No. 18-1334

In The
Supreme Court of the United States

FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, *ET AL.*,

Respondents.

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

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO SUPPORTING THE FIRST CIRCUIT'S RULING ON THE APPOINTMENTS CLAUSE ISSUE

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor and practitioner with expertise in constitutional law, federal practice and procedure, creditors' rights, and financial law. This *amicus curiae* filed *amicus curiae* briefs in *Lucia v. S.E.C.*, 585 U.S. ___, 138 S. Ct. 2044 (2018) ("*Lucia*"), a precedent essential to the disposition of the instant case. Furthermore, this *amicus curiae* has authored and edited scholarly articles on the Appointments Clause, *Lucia*, and creditors' rights, and regularly lectures on the precise topics found in the pending controversy. This case addresses the interpretation of the Appointments Clause of Article II of the Constitution, and implicates the appropriate methodology for the appointment of "officers of the United States." This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of Facts set forth by the Petitioner

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of the intent to file this brief, as required by Supreme Court Rule 37.3(a). All parties filed blanket consents to the filing of *amicus curiae* briefs.

herein, the Financial Oversight and Management Board for Puerto Rico.

SUMMARY OF ARGUMENT

Respectfully, the question presented must be answered in the affirmative, and the lower court's ruling on the Appointments Clause issue affirmed. Such an outcome shall propagate the Court's established Appointments Clause jurisprudence, most especially *Lucia*, its newest landmark in that domain, reinforce with precision the appropriate methodology for determining who are officers of the United States who must take office pursuant to the Appointments Clause, and add to the store of Article II precedent addressing a controversy which appears with regularity before this Court and the courts below. Above all else, the Court's decision herein shall rightly cabin executive power, uphold axioms of checks and balances, and assure the separation of powers, in particular Article II's structural constraints upon the appointment of officers of the United States.

ARGUMENT

I. THE APPOINTMENTS CLAUSE GOVERNS THE APPOINTMENT OF THE BOARD MEMBERS FOR REASON THAT THEY EXERCISE "SIGNIFICANT AUTHORITY," AS THAT TERM IS DEFINED IN *LUCIA* AND ITS ANTECEDENTS; THE BOARD MEMBERS ARE THEREFORE OFFICERS OF THE UNITED STATES, AND SUBJECT TO THE APPOINTMENTS CLAUSE.

Respectfully, the question presented must be answered in the affirmative. The Appointments Clause governs the appointment of the members of the Financial Oversight and Management Board for Puerto Rico (the "Board") for reason that they exercise "significant authority" pursuant to federal law. The Board members are therefore properly categorized as officers of the United States who must attain office in a manner compliant with the Appointments Clause.

The Appointments Clause prescribes the procedure by which officers of the United States are appointed. U.S. Const. art. II, § 2, cl. 2. All officers of the United States must be appointed in accordance with its strictures. *Buckley v. Valeo*, 424 U.S. 1, 132, 140, 141 (1976).

The proviso has been characterized as a "structural safeguard" which tethers federal officers to the "sovereign power of the United States, and thus to the people." *Bandimere v. S.E.C.*, 844 F.3d 1168, 1188

(Briscoe, J., concurring), *cert. denied*, 585 U.S. ___, 138 S. Ct. 2706 (2018).

The relevant lexicon of Article II has been defined by the Court, as follows. An officer of the United States is one who exercises significant authority pursuant to federal law, as distinct from a mere government employee who is subject to supervision and control by his superiors while he carries out limited responsibilities. In turn, significant authority is defined as the power of the officeholder to exercise substantial discretion, and to perform important functions. *Lucia v. S.E.C.*, 585 U.S. ___, ___, 138 S. Ct. 2044, 2053 (2018) (quotations and citation omitted).

In its recent postulation of these axioms, *Lucia* further declared that, when determining if an appointee is an officer of the United States or a mere functionary, the inquiry pivots upon "the extent of power an individual wields in carrying out his assigned functions." *Id*., 585 U.S. at ___, 138 S. Ct. at 2051.

