtained after ratification of the Constitution, Congress specifically considered and rejected arguments that it was bound by the Appointments Clause and other separation-of-powers principles. And Congress has, since 1789, authorized officers in the territories to be appointed in ways that would clearly violate the Appointments Clause if it applied. This "contemporaneous legislative exposition of the Constitution, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Printz v. United States*, 521 U.S. 898, 905 (1997) (quotation marks and alterations omitted); *see also Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011) (finding congressional action "[w]ithin 15 years of the founding" to be "dispositive" evidence of constitutional meaning); *Loving v. United States*, 517 U.S. 748, 773 (1996) (finding congressional action constitutional where "[f]rom the early days of the Republic," Congress had passed similar laws, relying on statute from 1806). These practices show the Clause does not apply to territorial officials.

A. As Early As 1803, Congress Specifically Considered And Rejected Arguments That It Was Bound By The Appointments Clause And Other Separation-Of-Powers Principles When Dealing With The Territories.

In 1803, in the wake of the Louisiana Purchase, Congress passed a statute "for the temporary government" of the territories of Orleans and

Louisiana.[2] Congress provided that "all the military, civil and judicial powers" of the territories "shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct."[3] That legislation contained at least two features that would have been plainly unconstitutional if the Appointments Clause and other separation-of-powers principles applied. But Congress, after deliberating on exactly those constitutional objections, passed the legislation anyway. In short, "all constitutional objections brought forward in the Louisiana debates were decisively rejected" by Congress. David P. Currie, *The Constitution in Congress: The Jeffersonians 1801-1829*, at 113 (2001).

First, under the Louisiana statute, the "persons" appointed to serve as territorial officials were appointed by the President alone and subject to his oversight, and at least the Governor of Louisiana was subject to supervision only by the President. *See The Title To Certain Lands in Louisiana*, 4 Op. Att'y Gen. 643, 652 (1847) (noting Jefferson's appointment of Louisiana governor). Under the First Circuit's view, these officials would be principal officers under the Appointments Clause. Pet. App. 38a. Yet they were not appointed with the advice and consent of the Senate, as the Appointments Clause would require if it applied.

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[2] An Act to enable the President of the United States to take possession of the territories ceded by France to the United States, by the treaty concluded at Paris, on the thirtieth of April last; and for the temporary government thereof, 8th Cong. ch. 1, § 2, 2 Stat. 245, 245 (1803) ("Louisiana Territory Act of 1803").

[3] *Id.*

This did not go unnoticed at the time. In debating the bill, Congressman Griswold raised the obvious constitutional infirmity the statute would have if the Appointments Clause applied:

> [P]ower is given to the President to appoint all the officers in the province, from the governor down to the lowest officer. Gentlemen will not say that the office of governor or judge is one of the inferior offices contemplated in the Constitution. They had never been so considered. In all the arrangements of appointments for the territorial governments, the sanction of the Senate had been required for the governors, judges, secretaries, &c.; whereas, in this instance, the President is clothed with power to appoint all the officers in the territory.

13 Annals of Cong. 509 (1803).

Second, the statute delegated to the President Congress's Article I legislative power, by permitting the President to vest the "civil" power in an individual *and* to "direct" how that power "shall be exercised." Louisiana Territory Act of 1803, § 2, 2 Stat. at 245. The statute thus appeared to violate the "universally recognized" rule that "[C]ongress cannot delegate legislative power to the president." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

Citing that fundamental principle, several congressmen again raised a constitutional objection to that aspect of the Louisiana statute. Representative Elliot of Vermont argued that the statute violated the principle that "the Constitution … not only precluded the President from exercising [legislative power], but

likewise forbade [Congress's] delegation of it to him." 13 Annals of Cong. 508 (1803). And Congressman Griswold of Connecticut specifically argued that that principle continued to constrain Congress even in the territories, rejecting the idea that Congress "may do as we please with [the territory]" because it was not "a part of the United States, but a colony." *Id.* at 510. "[I]t is not consistent with the Constitution," Congressman Griswold contended, "to delegate to the President, even over a colony thus acquired, all power, Legislative, Executive, and Judicial . . . ." *Id.*

Strong voices went the other way. Congressman Smilie noted that "[i]f it appeared clear … that the Constitutional right to delegate the powers contemplated" by the statute "did not exist, he should vote against it," but "those doubts were this day abandoned." *Id.* at 511. And Congressman Eustis went so far as to argue "that the President should be authorized not only to continue all necessary existing powers, but to institute such other powers as may be necessary for the well being of the territory." *Id.* at 507.

Congressman Rodney put an end to the debate regarding both constitutional concerns voiced by the bill's opponents. He noted that "[t]here is a wide distinction between States and Territories, and the Constitution appears clearly to indicate it." *Id.* at 513. Citing Article IV, Rodney noted "[t]his provision does not limit or restrain the authority of Congress with respect to Territories, but vests them with full and complete power to exercise a sound discretion generally on the subject." *Id.* He thus concluded that "Congress have a power in the Territories, which they cannot

exercise in States; and that the limitations of power, found in the Constitution, are applicable to States and not to Territories." *Id.* at 514.

