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.

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

BRIEF FOR THE UNITED STATES

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Additional Captions Listed on Inside Cover

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

v.

AURELIUS INVESTMENT, LLC, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

AURELIUS INVESTMENT, LLC, ET AL.

QUESTION PRESENTED

Whether the members of the Financial Oversight and Management Board, an entity established by Congress as part of the territorial government of Puerto Rico, are "Officers of the United States" under the Appointments Clause of the Constitution of the United States.

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

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. 1a-45a[1]) is reported at 915 F.3d 838. The opinion and order of the district court (Pet. App. 46a-82a) are reported at 318 F. Supp. 3d 537.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. A petition for rehearing was denied on March 7, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-68a.

STATEMENT

1. In the summer of 2016, the Commonwealth of Puerto Rico faced the most debilitating fiscal emergency in its history. The Commonwealth and its instrumentalities carried around $71.5 billion in outstanding debt, more than the whole annual output of the island's economy. See Government Development Bank for Puerto Rico, *Commonwealth of Puerto Rico: Financial Information and Operating Data Report* 52 (Dec. 18, 2016).[2] Their credit ratings had been downgraded to junk, leaving them unable to borrow money on the bond markets. *Id.* at 67-68. Nor could they get debt relief through the federal bankruptcy code. See *Puerto Rico*

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[1] Unless otherwise indicated, references are to the petition appendix, Aurelius's brief in response, and UTIER's brief in opposition in No. 18-1334.

[2] https://go.usa.gov/xPZ2e.

v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016).

This financial catastrophe precipitated a humanitarian crisis for the more than three million U.S. citizens living in Puerto Rico. Hospitals turned away patients, schools closed their doors, and public pension funds faced depletion within three years. See The White House, *Puerto Rico Hill Update—Humanitarian Crisis* 2-4 (Apr. 19, 2016).[3] Because the government could not pay its bills, one supplier threatened to stop selling gasoline for ambulances and fire engines, while another almost stopped selling food for inmates in Puerto Rico's prisons. *Id.* at 3. Those challenges threatened "the Commonwealth's very ability to persist." *Wal-Mart P.R., Inc.* v. *Zaragoza-Gomez*, 174 F. Supp. 3d 585, 592 (D.P.R.), aff'd, 834 F.3d 110 (1st Cir. 2016).

2. In June 2016, Congress enacted and President Obama signed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA or the Act), 48 U.S.C. 2101 *et seq.*[4] A section captioned "Constitutional basis" states that Congress enacted the Act "pursuant to article IV, section 3 of the Constitution." 48 U.S.C. 2121(b)(2) (emphasis omitted). That provision, known as the Territory Clause, empowers Congress "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.

As relevant here, the Act creates a Financial Oversight and Management Board to oversee Puerto Rico's finances. 48 U.S.C. 2121. The Act establishes the Board

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[3] https://go.usa.gov/xPW4d.

[4] All references in this brief to Title 48 of the United States Code are to Supplement V (2017) of the 2012 edition.

as an entity "within the territorial government" of Puerto Rico. 48 U.S.C. 2121(c)(1). It authorizes the Board to approve fiscal plans and budgets for the Commonwealth and its instrumentalities, 48 U.S.C. 2141, 2142; to enforce those plans and budgets, 48 U.S.C. 2143, 2144; and to supervise Puerto Rico's debts, 48 U.S.C. 2147. The Board also serves as Puerto Rico's sole representative in "Title III" cases—judicial proceedings, modeled in several ways on federal bankruptcy cases, for restructuring the debts owed by the Commonwealth and its instrumentalities. 48 U.S.C. 2172(a); see 48 U.S.C. 2161-2177. The Act provides that, once the Commonwealth reestablishes adequate access to credit markets and balances its budget for four years, the Board "shall terminate." 48 U.S.C. 2149.

The Board consists of eight members: seven voting members appointed by the President, together with the Governor of Puerto Rico (or his designee) as a nonvoting member. 48 U.S.C. 2121(e). The President chooses one of the seven voting members in his "sole discretion." 48 U.S.C. 2121(e)(2)(A)(vi). The President "should" choose the other six from lists of candidates submitted by the Speaker of the House of Representatives, Majority Leader of the Senate, and Minority Leaders of the House and Senate. 48 U.S.C. 2121(e)(2)(A)(i)-(v). If the President chooses a candidate from one of the lists, "no Senate confirmation is required," but if he chooses a candidate from outside the lists, the appointment requires "the advice and consent of the Senate." 48 U.S.C. 2121(e)(2)(E). If the President failed to appoint all voting members by September 1, 2016, he was required within two weeks to appoint the remaining members from the lists. 48 U.S.C. 2121(e)(2)(G). Each voting member serves

for three years, and may remain in office after the expiration of that term "until a successor has been appointed." 48 U.S.C. 2121(e)(5)(A) and (C).

In August 2016, two months after the enactment of the Act, President Obama appointed all seven voting members of the Board. See The White House, *President Obama Announces the Appointment of Seven Individuals to the Financial Oversight and Management Board for Puerto Rico* (Aug. 31, 2016).[5] He chose six of the seven members from the lists provided by congressional leadership; he did not invoke his power to appoint candidates from outside the lists with the advice and consent of the Senate. *Ibid.*

3. Starting in May 2017, the Board commenced a series of Title III cases on behalf of the Commonwealth and its instrumentalities in federal district court in Puerto Rico. Pet. App. 52a. According to the Board, creditors have filed around 165,000 proofs of claim in those cases. See D. Ct. Doc. 4052, at 6 (Oct. 16, 2018). Those proofs of claim involve around $74 billion in bond debt and $49 billion in unfunded pension liabilities. See Kobre & Kim LLP, Special Investigation Comm., Fin. Oversight & Mgmt. Bd. for P.R., *Final Investigative Report* 2 (Aug. 20, 2018).[6]

a. In August 2017, a group of entities holding outstanding bonds issued by the Commonwealth (collectively Aurelius) moved the district court to dismiss the Commonwealth's Title III case, arguing that the selection of the Board's members violated the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. Pet. App. 14a. The United States intervened under 28 U.S.C. 2403(a)

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[5] https://go.usa.gov/xP2ZG.

[6] https://assets.documentcloud.org/documents/4777926/FOMB-Final-Investigative-Report-Kobre-amp-Kim.pdf.

to defend the constitutionality of the Act. Pet. App. 15a. The district court denied the motion to dismiss. *Id.* at 46a-82a. The court reasoned that "Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but [that] include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States." *Id.* at 65a. The court determined that, because "the Oversight Board is a territorial entity and its members are territorial officers," there is "no constitutional defect in the method of appointment" of the Board's members. *Id.* at 79a, 81a. The court then certified its order for interlocutory appeal under 48 U.S.C. 2166(e)(3)(A). 18-1475 Pet. App. 113a-114a.

The Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER) and Assured Guaranty filed adversary complaints raising similar challenges. Pet. App. 15a; 18-1475 Pet. App. 110a. The district court dismissed both adversary complaints. 18-1475 Pet. App. 109a-111a; 18-1521 Pet App. 1a-19a. UTIER and Assured Guaranty appealed. Pet. App. 14a-16a.

b. The court of appeals reversed. Pet. App. 1a-45a.

The court of appeals concluded that the Board's members are officers of the United States under the Appointments Clause. Pet. App. 30a. The court reasoned that the Clause governs the selection of officers in the territories because it refers to "*all*" officers and because it is more specific than the Territory Clause. *Id.* at 21a (citation omitted). The court also relied on "historical precedents" in which most (though not all) "major federal appointments to Puerto Rico's civil government throughout the first half of the 20th century"

had been made in accordance with the Appointments Clause. *Id.* at 34a.

The court of appeals acknowledged that this Court had previously held that the nondelegation doctrine does not restrain Congress in the territories, but it asserted that a failure to comply with that doctrine, unlike a failure to comply with the Appointments Clause, would "pose no challenge by Congress to the power of the other branches." Pet. App. 24a. The court of appeals also acknowledged that this Court had previously upheld Congress's creation of non-Article III courts in the territories, but claimed that "Article III itself accommodates exceptions" while the Appointments Clause does not. *Id.* at 27a. The court of appeals further acknowledged the long tradition of territorial self-government, under which territorial officers are elected by territorial residents or appointed by other territorial officers, but asserted that such officials do not qualify as officers of the United States because "they exercise authority pursuant to the laws of the territory" rather than "'pursuant to the laws of the United States.'" *Id.* at 37a (citation omitted).

Turning to the remedy, the court of appeals determined that the provisions authorizing the appointment of the Board's members without Senate confirmation are severable from the rest of the Act, and it ruled that only those provisions are invalid. Pet. App. 40a-42a. The court then rejected Aurelius's request to "dismiss the Title III petitions" in their entirety, a remedy that would "cast a specter of invalidity over all of the Board's actions until the present day." *Id.* at 42a. The court instead sustained the Board's previous acts under the *de facto* officer doctrine, which validates "acts performed by a person acting under the color of official title even

though it is later discovered that the legality of that person's appointment to office is deficient." *Ibid.* (quoting *Ryder* v. *United States*, 515 U.S. 177, 180 (1995)) (ellipsis omitted). The court found that doctrine "especially appropriate in this case" because the Board had acted at all times in "good faith" and "with the color of authority." *Id.* at 42a-43a. The court also emphasized that dismissal of the Title III case would produce "negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now," and would delay "a historic debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017." *Id.* at 43a.

c. UTIER filed a petition for panel rehearing and rehearing en banc challenging the court of appeals' remedy. The court denied the petition. Pet. App. 83a-84a.

d. In its original opinion, the court of appeals stayed its mandate for 90 days, "so as to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board." Pet. App. 44a. The court later extended the stay until July 15, 2019. See 5/6/19 Order. After this Court granted writs of certiorari in these cases, the court of appeals further extended the stay until final disposition of the petitions. See 7/2/19 Order.

4. On June 18, 2019, because of the court of appeals' decision, the President nominated the current members of the Board for Senate consideration. See The White House, *Seven Nominations Sent to the Senate* (June 18,

2019).[7] The terms for which the members were nominated expire on August 30, 2019, but the Act allows a member to remain in office even after the expiration of his term until the appointment of a successor. See *ibid.*; 48 U.S.C. 2121(e)(5)(C).

SUMMARY OF ARGUMENT

I. The Appointments Clause governs the selection of "Officers of the United States." Those words refer to officers in the national government of the United States, as opposed to the local government of a territory or the District of Columbia. For centuries, the law has distinguished between "officers of" a sovereign and "officers of" a subordinate government created by that sovereign. In addition, the words "of the United States" in many other constitutional provisions exclude the territories. For example, territorial governments do not exercise the legislative, executive, and judicial powers of the United States under the Vesting Clauses, territorial excises do not provide for the general welfare of the United States under the Uniformity Clause, and territorial treasuries do not form part of the treasury of the United States under the Appropriations Clause. Finally, the surrounding words of the Appointments Clause—such as "Congress," "President," and "Heads of Departments"—all refer to entities in the national government. That pattern suggests that the phrase "Officers of the United States" similarly refers to officers of the national government.

The Territory Clause confirms that reading. The Clause grants Congress "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." *National*

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[7] https://go.usa.gov/xywJQ.

Bank v. *County of Yankton*, 101 U.S. 129, 133 (1880). "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). In particular, "Congress has as much power" to determine the structure of a territorial government "as a state legislature has" to determine the structure of a state government. *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428, 443 (1923). Just as a state legislature need not comply with the Appointments Clause in organizing a state government, Congress need not comply with the Appointments Clause in organizing a territorial government.

The structure of the Constitution, too, confirms that the Appointments Clause does not govern territorial offices. Articles I, II, and III set out a detailed blueprint for the national government. But Congress need not follow that blueprint when it organizes a territorial government. Territorial governments "are not organized under the Constitution, nor subject to its complex distribution of the powers of government." *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850). This Court has thus held that numerous separation-of-powers principles do not constrain Congress's organization (or, as here, reorganization) of a territorial government. For example, Congress may vest legislative power in the President or a territorial legislature, *United States* v. *Heinszen & Co.*, 206 U.S. 370, 385 (1907); vest territorial executive functions in officers who are not controlled by the President, *Snow* v. *United States*, 85 U.S. (18 Wall.) 317, 321-322 (1873); and deny judges tenure during good behavior, *McAllister* v. *United States*, 141 U.S. 174, 186 (1891). Just as those surrounding separation-of-powers

provisions do not apply in the territories, neither does the Appointments Clause.

Historical practice leads to the same conclusion. From 1789 to the present day, Congress has used methods not contemplated by the Appointments Clause to choose territorial officers. For example, it has authorized elections, appointments by territorial officers, appointments of principal officers by the President alone, and appointments from lists. Those two centuries of practice contradict the court of appeals' holding that territorial officers are "Officers of the United States" under the Appointments Clause.

II. The members of the Financial Oversight and Management Board for Puerto Rico (Board) are officers of the Commonwealth of Puerto Rico, not officers of the United States. Under this Court's decision in *Palmore* v. *United States*, 411 U.S. 389 (1973), which involved the distinction between national and D.C. bodies, an entity is local rather than national for constitutional purposes if (1) Congress invoked its plenary powers to establish the entity, (2) Congress placed the entity in a local government, and (3) the entity's powers and duties primarily concern local matters. Congress took pains to fulfill all three of those criteria when it created the Board.

First, Congress said that it enacted PROMESA "pursuant to article IV, section 3 of the Constitution of the United States," under its "power to dispose of and make all needful rules and regulations for territories." 48 U.S.C. 2121(b)(2). Second, Congress organized the Board as "an entity within the territorial government." 48 U.S.C. 2121(c)(1). The federal government does not direct the Board's operations, represent the Board in court, or control the Board's finances. Third, the Board does local work. The Board exists to address a financial

crisis in Puerto Rico, its main duties involve reforming the budget and restructuring the debt of Puerto Rico, and its main powers involve representing Puerto Rico in debt-relief proceedings. The Board is thus a territorial entity, and its members are territorial officers, not officers of the United States. The Appointments Clause accordingly does not govern their selection.

ARGUMENT

The court of appeals held that the Appointments Clause governs not only offices in the federal government, but also offices in local territorial governments. That conclusion contradicts the Constitution's text, its structure, and over two centuries of history. The Appointments Clause prescribes methods for appointing "Officers *of the United States*." U.S. Const. Art. II, § 2, Cl. 2 (emphasis added). That phrase means federal officers, not territorial officers. And the Appointments Clause forms one part of the separation of powers at the federal level, whereas the Territory Clause grants Congress plenary power to organize governments at the territorial level. From the Northwest Ordinance in 1789 to the District of Columbia Home Rule Act today, Congress has filled local offices using elections, appointments by other local officers, and appointments by the federal government through methods inconsistent with the Appointments Clause.

Aurelius and UTIER are left to claim that the Appointments Clause applies because the Board and its members are part of the United States government rather than the Puerto Rican government. But under *Palmore* v. *United States*, 411 U.S. 389 (1973), an entity is local rather than federal at least if Congress creates it under Article IV, establishes the entity in the territorial government, and charges the entity with territorial

work. Congress did all three in the Act: it invoked Article IV, placed the Board in the government of Puerto Rico, and limited the Board's powers to Puerto Rican matters. The members of the Board are thus officers of the Commonwealth of Puerto Rico, not officers of the United States, and it was up to Congress to decide how to select them.

I. THE APPOINTMENTS CLAUSE DOES NOT GOVERN THE SELECTION OF TERRITORIAL OFFICERS

The Appointments Clause, the Territory Clause, the structure of the Constitution, and more than two centuries of historical practice all lead to the same conclusion: The Appointments Clause does not govern the selection of territorial officers.

A. The Appointments Clause By Its Terms Does Not Govern Territorial Offices

The Appointments Clause governs the selection of "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." U.S. Const. Art. II, § 2, Cl. 2 (emphasis added). For the Framers, "Officers of the United States" meant officers in the national government of the United States. The Necessary and Proper Clause reflects that meaning when it refers to "the Government of the United States, or * * * any * * * Officer thereof." U.S. Const. Art. I, § 8, Cl. 18. In particular, "Officers of the United States" meant officers in the national executive and national judiciary. The Oaths Clause reflects that meaning when it refers to "Senators and Representatives * * * and all executive and judicial Officers * * * of the United States." U.S. Const. Art. VI, Cl. 3. Officers of the United States are

either "executive" (Article II) or "judicial" (Article III)—not territorial (Article IV).

To begin with the words "Officers of," the law has long distinguished officers of a sovereign from officers of a subordinate government created by that sovereign. At common law, "an early distinction was drawn between a town officer and an officer of the crown"; "the citizens of towns and cities were subjects of the crown, but their officers were not crown officers." *State* v. *Lane*, 62 So. 31, 32 (Ala. 1913). Blackstone thus distinguished "magistrates and officers * * * [who] have a jurisdiction and authority dispersedly throughout the kingdom" from "mayors and aldermen, or other magistrates of particular corporations." 1 William Blackstone, *Commentaries* *338-339. In the 19th century, state courts drew similar lines under state constitutions. Many of them held that terms such as "officers of the state" and "state officers" excluded county and municipal officers.[8] So too, "Officers of the United States" excludes territorial officers.