Applying these maxims to administrative law judges working at the Securities and Exchange Commission (the "S.E.C."), *Lucia* determined these agency jurists exercised significant authority in adjudicating Commission enforcement actions, and therefore were properly classified as officers of the United States. *Id*., 585 U.S. at ___, 138 S. Ct. at 2053-2055. *See generally* Michael A. Sabino, " 'Liberty Requires Accountability': The Appointments Clause, *Lucia v. S.E.C.*, and the Next Constitutional Controversy," 11 *William & Mary Business Law Review* ___, ___ (2020) (forthcoming) (*Lucia* now

stands as "the pivot" upon which the next Appointments Clause challenge shall turn).

Invoking the quintessential landmark of *Buckley v. Valeo*, *supra*, *Lucia* elaborated that an official qualifies as an officer of the United States when she "exercis[es] significant authority pursuant to the laws of the United States." *Lucia*, *supra*, 585 U.S. at ___, 138 S. Ct. at 2051, *quoting Buckley*, *supra*, 424 U.S. at 126 (internal quotations omitted). *Lucia* analogized the S.E.C.'s ALJs to Article III judges, reasoning that the former possessed "all the authority needed" to resolve the cases placed before them by the Commission. *Id*., 585 U.S. at ___, 138 S. Ct. at 2053. Furthermore, these in-house adjudicators issued decisions with "independent effect," which often constituted the "last-word" of the Commission. *Id*., 585 U.S. at ___, 138 S. Ct. at 2053-2054. Writing for the majority, Justice Kagan placed great emphasis upon the relative autonomy enjoyed by these ALJs in the performance of their duties. *Id*., 585 U.S. at ___, 138 S. Ct. at 2053-2054.

It cannot be gainsaid that *Lucia* provides the rule for decision in the case at bar; indeed, *Lucia* might very well dispose of the matter at hand. *Compare American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 238 (2013) (Scalia, J.) ("Truth to tell, our [earlier] decision . . . all but resolves this case."), *citing AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (Scalia, J.).

Notwithstanding the inestimable value of *Lucia* in concluding the matter at hand, we need not rely solely

upon this most recent addition to the pantheon of Article II jurisprudence.

Lucia is the rightful progeny of other notable Appointments Clause landmarks, in particular its direct ancestor, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). *Freytag* is recognizable as the essential precursor to *Lucia*'s pronouncements upon what constitutes significant authority for purposes of classifying individuals as officers of the United States.

Freytag addressed whether Special Trial Judges ("STJs"), statutorily created adjuncts to the United States Tax Court, were subject to the strictures of the Appointments Clause. Akin to the S.E.C. ALJs present in *Lucia*, the STJs were found to enjoy sweeping discretion to hear cases, and render decisions on important issues. *Id*. at 881, 882. Employing the rubric of "significant discretion" in that seminal landmark, the Court readily classified these specialist tax jurists as officers of the United States, and therefore subject to the rigors of the Appointments Clause. *Id*. at 882.

It bears mentioning that *Lucia* pointedly declared that *Freytag* "necessarily decides this case," to wit, *Lucia*. *Lucia*, *supra*, 585 U.S. at ___, 138 S. Ct. at 2052. In truth, then, *Freytag* preordained *Lucia*, and *Lucia*, as the offspring of its parent's wisdom, now decides the matter at hand.

The elements of significant authority which were dispositive in both *Lucia* and *Freytag* are replicated in the case at bar.

First, and possibly foremost, the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101, *et seq*. ("PROMESA"), bestows upon the Board members the rare authority to "veto, rescind, or revise" any laws of the Commonwealth of Puerto Rico which they deem inconsistent with the Board's ongoing efforts to reorganize the Commonwealth's finances. *Aurelius Investment, LLC v. Commonwealth of Puerto Rico*, 915 F.3d 838, 856 (1st Cir. 2019), *citing* 48 U.S.C. § 2144. As stated with precision by the court below, the rehabilitation legislation "unambiguously . . . subordinates the Puerto Rico territorial government to the Board." *Id*. at 844, 845, *citing* 48 U.S.C. § 2128(a). Put another way, the members of the Board can effectively override the legislative and executive choices of the Commonwealth's elected officials.