In the wake of Congressman Rodney's analysis, the bill passed by a wide margin. Thus, as early as 1803, Congress had considered and rejected the idea that the Appointments Clause and other structural separation-of-powers principles constrained its legislation regarding new territories. Congress thus "appeared to think the only constitutional provisions that applied to the territories were those authorizing the United States to acquire and administer them." Currie, *supra*, at 113.

Congress has adhered to that judgment ever since, enacting materially identical legislation for many different territories. In 1819, Congress used the same statutory language to grant the President the same plenary power over Florida, providing that "all the military, civil, and judicial, powers, exercised by the officers of the existing government of the same territories, shall be vested in such person and persons, and shall be exercised in such manner as the President of the United States shall direct."[4] It used the same language again for the first civil government of the Philippines.[5] And it did so again when establishing the

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[4] *See* An act to authorize the President of the United States to take possession of East and West Florida, and establish a temporary government therein, 15th Cong. ch. 93, § 2, 3 Stat. 523, 524 (1819).

[5] *See* An Act Making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and two, 56th Cong. ch. 803, 31 Stat. 895, 910 (1901).

first civil government of the Panama Canal Zone.[6] Congress has never (to our knowledge) retreated from that position, and when this Court reviewed the Panama Canal Zone's appointment statute in 1923, it did not so much as hint that there was a violation of the Appointments Clause. *See McConaughey v. Morrow*, 263 U.S. 39, 45-46 (1923).

B. Other Congressional Practice From The Early Years Of The Nation Confirms That Congress Did Not Think It Was Bound By The Appointments Clause When Dealing With The Territories.

Congressional practice has repeatedly confirmed Congress's judgment that the Clause does not apply when it comes to the territories.

First, Congress has often provided for the direct election of officials that would be "Officers of the United States" if the Appointments Clause applied, even though that method of appointment is not permitted under the Clause.[7] For example, Congress provided for the election of the lower body of the territorial legislature,

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[6] *See* An Act To provide for the temporary government of the Canal Zone at Panama, the protection of the canal works, and for other purposes, Pub. L. No. 58-190, ch. 1758, § 2, 33 Stat. 429, 429 (1904).

[7] *See, e.g.*, An Act providing for the government of the territory of Missouri, 12th Cong. ch. 95, §§ 4, 6, 2 Stat. 743, 744-45 (1812) ("Missouri Territory Act of 1812"); An Act establishing a separate territorial government in the southern part of the territory of Missouri, 15th Cong. ch. 49, § 6, 3 Stat. 493, 494 (1819) ("Missouri Territory Act of 1819"); An Act To provide a civil government for Porto Rico, and for other purposes, Pub. L. No. 64-368, ch. 145, §§ 26–27, 39 Stat. 951, 958–59 (1917) ("Puerto Rico Territory Act").

the territorial House of Representatives, in the Northwest Ordinance. *See* An Act to provide for the Government of the Territory North-west of the River Ohio, 1st Cong. ch. 8, 1 Stat. 50, 51-52 n.a (1789) ("Northwest Ordinance of 1789"). That early and consistent congressional practice cannot be squared with the text of the Clause.[8]

Second, Congress has required that the President select territorial officials from short lists, even though that practice, according to Aurelius, would violate the Appointments Clause if that clause applied. *See* Br. of Appellants at 30, *Aurelius Investment, LLC v. Puerto Rico*, 915 F.3d 838 (1st Cir. 2019), 2018 WL 4075970. Again, the Northwest Ordinance, as amended by the First Congress in 1789, required the President, with Senate confirmation, to appoint members of the upper house of the territorial legislature, the territorial legislative council. Specifically, Congress required the President to select these members from lists submitted by the territorial house of representatives: five members from a list of just ten, and, upon a vacancy, one member from a list of just two. *See* Northwest Ordinance of 1789, 1 Stat. at 52 n.a. Thus, the First Congress restricted the President's purportedly "sole" authority to select territorial officials in just the same way Congress did here. *Id.* Congress repeated these restrictions in subsequent territorial statutes—for

[8] The significance of direct elections of territorial officials is amply discussed by other parties, so the Retiree Committee focuses its attention on three other congressional practices that are equally inconsistent with the First Circuit's holding.

example, little more than twenty years later, Congress adopted the same model for the Missouri Territory: requiring the President to select nominees for the Territory's legislative council from a list provided by the lower house of the territorial legislature.[9] Once again, this consistent congressional practice would be unconstitutional (under Aurelius's view) if the Appointments Clause applied, confirming that Congress did not view itself as bound by the Clause. Moreover, if, as these early precedents make clear, Congress may *require* the President to select nominees for territorial offices, subject to Senate confirmation, from lists provided by others, it plainly may take the less restrictive step of simply *encouraging* the President to select individuals for territorial offices from such lists by providing that such individuals need not be confirmed by the Senate. *See* 48 U.S.C. § 2121(e)(2).