In addition, the words "of the United States" require a connection with the government of the United States, not just the government of one territory. Territorial legislators do not wield the legislative power of the United States. U.S. Const. Art. I, § 1; see *Ortiz* v. *United States*, 138 S. Ct. 2165, 2196-2197 (2018) (Alito, J., dissenting). Territorial executives do not wield the executive power of the United States. U.S. Const. Art. II, § 1, Cl. 1; see *Snow* v. *United States*, 85 U.S.

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[8] See, *e.g.*, *In re Opinion of the Justices*, 46 N.E. 118, 119 (Mass. 1897); *State* v. *Burns*, 21 So. 290, 295 (Fla. 1896); *Brock* v. *Bruce*, 2 A. 598, 606 (Vt. 1886); *State* v. *Dillon*, 2 S.W. 417, 419 (Mo. 1886); *Ex parte Wiley*, 54 Ala. 226, 228 (1875); *Newsom* v. *Cocke*, 44 Miss. 352, 362 (1870); *Dorsey* v. *Vaughan*, 5 La. Ann. 155, 156 (1850).

(18 Wall.) 317, 321-322 (1873); *Freytag* v. *Commissioner*, 501 U.S. 868, 914 (1991) (Scalia, J., concurring in part and concurring in the judgment). Territorial judges do not wield "the judicial Power of the United States." U.S. Const. Art. III, § 1; see *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545 (1828) (*Canter*) (Marshall, C.J.). "Territorial courts are not courts of the United States." *Good* v. *Martin*, 95 U.S. 90, 98 (1877). Territorial excises do not provide for the "general Welfare of the United States" and thus need not be "uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1; see *Binns* v. *United States*, 194 U.S. 486, 490 (1904). Territorial treasuries do not form part of "the Treasury of the United States." U.S. Const. Art. I, § 6, Cl. 1 and § 9, Cl. 7; see *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937). And both the court of appeals and Aurelius admit that "territorial laws" are not "laws of the United States." Aurelius Br. in Resp. 21; see Pet. App. 38a. For the same reasons, territorial officers are not "Officers of the United States."

Words are also known by the company they keep, and the neighboring words of the Appointments Clause all refer to the national government. All the officers named in the Clause—"Ambassadors," "public Ministers," "Consuls," and "judges of the Supreme Court"—hold offices in the national government. And each entity empowered by the Clause—"Congress," "Senate," "President," "Heads of Departments," and "Courts of Law"—forms part of the national government. The "Heads of Departments" do not include the Secretary of the Puerto Rico Department of Sports and Recreation, just as the "Courts of Law" do not include the

Puerto Rico Court of First Instance. Likewise, "Officers of the United States" can mean only officers that exercise the authority of the national government, not officers in territorial governments.

It makes no difference that the Appointments Clause governs the selection of "all" officers of the United States (apart from those addressed in other provisions). U.S. Const. Art. II, § 2, Cl. 2; see Pet. App. 21a. "All" is an adjective. An adjective "pick[s] out a subset of a category"—or, in the case of "all," the whole of a category. *Rimini Street, Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 878-879 (2019) (citation omitted). It "does not alter the meaning" of that category. *Ibid.* "[A]ll other Officers of the United States" no doubt picks out the whole category of federal officers, but it does not expand that category to include territorial officers.

B. The Territory Clause Confirms That The Appointments Clause Does Not Govern Territorial Offices

This Court should interpret the Appointments Clause alongside the Territory Clause, and that Clause confirms Congress's authority to decide how to choose territorial officers.

1. The Territory Clause empowers Congress "to make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. "No one has ever doubted the authority of congress to erect territorial governments within the territory of the United States, under the general language of the clause, 'to make all needful rules and regulations.'" 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1319, at 195 (1833). And "[w]hat shall be the form of government established in the territories depends exclusively upon the discretion of congress." *Ibid.*

This Court has recognized the breadth of Congress's power to organize territorial governments. The Court has described the territory power as "absolute and undisputed," *Sere* v. *Pitot*, 10 U.S. (6 Cranch) 332, 337 (1810) (Marshall, C.J.); "supreme," *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 44 (1890); "paramount," *Grafton* v. *United States*, 206 U.S. 333, 354 (1907); and "plenary," *El Paso & N.E. Ry. Co.* v. *Gutierrez*, 215 U.S. 87, 93 (1909). That plenary power encompasses not only the power to legislate for "the people of the Territories," but also "full and complete legislative authority over * * * all the departments of the territorial governments." *National Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880). "[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 by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it." *Murphy* v. *Ramsey*, 114 U.S. 15, 44 (1885).

More specifically, when Congress legislates for the territories, it exercises the "combined powers of the general, and of a state government." *Canter*, 26 U.S. (1 Pet.) at 546. "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). One corollary of that principle is that "Congress has as much power" to determine the structure of a territorial government "as a state legislature has" to determine the structure of a state government. *Keller* v. *Potomac*

Elec. Power Co., 261 U.S. 428, 443 (1923). A state legislature, of course, need not comply with the Appointments Clause in organizing a state government. In the same way, Congress need not comply with the Appointments Clause in organizing a territorial government.

The practical realities of territorial governance also counsel against extending the Appointments Clause to the territories. Different territories have different needs, and a single territory may have different needs at different times. From the start, Congress has tailored territorial governments to each territory's unique circumstances. For instance, in the Northwest Ordinance, Congress at first vested lawmaking power in the governor and judges, but established a legislature once the free male population of the territory reached 5000. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 51 & n.(a). In the 19th century, Congress gave Alaska a two-branch government (omitting a legislature), rather than the three-branch government that had been customary in the contiguous United States. See *Binns*, 194 U.S. at 492. Today, Congress has provided one form of government for Puerto Rico (population 3 million, bicameral legislature), another for the Virgin Islands (population 100,000, unicameral legislature), and a third for Wake Island (no permanent population, no local legislature). Extending provisions such as the Appointments Clause to the territories would deny Congress the flexibility "to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

2. The court of appeals nonetheless reasoned that the Appointments Clause governs territorial offices because it is more "specific" and the Territory Clause is more "general." Pet. App. 21a (citation omitted). That

analysis is flawed twice over. First, a court must try to read the provisions of a legal text to be compatible rather than contradictory; only when the provisions "cannot be reconciled" should the court turn to the principle that the specific governs the general. Antonin Scalia & Bryan A. Garner, *Reading Law* § 28 (2012); see *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) (Marshall, C.J.). No conflict arises here when one reads "Officers of the United States" to mean federal officers. Second, the rule that the specific controls the general has no relevance where each provision "is more specific with respect to" a different subject. *Maracich* v. *Spears*, 570 U.S. 48, 66 (2013). Neither the Appointments Clause nor the Territory Clause is more specific than the other. One specifically addresses appointments, but the other specifically addresses territories.

C. Constitutional Structure Confirms That The Appointments Clause Does Not Govern Territorial Offices

This Court should also interpret the Appointments Clause in the context of the Constitution's separation-of-powers scheme as a whole. That context further demonstrates the Clause's inapplicability to territorial governments.

1. Articles I, II, and III of the Constitution set out a blueprint for our national government. They establish separate legislative, executive, and judicial branches, assign different responsibilities to each of those branches, and calibrate the branches' powers to enable each to check the others. Articles I, II, and III thus separate powers at the federal level and in the process frame "a government for the United States." *Barron* v. *Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (Marshall, C.J.). Their provisions are

"naturally" read to refer only "to the government created by the instrument," not to "distinct governments, framed by different persons and for different purposes." *Ibid.*

Territorial governments, of course, are not "the government created by the [Constitution]." *Barron*, 32 U.S. (7 Pet.) at 247. They "are not organized under the Constitution, nor subject to its complex distribution of the powers of government, * * * but are the creations, exclusively, of the legislative department, and subject to its supervision and control." *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850). Congress thus enjoys "broad latitude to develop innovative approaches to territorial governance." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016). "In dealing with the territories," Congress "is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union." *Cincinnati Soap*, 301 U.S. at 323. Congress therefore may organize a territorial government in a way "that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers." *Palmore*, 411 U.S. at 398. For example, "Congress may endow territorial governments with a plural executive; it may allow the executive to legislate; it may dispense with the legislature or judiciary altogether." *Freytag*, 501 U.S. at 914 (Scalia, J., concurring in part and concurring in the judgment). Put simply, "[h]aving a right to erect a territorial government, [Congress] may confer on it such powers, legislative, judicial, and executive, as they may deem best." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1319, at 195.

Against that backdrop, extending the Appointments Clause to the territories makes no sense. The terms of the Clause—"Officers," "Departments," and "Courts of Law"—presuppose the division of government into the three familiar branches. It would be incongruous to apply the Clause to governments that need not follow that tripartite scheme in the first place. In addition, the very aim of the Clause is to allocate powers over offices among the three branches. That aim has nothing to do with Congress's exercise of its plenary power over the territories. And the Clause forms one part of an integrated scheme of checks and balances; it works together with the rest of Articles I, II, and III to preserve equilibrium among the legislature, executive, and judiciary. None of that has any relevance to Congress's organization (or, as here, reorganization) of a territorial government.

2. This Court's decisions concerning other separation-of-powers provisions underscore those points. Time and again, the Court has rejected the notion that Congress must organize territorial governments in the same way as the federal government:

- Article I's Legislative Vesting Clause bars Congress from delegating the power to make laws. U.S. Const. Art. I, § 1; see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Yet in the territories, Congress may "delegate legislative authority to such agencies as it may select," *United States* v. *Heinszen & Co.*, 206 U.S. 370, 385 (1907)—for example, to "a local legislature," *Cincinnati Soap*, 301 U.S. at 323, or even to "the President," *Heinszen*, 206 U.S. at 384.

- The Appropriations Clause requires a congressional appropriation to draw money from the federal treasury. U.S. Const. Art. I, § 9, Cl. 7. It does not require one to draw money from a territorial treasury. *Cincinnati Soap*, 301 U.S. at 322.
- Article II's Executive Vesting Clause and Take Care Clause empower the President to control those who execute the laws of the United States. U.S. Const. Art. II, § 1, Cl. 1 and § 3. Yet Congress may vest territorial executive functions in officers who are independent of the President. *Snow*, 85 U.S. at 321-322.
- Article II also prevents Congress from requiring the President to get the consent of the Senate before removing a federal officer. *Myers* v. *United States*, 272 U.S. 52, 176 (1926). Yet Congress once made territorial judges "remov[able] by the President with the consent of the Senate," and this Court has said that "it was competent for Congress" to do so. *McAllister* v. *United States*, 141 U.S. 174, 186 (1891).
- The Tribunals Clause and Judicial Vesting Clause empower Congress to establish courts. U.S. Const. Art. I, § 8, Cl. 9 and Art. III, § 1. Yet in the territories, Congress "may leave it to the legislature of the territory to create such tribunals." *The "City of Panama,"* 101 U.S. 453, 460 (1880).
- The Tenure Clause guarantees judges tenure during good behavior. U.S. Const. Art. III, § 1. But "the judges of territorial courts * * * [a]re not entitled, by virtue of their appointment and the Constitution of the United States, to hold

their offices during good behavior." *McAllister*, 141 U.S. at 186.

- The Compensation Clause prohibits reduction of judicial salaries. U.S. Const. Art. III, § 1. "[N]o such guaranties are provided by that instrument in respect to judges of courts created by or under the authority of Congress for a Territory." *McAllister*, 141 U.S. at 187.
- Article III empowers federal courts to hear only certain types of cases and controversies. U.S. Const. Art. III, § 2, Cl. 1. That limitation does not bind territorial courts. See *Sere*, 10 U.S. (6 Cranch) at 336-337.
- Article III, conversely, prohibits Congress from vesting the power to hear certain types of cases in entities outside the federal judiciary. See *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011). "[T]he same limitation does not extend to the territories." *Canter*, 26 U.S. (1 Pet.) at 546.
- Article III precludes Congress from imposing "executive or administrative duties of a nonjudicial nature" on federal judges. *Buckley* v. *Valeo*, 424 U.S. 1, 123 (1976) (per curiam). That limitation, too, does not extend to the territories. See *O'Donoghue* v. *United States*, 289 U.S. 516, 551 (1933).

A clause, like a word, is known by the company it keeps. Just as these similar separation-of-powers provisions do not apply in the territories, neither does the Appointments Clause. The court of appeals, Aurelius, and UTIER do not offer any justification for extending the

Appointments Clause to the territories that would not apply equally to other separation-of-powers provisions.

3. Instead of grouping the Appointments Clause with those provisions, the court of appeals analogized it to the Presentment Clause. The court reasoned that, if bills concerning the territories must comply with the Presentment Clause before becoming law, they must also comply with the Appointments Clause after becoming law. Pet. App. 21a-22a. That reasoning is flawed as matter of both text and logic. First, there is an obvious textual reason to apply the Presentment Clause, but not the Appointments Clause, to legislation for the territories. The Presentment Clause governs "*[e]very* Bill" and "*[e]very* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)." U.S. Const. Art. I, § 7, Cls. 2-3 (emphasis added). The Appointments Clause, by contrast, governs only "Officers *of the United States*." Second, the Presentment Clause addresses *how* Congress legislates—*i.e.*, how it "make[s] all needful Rules and Regulations respecting" the territories. U.S. Const. Art. IV, § 3, Cl. 2. The Appointments Clause and other related separation-of-powers provisions address *what* that legislation may contain. All legislation must comply with the former requirement, but this Court's precedents make clear that legislation concerning territorial governments need not comply with the latter.

The court of appeals also sought to distinguish the Appointments Clause from other separation-of-powers provisions by asserting that "[a]n exception from the Appointments Clause would alter the balance of power within the federal government itself." Pet. App. 26a. As an initial matter, Congress does not "alter the balance

of power within the federal government" when it organizes territorial governments, because those governments simply lie outside the sphere in which the Constitution's separation of powers operates. In addition, *all* separation-of-powers principles could be said to affect the "balance of power within the federal government." *Ibid.* For example, the nondelegation doctrine affects that balance by ensuring that bills get presented to the President; the Executive Vesting Clause and Take Care Clause affect that balance by empowering the President to control those who execute the laws; and the Tenure and Compensation Clauses do so by protecting judicial independence. Yet none of those principles applies to territorial governments.

4. UTIER, but not Aurelius, invokes (Br. in Opp. 12-21) the Insular Cases as the reason why the Constitution's separation-of-powers provisions do not apply to the territories. See *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *De Lima* v. *Bidwell*, 182 U.S. 1 (1901). As even the court of appeals recognized (Pet. App. 27a-29a), the Insular Cases are not relevant here. Those cases chiefly concern the applicability of the Bill of Rights and other individual-rights guarantees to the territories. They answer that question by considering whether Congress has "incorporated" the territory into the United States. See *Torres* v. *Puerto Rico*, 442 U.S. 465, 469 (1979). Those cases have nothing to do with the separation-of-powers guarantees of Articles I, II, and III. This Court held those separation-of-powers provisions inapplicable in the territories long before the Insular Cases, and it has

continued to do so long after them—all without any reliance on the distinction between "incorporated" and "unincorporated" territories. See pp. 21-23, *supra*.