Third, Congress's view that the Appointments Clause did not apply in the territories is reinforced by congressional practice when it came to *inferior* territorial officers. From the earliest days of the Nation, territorial governors have frequently been vested with the power to appoint inferior territorial officers. *See generally Governor of the Northwest Territory*, 1 U.S. Op. Atty Gen. 102, 103 (1802) (Northwest Territory Ordinance "expressly provides that all magistrates and other civil officers shall . . . be appointed by the *governor*,

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[9] Missouri Territory Act of 1812, § 5, 2 Stat. at 744; *see also, e.g.*, An Act further providing for the government of the territory of Orleans, 8th Cong. ch. 23, § 1, 2 Stat. 322, 322 (1805) (incorporating terms of Northwest Ordinance providing for appointment by President of five-member Legislative Council from list of ten nominees provided by the territorial house of representatives).

unless otherwise therein directed"). This is so despite the Appointments Clause's requirement that inferior officers *of the United States* may only be appointed by the President (with or without advice and consent), by "the Courts of law" or by "the Heads of Departments." U.S. Const. art II, § 2, cl. 2. The selection of inferior officers has been vested in other organs of territorial government as well, and this Court has approved such arrangements even though they do not comport with Article II. *See Snow v. United States*, 85 U.S. (18 Wall.) 317, 321–22 (1873) (Utah territorial legislature's appointment of prosecuting attorneys).

Fourth, as noted earlier, Congress has, since 1803, permitted territorial officials exercising significant authority in the territories, including territorial governors, to be appointed by the President *without* the advice and consent of the Senate. *See supra* 11-15. As congressmen pointed out at the time, that arrangement would plainly violate the Appointments Clause if it applied. *Id.*

This practice goes back even further with respect to the District of Columbia, a useful analogy, since the Constitution similarly grants Congress broad power over the District. *See* U.S. Const. art I, § 8, cl. 17 ("The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District"). In 1802, Congress passed a law incorporating the City of Washington within the District and establishing its government.[10] That statute created a popularly elected city council and a mayor, who was to be appointed

[10] An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia, 7th Cong. ch. 53, 2 Stat. 195 (1802).

annually by the President. §§ 2, 5, 2 Stat. at 196. President Thomas Jefferson appointed Robert Brent to the office *without* Senate advice and consent in June 1802, delivering the commission to Brent immediately upon his acceptance of the appointment. *See* James Dudley Morgan, *Robert Brent, First Mayor of Washington City*, 2 Rec. Columbia Hist. Soc'y 236, 240–41 & Ex. 6 (1899), https://www.jstor.org/stable/40066731. Robert Brent served ten years as mayor, receiving a new appointment (and apparently a new commission) each year. *Id.* at 244. In short, congressional practice reflected a widespread belief that, while officers *of the United States* must be appointed in conformity with Article II, officers *of governments within the District* and officers *of territorial governments* need not.

The First Circuit did not engage with this precedent. Instead, it focused on Congress's practice as to Puerto Rico, concluding that "[e]xcepting the short period during when Puerto Rico was under military administration following the Spanish-American War, the major federal appointments to Puerto Rico's civil government throughout the first half of the 20th century all complied with the Appointments Clause." Pet. App. 34a. The First Circuit's approach was doubly misguided. As an initial matter, and as the district court concluded, "nothing in the Constitution *precludes* the use of [the advice and consent] mechanism for positions created under Article IV, and its use does not establish that Congress was obliged to invoke it." *Id.* at 81a (emphasis added). More to the point, the First Circuit did not explain its choice to look narrowly at congressional practice in Puerto Rico, rather than more broadly at Congress's treatment of other territories dating back to

the Founding—as explained above, the first governors of the territories of Louisiana and Orleans, Florida, the Philippines, and the Panama Canal Zone did not go through Senate confirmation. There is no constitutionally-significant reason to start the constitutional analysis with Puerto Rico. *See supra* at 10. In fact, congressional treatment of the territories *as a whole* says more about that body's understanding of the limits of its constitutional power here. And, indeed, as has been evident since the Founding, the Framers intentionally bestowed upon Congress broad and flexible power over the territories writ large, *see infra* at 37-41, which Congress has exercised again and again.

C. Congress's 1789 Amendment To The Northwest Ordinance Is Consistent With This History.

To the extent the First Circuit engaged with early history at all, it got the history wrong. In holding that the Appointments Clause applied, the First Circuit looked to the First Congress's amendment to the Northwest Ordinance of 1787 to provide that certain territorial officials would be appointed by the President with Senate confirmation. Pet. App. 24a-25a. The Ordinance had been passed by the Continental Congress and provided that that *Congress* would appoint the governor of the Northwest Territory. As the First Circuit explained, in 1789, Congress amended the

Ordinance's appointment provisions to "adapt the same to the present Constitution of the United States."[11]

The court of appeals believed the amendments showed that the First Congress accepted that advice and consent were necessary in the territories. But that was quite wrong. At the outset, Congress itself *rejected* the idea that the Northwest Ordinance set the bounds of congressional authority. As Congressman Rodney put it in 1803, "We may be told that, in the government of the Northwestern Territory, there are certain fixed rules established" that were inconsistent with Congress's Louisiana statute. *See* 13 Annals of Cong. 514 (1803). But "Congress have conceived themselves to be possessed of the right, and have actually exercised the power, to alter the Territory, by adding to or taking from it as they thought proper, and by making rules variant from those under which it was originally organized." *Id.* Indeed, when Congressman Griswold objected to the Louisiana statute's lack of advice and consent he raised historical examples—such as the Northwest Ordinance—where Senate confirmation was required. *Id.* at 509 ("In all the arrangements of appointments for the territorial governments, the sanction of the Senate had been required for the governors, judges, secretaries &c…"); *see also* Currie, *supra*, at 113 ("Earlier statutes, as Roger Griswold pointed out, had required Senate confirmation of important territorial appointments."). Congress was unpersuaded that this past practice reflected a constitutional requirement; it enacted the Louisiana statute allowing for presidential-appointment-sans-consent over these objections.