D. Historical Practice Confirms That The Appointments Clause Does Not Govern Territorial Offices

1. This Court has often looked to the longstanding and consistent practice of the political branches to illuminate the meaning of the structural requirements of the Constitution. A "doubtful question, one on which human reason may pause, and the human judgment be suspended, * * * if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." *McCulloch*, 17 U.S. (4 Wheat.) at 401. Here, four categories of practice show that territorial officers have never been considered officers of the United States: (1) territorial elections, (2) appointments by territorial officers, (3) appointments by federal officers using methods not contemplated by the Appointments Clause, and (4) determinations that territorial officers are not subject to impeachment.

a. The Appointments Clause proscribes the election of officers of the United States, but Congress has authorized territorial elections since the beginning of the Republic. For example, the Northwest Ordinance, enacted by the Confederation Congress and re-enacted by the First Congress, authorized the people of the Northwest Territory to elect a house of representatives. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 51 & n.(a). Congress later created elected territorial legislatures in almost every organized territory from the Southwest Territory (1790) to the Northern Mariana Islands (1976).[9]

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[9] See 1 Stat. 123, 123 (1790) (Southwest Territory); 1 Stat. 549, 550 (1798) (Mississippi); 2 Stat. 103; 2 Stat. 58, 59 (1800) (Indiana);

Since the rise of Jacksonian democracy in the 1820s, Congress has also authorized territories to elect their executives. In 1829, Congress allowed the territories of Arkansas and Florida to "elect their officers, civil and military."[10] The organic act of almost every territory from Wisconsin (1836) to Oklahoma (1890) allowed the people to elect township and county officers.[11] In the 20th century, Congress authorized Puerto Rico, Guam,

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2 Stat. 195, 196 (1802) (District of Columbia); 2 Stat. 309, 309 (1805) (Michigan); 2 Stat. 322, 322 (1805) (Orleans); 2 Stat. 514, 515 (1809) (Illinois); 2 Stat. 743, 745 (1812) (Missouri); 3 Stat. 371, 372 (1817) (Alabama); 3 Stat. 493, 494 (1819) (Arkansas); 4 Stat. 332, 333 (1829) (Florida); 5 Stat. 10, 12 (1836) (Wisconsin); 5 Stat. 235, 236-237 (1838) (Iowa); 9 Stat. 323, 324 (1848) (Oregon); 9 Stat. 403, 404-405 (1849) (Minnesota); 9 Stat. 446, 448 (1850) (New Mexico); 9 Stat. 453, 454 (1850) (Utah); 10 Stat. 172, 173-174 (1853) (Washington); 10 Stat. 277, 278-279, 284-285 (1854) (Nebraska and Kansas); 12 Stat. 172, 173 (1861) (Colorado); 12 Stat. 209, 210-211 (1861) (Nevada); 12 Stat. 239, 240 (1861) (Dakota); 12 Stat. 664, 665 (1863) (Arizona); 12 Stat. 808, 809-810 (1863) (Idaho); 13 Stat. 85, 87 (1864) (Montana); 15 Stat. 178, 179 (1868) (Wyoming); 26 Stat. 81, 83-84 (1890) (Oklahoma); 31 Stat. 77, 82 (1900) (Puerto Rico); 31 Stat. 141, 144 (1900) (Hawaii); 32 Stat. 691, 693 (1902) (Philippines); 37 Stat. 512, 513 (1912) (Alaska); 49 Stat. 1807, 1807-1808 (1936) (Virgin Islands); 68 Stat. 497, 498 (1954) (Virgin Islands); 64 Stat. 384, 387 (1950) (Guam); 90 Stat. 263, 265 (1976) (Northern Mariana Islands).

[10] See 4 Stat. 332, 332 (1829) (Arkansas); *id.* at 333 (Florida).

[11] See 5 Stat. 10, 13 (1836) (Wisconsin); 5 Stat. 235, 237 (1838) (Iowa); 9 Stat. 323, 326 (1848) (Oregon); 9 Stat. 403, 405 (1849) (Minnesota); 9 Stat. 446, 449 (1850) (New Mexico); 9 Stat. 453, 455 (1850) (Utah); 10 Stat. 172, 175 (1853) (Washington); 10 Stat. 277, 279, 286 (1854) (Nebraska and Kansas); 12 Stat. 172, 174 (1861) (Colorado); 12 Stat. 209, 212 (1861) (Nevada); 12 Stat. 239, 241 (1861) (Dakota); 12 Stat. 808, 811 (1863) (Idaho); 13 Stat. 85, 88 (1864) (Montana); 15 Stat. 178, 180 (1868) (Wyoming); 26 Stat. 81, 85 (1890) (Oklahoma).

and the Virgin Islands to elect their governors and some other executive officers.[12]

There is also a long history of elections in the District of Columbia—a practice that is relevant here because this Court has often relied on the "apt" "analogy" between the District and the territories. *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 105 (1953). In 1801 and 1802, Congress allowed the cities of Alexandria, Georgetown, and Washington to elect municipal councils.[13] Congress later authorized elections for mayor of Washington (1820); mayor of Georgetown (1830); mayor of Alexandria (1843); assessors, city register, collector, and surveyor of Washington (1848); and the District-wide house of delegates (1871).[14] Today, the District elects a mayor, council, and board of education.[15]

b. Since the early 19th century, Congress also has vested the appointment of territorial officers in other territorial officers, even though the Appointments Clause does not permit that manner of selection. Two statutes from the 1810s vested appointments in territorial governors, and one from the 1820s vested them in a

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[12] See 61 Stat. 770, 770-771 (1947) (Puerto Rico); 82 Stat. 842, 842 (1968) (Guam); 112 Stat. 2785, 2785 (1998) (same); 82 Stat. 837, 837 (1968) (Virgin Islands).

[13] See 2 Stat. 103, 108 (1801) (Alexandria and Georgetown); 1779 Va. Acts ch. XXV (Alexandria); 1789 Md. Laws ch. XXIII, § 2 (Georgetown); 2 Stat. 195, 196 (1802) (Washington).

[14] See 3 Stat. 583, 584 (1820) (mayor of Washington); 4 Stat. 426, 426 (1830) (mayor of Georgetown); 5 Stat. 599, 599 (1843) (mayor of Alexandria); 9 Stat. 223, 224-225 (1848) (assessors, city register, collector, and surveyor); 16 Stat. 419, 420-421 (1871) (house of delegates).

[15] See 87 Stat. 774, 789, 811-812 (1973).

territorial legislature.[16] And from the 1830s to the middle of the 20th century, Congress routinely vested appointments in the territorial governor with the advice and consent of the territorial upper house.[17]

Similarly, local officers in the District of Columbia have appointed other local officers. At various points, Congress has vested appointments in the council of Alexandria (1804), the council of Georgetown (1805), the council of Washington (1812), the mayor of Washington with the consent of the aldermen (1812), the board of police (1861), and the board of commissioners (1874 and 1878).[18] Today, federal law vests various appointments in the mayor with the advice and consent of the council, the mayor alone, the council alone, and even the board of governors of the D.C. bar.[19]

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[16] See 2 Stat. 743, 744 (1812) (governor of Missouri); 3 Stat. 493, 494 (1819) (governor of Arkansas); 4 Stat. 332, 332 (1829) (legislature of Arkansas).

[17] See 5 Stat. 10, 13 (1836) (Wisconsin); 5 Stat. 235, 237 (1838) (Iowa); 9 Stat. 403, 405 (1849) (Minnesota); 9 Stat. 446, 449 (1850) (New Mexico); 9 Stat. 453, 455 (1850) (Utah); 10 Stat. 277, 279-280, 286 (1854) (Nebraska and Kansas); 12 Stat. 172, 174 (1861) (Colorado); 12 Stat. 209, 212 (1861) (Nevada); 12 Stat. 239, 241 (1861) (Dakota); 12 Stat. 664, 665 (1863) (Arizona); 12 Stat. 808, 811 (1863) (Idaho); 13 Stat. 85, 88 (1864) (Montana); 15 Stat. 178, 180 (1868) (Wyoming); 26 Stat. 81, 85 (1890) (Oklahoma); 31 Stat. 77, 84 (Puerto Rico); 31 Stat. 141, 156 (1900) (Hawaii); 32 Stat. 691, 695 (1902) (Philippines); 49 Stat. 1807, 1813 (1936) (Virgin Islands); 64 Stat. 384, 386 (1950) (Guam).

[18] See 2 Stat. 255, 257-258 (1804) (council of Alexandria); 2 Stat. 332, 333 (1805) (council of Georgetown); 2 Stat. 721, 723 (1812) (council of Washington); *id.* at 723 (mayor of Washington with consent of aldermen); 12 Stat. 320, 321 (1861) (board of police); 18 Stat. 116, 117 (1874) (board of commissioners); 20 Stat. 102, 104 (1878) (same).

[19] See 87 Stat. 774, 778, 791, 793-794, 797, 810, 811 (1973).

c. In addition, Congress has directed federal officers to make territorial appointments using methods forbidden by the Appointments Clause. The Appointments Clause allows the President acting alone to appoint only inferior officers—officers whose work is "directed and supervised at some level" by a superior other than the President, *Edmond* v. *United States*, 520 U.S. 651, 663 (1997)—but, in the territories, Congress has allowed the President alone to appoint even principal officers. For example, it has empowered the President to appoint the mayor of Washington (1802); commissioners to adjudicate land claims in Mississippi (1803) and Louisiana (1805); and all officers in Louisiana (1803), American Samoa (1920), and Wake Island (1960).[20] In 1997, it also empowered the President alone to appoint members of the D.C. Financial Responsibility and Management Authority—a body that Congress created to address a financial crisis in the District of Columbia, and that in some respects is the model for the Financial Oversight and Management Board in this case. See District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, § 101(b)(2), 109 Stat. 100.

In addition, the Appointments Clause makes the nomination "the sole act of the President." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 155 (1803). Yet Congress has required the President to choose territorial appointees from lists of candidates nominated by other bodies. Under the organic act of every territory from

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[20] See 2 Stat. 195, 196 (1802) (mayor of Washington); 2 Stat. 229, 230 (1803) (Mississippi land commissioners); 2 Stat. 245, 245 (1803) (all officers in Louisiana); 2 Stat. 324, 327 (1805) (Louisiana land commissioners); 45 Stat. 1253, 1253 (1929) (all officers in American Samoa); 74 Stat. 411, 424 (1960) (all officers in Wake Island).

the Northwest Territory (1789) to Arkansas (1819), the President appointed the territorial upper house with the advice and consent of the Senate, but from a list of candidates nominated by the territorial lower house.[21] Today, the President appoints the judges of the D.C. Court of Appeals and Superior Court with the advice and consent of the Senate, but from lists of candidates named by a judicial nomination commission. D.C. Code § 1-204.33(a) (2013). Indeed, in some circumstances, the commission may itself nominate, and with the advice and consent of the Senate appoint, judges of those courts. *Id.* § 1-204.34(d)(1).

d. Finally, the political branches have agreed that the Impeachment Clause—which authorizes the impeachment and removal of "all civil Officers of the United States," U.S. Const. Art. II, § 4—does not apply to territorial officers. During an attempted impeachment of a territorial judge in the House of Representatives in 1833, "the Judiciary Committee held that a Territorial judge was not a civil officer of the United States within the meaning of the Constitution." 3 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 2493, at 991 (1907). The Attorney General agreed six years later: "They are not civil officers of the United States, in the constitutional meaning of the phrase; they are merely Territorial officers." *Territorial Judges Not Liable to Impeachment*, 3 Op. Att'y Gen. 409, 411 (1839). And in 1926, the House

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[21] See 1 Stat. 51, 53 n.(a) (1789) (Northwest Territory); 1 Stat. 123, 123 (1790) (Southwest Territory); 1 Stat. 549, 550 (Mississippi) (1798); 2 Stat. 58, 59 (1800) (Indiana); 2 Stat. 309, 309 (1805) (Michigan); 2 Stat. 514, 515 (1809) (Illinois); 2 Stat. 743, 744 (1812) (Missouri); 3 Stat. 371, 372-373 (1817) (Alabama); 3 Stat. 493, 494 (1819) (Arkansas).

Judiciary Committee determined that the House lacked the power to impeach officers of the District of Columbia, because they were "municipal officers" rather than "Federal officers." 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives* (*Cannon's Precedents*) § 548 (1935). If territorial officers do not qualify as "civil Officers of the United States" for purposes of removal from office, they also do not qualify as "Officers of the United States" for purposes of appointment to office.

2. Aurelius offers a series of historical arguments for extending the Appointments Clause to territorial governments. None withstands scrutiny.

Aurelius notes (Br. in Resp. 20) that "[e]very civilian territorial governor appointed to a continuing office was nominated by the President and confirmed by the Senate, or recess-appointed by the President alone." That argument concentrates on just one category of officers: appointed territorial governors. It disregards numerous other officers who have been selected without regard to the Appointments Clause. See pp. 26-31, *supra*. Even on its own terms, the argument falls short. Like most constitutional provisions, the Appointments Clause sets a floor rather than a ceiling. The Clause does not preclude Congress from filling a position using the methods that it lists, even if that position is not an office of the United States. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116-117 (2007); *Employee's Compensation Act—Assistant United States Attorney*, 31 Op. Att'y Gen. 201, 203 (1918). For example, under the Jay Treaty of 1794, the President named and the Senate confirmed commissioners on a claims tribunal, even though those commissioners "[w]ere not in a strict sense Officers" because they exercised only temporary

authority. Alexander Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *The Papers of Alexander Hamilton* 13, 20 (Harold C. Syrett ed., 1974) (capitalization altered); see Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116. And it should come as no surprise that Congress decided to require governors, the most powerful officials in the territories, to go through the rigors of Senate confirmation. The use of Appointments Clause procedures to appoint some territorial officials thus does not prove that those officials were considered officers of the United States.

Aurelius also observes (Br. in Resp. 23) that Presidents have made recess appointments to territorial offices for which Congress had, by statute, required the Senate's advice and consent. But the most natural explanation for that practice is that the statutes themselves authorized recess appointments. "[I]f a word is obviously transplanted from another legal source, * * * it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Presidents may have understood that, where a territorial organic act borrowed the Constitution's advice-and-consent procedure, it also implicitly borrowed the recess-appointments exception to that procedure. In any event, a "'regular course of practice'" deserves more weight than a "few scattered examples." *NLRB* v. *Noel Canning*, 573 U.S. 513, 525, 538 (2014) (citation omitted). The practice of making appointments in the territories without regard to the Appointments Clause spans scores of statutes, dozens of territories, and more than two centuries. See pp. 25-31, *supra*. In contrast, Aurelius has identified (C.A. Br. 41) just five instances, spanning just two territories, where

Presidents have made recess appointments without express statutory authorization.

Aurelius next contends (Br. in Resp. 20) that the original Northwest Ordinance vested the power to appoint territorial officials in the Confederation Congress, but the First Congress amended the ordinance to transfer that power to the President with the advice and consent of the Senate. It does not follow, however, that Congress did so because of the Appointments Clause. "[S]ome change was obviously necessary because the old [Confederation] Congress, which had previously made appointments under the Ordinance, no longer existed." David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829*, at 114 n.200 (2001). And Congress's decision to vest appointments in the President with the advice and consent of the Senate may well have reflected "policy considerations rather than constitutional compulsion." *Id.* at 114. After all, other provisions of the Ordinance retained by the First Congress required the selection of territorial officials using methods that are not authorized by the Appointments Clause, such as elections and appointments from lists. See pp. 26, 30-31, *supra*. Aurelius offers no good explanation for those other provisions.

Aurelius also relies (Br. in Resp. 13) on *Marbury* v. *Madison*, *supra*, which assumed that William Marbury, a justice of the peace in the District of Columbia, was an officer of the United States. See 5 U.S. (1 Cranch) at 155-162. Aurelius's reliance on that case is misplaced. This Court has explained that Congress "possesses a dual authority over the District." *Keller*, 261 U.S. at 443. That is, Congress may choose to establish entities in the District as part of the local government of the District (*e.g.*, the D.C. Court of Appeals), or as part of

the national government of the United States (*e.g.*, the D.C. Circuit). *Marbury* establishes, at most, that Congress *chose* to create the local office of justice of the peace as an office of the United States. It does not establish that Congress was *required* to do so. That is why, notwithstanding *Marbury*'s assumption that D.C. justices of the peace are officers of the United States, Congress enacted numerous statutes in the 19th century vesting the appointment of territorial justices of the peace in the territorial governor or territorial legislature.[22]

Finally, Aurelius invokes (C.A. Br. 59) this Court's statement in *Freytag*, *supra*, that "since the early 1800s, Congress regularly granted non-Article III territorial courts the authority to appoint their own clerks of court, who * * * were 'inferior Officers' within the meaning of the Appointments Clause." 501 U.S. at 892. That statement, which relies on the premise that territorial clerks are "Officers" in order to conclude that territorial courts and other non-Article III courts are "Courts of Law" under the Appointments Clause, deserves little weight. First, the statement was unnecessary to the judgment. *Freytag* concerned the status of judges in the Article I Tax Court, not clerks in Article IV territorial courts. *Id.* at 877. Second, the statement was unreasoned. The Court neither explained the basis for its premise that territorial clerks are officers of the United States, nor explored any of the arguments for distinguishing territorial from federal officers. Third,

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[22] See 4 Stat. 332, 332 (1829) (Arkansas) (legislature); 5 Stat. 10, 13 (1836) (Wisconsin) (governor); 5 Stat. 235, 237 (1838) (Iowa) (same); 9 Stat. 403, 405, 407 (1849) (Minnesota) (same); 9 Stat. 446, 449, 451-452 (1850) (New Mexico) (same); 9 Stat. 453, 455-456 (1850) (Utah) (same).

this Court has already declined to extend some of the analysis of the majority in *Freytag*, adopting instead the analysis in Justice Scalia's concurrence. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 510-511 (2010). And Justice Scalia squarely rejected the theory that territorial entities are subject to separation-of-powers provisions such as the Appointments Clause, reasoning that those entities exercise neither "the national executive power" nor "the national judicial power." *Freytag*, 501 U.S. at 913 (opinion concurring in the judgment) (emphasis omitted).