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[11] Northwest Ordinance of 1789, § 1, 1 Stat. at 51.

Moreover, the First Circuit misconstrued Congress's actions. The fact that Congress amended the Ordinance to "adapt [it] to the Constitution" by no means shows that Congress amended the Ordinance to adapt to the *Appointments Clause*. Indeed, amending those provisions was necessary for a separate reason: "the old Continental Congress, which had previously made appointments under the Ordinance, no longer existed." Currie, *supra*, at 114 n.200. Section 1 of the 1789 amendments made three changes, not all relevant to appointments—yet *each* amendment involved replacing references to "the United States in Congress assembled" with references to the President.[12] For example, the Northwest Ordinance of 1787 had provided that the territory's governor or judges were required to adopt laws "as may be necessary and best suited to the circumstances of the district and report them *to Congress* from time to time"[13] and the 1789 amendment clarified that, instead, it "shall be the duty of the said governor to give such information and to make such

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[12] *See* Northwest Ordinance of 1789, § 1, 1 Stat. at 52-53 (stating that "in all cases in which . . . any information is to be given, or communication made by the governor of the said territory to the United States in Congress assembled, or to any of their officers, it shall be the duty of the said governor to give such information and to make such communication to the President of the United States"); *id.* at 53 (stating that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled"); *id.* (stating that "in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal").

[13] Northwest Ordinance of 1789, 1 Stat. at 51 n.a (emphasis added).

communication *to the President*." Northwest Ordinance of 1789, § 1, 1 Stat. at 52-53 (emphasis added).

Indeed, as just explained, properly viewed, the adoption of the Northwest Ordinance by the First Congress undermines rather than supports the First Circuit's decision. In the Ordinance, Congress provided for the direct election of one house of the territorial legislature, required the President to appoint members of the *upper* territorial house from lists submitted by the *lower* territorial house, and vested the territorial governor with the power to appoint inferior territorial officers. The Northwest Ordinance, in short, makes clear that Congress believed that the Appointments Clause simply did not apply in the territories.

What is more, the Northwest Ordinance illustrates that Congress understood that *other* structural, separation-of-powers constraints likewise did not apply in the territories. In the Ordinance, Congress not only intermingled legislative authority in executive officers and judges who simultaneously enforced and interpreted the laws they adopted, but also delegated legislative authority with no intelligible principle—actions that would clearly be unconstitutional if separation-of-powers constraints applied to the territories.[14]

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[14] *See* Northwest Ordinance of 1789, 1 Stat. at 51 n.a ("The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district . . . ."); *id.* at 52 n.a ("And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for

II. This Court Has Consistently Held That Inter-Branch, Structural Separation-Of-Powers Constraints Do Not Apply When Congress Acts In The Territories.

This Court has long made clear that Congress may act under the Territory Clause "in a manner . . . that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it . . . ." *Palmore v. United States*, 411 U.S. 389, 398 (1973). Indeed, from Chief Justice Marshall onward, the Court has repeatedly held that structural separation-of-powers principles like the Appointments Clause that would ordinarily constrain Congress do not do so when it acts in the territories.

In Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), for example, the Court held that territorial courts could exercise admiralty jurisdiction—within Article III's exclusive province in the States—despite not having life tenure as Article III required, because the structural safeguards of Article III did not apply to the creation of territorial courts:

> These Courts, then, *are not constitutional Courts* .... They are *legislative Courts*, created ... in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a

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the good government of the district, not repugnant to the principles and articles in this ordinance established and declared.").

> part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; *the same limitation does not extend to the territories*.

Id. at 546 (emphases added).[15] "[*Canter*] has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it." *Downes v. Bidwell*, 182 U.S. 244, 267 (1901) (opinion of Brown, J.); *see Palmore*, 411 U.S. at 403 (*Canter* reflects "the consistent view" of this Court); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); *Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648, 655 (1873). That is because territorial courts "may have judicial power, but it is not '*of the United States*.'" William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. (forthcoming 2020) (manuscript at 18), https://papers. ssrn.com/sol3/papers. cfm?abstract_id=3194945. Thus, even though Article IV

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[15] Even before *Canter* settled the question, numerous examples of Congress's practical construction of its Article IV powers supported this conclusion. *See, e.g.*, An Act erecting Louisiana into two territories, and providing for the temporary government thereof, 8th Cong. ch. 38, § 5, 2 Stat. 283, 284 (1804) (judges appointed for a term of years); Missouri Territory Act of 1812, § 10, 2 Stat. at 746 (same); Missouri Territory Act of 1819, § 7, 3 Stat. at 495 (same).

does not explicitly grant Congress the authority to appoint judges that do not comply with Article III, or even to appoint judges at all, the Court even so has held that Article III's restrictions must "give way to accommodate" Article IV's "plenary grants of power to Congress to legislate" for courts and judges in the territories. *Palmore*, 411 U.S. at 407-08; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70-71 (1982) (plurality op.), *superseded by statute as stated in Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). Thus, "We must assume as a logical inference from [*Canter*] that the other powers vested in Congress by the Constitution have no application to these territories, or that the judicial clause is exceptional in that particular." *Downes*, 182 U.S. at 267 (opinion of Brown, J.); *see also* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 894 (1990) ("If Congress can create queer-duck territorial judges who need not conform to the structural requirements of article III, why can't it also create queer-duck territorial executives who need not conform to the structural requirements of article II?"). The First Circuit did not address *Canter* or explain why the Appointments Clause should be treated differently.

Consistent with the recognition that territorial courts are not governed or constrained by Article III, Congress has historically exercised its Article IV powers to reopen final judgements of territorial courts. *See, e.g.*, An Act supplementary to an act, entitled "An act to divide the territory of the United States northwest of the Ohio, into two separate governments," 6th Cong. ch. 16, § 1, 2 Stat. 108 (1801). And although this practice would be unconstitutional

when applied to an Article III court, this Court has observed that precedents involving territorial courts "distinguish themselves." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995). Article III, in short, does not apply when Congress acts in the territories, even though that constraint contains no express exception for the territories.

Nor is Article III the only fundamental separation-of-powers principle that has no application when Congress legislates for the territories. For example, although Congress ordinarily cannot delegate its Article I legislative authority to entities it creates, the Court has held that limitation does not apply when Congress acts in the territories.

"Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . ." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (alterations in original) (citation omitted). This limitation on delegation no doubt applies to administrative agencies and other entities themselves created by Congress. *See id.*

But that principle does not apply when Congress acts in the exercise of its territorial powers. The Court has held that Congress has not only the power to create territorial governments, but also a "comprehensive" "power of delegation to . . . a local [territorial] government," and so has rejected the argument that a territorial legislature's tax "constitut[ed] an unlawful delegation of legislative power." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321-23 (1937). Indeed, "[t]he power of Congress to delegate legislative power to a

territory is," by now, "well settled." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 106 (1953). And Congress has, historically, often so delegated—not just to officers but to local legislatures chosen by popular election.[16]

Nor are there limitations on the type of legislative power that Congress can delegate to territorial governments. For example, in *Simms v. Simms*, 175 U.S. 162 (1899), the Court characterized as unlimited the scope of the legislative authority that Congress may delegate to territorial governments:

> In the territories of the United States, Congress has the *entire* dominion and sovereignty, *national and local*, *Federal and state*, and has full legislative power over all subjects upon which the legislature of a state might legislate within the

[16] *See*, *e.g.*, Northwest Ordinance of 1789, 1 Stat. at 51-52 n.a (broad delegation to governor, legislative council, and territorial house of representatives incorporated by 1789 amendment); An Act erecting Louisiana into two territories, and providing for the temporary government thereof § 4, 2 Stat. 283, 284 (1804) (vesting the Governor and legislative counsel with legislative powers "extend[ing] to all the rightful subjects of legislation"); Missouri Territory Act of 1819, § 5, 3 Stat. at 494 (temporarily vesting the governor and the judges of the Arkansas Territory with "power to pass any law for the administration of justice in said territory"); Puerto Rico Territory Act, § 37, 39 Stat. at 964 (establishing the legislature as it existed before Puerto Rico constituted its own government in the 1950s, and vesting it with legislative authority "extend[ing] to all matters of a legislative character not locally inapplicable" and with "the power to alter, amend, modify, or repeal any or all laws and ordinances of every character now in force in Porto Rico or municipality or district thereof in so far as such alteration, amendment, modification, or repeal may be consistent with the provisions of this Act").

> state; and may, at its discretion, intrust *that* power to the legislative assembly of a territory.

Id. at 168 (emphases added). Thus, Congress may delegate to territorial legislatures a power that extends to the full police power that a State may exercise within its borders.

Further, although the Court has held that Congress may not generally delegate its legislative powers to the President himself, again, that principle does not apply when Congress and the President act in the territories. The Court had no opportunity to weigh in on Congress's practice of delegating its Article I legislative authority to the President in the territories until the start of the twentieth century. *See supra* 12-15. But when the Court did confront that issue, in *United States v. Heinszen*, 206 U.S. 370 (1907), it expressly approved of Congress's practice.

Heinszen arose in the aftermath of tariffs the President had imposed after the United States took military control over the Philippine Islands. *See id.* at 378. This Court declared those tariffs invalid in *Dooley v. United States*, 182 U.S. 222, 234-35 (1901), and Congress sought to cure the infirmity, providing that the prior duties were "hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed." 206 U.S. at 381 (quotation marks omitted). *Heinszen* addressed whether Congress's ratification of the President's tariffs could render those tariffs lawful. *Id.* at 382.

The dispositive question, the Court made clear, was whether Congress could lawfully delegate its legislative

authority to the President. As the Court observed, Congress may, in general, ratify by later legislation the acts of "an agent" who "has exercised, in the name of [Congress], a power which [Congress] had the capacity to bestow." *Id.* But the plaintiff contended that that "general rule" did not apply under the circumstances—because Congress "was without authority to delegate to the President the legislative power of prescribing a tariff of duties," and so it "could not, by ratification, make valid the exercise by the President a legislative authority which could not have been delegated to him in the first instance." *Id.* at 384-85.