II. THE MEMBERS OF THE BOARD ARE OFFICERS OF THE TERRITORIAL GOVERNMENT OF PUERTO RICO

Aurelius and UTIER defend the court of appeals' sweeping conclusion that "the Territorial Clause * * * do[es] not impede the application of the Appointments Clause" (Pet. App. 30a), but in the end they are forced to concede that *some* territorial officers may be selected outside the strictures of the Appointments Clause. For instance, Aurelius accepts (Br. in Resp. 22) that, in light of "the long-standing practice of territorial self-government," the Appointments Clause does not govern the selection of "democratically elected territorial officials" or "territorial officials [who] promulgate, administer, enforce, and apply local territorial laws." UTIER, too, accepts (Br. in Opp. 11-12) that "Puerto Rico's elected officials are not federal officers." Those statements concede the general principle; the only dispute concerns the line between federal and territorial officers.

This Court, however, has already drawn that line. In *Palmore*, the Court held that, at a minimum, a governmental body is local when Congress has invoked its plenary powers in creating the entity, has located the entity in a local government, and has limited the entity's

powers and duties to primarily local matters. 411 U.S. at 407-408. In enacting PROMESA, Congress followed that guidance to the letter. It invoked Article IV, located the Board in the government of Puerto Rico, and limited the Board's power and duties to territorial matters. The members of the Board are therefore officers of Puerto Rico, not officers of the United States.

A. The Board's Members Qualify As Territorial Officers

1. a. *Palmore* arose after Congress created two sets of courts for the District of Columbia: (1) the D.C. Circuit and D.C. District Court, responsible for cases arising under federal laws that apply nationwide, and (2) the D.C. Court of Appeals and D.C. Superior Court, responsible for cases arising under federal laws that apply only to the District. 411 U.S. at 398. In *Palmore*, this Court held that the D.C. Court of Appeals and D.C. Superior Court were courts of the District under Article I rather than courts of the United States under Article III—meaning, for example, that Congress could deny the judges life tenure. *Id.* at 405-407. The Court emphasized that (1) Congress "expressly" created the courts "pursuant to the plenary Art. I power to legislate for the District of Columbia," (2) Congress placed those courts in a "wholly separate * * * local court system," and (3) the work of the courts "primarily" involved "cases arising under the District of Columbia Code and * * * other matters of strictly local concern." *Id.* at 407-408.

In light of the "apt" "analogy" between the territories and the District of Columbia, *John R. Thompson Co.*, 346 U.S. at 105, *Palmore* establishes that, at a minimum, an office is territorial rather than federal if (1) Congress invokes its Article IV powers in establishing the office, (2) Congress places the office in a territorial government, and (3) Congress limits the office's

powers and duties to territorial matters. Those conditions may not be necessary, but they are at least sufficient; any office that satisfies them falls comfortably within Congress's authority over the territories. After all, it made no difference in *Palmore* that the local D.C. courts had been established by Congress rather than the D.C. Council. See *Palmore*, 411 U.S. at 398. Nor did it matter that the judges were appointed by the President rather than the D.C. mayor. *Id.* at 392. Nor still did it matter that the courts' jurisdiction rested on a federal statute rather than a local ordinance. *Id.* at 398. Indeed, it did not even matter that the cases heard by the local D.C. courts arose under laws enacted by Congress (because the District had not yet been granted home rule). *Ibid.* None of those factors converted the D.C. courts into federal bodies for constitutional purposes.

It is true that *Palmore* involved the line between national and local *courts*, while this case involves the line between national and local *executive officers*. But *Palmore*'s criteria are equally relevant here. As a textual matter, *Palmore* interpreted the words "judicial Power of the United States" in the Judicial Vesting Clause, while this case concerns the words "Officers of the United States" in the Appointments Clause. The Court should give the phrase "of the United States" the same interpretation in both provisions. As a structural matter, the Appointments Clause and the Vesting Clauses are "cognate provisions." *Buckley*, 424 U.S. at 124. If an entity is territorial under the Vesting Clauses, it must be territorial under the Appointments Clause. And as a historical matter, the political branches long ago concluded that territorial judges are not federal officers under the Impeachment Clause precisely because

their courts are not federal under the Vesting Clauses. See p. 31, *supra*. The link between the Vesting Clauses and the phrase "Officers of the United States" is thus nothing new.

b. In any event, *Palmore*'s criteria make sense on their own terms. In classifying an office, the first question is one of statutory interpretation: Has Congress chosen to create a local institution (such as the D.C. Court of Appeals) or a national one (such as the D.C. Circuit)? *Palmore*'s first two criteria help to answer that question. Congress's express invocation of its plenary Article IV powers, rather than its ordinary Article I powers, provides an "expression of the intent of Congress" that "clarifies the status" of the office Congress has created. *Palmore*, 411 U.S. at 399 (citation omitted). So does Congress's placement of the office in a local government rather than in the federal government.

Once a court determines that Congress has chosen to create a local office, it then faces a question of constitutional law: Does Congress's choice exceed its constitutional powers? *Palmore*'s third criterion, which asks whether the officer's work primarily involves local matters, see 411 U.S. at 407, helps to answer that question. Under the Territory Clause, the creation of an office with only territorial duties falls well within Congress's power to make "all" needful rules and regulations "respecting" a territory. U.S. Const. Art. IV, § 3, Cl. 2. And under the Appointments Clause, an officer with only territorial duties falls well outside the ordinary meaning of the phrase "Officers of the United States." In sum, when Congress creates an office under its territory power, places the office in a territorial government, and limits the office's work to the territory, there

can be no reasonable basis for treating the office as anything other than territorial.

2. In establishing the Board, Congress did exactly what *Palmore* says it should have. First, Congress expressly invoked its Article IV powers. It said that it enacted PROMESA "pursuant to article IV, section 3 of the Constitution of the United States," using its "power to dispose of and make all needful rules and regulations for territories." 48 U.S.C. 2121(b)(2). Second, Congress organized the Board as a part of the territorial government. The Act provides that the Board is "an entity within the territorial government." 48 U.S.C. 2121(c)(1). It further provides that the Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. 2121(c)(2).

Those designations are substantive realities, not just formal labels. No federal official directs or manages the Board's operations. 48 U.S.C. 2124. In "any action brought by, on behalf of, or against" it, the Board is "represented by such counsel as *it* may hire or retain." 48 U.S.C. 2128(b) (emphasis added). The federal government lacks financial control over the Board; the Board receives its funding entirely from Puerto Rico, 48 U.S.C. 2127(b), and its members serve without compensation, 48 U.S.C. 2121(g). Further, employees of the federal government ordinarily do not work for the Board—except in accordance with the Title IV of the Intergovernmental Personnel Act of 1970, 5 U.S.C. 3371 *et seq.*, which authorizes details of employees from the federal government to state and territorial governments. See 48 U.S.C. 2123(d). And the Board need not comply with numerous federal laws that apply to the

federal government, including the Freedom of Information Act, 5 U.S.C. 552, and Administrative Procedure Act, 5 U.S.C. 551, 701 *et seq.* See 48 U.S.C. 2124(c)(1).

Third, the Board's work is local. Congress established the Board "for Puerto Rico." 48 U.S.C. 2121(b). The Board's stated "purpose" is to "provide a method for [the] territory to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. 2121(a). The Board's main duties involve reforming the Commonwealth's budget and restructuring the Commonwealth's debt. The Board performs those duties under the Title III process, a debt-adjustment procedure that is available only to a "territory" or a "territorial instrumentality." 48 U.S.C. 2162(1). In that process, the Board acts as the "representative of the debtor"—the debtor being the Commonwealth or one of its instrumentalities. 48 U.S.C. 2175(b). Those functions are all territorial. To be sure, the Board's decisions affect bondholders in the United States (like Aurelius), but they do so only because of those bondholders' investments in Puerto Rico.

The Board's other powers and duties are similarly local. The Board's subpoenas must comply with Puerto Rico's personal-jurisdiction statutes. 48 U.S.C. 2124(f). The Board's enforcement powers extend only to "certain laws of the * * * territory." 48 U.S.C. 2124(h) (emphasis omitted). The Board may investigate disclosure and selling practices associated with certain bonds, but only if those bonds were, among other things, "issued by [the] territory." 48 U.S.C. 2124(*o*). Indeed, territorial employees who intentionally provide false or misleading information to the Board are subject to prosecution only under Puerto Rico law, not federal law. 48 U.S.C. 2124(*l*).

Notably, many of the functions vested in the Board overlap with functions previously exercised by other institutions in the territorial government of Puerto Rico. For example, the Puerto Rico Constitution empowers the legislature to issue, retire, and adjust debt, see P.R. Const. Art. VI, §§ 2, 6-8; the Act likewise empowers the Board to manage the Commonwealth's debt, see 48 U.S.C. 2124. The Puerto Rico Constitution directs the governor to present a budget to the legislature, see P.R. Const. Art. IV, § 4, Cl. 8; the Act likewise directs the governor to present certain budgets and reports to the Board, see 48 U.S.C. 2121(d)(1)(B). In essence, Congress chose to reorganize the government of Puerto Rico by shifting some powers from the Legislative Assembly and Governor to the Board, and granting yet additional authority to guide Puerto Rico through a newly created bankruptcy system. That is a paradigmatic exercise of Congress's authority under the Territory Clause.

3. To the extent that any doubts remain about the Board's status, this Court should defer to Congress's judgment that the Board is a territorial body and that its members are territorial officers. The Court has described Congress's power over the territories as "general and plenary," *Latter-Day Saints*, 136 U.S. at 42, and it has emphasized the importance of preserving "Congress' ability to govern such possessions," *Torres*, 442 U.S. at 470. The Court has therefore deferred to Congress's judgments regarding territorial status. In *Binns*, for example, the Court accepted Congress's judgment that a license fee in Alaska provided for the territorial rather than the general welfare under the Uniformity Clause—even though the proceeds were "paid into the Treasury of the United States and not

specifically appropriated to the expenses of the Territory." 194 U.S. at 494; see U.S. Const. Art. I, § 8, Cl. 1. Similarly, in *Palmore*, the Court deferred to Congress's classification of the D.C. Court of Appeals and D.C. Superior Court as local courts—even though Congress established the courts and the President appointed their judges. 411 U.S. at 398. So too here, the Court should defer to Congress's judgment that the Board and its members are part of the territorial government of Puerto Rico rather than the national government of the United States.

B. Respondents' Contrary Arguments Lack Merit

1. a. According to Aurelius and UTIER, those who exercise "significant authority pursuant to the laws of the United States" are federal officers, while those who exercise authority pursuant to territorial laws are territorial officers. See Aurelius Br. in Resp. 21; UTIER Br. in Opp. 10. According to another framing of the same test, representatives of the federal government who "superintend territories" are federal officers, while officers selected by the territory in the course of "territorial self-government" are local. Aurelius Br. in Resp. 18, 22 (emphasis omitted). For multiple reasons, Aurelius's and UTIER's test is unsound.

First, the cases setting out the significant-authority test—*Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), *Freytag*, *supra*, and *Buckley*, *supra*—all involved the distinction between officers and employees of the United States, not between federal officers and territorial officers. The question in *Lucia* was whether certain administrative law judges were "'Officers of the United States' or simply employees," 138 S. Ct. at 2051; the question in *Freytag* was whether certain tax judges "may be deemed employees," 501 U.S. at 881; and *Buckley*, too,

discussed the distinction between officers and "employees," 424 U.S. at 126 n.162. This Court has thus described the "'significant authority' test" as the "basic framework for distinguishing between officers and employees." *Lucia*, 138 S. Ct. at 2051. The Court has never used that test to distinguish between federal and territorial officers.

Second, the attempted distinction between officers who act under federal law and those who act under territorial law is conceptually flawed. *All* officers in the territories ultimately derive their authority from federal law. "[T]here is no sovereignty in a Territory of the United States but that of the United States itself," *Snow*, 85 U.S. (18 Wall.) at 321—which is why, for example, territories do not count as separate sovereigns for purposes of the Double Jeopardy Clause, see *Sanchez Valle*, *supra*. This Court has thus explained that both "territorial and federal laws * * * are creations emanating from the same sovereignty." *Puerto Rico* v. *Shell Co. (P.R.)*, 302 U.S. 253, 264 (1937). It has explained that territorial officers "exert all their powers by authority of the United States." *Grafton*, 206 U.S. at 354. And it has explained that "federal and territorial [officers] do not derive their powers * * * from independent sources of authority." *Sanchez Valle*, 136 S. Ct. at 1873 (brackets, citation, and internal quotation marks omitted). Source of authority cannot be the basis for distinguishing territorial officers from federal ones.

Third, Aurelius's and UTIER's approach makes too much of who enacted a law and too little of how far that law extends. According to Aurelius, an officer ranks as federal if he administers a law enacted by Congress, but territorial if he administers an identical law enacted by

a territorial legislature. But the Territory Clause grants Congress both the power to govern a territory directly and the power to govern by enlisting an intermediary such as a territorial legislature. Both powers stand on an equal footing. This Court has thus explained that Congress may "itself directly legislate for any Territory * * * in any particular that Congress may think fit." *United States* v. *McMillan*, 165 U.S. 504, 511 (1897). "It may entrust [to the territorial legislature] a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto." *Binns*, 194 U.S. at 491-492. Indeed, in 19th-century Alaska, Congress enacted "a penal and civil code" by direct legislation, and "provided no legislative body but only executive and judicial officers." *Id.* at 492. There is no principled basis for drawing a constitutional line between officers who administer territorial laws enacted by Congress's delegate and officers who administer territorial laws enacted by Congress itself.

The more relevant distinction is between statutes that apply nationwide and those that apply only in a territory. In *Palmore*, this Court treated the District of Columbia Code as "local law"—and the D.C. courts that administered that code as local courts—even though the code consisted of statutes "enacted by Congress." 411 U.S. at 400. The Court emphasized that the code was "applicable to the District of Columbia alone," and it distinguished the code from "the statutes of the United States * * * having nationwide application." *Id.* at 406-407. Similarly, in *Binns*, the Court treated license fees in Alaska as "local taxes," even though they had been imposed by Congress. 194 U.S. at 495. The Court emphasized that the fees "were authorized in

statutes dealing solely with Alaska." *Ibid.* The critical point in both cases was thus the geographic extent of the law, not the identity of the lawmaker. The law here concerns the territory of Puerto Rico, not the United States as a whole.

Fourth, Aurelius's and UTIER's approach contradicts this Court's precedents. This Court has always treated territorial and D.C. courts as local bodies. See, *e.g.*, *Palmore*, 411 U.S. at 397-404; *Good*, 95 U.S. at 98; *Hornbuckle* v. *Toombs*, 85 U.S. (18 Wall.) 648, 655 (1874); *Clinton* v. *Englebrecht*, 80 U.S. (13 Wall.) 434, 442 (1872); *Canter*, 26 U.S. (1 Pet.) at 546. Yet, as Aurelius accepts (C.A. Br. 59), those bodies exercise significant authority under federal law. After all, Congress created the territorial courts and, in general, "invested [them] with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States." *Hornbuckle*, 85 U.S. (18 Wall.) at 656. Congress also created the D.C. courts and empowered them to decide cases under federal statutes. *Palmore*, 411 U.S. at 392, 398. Adopting Aurelius's significant-authority approach would thus require the Court either to repudiate two centuries of decisions treating territorial and D.C. courts as local bodies, or to divorce the Appointments Clause from the Vesting Clauses and treat the very same officer as federal under one provision but territorial under another.

Fifth, Aurelius's and UTIER's approach would contradict consistent, longstanding practice. Since the Founding, Congress has treated officials as territorial rather than federal even though they exercise significant authority directly under the laws of the United States. For example, elected territorial legislators, as

well as territorial legislators appointed from lists, received all of their authority from organic acts enacted by Congress. See pp. 26, 30-31, *supra*. Elected and appointed mayors, city councilors, and city officials in the District of Columbia have also wielded significant authority under acts of Congress—sometimes under city charters granted by Congress, sometimes under D.C.-specific legislation enacted by Congress. See pp. 27-30, *supra*. Territorial judges, whom the political branches have classified as territorial officers for purposes of impeachment, also exercise authority under acts of Congress. See p. 31, *supra*.

Finally, Aurelius's and UTIER's approach would threaten to upend the governments of all five major U.S. territories and the District of Columbia. In every one of those governments, officers who have been selected using methods not authorized by the Appointments Clause exercise significant authority under federal law. In Puerto Rico, an elected legislature enacts civil and criminal laws, and an elected governor executes those laws, all under a territorial constitution authorized and approved by Congress. See *Sanchez Valle*, 136 S. Ct. at 1868-1869. In American Samoa and the Northern Mariana Islands, elected governors and elected legislatures act under constitutions authorized and approved by the Secretary of the Interior. See 42 Fed. Reg. 48,398 (Sept. 23, 1977) (American Samoa); 51 Fed. Reg. 40,399 (Nov. 7, 1986) (Northern Mariana Islands). In Guam, which lacks its own constitution, the elected governor and elected legislature derive all their power from a territorial organic act passed by Congress, and the elected governor administers a territorial income tax imposed by Congress. See 48 U.S.C. 1421i, 1422, 1423. In the Virgin Islands, which also lacks

its own constitution, the elected governor and elected legislature again derive all their power from a territorial organic act passed by Congress. See 48 U.S.C. 1571, 1591. Last, in the District of Columbia, an elected mayor and council derive their authority from a home-rule statute enacted by Congress, and administer D.C.-specific statutes enacted by Congress. See District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774. And judges of the D.C. courts, who are appointed from lists supplied by a nominating commission, exercise jurisdiction under an act of Congress and hear cases under D.C.-specific enactments passed by Congress. See *Palmore*, 411 U.S. at 406. If the Appointments Clause governed the selection of every local official who exercises significant authority under an act of Congress, all of those local governments would be unconstitutional, and the centuries-long practice of territorial home rule would come to an end.

b. In an effort to address the flaws in its test, Aurelius asserts (Br. in Resp. 22) that "democratically elected territorial officials" are not officers of the United States. But Aurelius's special exception for elections has no basis in its significant-authority framework. Even an elected territorial officer derives his authority from the laws of the United States. The territorial people may be "the most immediate source of such authority," but "[b]ack of the [territorial] people * * * remains the U.S. Congress." *Sanchez Valle*, 136 S. Ct. at 1875. Aurelius's elections exception thus amounts to an ad hoc proviso, tacked on in order to avoid invalidating territorial home rule.

An exception for elections also lacks a principled basis in the relevant constitutional provisions. The Ap-

pointments Clause itself nowhere suggests that elections are special. Congress could not, for example, hold a popular election in Manhattan to choose the next U.S. Attorney for the Southern District of New York. Nor does the Territory Clause distinguish between elections and appointments. "It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient." *Murphy*, 114 U.S. at 44.

Finally, Aurelius's elections exception cannot make sense of historical practice. The exception addresses one of the four categories of historical evidence discussed above (territorial elections). See pp. 26-28, *supra*. It does nothing to address the second category (appointments by territorial officers), the third (appointments by the federal government using methods not contemplated by the Appointments Clause), or the fourth (determinations that territorial officers are not subject to impeachment). See pp. 28-32, *supra*. All of that historical evidence remains inconsistent with Aurelius's significant-authority test, even accepting an arbitrary carveout for elected territorial officials. Moreover, under Aurelius's theory, territorial governors used to be officers of the United States when they were appointed by the President with the advice and consent of the Senate, but ceased to be officers of the United States when Congress granted territories home rule and authorized them to hold gubernatorial elections. See pp. 27, 31-32, *supra*. Aurelius fails to explain how

the Appointments Clause would allow Congress to remove an office from the Clause's domain simply by changing the method of appointment.

2. Aurelius relies in the alternative (Br. in Resp. 24) on *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), which addressed when a federally chartered corporation qualifies as a governmental rather than a private entity. The Court concluded that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government." *Id.* at 400. In a later decision, the Court repeated that a corporation that satisfies the criteria set out in *Lebron* is "a governmental entity, not a private one." *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015). Aurelius nevertheless insists that the test set out in *Lebron* also distinguishes a federal from a territorial body: an entity is federal if the federal government creates it, its creation serves federal objectives, and the federal government retains the power to appoint the entity's members.

The *Lebron* factors are inapt here. First, an entity does not become federal on account of having been created by the federal government. Nearly every territorial entity owes its existence to an act of Congress—most often, a territorial organic act. That does not make the entity any less territorial. For example, it was Congress that created territorial courts, but "[t]erritorial courts are not courts of the United States within the meaning of the Constitution, as appears by all the authorities." *Good*, 95 U.S. at 98. It was also Congress

that created the D.C. Court of Appeals and D.C. Superior Court, but those courts are nonetheless "local courts." *Palmore*, 411 U.S. at 389. And Congress created territorial legislatures, elected territorial governorships, and territorial offices filled by other territorial officers, but all of those entities remain territorial. See pp. 26-29, *supra*.

Second, an entity's federal or territorial status does not turn on the objectives the entity serves. Every time Congress creates a territorial entity, it presumably takes into account, among other things, the interest of the Nation as a whole. The second factor thus adds nothing to the first, and is unsound for the same reasons. Besides, any effort to separate territorial objectives from federal objectives is likely to be impracticable. Whenever Congress creates an entity, it is likely to consider both the territorial and the national interest. Trying to disentangle the two would likely be a fruitless endeavor.

Third, an entity does not become federal because its members are appointed by the federal government. This Court determined that "the government of the District of Columbia" was not "a department of the United States government" at a time when most of its officers were appointed by the President, explaining that "[t]he mode of appointing its officers does not abrogate its character as a municipal body politic." *Metropolitan R.R.* v. *District of Columbia*, 132 U.S. 1, 8 (1889). "The judges of [the territorial courts] are appointed by the President under [an] act of Congress, but this does not make the courts they are authorized to hold courts of the United States." *Clinton*, 80 U.S. (13 Wall.) at 447. The judges of the D.C. Court of Appeals and D.C. Superior Court are also appointed by the President, but this

Court determined in *Palmore* that those courts remain local courts. See pp. 37-39, *supra*. One of the categories of historical practice discussed above—territorial appointments by federal officers using methods not contemplated by the Appointments Clause—also contradicts the theory that territorial status turns on the identity of the appointer. See pp. 30-31, *supra*. And the House Judiciary Committee in 1926 determined that D.C. officers remained local rather than federal officers even when appointed by the President, reasoning that "the method of appointing [them] * * * [wa]s not material, and certainly not controlling." *Cannon's Precedents* § 548.

In other contexts, moreover, the status of an entity does not normally turn on the identity of the appointer. State legislatures used to choose U.S. Senators, and state governors still fill senatorial vacancies, but Senators have always been considered part of the federal government. See U.S. Const. Art. I, § 3, Cls. 1-2 and Amend. XVII, Cls. 1-2. "The mayor of a city may be elected by the people, or he may be appointed by the governor with the consent of the senate; but the slightest reflection will show that * * * his position as the chief agent and representative of the city, [is] the same under either mode of appointment." *Barnes* v. *District of Columbia*, 91 U.S. 540, 546 (1876). And "[c]ommissioners are not unfrequently appointed by the legislature or executive of a State for the administration of municipal affairs," but it is not "'of the slightest consequence by what means these several officers are placed in their position.'" *Metropolitan R.R.*, 132 U.S. at 8 (citation omitted).

Aurelius's factors fare no better when viewed as a whole than when examined one by one. Those factors

stack the deck in favor of treating an entity as federal. The first factor will be satisfied almost by definition; as explained above, nearly every entity in the territories owes its existence to Congress, and in any event the question of an entity's status will arise only when Congress has created it. The second factor will also be satisfied almost by definition; whenever Congress creates an entity, it surely seeks, at least in part, to serve some federal objective. Only the third factor—which asks whether the federal government retains the power to appoint the entity's members—does any work. Yet as explained above (pp. 51-52, *supra*), that factor is not even relevant under this Court's cases, let alone dispositive. Put simply, *Palmore*, not *Lebron*, sets out the right test.

* * *

When Congress enacted PROMESA, Puerto Rico faced a fiscal and humanitarian crisis that threatened "the Commonwealth's very ability to persist," *Wal-Mart P.R., Inc.* v. *Zaragoza-Gomez*, 174 F. Supp. 3d 585, 592 (D.P.R.), aff'd, 834 F.3d 110 (1st Cir. 2016). In response to that crisis, Congress called upon its "broad" authority "to develop innovative approaches to territorial governance." *Sanchez Valle*, 136 S. Ct. at 1876. It reorganized the government of Puerto Rico, created a new Board, and charged that Board with ensuring Puerto Rico's long-term financial stability.

The court of appeals' decision to override Congress's choice lacks a sound basis in constitutional text, contradicts this Court's precedents, and challenges centuries of practice going back to the First Congress. If allowed to stand, it could devastate Puerto Rico's ongoing eco-

nomic recovery, and would threaten to upend the current governmental structure of the District of Columbia and all U.S. territories.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. II, § 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.

2. U.S. Const. Art. IV, § 3, Cl. 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.

3. 48 U.S.C. 2121 (Supp. V 2017) provides:

Financial Oversight and Management Board

(a) Purpose

The purpose of the Oversight Board is to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.

(b) Establishment

(1) Puerto Rico

A Financial Oversight and Management Board is hereby established for Puerto Rico.

(2) Constitutional basis

The Congress enacts this chapter 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.

(c) Treatment

An Oversight Board established under this section—

(1) shall be created as an entity within the territorial government for which it is established in accordance with this subchapter; and

(2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.

(d) Oversight of territorial instrumentalities

(1) Designation

(A) In general

An Oversight Board, in its sole discretion at such time as the Oversight Board determines to be appropriate, may designate any territorial instrumentality as a covered territorial instrumentality that is subject to the requirements of this chapter.

(B) Budgets and reports

The Oversight Board may require, in its sole discretion, the Governor to submit to the Oversight Board such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the Oversight Board determines to be necessary and may designate any covered territorial instrumentality to be included in the Territory Budget; except that the Oversight Board may not designate a covered territorial instrumentality to be included in the Territory Budget if applicable territory law does not require legislative approval of such covered territorial instrumentality's budget.

(C) Separate Instrumentality Budgets and reports

The Oversight Board in its sole discretion may or, if it requires a budget from a covered territorial instrumentality whose budget does not require legislative approval under applicable territory law, shall designate a covered territorial instrumentality to be the subject of an Instrumentality Budget separate from the applicable Territory Budget and require that the Governor develop such an Instrumentality Budget.

(D) Inclusion in Territory Fiscal Plan

The Oversight Board may require, in its sole discretion, the Governor to include a covered territorial instrumentality in the applicable Territory Fiscal Plan. Any covered territorial instrumentality submitting a separate Instrumentality Fiscal Plan must also submit a separate Instrumentality Budget.

(E) Separate Instrumentality Fiscal Plans

The Oversight Board may designate, in its sole discretion, a covered territorial instrumentality to be the subject of an Instrumentality Fiscal Plan separate from the applicable Territory Fiscal Plan and require that the Governor develop such an Instrumentality Fiscal Plan. Any covered territorial instrumentality submitting a separate Instrumentality Fiscal Plan shall also submit a separate Instrumentality Budget.

(2) Exclusion

(A) In general

An Oversight Board, in its sole discretion, at such time as the Oversight Board determines to be appropriate, may exclude any territorial instrumentality from the requirements of this chapter.

(B) Treatment

A territorial instrumentality excluded pursuant to this paragraph shall not be considered to be a covered territorial instrumentality.

(e) Membership

(1) In general

(A) The Oversight Board shall consist of seven members appointed by the President who meet the qualifications described in subsection (f) and section 2129(a) of this title.

(B) The Board shall be comprised of one Category A member, one Category B member, two Category C members, one Category D member, one Category E member, and one Category F member.

(2) Appointed members

(A) The President shall appoint the individual members of the Oversight Board, of which—

(i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives;

(ii) the Category B member should be selected from a separate, non-overlapping list of individuals submitted by the Speaker of the House of Representatives;

(iii) the Category C members should be selected from a list submitted by the Majority Leader of the Senate;

(iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives;

(v) the Category E member should be selected from a list submitted by the Minority Leader of the Senate; and

(vi) the Category F member may be selected in the President's sole discretion.

(B) After the President's selection of the Category F Board member, for purposes of subparagraph (A) and within a timely manner—

(i) the Speaker of the House of Representatives shall submit two non-overlapping lists of at least three individuals to the President; one list shall include three individuals who maintain a primary residence in the territory or have a primary place of business in the territory;

(ii) the Senate Majority Leader shall submit a list of at least four individuals to the President;

(iii) the Minority Leader of the House of Representatives shall submit a list of at least three individuals to the President; and

(iv) the Minority Leader of the Senate shall submit a list of at least three individuals to the President.

(C) If the President does not select any of the names submitted under subparagraphs (A) and (B), then whoever submitted such list may supplement the lists provided in this subsection with additional names.

(D) The Category A member shall maintain a primary residence in the territory or have a primary place of business in the territory.

(E) With respect to the appointment of a Board member in Category A, B, C, D, or E, such an appointment shall be by and with the advice and consent of the Senate, unless the President appoints an individual from a list, as provided in this subsection, in which case no Senate confirmation is required.

(F) In the event of a vacancy of a Category A, B, C, D, or E Board seat, the corresponding congressional leader referenced in subparagraph (A) shall submit a list pursuant to this subsection within a timely manner of the Board member's resignation or removal becoming effective.

(G) With respect to an Oversight Board for Puerto Rico, in the event any of the 7 members have not been appointed by September 1, 2016, then the

President shall appoint an individual from the list for the current vacant category by September 15, 2016, provided that such list includes at least 2 individuals per vacancy who meet the requirements set forth in subsection (f) and section 2129 of this title, and are willing to serve.

(3) Ex officio member

The Governor, or the Governor's designee, shall be an ex officio member of the Oversight Board without voting rights.

(4) Chair

The voting members of the Oversight Board shall designate one of the voting members of the Oversight Board as the Chair of the Oversight Board (referred to hereafter in this chapter as the "Chair") within 30 days of the full appointment of the Oversight Board.

(5) Term of service

(A) In general

Each appointed member of the Oversight Board shall be appointed for a term of 3 years.

(B) Removal

The President may remove any member of the Oversight Board only for cause.

(C) Continuation of service until successor appointed

Upon the expiration of a term of office, a member of the Oversight Board may continue to serve until a successor has been appointed.

(D) Reappointment

An individual may serve consecutive terms as an appointed member, provided that such reappointment occurs in compliance with paragraph (6).

(6) Vacancies

A vacancy on the Oversight Board shall be filled in the same manner in which the original member was appointed.

(f) Eligibility for appointments

An individual is eligible for appointment as a member of the Oversight Board only if the individual—

(1) has knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and

(2) prior to appointment, an individual is not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.

(g) No compensation for service

Members of the Oversight Board shall serve without pay, but may receive reimbursement from the Oversight Board for any reasonable and necessary expenses incurred by reason of service on the Oversight Board.

(h) Adoption of bylaws for conducting business of Oversight Board

(1) In general

As soon as practicable after the appointment of all members and appointment of the Chair, the Oversight Board shall adopt bylaws, rules, and procedures governing its activities under this chapter, including procedures for hiring experts and consultants. Such bylaws, rules, and procedures shall be public documents, and shall be submitted by the Oversight Board upon adoption to the Governor, the Legislature, the President, and Congress. The Oversight Board may hire professionals as it determines to be necessary to carry out this chapter.

(2) Activities requiring approval of majority of members

Under the bylaws adopted pursuant to paragraph (1), the Oversight Board may conduct its operations under such procedures as it considers appropriate, except that an affirmative vote of a majority of the members of the Oversight Board's full appointed membership shall be required in order for the Oversight Board to approve a Fiscal Plan under section 2141 of this title, to approve a Budget under section 2142 of this title, to cause a legislative act not to be enforced under section 2144 of this title, or to approve or disapprove an infrastructure project as a Critical Project under section 2213 of this title.

(3) Adoption of rules and regulations of territorial government

The Oversight Board may incorporate in its bylaws, rules, and procedures under this subsection such rules and regulations of the territorial government as

it considers appropriate to enable it to carry out its activities under this chapter with the greatest degree of independence practicable.

(4) Executive session

Upon a majority vote of the Oversight Board's full voting membership, the Oversight Board may conduct its business in an executive session that consists solely of the Oversight Board's voting members and any professionals the Oversight Board determines necessary and is closed to the public, but only for the business items set forth as part of the vote to convene an executive session.

4. 48 U.S.C. 2123 (Supp. V 2017) provides:

Executive Director and staff of Oversight Board

(a) Executive Director

The Oversight Board shall have an Executive Director who shall be appointed by the Chair with the consent of the Oversight Board. The Executive Director shall be paid at a rate determined by the Oversight Board.

(b) Staff

With the approval of the Chair, the Executive Director may appoint and fix the pay of additional personnel as the Executive Director considers appropriate, except that no individual appointed by the Executive Director may be paid at a rate greater than the rate of pay for the Executive Director unless the Oversight Board provides for otherwise. The staff shall include a Revitalization Coordinator appointed pursuant to subchapter V of this

chapter. Any such personnel may include private citizens, employees of the Federal Government, or employees of the territorial government, provided, however, that the Executive Director may not fix the pay of employees of the Federal Government or the territorial government.

(c) Inapplicability of certain employment and procurement laws

The Executive Director and staff of the Oversight Board may be appointed and paid without regard to any provision of the laws of the covered territory or the Federal Government governing appointments and salaries. Any provision of the laws of the covered territory governing procurement shall not apply to the Oversight Board.