In the holding directly related to the current litigation, the Court rejected that argument. "[T]he premise upon which this proposition rests presupposes," the Court explained, "that Congress, in dealing with the Philippine Islands, may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select—a proposition which is not now open for discussion." *Id.* at 385. So, the Court held, Congress may, when dealing with the territories, bestow its Article I legislative power on its agents, including on *the President himself.*

The First Circuit's response to the array of this Court's decisions was remarkably meager. For example, the First Circuit acknowledged, in light of this precedent, that the nondelegation doctrine "does bend to the peculiar demands of providing for governance within the territories." Pet. App. 22a-23a. But the First Circuit concluded those decisions could not support the appointments at issue here, because it believed that "territorial variations on the traditional restrictions of

the nondelegation doctrine pose no challenge by Congress to the power of the other branches." *Id.* at 24a. But that is no distinction at all. The structural limitations in the Constitution protect the *balance of power* between the three branches of government; this finely-tuned balance is offended equally by Congress's bestowal of power as much as by its usurpation. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (in cases involving judiciary, "we have expressed our vigilance against two dangers": delegation to the judiciary of "tasks that are more properly accomplished by other branches" and any "law [that] impermissibly threatens the institutional integrity of the Judicial Branch" (internal quotation marks and alterations omitted)); *see also Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) ("[E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law."). The fact that Congress gave away (rather than accumulated) power is of no moment.

Equally unpersuasive are the assertions by the court of appeals that nondelegation occurred against "[t]he expectation … that territories would become states" and that "it makes evident sense that partial delegations of home-rule powers would incrementally precede full statehood." Pet. App. 24a. In fact it was not evident at the time of these various delegations or at the Framing that each territory was bound for statehood. *See Dorr v. United States*, 195 U.S. 138, 142-43 (1904). Delegates to

the constitutional convention voted to require congressional consent for admission and authorized Congress to impose, as a precondition of admission, requirements well beyond what could be imposed on existing States. *See* James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 487-92 (Gaillard Hunt & James Brown Scott eds., 1920) (documenting the adoption of a proposal giving Congress authority over admission, and the rejection of a proposal to limit this authority by requiring territories be admitted on equal footing with the States). Congress has consistently exercised this power since the Founding, imposing a wide range of conditions on almost every territory to seek admission. *See* William A. Dunning, *Are the States Equal Under the Constitution?*, 3 Pol. Sci. Q. 425, 426-35 (1888) (discussing admissions conditions imposed by nineteenth-century Congresses); Eric Biber, *The Price of Admission*, 46 Am. J. Legal Hist. 119, 128-71 (2004) (same for nineteenth- and twentieth-century Congresses). A territory's admission to the Union has never been a foregone conclusion. And in any event the First Circuit never explained how its "path to statehood" exception could be reconciled with the text of the Constitution.

Finally, the First Circuit had no answer at all to *Heinszen*; indeed, it acknowledged (with considerable understatement) that if Article IV must always yield to the structural separation-of-powers constraints, the case is "difficult to explain." Pet. App. 25a. And so it is. Yet the First Circuit dismissed *Heinszen* because it "has no progeny that might shed light on how reliable it might serve as an apt analogy in the [present] case." *Id.* That

is nonsense. *Heinszen*'s statement regarding delegation is plain, and it needs no subsequent precedent to explain its import.

Nor can the First Circuit's casual disregard of *Heinszen* be justified on the ground that *Heinszen* "concerned a grant of power by Congress, not a grab for power at the expense of the executive." *Id.* As explained above, the structural limits in the constitution prescribe a certain *balance* of power between the branches, and punts are as problematic as power grabs. At any rate, the First Circuit misconceived of the Board appointment process. Nothing in PROMESA's text *requires* the President to appoint from the lists submitted to him. If the President selects a member from a list, no Senate confirmation is required; if he selects someone else, the appointment requires advice and consent. 48 U.S.C. § 2121(e)(2)(A)-(B). Moreover, the President selects one member of the Board "in the President's sole discretion," and that member, too, does not go through advice and consent. *Id.* In other words, PROMESA's appointment process represents a different, *optional* alternative to advice and consent, so *Heinszen*'s rule even as misconstrued by the First Circuit would apply equally to PROMESA as to the tariff ratification the Court addressed in *Heinszen*.

III. The Executive Branch Has Consistently Maintained That Territorial Officials Are Not "Officers Of The United States."

That territorial officers are not subject to the Appointments Clause is also confirmed by the Executive's consistent position that territorial officers are not "Officers of the United States" under the

Constitution. In 1839, Attorney General Grundy interpreted that key phrase as applied to territorial judges and concluded that territorial judges, though appointed by the President with Senate confirmation, "*are not civil officers of the United States*, in the constitutional meaning of the phrase; they are merely Territorial officers," and so are not subject to impeachment under Article II, Section 4. *Territorial Judges Not Liable to Impeachment*, 3 Op. Att'y Gen. 409, 411 (1839) (emphasis added). That was because such judges were "not constitutional, but legislative judges" created by Congress under Article IV, just as the Court had found territorial courts to be not constitutional—but rather legislative—courts. *Id.* (citing *Canter*, 26 U.S. 511). The Appointments Clause and Impeachment Clause each applies to "Officers of the United States," U.S. Const. art. II, § 2, cl. 2; U.S. Const. art. II, § 4, and the Court has held that the class of officers subject to the two Clauses is the same. *See Bowsher v. Synar*, 478 U.S. 714, 722-23 (1986).[17] Thus, if territorial judges are not "civil Officers of the United States" under Article II's Impeachment Clause, they are not "Officers of the United States" under the Appointments Clause. *See id.*