(d) Staff of Federal agencies

Upon request of the Chair, the head of any Federal department or agency may detail, on a reimbursable or nonreimbursable basis, and in accordance with the Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371-3375), any of the personnel of that department or agency to the Oversight Board to assist it in carrying out its duties under this chapter.

(e) Staff of territorial government

Upon request of the Chair, the head of any department or agency of the covered territory may detail, on a reimbursable or nonreimbursable basis, any of the personnel of that department or agency to the Oversight Board to assist it in carrying out its duties under this chapter.

5. 48 U.S.C. 2124 (Supp. V 2017) provides:

Powers of Oversight Board

(a) Hearings and sessions

The Oversight Board may, for the purpose of carrying out this chapter, hold hearings, sit and act at times and places, take testimony, and receive evidence as the Oversight Board considers appropriate. The Oversight Board may administer oaths or affirmations to witnesses appearing before it.

(b) Powers of members and agents

Any member or agent of the Oversight Board may, if authorized by the Oversight Board, take any action that the Oversight Board is authorized to take by this section.

(c) Obtaining official data

(1) From Federal government

Notwithstanding sections 552 (commonly known as the Freedom of Information Act), 552a (commonly known as the Privacy Act of 1974), and 552b (commonly known as the Government in the Sunshine Act) of title 5, the Oversight Board may secure directly from any department or agency of the United States information necessary to enable it to carry out this chapter, with the approval of the head of that department or agency.

(2) From territorial government

Notwithstanding any other provision of law, the Oversight Board shall have the right to secure copies, whether written or electronic, of such records, documents, information, data, or metadata from the territorial government necessary to enable the Oversight

Board to carry out its responsibilities under this chapter. At the request of the Oversight Board, the Oversight Board shall be granted direct access to such information systems, records, documents, information, or data as will enable the Oversight Board to carry out its responsibilities under this chapter. The head of the entity of the territorial government responsible shall provide the Oversight Board with such information and assistance (including granting the Oversight Board direct access to automated or other information systems) as the Oversight Board requires under this paragraph.

(d) Obtaining creditor information

(1) Upon request of the Oversight Board, each creditor or organized group of creditors of a covered territory or covered territorial instrumentality seeking to participate in voluntary negotiations shall provide to the Oversight Board, and the Oversight Board shall make publicly available to any other participant, a statement setting forth—

(A) the name and address of the creditor or of each member of an organized group of creditors; and

(B) the nature and aggregate amount of claims or other economic interests held in relation to the issuer as of the later of—

(i) the date the creditor acquired the claims or other economic interests or, in the case of an organized group of creditors, the date the group was formed; or

(ii) the date the Oversight Board was formed.

(2) For purposes of this subsection, an organized group shall mean multiple creditors that are—

(A) acting in concert to advance their common interests, including, but not limited to, retaining legal counsel to represent such multiple entities; and

(B) not composed entirely of affiliates or insiders of one another.

(3) The Oversight Board may request supplemental statements to be filed by each creditor or organized group of creditors quarterly, or if any fact in the most recently filed statement has changed materially.

(e) Gifts, bequests, and devises

The Oversight Board may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Oversight Board. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in such account as the Oversight Board may establish and shall be available for disbursement upon order of the Chair, consistent with the Oversight Board's bylaws, or rules and procedures. All gifts, bequests or devises and the identities of the donors shall be publicly disclosed by the Oversight Board within 30 days of receipt.

(f) Subpoena power

(1) In general

The Oversight Board may issue subpoenas requiring the attendance and testimony of witnesses and the production of books, records, correspondence, mem-

oranda, papers, documents, electronic files, metadata, tapes, and materials of any nature relating to any matter under investigation by the Oversight Board. Jurisdiction to compel the attendance of witnesses and the production of such materials shall be governed by the statute setting forth the scope of personal jurisdiction exercised by the covered territory, or in the case of Puerto Rico, 32 L.P.R.A. App. III. R. 4. 7., as amended.

(2) Failure to obey a subpoena

If a person refuses to obey a subpoena issued under paragraph (1), the Oversight Board may apply to the court of first instance of the covered territory. Any failure to obey the order of the court may be punished by the court in accordance with civil contempt laws of the covered territory.

(3) Service of subpoenas

The subpoena of the Oversight Board shall be served in the manner provided by the rules of procedure for the courts of the covered territory, or in the case of Puerto Rico, the Rules of Civil Procedure of Puerto Rico, for subpoenas issued by the court of first instance of the covered territory.

(g) Authority to enter into contracts

The Executive Director may enter into such contracts as the Executive Director considers appropriate (subject to the approval of the Chair) consistent with the Oversight Board's bylaws, rules, and regulations to carry out the Oversight Board's responsibilities under this chapter.

(h) Authority to enforce certain laws of the covered territory

The Oversight Board shall ensure the purposes of this chapter are met, including by ensuring the prompt enforcement of any applicable laws of the covered territory prohibiting public sector employees from participating in a strike or lockout. In the application of this subsection, with respect to Puerto Rico, the term "applicable laws" refers to 3 L.P.R.A. 1451q and 3 L.P.R.A. 1451r, as amended.

(i) Voluntary agreement certification

(1) In general

The Oversight Board shall issue a certification to a covered territory or covered territorial instrumentality if the Oversight Board determines, in its sole discretion, that such covered territory or covered territorial instrumentality, as applicable, has successfully reached a voluntary agreement with holders of its Bond Claims to restructure such Bond Claims—

(A) except as provided in subparagraph (C), if an applicable Fiscal Plan has been certified, in a manner that provides for a sustainable level of debt for such covered territory or covered territorial instrumentality, as applicable, and is in conformance with the applicable certified Fiscal Plan;

(B) except as provided in subparagraph (C), if an applicable Fiscal Plan has not yet been certified, in a manner that provides, in the Oversight Board's sole discretion, for a sustainable level of debt for such covered territory or covered territorial instrumentality; or

(C) notwithstanding subparagraphs (A) and (B), if an applicable Fiscal Plan has not yet been certified and the voluntary agreement is limited solely to an extension of applicable principal maturities and interest on Bonds issued by such covered territory or covered territorial instrumentality, as applicable, for a period of up to one year during which time no interest will be paid on the Bond Claims affected by the voluntary agreement.

(2) Effectiveness

The effectiveness of any voluntary agreement referred to in paragraph (1) shall be conditioned on—

(A) the Oversight Board delivering the certification described in paragraph (1); and

(B) the agreement of a majority in amount of the Bond Claims of a covered territory or a covered territorial instrumentality that are to be affected by such agreement, provided, however, that such agreement is solely for purposes of serving as a Qualifying Modification pursuant to subsection[1] 2231(g) of this title and shall not alter existing legal rights of holders of Bond Claims against such covered territory or covered territorial instrumentality that have not assented to such agreement until an order approving the Qualifying Modification has been entered pursuant to section 2231(m)(1)(D) of this title.

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[1] So in original. Probably should be a "section".

(3) Preexisting voluntary agreements

Any voluntary agreement that the territorial government or any territorial instrumentality has executed before May 18, 2016, with holders of a majority in amount of Bond Claims that are to be affected by such agreement to restructure such Bond Claims shall be deemed to be in conformance with the requirements of this subsection.

(j) Restructuring filings

(1) In general

Subject to paragraph (3), before taking an action described in paragraph (2) on behalf of a debtor or potential debtor in a case under subchapter III, the Oversight Board must certify the action.

(2) Actions described

The actions referred to in paragraph (1) are—

(A) the filing of a petition; or

(B) the submission or modification of a plan of adjustment.

(3) Condition for plans of adjustment

The Oversight Board may certify a plan of adjustment only if it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan.

(k) Civil actions to enforce powers

The Oversight Board may seek judicial enforcement of its authority to carry out its responsibilities under this chapter.

(*l*) Penalties

(1) Acts prohibited

Any officer or employee of the territorial government who prepares, presents, or certifies any information or report for the Oversight Board or any of its agents that is intentionally false or misleading, or, upon learning that any such information is false or misleading, fails to immediately advise the Oversight Board or its agents thereof in writing, shall be subject to prosecution and penalties under any laws of the territory prohibiting the provision of false information to government officials, which in the case of Puerto Rico shall include 33 L.P.R.A. 4889, as amended.

(2) Administrative discipline

In addition to any other applicable penalty, any officer or employee of the territorial government who knowingly and willfully violates paragraph (1) or takes any such action in violation of any valid order of the Oversight Board or fails or refuses to take any action required by any such order, shall be subject to appropriate administrative discipline, including (when appropriate) suspension from duty without pay or removal from office, by order of the Governor.

(3) Report by Governor on disciplinary actions taken

In the case of a violation of paragraph (2) by an officer or employee of the territorial government, the Governor shall immediately report to the Oversight Board all pertinent facts together with a statement of the action taken thereon.

(m) Electronic reporting

The Oversight Board may, in consultation with the Governor, ensure the prompt and efficient payment and administration of taxes through the adoption of electronic reporting, payment and auditing technologies.

(n) Administrative support services

Upon the request of the Oversight Board, the Administrator of General Services or other appropriate Federal agencies shall promptly provide to the Oversight Board, on a reimbursable or non-reimbursable basis, the administrative support services necessary for the Oversight Board to carry out its responsibilities under this chapter.

(*o*) Investigation of disclosure and selling practices

The Oversight Board may investigate the disclosure and selling practices in connection with the purchase of bonds issued by a covered territory for or on behalf of any retail investors including any underrepresentation of risk for such investors and any relationships or conflicts of interest maintained by such broker, dealer, or investment adviser is as provided in applicable laws and regulations.

(p) Findings of any investigation

The Oversight Board shall make public the findings of any investigation referenced in subsection (*o*).

6. 48 U.S.C. 2127 (Supp. V 2017) provides:

Budget and funding for operation of Oversight Board

(a) Submission of budget

The Oversight Board shall submit a budget for each fiscal year during which the Oversight Board is in operation, to the President, the House of Representatives Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature.

(b) Funding

The Oversight Board shall use its powers with respect to the Territory Budget of the covered territory to ensure that sufficient funds are available to cover all expenses of the Oversight Board.

(1) Permanent funding

Within 30 days after June 30, 2016, the territorial government shall designate a dedicated funding source, not subject to subsequent legislative appropriations, sufficient to support the annual expenses of the Oversight Board as determined in the Oversight Board's sole and exclusive discretion.

(2)(A) Initial funding

On the date of establishment of an Oversight Board in accordance with section 2121(b) of this title and on the 5th day of each month thereafter, the Governor of the covered territory shall transfer or cause to be transferred the greater of $2,000,000 or such amount as shall be determined by the Oversight Board pursuant to subsection (a) to a new account established by the territorial government, which shall be

available to and subject to the exclusive control of the Oversight Board, without any legislative appropriations of the territorial government.

(B) Termination

The initial funding requirements under subparagraph (A) shall terminate upon the territorial government designating a dedicated funding source not subject to subsequent legislative appropriations under paragraph (1).

(3) Remission of excess funds

If the Oversight Board determines in its sole discretion that any funds transferred under this subsection exceed the amounts required for the Oversight Board's operations as established pursuant to subsection (a), any such excess funds shall be periodically remitted to the territorial government.

7. 48 U.S.C. 2128 (Supp. V 2017) provides:

Autonomy of Oversight Board

(a) In general

Neither the Governor nor the Legislature may—

(1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or

(2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board.

(b) Oversight Board legal representation

In any action brought by, on behalf of, or against the Oversight Board, the Oversight Board shall be represented by such counsel as it may hire or retain so long as the representation complies with the applicable professional rules of conduct governing conflicts of interests.

8. 48 U.S.C. 2129 (Supp. V 2017) provides:

Ethics

(a) Conflict of interest

Notwithstanding any ethics provision governing employees of the covered territory, all members and staff of the Oversight Board shall be subject to the Federal conflict of interest requirements described in section 208 of title 18.

(b) Financial disclosure

Notwithstanding any ethics provision governing employees of the covered territory, all members of the Oversight Board and staff designated by the Oversight Board shall be subject to disclosure of their financial interests, the contents of which shall conform to the same requirements set forth in section 102 of the Ethics in Government Act of 1978 (5 U.S.C. App.).

9. 48 U.S.C. 2141 (Supp. V 2017) provides:

Approval of Fiscal Plans

(a) In general

As soon as practicable after all of the members and the Chair have been appointed to the Oversight Board

in accordance with section 2121(e) of this title in the fiscal year in which the Oversight Board is established, and in each fiscal year thereafter during which the Oversight Board is in operation, the Oversight Board shall deliver a notice to the Governor providing a schedule for the process of development, submission, approval, and certification of Fiscal Plans. The notice may also set forth a schedule for revisions to any Fiscal Plan that has already been certified, which revisions must be subject to subsequent approval and certification by the Oversight Board. The Oversight Board shall consult with the Governor in establishing a schedule, but the Oversight Board shall retain sole discretion to set or, by delivery of a subsequent notice to the Governor, change the dates of such schedule as it deems appropriate and reasonably feasible.

(b) Requirements

(1) In general

A Fiscal Plan developed under this section shall, with respect to the territorial government or covered territorial instrumentality, provide a method to achieve fiscal responsibility and access to the capital markets, and—

(A) provide for estimates of revenues and expenditures in conformance with agreed accounting standards and be based on—

(i) applicable laws; or

(ii) specific bills that require enactment in order to reasonably achieve the projections of the Fiscal Plan;

(B) ensure the funding of essential public services;

(C) provide adequate funding for public pension systems;

(D) provide for the elimination of structural deficits;

(E) for fiscal years covered by a Fiscal Plan in which a stay under subchapters III or IV is not effective, provide for a debt burden that is sustainable;

(F) improve fiscal governance, accountability, and internal controls;

(G) enable the achievement of fiscal targets;

(H) create independent forecasts of revenue for the period covered by the Fiscal Plan;

(I) include a debt sustainability analysis;

(J) provide for capital expenditures and investments necessary to promote economic growth;

(K) adopt appropriate recommendations submitted by the Oversight Board under section 2145(a) of this title;

(L) include such additional information as the Oversight Board deems necessary;

(M) ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory, unless per-

mitted by the constitution of the territory, an approved plan of adjustment under subchapter III, or a Qualifying Modification approved under subchater VI; and

(N) respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to June 30, 2016.

(2) Term

A Fiscal Plan developed under this section shall cover a period of fiscal years as determined by the Oversight Board in its sole discretion but in any case a period of not less than 5 fiscal years from the fiscal year in which it is certified by the Oversight Board.

(c) Development, review, approval, and certification of Fiscal Plans

(1) Timing requirement

The Governor may not submit to the Legislature a Territory Budget under section 2142 of this title for a fiscal year unless the Oversight Board has certified the Territory Fiscal Plan for that fiscal year in accordance with this subsection, unless the Oversight Board in its sole discretion waives this requirement.

(2) Fiscal Plan developed by Governor

The Governor shall submit to the Oversight Board any proposed Fiscal Plan required by the Oversight Board by the time specified in the notice delivered under subsection (a).

(3) Review by the Oversight Board

The Oversight Board shall review any proposed Fiscal Plan to determine whether it satisfies the requirements set forth in subsection (b) and, if the Oversight Board determines in its sole discretion that the proposed Fiscal Plan—

(A) satisfies such requirements, the Oversight Board shall approve the proposed Fiscal Plan; or

(B) does not satisfy such requirements, the Oversight Board shall provide to the Governor—

(i) a notice of violation that includes recommendations for revisions to the applicable Fiscal Plan; and

(ii) an opportunity to correct the violation in accordance with subsection (d)(1).

(d) Revised Fiscal Plan

(1) In general

If the Governor receives a notice of violation under subsection (c)(3), the Governor shall submit to the Oversight Board a revised proposed Fiscal Plan in accordance with subsection (b) by the time specified in the notice delivered under subsection (a). The Governor may submit as many revised Fiscal Plans to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits.

(2) Development by Oversight Board

If the Governor fails to submit to the Oversight Board a Fiscal Plan that the Oversight Board determines in its sole discretion satisfies the requirements

set forth in subsection (b) by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop and submit to the Governor and the Legislature a Fiscal Plan that satisfies the requirements set forth in subsection (b).

(e) Approval and certification

(1) Approval of Fiscal Plan developed by Governor

If the Oversight Board approves a Fiscal Plan under subsection (c)(3), it shall deliver a compliance certification for such Fiscal Plan to the Governor and the Legislature.

(2) Deemed approval of Fiscal Plan developed by Oversight Board

If the Oversight Board develops a Fiscal Plan under subsection (d)(2), such Fiscal Plan shall be deemed approved by the Governor, and the Oversight Board shall issue a compliance certification for such Fiscal Plan to the Governor and the Legislature.

(f) Joint development of Fiscal Plan

Notwithstanding any other provision of this section, if the Governor and the Oversight Board jointly develop a Fiscal Plan for the fiscal year that meets the requirements under this section, and that the Governor and the Oversight Board certify that the fiscal plan[1] reflects a consensus between the Governor and the Oversight Board, then such Fiscal Plan shall serve as the Fiscal Plan for the territory or territorial instrumentality for that fiscal year.

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[1] So in original. Probably should be "Fiscal Plan".

10. 48 U.S.C. 2142 (Supp. V 2017) provides:

Approval of Budgets

(a) Reasonable schedule for development of Budgets

As soon as practicable after all of the members and the Chair have been appointed to the Oversight Board in the fiscal year in which the Oversight Board is established, and in each fiscal year thereafter during which the Oversight Board is in operation, the Oversight Board shall deliver a notice to the Governor and the Legislature providing a schedule for developing, submitting, approving, and certifying Budgets for a period of fiscal years as determined by the Oversight Board in its sole discretion but in any case a period of not less than one fiscal year following the fiscal year in which the notice is delivered. The notice may also set forth a schedule for revisions to Budgets that have already been certified, which revisions must be subject to subsequent approval and certification by the Oversight Board. The Oversight Board shall consult with the Governor and the Legislature in establishing a schedule, but the Oversight Board shall retain sole discretion to set or, by delivery of a subsequent notice to the Governor and the Legislature, change the dates of such schedule as it deems appropriate and reasonably feasible.

(b) Revenue forecast

The Oversight Board shall submit to the Governor and Legislature a forecast of revenues for the period covered by the Budgets by the time specified in the notice delivered under subsection (a), for use by the Governor in developing the Budget under subsection (c).

(c) Budgets developed by Governor

(1) Governor's proposed budgets

The Governor shall submit to the Oversight Board proposed Budgets by the time specified in the notice delivered under subsection (a). In consultation with the Governor in accordance with the process specified in the notice delivered under subsection (a), the Oversight Board shall determine in its sole discretion whether each proposed Budget is compliant with the applicable Fiscal Plan and—

(A) if a proposed Budget is a compliant budget, the Oversight Board shall—

(i) approve the Budget; and

(ii) if the Budget is a Territory Budget, submit the Territory Budget to the Legislature; or

(B) if the Oversight Board determines that the Budget is not a compliant budget, the Oversight Board shall provide to the Governor—

(i) a notice of violation that includes a description of any necessary corrective action; and

(ii) an opportunity to correct the violation in accordance with paragraph (2).

(2) Governor's revisions

The Governor may correct any violations identified by the Oversight Board and submit a revised proposed Budget to the Oversight Board in accordance with paragraph (1). The Governor may submit as many revised Budgets to the Oversight Board as

the schedule established in the notice delivered under subsection (a) permits. If the Governor fails to develop a Budget that the Oversight Board determines is a compliant budget by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop and submit to the Governor, in the case of an Instrumentality Budget, and to the Governor and the Legislature, in the case of a Territory Budget, a revised compliant budget.

(d) Budget approval by Legislature

(1) Legislature adopted budget

The Legislature shall submit to the Oversight Board the Territory Budget adopted by the Legislature by the time specified in the notice delivered under subsection (a). The Oversight Board shall determine whether the adopted Territory Budget is a compliant budget and—

(A) if the adopted Territory Budget is a compliant budget, the Oversight Board shall issue a compliance certification for such compliant budget pursuant to subsection (e); and

(B) if the adopted Territory Budget is not a compliant budget, the Oversight Board shall provide to the Legislature—

(i) a notice of violation that includes a description of any necessary corrective action; and

(ii) an opportunity to correct the violation in accordance with paragraph (2).

(2) Legislature's revisions

The Legislature may correct any violations identified by the Oversight Board and submit a revised Territory Budget to the Oversight Board in accordance with the process established under paragraph (1) and by the time specified in the notice delivered under subsection (a). The Legislature may submit as many revised adopted Territory Budgets to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits. If the Legislature fails to adopt a Territory Budget that the Oversight Board determines is a compliant budget by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop a revised Territory Budget that is a compliant budget and submit it to the Governor and the Legislature.

(e) Certification of Budgets

(1) Certification of developed and approved Territory Budgets

If the Governor and the Legislature develop and approve a Territory Budget that is a compliant budget by the day before the first day of the fiscal year for which the Territory Budget is being developed and in accordance with the process established under subsections (c) and (d), the Oversight Board shall issue a compliance certification to the Governor and the Legislature for such Territory Budget.

(2) Certification of developed Instrumentality Budgets

If the Governor develops an Instrumentality Budget that is a compliant budget by the day before the first day of the fiscal year for which the Instrumentality Budget is being developed and in accordance

with the process established under subsection (c), the Oversight Board shall issue a compliance certification to the Governor for such Instrumentality Budget.

(3) Deemed certification of Territory Budgets

If the Governor and the Legislature fail to develop and approve a Territory Budget that is a compliant budget by the day before the first day of the fiscal year for which the Territory Budget is being developed, the Oversight Board shall submit a Budget to the Governor and the Legislature (including any revision to the Territory Budget made by the Oversight Board pursuant to subsection (d)(2)) and such Budget shall be—

(A) deemed to be approved by the Governor and the Legislature;

(B) the subject of a compliance certification issued by the Oversight Board to the Governor and the Legislature; and

(C) in full force and effect beginning on the first day of the applicable fiscal year.

(4) Deemed certification of Instrumentality Budgets

If the Governor fails to develop an Instrumentality Budget that is a compliant budget by the day before the first day of the fiscal year for which the Instrumentality Budget is being developed, the Oversight Board shall submit an Instrumentality Budget to the Governor (including any revision to the Instrumentality Budget made by the Oversight Board pursuant to subsection (c)(2)) and such Budget shall be—

(A) deemed to be approved by the Governor;

(B) the subject of a compliance certification issued by the Oversight Board to the Governor; and

(C) in full force and effect beginning on the first day of the applicable fiscal year.

(f) Joint development of Budgets

Notwithstanding any other provision of this section, if, in the case of a Territory Budget, the Governor, the Legislature, and the Oversight Board, or in the case of an Instrumentality Budget, the Governor and the Oversight Board, jointly develop such Budget for the fiscal year that meets the requirements under this section, and that the relevant parties certify that such budget reflects a consensus among them, then such Budget shall serve as the Budget for the territory or territorial instrumentality for that fiscal year.

11. 48 U.S.C. 2143 (Supp. V 2017) provides:

Effect of finding of noncompliance with Budget

(a) Submission of reports

Not later than 15 days after the last day of each quarter of a fiscal year (beginning with the fiscal year determined by the Oversight Board), the Governor shall submit to the Oversight Board a report, in such form as the Oversight Board may require, describing—

(1) the actual cash revenues, cash expenditures, and cash flows of the territorial government for the

preceding quarter, as compared to the projected revenues, expenditures, and cash flows contained in the certified Budget for such preceding quarter; and

(2) any other information requested by the Oversight Board, which may include a balance sheet or a requirement that the Governor provide information for each covered territorial instrumentality separately.

(b) Initial action by Oversight Board

(1) In general

If the Oversight Board determines, based on reports submitted by the Governor under subsection (a), independent audits, or such other information as the Oversight Board may obtain, that the actual quarterly revenues, expenditures, or cash flows of the territorial government are not consistent with the projected revenues, expenditures, or cash flows set forth in the certified Budget for such quarter, the Oversight Board shall—

(A) require the territorial government to provide such additional information as the Oversight Board determines to be necessary to explain the inconsistency; and

(B) if the additional information provided under subparagraph (A) does not provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate, advise the territorial government to correct the inconsistency by implementing remedial action.

(2) Deadlines

The Oversight Board shall establish the deadlines by which the territorial government shall meet the requirements of subparagraphs (A) and (B) of paragraph (1).

(c) Certification

(1) Inconsistency

If the territorial government fails to provide additional information under subsection (b)(1)(A), or fails to correct an inconsistency under subsection (b)(1)(B), prior to the applicable deadline under subsection (b)(2), the Oversight Board shall certify to the President, the House of Representatives Committee on Natural Resources, the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature that the territorial government is inconsistent with the applicable certified Budget, and shall describe the nature and amount of the inconsistency.

(2) Correction

If the Oversight Board determines that the territorial government has initiated such measures as the Oversight Board considers sufficient to correct an inconsistency certified under paragraph (1), the Oversight Board shall certify the correction to the President, the House of Representatives Committee on Natural Resources, the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature.

(d) Budget reductions by Oversight Board

If the Oversight Board determines that the Governor, in the case of any then-applicable certified Instrumentality Budgets, and the Governor and the Legislature, in the case of the then-applicable certified Territory Budget, have failed to correct an inconsistency identified by the Oversight Board under subsection (c), the Oversight Board shall—

(1) with respect to the territorial government, other than covered territorial instrumentalities, make appropriate reductions in nondebt expenditures to ensure that the actual quarterly revenues and expenditures for the territorial government are in compliance with the applicable certified Territory Budget or, in the case of the fiscal year in which the Oversight Board is established, the budget adopted by the Governor and the Legislature; and

(2) with respect to covered territorial instrumentalities at the sole discretion of the Oversight Board—

(A) make reductions in nondebt expenditures to ensure that the actual quarterly revenues and expenses for the covered territorial instrumentality are in compliance with the applicable certified Budget or, in the case of the fiscal year in which the Oversight Board is established, the budget adopted by the Governor and the Legislature or the covered territorial instrumentality, as applicable; or

(B)(i) institute automatic hiring freezes at the covered territorial instrumentality; and

(ii) prohibit the covered territorial instrumentality from entering into any contract or engaging in any financial or other transactions, unless the contract or transaction was previously approved by the Oversight Board.

(e) Termination of Budget reductions

The Oversight Board shall cancel the reductions, hiring freezes, or prohibition on contracts and financial transactions under subsection (d) if the Oversight Board determines that the territorial government or covered territorial instrumentality, as applicable, has initiated appropriate measures to reduce expenditures or increase revenues to ensure that the territorial government or covered territorial instrumentality is in compliance with the applicable certified Budget or, in the case of the fiscal year in which the Oversight Board is established, the budget adopted by the Governor and the Legislature.

12. 48 U.S.C. 2144 (Supp. V 2017) provides:

Review of activities to ensure compliance with Fiscal Plan

(a) Submission of legislative acts to Oversight Board

(1) Submission of acts

Except to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after a territorial government duly enacts any law during any fiscal year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

(2) Cost estimate; certification of compliance or non-compliance

The Governor shall include with each law submitted to the Oversight Board under paragraph (1) the following:

(A) A formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues.

(B) If the appropriate entity described in subparagraph (A) finds that the law is not significantly inconsistent with the Fiscal Plan for the fiscal year, it shall issue a certification of such finding.

(C) If the appropriate entity described in subparagraph (A) finds that the law is significantly inconsistent with the Fiscal Plan for the fiscal year, it shall issue a certification of such finding, together with the entity's reasons for such finding.

(3) Notification

The Oversight Board shall send a notification to the Governor and the Legislature if—

(A) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by the estimate required under paragraph (2)(A);

(B) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by either a certification described in paragraph (2)(B) or (2)(C); or

(C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

(4) Opportunity to respond to notification

(A) Failure to provide estimate or certification

After sending a notification to the Governor and the Legislature under paragraph (3)(A) or (3)(B) with respect to a law, the Oversight Board may direct the Governor to provide the missing estimate or certification (as the case may be), in accordance with such procedures as the Oversight Board may establish.

(B) Submission of certification of significant inconsistency with Fiscal Plan and Budget

In accordance with such procedures as the Oversight Board may establish, after sending a notification to the Governor and Legislature under paragraph (3)(C) that a law is significantly inconsistent with the Fiscal Plan, the Oversight Board shall direct the territorial government to—

(i) correct the law to eliminate the inconsistency; or

(ii) provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.

(5) Failure to comply

If the territorial government fails to comply with a direction given by the Oversight Board under paragraph (4) with respect to a law, the Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law.

(6) Preliminary review of proposed acts

At the request of the Legislature, the Oversight Board may conduct a preliminary review of proposed legislation before the Legislature to determine whether the legislation as proposed would be consistent with the applicable Fiscal Plan under this subtitle,[1] except that any such preliminary review shall not be binding on the Oversight Board in reviewing any law subsequently submitted under this subsection.

(b) Effect of approved Fiscal Plan on contracts, rules, and regulations

(1) Transparency in contracting

The Oversight Board shall work with a covered territory's office of the comptroller or any functionally equivalent entity to promote compliance with the applicable law of any covered territory that requires agencies and instrumentalities of the territorial government to maintain a registry of all contracts executed, including amendments thereto, and to remit a copy to the office of the comptroller for inclusion in a

[1] See References in Text note below.

comprehensive database available to the public. With respect to Puerto Rico, the term "applicable law" refers to 2 L.P.R.A. 97, as amended.

(2) Authority to review certain contracts

The Oversight Board may establish policies to require prior Oversight Board approval of certain contracts, including leases and contracts to a governmental entity or government-owned corporations rather than private enterprises that are proposed to be executed by the territorial government, to ensure such proposed contracts promote market competition and are not inconsistent with the approved Fiscal Plan.

(3) Sense of Congress

It is the sense of Congress that any policies established by the Oversight Board pursuant to paragraph (2) should be designed to make the government contracting process more effective, to increase the public's faith in this process, to make appropriate use of the Oversight Board's time and resources, to make the territorial government a facilitator and not a competitor to private enterprise, and to avoid creating any additional bureaucratic obstacles to efficient contracting.

(4) Authority to review certain rules, regulations, and executive orders

The provisions of this paragraph shall apply with respect to a rule, regulation, or executive order proposed to be issued by the Governor (or the head of any department or agency of the territorial government) in the same manner as such provisions apply to a contract.

(5) Failure to comply

If a contract, rule, regulation, or executive order fails to comply with policies established by the Oversight Board under this subsection, the Oversight Board may take such actions as it considers necessary to ensure that such contract, rule, executive order or regulation will not adversely affect the territorial government's compliance with the Fiscal Plan, including by preventing the execution or enforcement of the contract, rule, executive order or regulation.

(c) Restrictions on budgetary adjustments

(1) Submissions of requests to Oversight Board

If the Governor submits a request to the Legislature for the reprogramming of any amounts provided in a certified Budget, the Governor shall submit such request to the Oversight Board, which shall analyze whether the proposed reprogramming is significantly inconsistent with the Budget, and submit its analysis to the Legislature as soon as practicable after receiving the request.

(2) No action permitted until analysis received

The Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget.

(3) Prohibition on action until Oversight Board is appointed

(A) During the period after a territory becomes a covered territory and prior to the appointment of

all members and the Chair of the Oversight Board, such covered territory shall not enact new laws that either permit the transfer of any funds or assets outside the ordinary course of business or that are inconsistent with the constitution or laws of the territory as of June 30, 2016, provided that any executive or legislative action authorizing the movement of funds or assets during this time period may be subject to review and rescission by the Oversight Board upon appointment of the Oversight Board's full membership.

(B) Upon appointment of the Oversight Board's full membership, the Oversight Board may review, and in its sole discretion, rescind, any law that—

(i) was enacted during the period between, with respect to Puerto Rico, May 4, 2016; or with respect to any other territory, 45 days prior to the establishment of the Oversight Board for such territory, and the date of appointment of all members and the Chair of the Oversight Board; and

(ii) alters pre-existing priorities of creditors in a manner outside the ordinary course of business or inconsistent with the territory's constitution or the laws of the territory as of, in the case of Puerto Rico, May 4, 2016, or with respect to any other territory, 45 days prior to the establishment of the Oversight Board for such territory;

but such rescission shall only be to the extent that the law alters such priorities.

(d) Implementation of Federal programs

In taking actions under this chapter, the Oversight Board shall not exercise applicable authorities to impede territorial actions taken to—

(1) comply with a court-issued consent decree or injunction, or an administrative order or settlement with a Federal agency, with respect to Federal programs;

(2) implement a federally authorized or federally delegated program;

(3) implement territorial laws, which are consistent with a certified Fiscal Plan, that execute Federal requirements and standards; or

(4) preserve and maintain federally funded mass transportation assets.

13. 48 U.S.C. 2147 (Supp. V 2017) provides:

Oversight Board authority related to debt issuance

For so long as the Oversight Board remains in operation, no territorial government may, without the prior approval of the Oversight Board, issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt.

14. 48 U.S.C. 2149 (Supp. V 2017) provides:

Termination of Oversight Board

An Oversight Board shall terminate upon certification by the Oversight Board that—

(1) the applicable territorial government has adequate access to short-term and long-term credit markets at reasonable interest rates to meet the borrowing needs of the territorial government; and

(2) for at least 4 consecutive fiscal years—

(A) the territorial government has developed its Budgets in accordance with modified accrual accounting standards; and

(B) the expenditures made by the territorial government during each fiscal year did not exceed the revenues of the territorial government during that year, as determined in accordance with modified accrual accounting standards.