That has remained the Executive's position. In 1887, Assistant Attorney-General Howard observed that the "*appointment*, removal, and compensation of Territorial judges … *is entirely within the control of Congress*," describing this as part of the consistent "position taken

[17] The Impeachment Clause refers specifically to "*civil* Officers of the United States," excluding military officers, U.S. Const. art. II, § 4, while the Appointments Clause refers to all "Officers of the United States," U.S. Const. art. II, § 2, cl. 2. That difference is not relevant here.

by the Executive" from "as far back as 1839." *Howard v. United States*, 22 Ct. Cl. 305, 306, 315 (1887) (emphasis added). Indeed, in 1907, Attorney General Bonaparte went so far as to suggest that the President could appoint territorial officers even *absent* a statute so allowing—declaring that a provision "recogniz[ing] the President as authorized to govern the [Panama] Canal Zone and appoint and employ persons to take part in that government" only declared "what would have been the rights and duties of the President if it had not been enacted." *The President—Government of the Canal Zone*, 26 Op. Att'y Gen. 113, 117-18 (1907). In 2003, the U.S. Solicitor General emphatically told this Court that "the Appointments Clause, like the protections of Article III, regulates only the framework of the federal government and thus is no more applicable to the Territories than it is to State governments." Amicus Br. of United States at 33, *Nguyen v. United States*, 539 U.S. 69 (2003) (No. 01-10873), 2003 WL 548057. And, of course, the Executive Branch has taken that same position in this litigation. The First Circuit did not address the Executive's early and longstanding position that the Appointments Clause does not apply to territorial officers.

Below, Aurelius sought to sow doubt on the consistency of this Executive Branch opinion by pointing to an 1851 opinion from Attorney General Crittenden. But Attorney General Crittenden's opinion, in contrast to Attorney General Grundy's opinion, did not directly address whether territorial judges are "Officers of the United States." Indeed, that opinion addressed only the question whether the President had the inherent authority to "remove from office the chief justice of the

Territory of Minnesota." *See Executive Authority to Remove the Chief Justice of Minnesota*, 5 U.S. Op. Atty. Gen. 288, 288 (1851). Crittenden concluded that he did, because the power to remove is incident to the President's power to appoint, and that the President had appointed the territorial judge in question. *Id.* at 290-91. In the course of that opinion, Crittenden stated that if territorial judges were, by statute, not removable, that would "have precluded either the House of Representatives or the President from the exercise of their respective powers of impeachment or removal." *Id.* Crittenden thus seemingly assumed that territorial judges could be impeached. But Crittenden's opinion addresses only the latter power—the President's authority to remove—not the former power—Congress's authority to impeach. And Crittenden's opinion did not even mention Attorney General Grundy's opinion that territorial judges are *not* subject to impeachment.

It is thus unsurprising that the Executive Branch continued to follow Attorney General Grundy's opinion, apparently (and correctly) seeing no conflict. In 1854, just three years after Crittenden's opinion, the same controversy over the President's authority to remove the Minnesota territorial judge came before this Court. Arguing for the United States, Attorney General Cushing treated Attorney General Grundy's opinion that territorial judges are *not* Officers of the United States as settled law. *See United States ex rel. Goodrich v. Guthrie*, 58 U.S. 284, 289 (1854) (noting arguments of Attorney General Cushing). Cushing also cited Crittenden's opinion, but only for the proposition that it actually addressed: whether territorial judges "are

subject to removal from office at the discretion of the President . . . ." *Id.* Thus, Cushing reinforced and readopted Grundy's view, and that has remained the view of the Executive Branch through the present day.

In short, the First Circuit's opinion is profoundly ahistorical. Under the First Circuit's unyielding approach, Congress's only option for territorial governments would be executive officers appointed by the President with Senate consent (or for inferior officers, appointment by department heads) with specific, delegated authority, and judges only appointed for life by the President with Senate consent. There would be no room for temporary governments for newly acquired territories, no room for territorial elections, no room for territorial legislatures, and no room for alternative approaches to judicial tenure and jurisdiction. Nothing even remotely resembling the First Circuit's vision has been established in U.S. history, and the historical practice of all three branches conclusively refutes it.

IV. Exempting Territorial Officials From The Appointments Clause Is Consistent With This History And The Constitutional Design.

Interpreting the Appointments Clause not to apply to territorial officials tracks not only these historical practices, but also the Constitution's design. The Articles of Confederation gave Congress no authority to regulate western territories. Even so, interstate border disputes and the promise of land revenue to relieve war debt led to the Northwest Ordinance of 1787, which chartered governments for the territories and provided for their eventual admission to the Union. *See* David P.