15. 48 U.S.C. 2161 (Supp. V 2017) provides:

Applicability of other laws; definitions

(a) Sections applicable to cases under this subchapter

Sections 101 (except as otherwise provided in this section), 102, 104, 105, 106, 107, 108, 112, 333, 344, 347(b), 349, 350(b), 351, 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(2), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 902 (except as otherwise provided in this section), 922, 923, 924, 925, 926, 927, 928, 942, 944, 945, 946, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1123(d), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, 1145, and 1146(a) of title 11 apply in a case under

this subchapter and section 930 of title 11 applies in a case under this subchapter; however, section 930 shall not apply in any case during the first 120 days after the date on which such case is commenced under this subchapter.

(b) Meanings of terms

A term used in a section of title 11, made applicable in a case under this subchapter by subsection (a), has the meaning given to the term for the purpose of the applicable section, unless the term is otherwise defined in this subchapter.

(c) Definitions

In this subchapter:

(1) Affiliate

The term "affiliate" means, in addition to the definition made applicable in a case under this subchapter by subsection (a)—

(A) for a territory, any territorial instrumentality; and

(B) for a territorial instrumentality, the governing territory and any of the other territorial instrumentalities of the territory.

(2) Debtor

The term "debtor" means the territory or covered territorial instrumentality concerning which a case under this subchapter has been commenced.

(3) Holder of a claim or interest

The term "holder of a claim or interest", when used in section 1126 of title 11, made applicable in a case under this subchapter by subsection (a)—

(A) shall exclude any Issuer or Authorized Instrumentality of the Territory Government Issuer (as defined under subchapter VI of this chapter) or a corporation, trust or other legal entity that is controlled by the Issuer or an Authorized Territorial Instrumentality of the Territory Government Issuer, provided that the beneficiaries of such claims, to the extent they are not referenced in this subparagraph, shall not be excluded, and that, for each excluded trust or other legal entity, the court shall, upon the request of any participant or beneficiary of such trust or entity, at any time after the commencement of the case, order the appointment of a separate committee of creditors pursuant to section 1102(a)(2) of title 11; and

(B) with reference to Insured Bonds, shall mean the monoline insurer insuring such Insured Bond to the extent such insurer is granted the right to vote Insured Bonds for purposes of directing remedies or consenting to proposed amendments or modifications as provided in the applicable documents pursuant to which such Insured Bond was issued and insured.

(4) Insured Bond

The term "Insured Bond" means a bond subject to a financial guarantee or similar insurance contract, policy and/or surety issued by a monoline insurer.

(5) Property of the estate

The term "property of the estate", when used in a section of title 11 made applicable in a case under this subchapter by subsection (a), means property of the debtor.

(6) State

The term "State"[1] when used in a section of title 11 made applicable in a case under this subchapter by subsection (a)[1] means State or territory when used in reference to the relationship of a State to the municipality of the State or the territorial instrumentality of a territory, as applicable.

(7) Trustee

The term "trustee", when used in a section of title 11 made applicable in a case under this subchapter by subsection (a), means the Oversight Board, except as provided in section 926 of title 11. The term "trustee" as described in this paragraph does not mean the U.S. Trustee, an official of the United States Trustee Program, which is a component of the United States Department of Justice.

(d) Reference to subchapter

Solely for purposes of this subchapter, a reference to "this title", "this chapter", or words of similar import in a section of title 11 made applicable in a case under this subchapter by subsection (a) or to "this title", "title 11", "Chapter 9", "Chapter 11", "the Code", or words of sim-

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[1] So in original. Probably should be followed by a comma.

ilar import in the Federal Rules of Bankruptcy Procedure made applicable in a case under this subchapter shall be deemed to be a reference to this subchapter.

(e) Substantially similar

In determining whether claims are "substantially similar" for the purpose of section 1122 of title 11, made applicable in a case under this subchapter by subsection (a), the Oversight Board shall consider whether such claims are secured and whether such claims have priority over other claims.

(f) Operative clauses

A section made applicable in a case under this subchapter by subsection (a) that is operative if the business of the debtor is authorized to be operated is operative in a case under this subchapter.

16. 48 U.S.C. 2166 (Supp. V 2017) provides:

Jurisdiction

(a) Federal subject matter jurisdiction

The district courts shall have—

(1) except as provided in paragraph (2), original and exclusive jurisdiction of all cases under this subchapter; and

(2) except as provided in subsection (b), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, original but not exclusive jurisdiction of all civil proceedings arising under this subchapter,

or arising in or related to cases under this subchapter.

(b) Property jurisdiction

The district court in which a case under this subchapter is commenced or is pending shall have exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of the case.

(c) Personal jurisdiction

The district court in which a case under this subchapter is pending shall have personal jurisdiction over any person or entity.

(d) Removal, remand, and transfer

(1) Removal

A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce the police or regulatory power of the governmental unit, to the district court for the district in which the civil action is pending, if the district court has jurisdiction of the claim or cause of action under this section.

(2) Remand

The district court to which the claim or cause of action is removed under paragraph (1) may remand the claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291 or 1292 of title

28 or by the Supreme Court of the United States under section 1254 of title 28.

(3) Transfer

A district court shall transfer any civil proceeding arising under this subchapter, or arising in or related to a case under this subchapter, to the district court in which the case under this subchapter is pending.

(e) Appeal

(1) An appeal shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district court.

(2) The court of appeals for the circuit in which a case under this subchapter has venue pursuant to section 2167 of this title shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under this subchapter by the district court.

(3) The court of appeals for the circuit in which a case under this subchapter has venue pursuant to section 2167 of this title shall have jurisdiction to hear appeals of interlocutory orders or decrees if—

(A) the district court on its own motion or on the request of a party to the order or decree certifies that—

(i) the order or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the order or decree involves a question of law requiring the resolution of conflicting decisions; or

(iii) an immediate appeal from the order or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and

(B) the court of appeals authorizes the direct appeal of the order or decree.

(4) If the district court on its own motion or on the request of a party determines that a circumstance specified in clauses (i), (ii), or (iii) of paragraph (3)(A) exists, then the district court shall make the certification described in paragraph (3).

(5) The parties may supplement the certification with a short statement of the basis for the certification issued by the district court under paragraph (3)(A).

(6) Except as provided in section 2164(d) of this title, an appeal of an interlocutory order or decree does not stay any proceeding of the district court from which the appeal is taken unless the district court, or the court of appeals in which the appeal is pending, issues a stay of such proceedings pending the appeal.

(7) Any request for a certification in respect to an interlocutory appeal of an order or decree shall be made not later than 60 days after the entry of the order or decree.

(f) Reallocation of court staff

Notwithstanding any law to the contrary, the clerk of the court in which a case is pending shall reallocate as many staff and assistants as the clerk deems necessary

to ensure that the court has adequate resources to provide for proper case management.

17. 48 U.S.C. 2167 (Supp. V 2017) provides:

Venue

(a) In general

Venue shall be proper in—

(1) with respect to a territory, the district court for the territory or, for any territory that does not have a district court, the United States District Court for the District of Hawaii; and

(2) with respect to a covered territorial instrumentality, the district court for the territory in which the covered territorial instrumentality is located or, for any territory that does not have a district court, the United States District Court for the District of Hawaii.

(b) Alternative venue

(1) If the Oversight Board so determines in its sole discretion, then venue shall be proper in the district court for the jurisdiction in which the Oversight Board maintains an office that is located outside the territory.

(2) With respect to paragraph (1), the Oversight Board may consider, among other things—

(A) the resources of the district court to adjudicate a case or proceeding; and

(B) the impact on witnesses who may be called in such a case or proceeding.

18. 48 U.S.C. 2172 (Supp. V 2017) provides:

Filing of plan of adjustment

(a) Exclusivity

Only the Oversight Board, after the issuance of a certificate pursuant to section 2124(j) of this title, may file a plan of adjustment of the debts of the debtor.

(b) Deadline for filing plan

If the Oversight Board does not file a plan of adjustment with the petition, the Oversight Board shall file a plan of adjustment at the time set by the court.

19. 48 U.S.C. 2175 (Supp. V 2017) provides:

Role and capacity of Oversight Board

(a) Actions of Oversight Board

For the purposes of this subchapter, the Oversight Board may take any action necessary on behalf of the debtor to prosecute the case of the debtor, including—

(1) filing a petition under section 2164 of this title;

(2) submitting or modifying a plan of adjustment under sections 2172 and 2173 of this title; or

(3) otherwise generally submitting filings in relation to the case with the court.

(b) Representative of debtor

The Oversight Board in a case under this subchapter is the representative of the debtor.

20. 48 U.S.C. 2194 (Supp. V 2017) provides:

Automatic stay upon enactment

(a) Definitions

In this section:

(1) Liability

The term "Liability" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law related to such a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form, of which—

(A) the issuer, obligor, or guarantor is the Government of Puerto Rico; and

(B) the date of issuance or incurrence precedes June 30, 2016.

(2) Liability Claim

The term "Liability Claim" means, as it relates to a Liability—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable

remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(b) In general

Except as provided in subsection (c) of this section, the establishment of an Oversight Board for Puerto Rico (i.e., the enactment of this chapter) in accordance with section 2121 of this title operates with respect to a Liability as a stay, applicable to all entities (as such term is defined in section 101 of title 11), of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was or could have been commenced before the enactment of this chapter, or to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this chapter;

(2) the enforcement, against the Government of Puerto Rico or against property of the Government of Puerto Rico, of a judgment obtained before the enactment of this chapter;

(3) any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico;

(4) any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico;

(5) any act to create, perfect, or enforce against property of the Government of Puerto Rico any lien

to the extent that such lien secures a Liability Claim that arose before the enactment of this chapter;

(6) any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this chapter; and

(7) the setoff of any debt owing to the Government of Puerto Rico that arose before the enactment of this chapter against any Liability Claim against the Government of Puerto Rico.

(c) Stay not operable

The establishment of an Oversight Board for Puerto Rico in accordance with section 2121 of this title does not operate as a stay—

(1) solely under subsection (b)(1) of this section, of the continuation of, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was commenced on or before December 18, 2015; or

(2) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

(d) Continuation of stay

Except as provided in subsections (e), (f), and (g) the stay under subsection (b) continues until the earlier of—

(1) the later of—

(A) the later of—

(i) February 15, 2017; or

(ii) six months after the establishment of an Oversight Board for Puerto Rico as established by section 2121(b) of this title;

(B) the date that is 75 days after the date in subparagraph (A) if the Oversight Board delivers a certification to the Governor that, in the Oversight Board's sole discretion, an additional 75 days are needed to seek to complete a voluntary process under subchapter VI of this chapter with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

(C) the date that is 60 days after the date in subparagraph (A) if the district court to which an application has been submitted under subparagraph[1] 2231(m)(1)(D) of this title determines, in the exercise of the court's equitable powers, that an additional 60 days are needed to complete a voluntary process under subchapter VI of this chapter with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

(2) with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, the date on which a case is filed by or on behalf of the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, as applicable, under subchapter III.

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[1] So in original. Probably should be "section".

(e) Jurisdiction, relief from stay

(1) The United States District Court for the District of Puerto Rico shall have original and exclusive jurisdiction of any civil actions arising under or related to this section.

(2) On motion of or action filed by a party in interest and after notice and a hearing, the United States District Court for the District of Puerto Rico, for cause shown, shall grant relief from the stay provided under subsection (b) of this section.

(f) Termination of stay; hearing

Forty-five days after a request under subsection (e)(2) for relief from the stay of any act against property of the Government of Puerto Rico under subsection (b), such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (e)(2). A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (e)(2). The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (e)(2) if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the thirty-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(g) Relief to prevent irreparable damage

Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (b) as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (e) or (f).

(h) Act in violation of stay is void

Any order, judgment, or decree entered in violation of this section and any act taken in violation of this section is void, and shall have no force or effect, and any person found to violate this section may be liable for damages, costs, and attorneys' fees incurred in defending any action taken in violation of this section, and the Oversight Board or the Government of Puerto Rico may seek an order from the court enforcing the provisions of this section.

(i) Government of Puerto Rico

For purposes of this section, the term "Government of Puerto Rico", in addition to the definition set forth in section 2104(11) of this title, shall include—

(1) the individuals, including elected and appointed officials, directors, officers of and employees acting in their official capacity on behalf of the Government of Puerto Rico; and

(2) the Oversight Board, including the directors and officers of and employees acting in their official capacity on behalf of the Oversight Board.

(j) No default under existing contracts

(1) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, the holder of a Liability Claim or any other claim (as such term is defined in section 101 of title 11) may not exercise or continue to exercise any remedy under a contract or applicable law in respect to the Government of Puerto Rico or any of its property—

(A) that is conditioned upon the financial condition of, or the commencement of a restructuring, insolvency, bankruptcy, or other proceeding (or a similar or analogous process) by, the Government of Puerto Rico, including a default or an event of default thereunder; or

(B) with respect to Liability Claims—

(i) for the non-payment of principal or interest; or

(ii) for the breach of any condition or covenant.

(2) The term "remedy" as used in paragraph (1) shall be interpreted broadly, and shall include any right existing in law or contract, including any right to—

(A) setoff;

(B) apply or appropriate funds;

(C) seek the appointment of a custodian (as such term is defined in section 101(11) of title 11);

(D) seek to raise rates; or

(E) exercise control over property of the Government of Puerto Rico.

(3) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, a contract to which the Government of Puerto Rico is a party may not be terminated or modified, and any right or obligation under such contract may not be terminated or modified, solely because of a provision in such contract is conditioned on—

(A) the insolvency or financial condition of the Government of Puerto Rico at any time prior to the enactment of this chapter;

(B) the adoption of a resolution or establishment of an Oversight Board pursuant to section 2121 of this title; or

(C) a default under a separate contract that is due to, triggered by, or a result of the occurrence of the events or matters in paragraph (1)(B).

(4) Notwithstanding any contractual provision to the contrary and so long as a stay under this section is in effect, a counterparty to a contract with the Government of Puerto Rico for the provision of goods and services shall, unless the Government of Puerto Rico agrees to the contrary in writing, continue to perform all obligations under, and comply with the terms of, such contract, provided that the Government of Puerto Rico is not in default under such contract other than as a result of a condition specified in paragraph (3).

(k) Effect

This section does not discharge an obligation of the Government of Puerto Rico or release, invalidate, or impair any security interest or lien securing such obligation. This section does not impair or affect the imple-

mentation of any restructuring support agreement executed by the Government of Puerto Rico to be implemented pursuant to Puerto Rico law specifically enacted for that purpose prior to the enactment of this chapter or the obligation of the Government of Puerto Rico to proceed in good faith as set forth in any such agreement.

(*l*) Payments on Liabilities

Nothing in this section shall be construed to prohibit the Government of Puerto Rico from making any payment on any Liability when such payment becomes due during the term of the stay, and to the extent the Oversight Board, in its sole discretion, determines it is feasible, the Government of Puerto Rico shall make interest payments on outstanding indebtedness when such payments become due during the length of the stay.

(m) Findings

Congress finds the following:

(1) A combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing has created a fiscal emergency in Puerto Rico.

(2) As a result of its fiscal emergency, the Government of Puerto Rico has been unable to provide its citizens with effective services.

(3) The current fiscal emergency has also affected the long-term economic stability of Puerto Rico by contributing to the accelerated outmigration of residents and businesses.

(4) A comprehensive approach to fiscal, management, and structural problems and adjustments that

exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.

(5) Additionally, an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis.

(A) The stay advances the best interests common to all stakeholders, including but not limited to a functioning independent Oversight Board created pursuant to this chapter to determine whether to appear or intervene on behalf of the Government of Puerto Rico in any litigation that may have been commenced prior to the effectiveness or upon expiration of the stay.

(B) The stay is limited in nature and narrowly tailored to achieve the purposes of this chapter, including to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment based on accurate financial information that is reviewed by an independent authority or, at a minimum, receive a recovery from the Government of Puerto Rico equal to their best possible outcome absent the provisions of this chapter.

(6) Finally, the ability of the Government of Puerto Rico to obtain funds from capital markets in the future will be severely diminished without congressional action to restore its financial accountability and stability.

(n) Purposes

The purposes of this section are to—

(1) provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis;

(2) allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits;

(3) provide an oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring;

(4) make available a Federal restructuring authority, if necessary, to allow for an orderly adjustment of all of the Government of Puerto Rico's liabilities; and

(5) benefit the lives of 3.5 million American citizens living in Puerto Rico by encouraging the Government of Puerto Rico to resolve its longstanding fiscal governance issues and return to economic growth.

(*o*) Voting on voluntary agreements not stayed

Notwithstanding any provision in this section to the contrary, nothing in this section shall prevent the holder of a Liability Claim from voting on or consenting to a proposed modification of such Liability Claim under subchapter VI of this chapter.