Currie, *The Constitution in Congress, The Federalist Period: 1789-1801*, 103-07 (1997); The Federalist No. 7, at 60-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (decrying post-war conflicts over debt, state borders, territorial control under the decentralized Articles of Confederation). The experience of interstate conflict leading to the Ordinance, which was debated and approved contemporaneously with the Territory Clause during the summer of 1787, convinced the Framers the new Constitution must provide Congress express authority to structure territorial governments. As James Madison recounted in Federalist 38, the failure of the Articles of Confederation to provide such authority inevitably led to unconstitutional and unregulated action: "Congress have undertaken . . . to form new States, to erect temporary governments, to appoint officers for them . . . All this has been done; and done without the least color of constitutional authority." The Federalist No. 38, at 239 (James Madison).

These *ultra vires* measures were justified, in Madison's view, because "[t]he public interest, the necessity of the case, imposed upon [Congress] the task of overleaping their constitutional limits." *Id.* at 240. Indeed, the need for plenary congressional authority over the territories was so clear that the Federalist Papers' only discussion of the Territory Clause simply notes, "This is a power of very great importance, and required by considerations similar to those which show the propriety of [Congress's authority to admit new states]. The proviso . . . was probably rendered absolutely necessary by jealousies and questions concerning the Western territories sufficiently known to the public." The Federalist No. 43, at 274 (James

Madison). But Congress overstepping its constitutional authority in order to regulate territories set a risky precedent: "[I]s not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate with its objects? A dissolution or usurpation is the dreadful dilemma to which it is continually exposed." The Federalist No. 38 at 240 (James Madison). To the Framers, the necessity of expressly constitutionalizing Congress's plenary power in the Territory Clause was therefore as obvious as its inevitable exercise. *See Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336 (1810) ("The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and hold territory.").

This authority envisioned by the Framers was not only broad, but flexible. Under the Territory Clause, "Congress has broad latitude to develop innovative approaches to territorial governance." *Sanchez Valle*, 136 S. Ct. at 1876. Over the past two centuries, Congress has confronted an array of territorial possessions "warranting distinctive treatment": some destined for statehood, others not; some near existing States, others so distant as to make communication and commerce with the States difficult; some with common law traditions, some with experience in the civil law system. *See Palmore*, 411 U.S. at 408; *Glidden Co. v. Zdanok*, 370 U.S. 530, 546 (1972) (observing the practical challenges of governing territories "in a day of poor roads and slow mails"); *Balzac*, 258 U.S. at 309 (observing that the fact that Alaska was "on the American continent and within easy reach of the United States" made it "a very different case from that of Porto Rico"). Congress can manage these disparate territories because, as intended

by the Framers, the Constitution permits it to craft innovative governance solutions tailored to each territory's "particularized needs." *Palmore*, 411 U.S. at 408. As Felix Frankfurter, then the Law Officer in the Bureau of Insular Affairs at the Department of War, explained, "[h]istory suggests a great diversity of relationship between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily our Constitution has left this field of invention open." Memorandum for the Secretary of War, in Hearings on S. 4604 before the Senate Committee on Pacific Islands and Porto Rico, 63d Cong., 2d Sess., 22 (1914) (cited in *Sanchez-Valle*, 136 S. Ct. at 1876).

For instance, this Court has repeatedly held that the constitutional right to a jury trial does not limit Congress's plenary authority in the territories because the "imposition of the jury system on people unaccustomed to common law traditions," such as those previously living under a civil law system, "may be to work injustice and provoke disturbance rather than to aid in the orderly administration of justice." *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979) (internal quotation marks omitted). This flexibility applies to the constitutional separation of powers, as well. "[T]he realities of territorial government typically made it less urgent" that the judiciary "enjoy the independence from" legislative and executive functions, and from the early days of the Republic "the freedom of the territories to dispense with protections deemed inherent in a

separation of governmental powers was . . . fully recognized." *Glidden*, 370 U.S. at 546-47.

Exempting territorial officials from the strictures of the Appointments Clause grants Congress the flexibility it needs to meet the diverse governance challenges the territories present, unconstrained by certain federalism and structural protections essential for legislation affecting the sovereign States. So, when newly annexed territories were ceded to the United States and Congress did not have time to provide for the territory's leadership through the long Senate confirmation process, Congress instead erected territorial governments to maintain order and provide political stability. *See supra* at 15-19. That was "inventive statesmanship" made possible because the Appointments Clause did not needlessly restrict Congress's ability to act. Likewise, when Congress wanted to "enable a territory's people to make large-scale choices about their own political institutions," *Sanchez-Valle*, 136 S. Ct. at 1876, Congress facilitated self-government by providing for the direct election of territorial officials and local appointment of inferior territorial officials. *See supra* at 15-19. That too was "inventive statesmanship" that would have been impossible if (as the First Circuit believed) the Appointments Clause rigidly required federal appointment of territorial officials wielding authority of any significance. *Sanchez-Valle*, 136 S. Ct. at 1876.

That same inventive statesmanship is at work here. In the face the impending collapse of Puerto Rico's economy, Congress enacted PROMESA to chart a course with speed out of the fiscal mire and back toward

economic health, allowing stakeholders such as the Retiree Committee to work toward a solution that will provide long-term financial stability for the Island. This approach fits comfortably within our historical tradition and is constitutionally appropriate.

CONCLUSION

The judgment of the court of appeals should be reversed as to the Appointments Clause.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS

U.S. Const. art. II, § 2, cl. 2

[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. IV, § 3, cl. 2

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 ***