Concomitant to that sweeping discretion, the Board members have the power to outright reject the budgets or fiscal plans of the Commonwealth and its political subdivisions. *Id*. at 856, *citing* 48 U.S.C. § 2143 and § 2141(c)(3). Implicitly, the specter of this veto power translates into the capability to mold local government budgets to the preferences of the members of the Board.

Next, PROMESA explicitly guarantees the Board members autonomy, and goes so far as to use that exact term. *Id*. at 844, 845, *citing* 48 U.S.C. § 2128.

As a necessary adjunct to the exercise of such pervasive authority, the statutory regime invests the members of the Board with various "investigatory

and enforcement powers." *Id*. at 857, *citing* 48 U.S.C. § 2124(c) (authority to obtain official data) and § 2124(f) (subpoena power). *See also id*. at 845, *citing* 48 U.S.C. § 2124(f) ("[T]he Board's power to issue and enforce compliance with subpoenas is to be carried out in accordance with Puerto Rico law.").

Finally, PROMESA reserves to the Board members a singular power that might be the most indefatigable of all: the discretion to file a plan for the adjustment of the Commonwealth's debts. *Id.* at 857, *citing* 48 U.S.C. § 2172(a).

Given the depth and breadth of the powers they may exercise, the members of the Board stand in sharp contradistinction to "mere aids and subordinates" who enjoy immunity from the requirements of the Appointments Clause. *See United States v. Germaine*, 99 U.S. 508, 511, 9 Otto 508, 511 (1878).

In sum, the Board members comprise an autonomous body, with virtually unchecked discretion over the Commonwealth's finances, both for the present and the foreseeable future. Imbued by statute with sweeping powers, the members of the Board may exert influence, if not outright dictate, legislation and executive action within the territory. The power of the purse, indeed, elevated to an unprecedented degree.

And it hardly needs to be said that the Board members are acting pursuant to the federal power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. *See also Aurelius Investment*, *supra*, 915 F.3d

at 856 (The Board members are acting pursuant to "the bankruptcy power, . . . a quintessentially federal subject matter," and acutely so, as they go about their assigned duty of "initiat[ing] and prosecut[ing] the largest bankruptcy in the history of the United States municipal bond market.").

In a very real sense, the members of the Board take on the aspect of a superlegislature, an autonomous executive council or a ruling body combining elements of both. In any event, it cannot be denied that the prodigious discretion bestowed upon the Board members by PROMESA is precisely the type of significant authority exercised pursuant to federal law denominated by the Court in a plethora of Article II landmarks.

Furthermore, it is undeniable that the significant authority recognized in *Lucia* and *Freytag* pales in comparison to that found in the instant case. The S.E.C. ALJs and the Tax Court STJs in those prescient landmarks were strictly delimited to resolving disputes within precise subject areas, one case at a time, and with various avenues for review. In sharp counterpoise, the members of the Board in the instant case may act with autonomy in overturning legislation, vetoing budgets, and otherwise dictating other government action.

Above all else, the determinations of the Board members shall exert influence over billions of dollars in municipal debt, not only impacting the lives and businesses of those residing within the Commonwealth,

but credit markets, investors, and others residing far beyond the island.

Parenthetically, the instant case gives credence to the observation that "[t]oo many important decisions of the Federal Government are made nowadays by unelected officials." *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 572 U.S. ___, ___, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).

For reason of all the foregoing, the members of the Board exercise significant authority pursuant to federal law, as that term is defined in *Lucia*, *Freytag*, and other esteemed landmarks. The Board members are thus properly classified as officers of the United States, and therefore the Appointments Clause regulates the manner of their appointment.

Respectfully, the question presented must be answered in the affirmative.

II. THE APPOINTMENTS CLAUSE GOVERNS THE APPOINTMENT OF THE BOARD MEMBERS FOR REASON THAT THEY HOLD A CONTINUING OFFICE ESTABLISHED BY LAW, WITH THEIR APPOINTMENT AND DUTIES DEFINED BY STATUTE; THE BOARD MEMBERS ARE THEREFORE OFFICERS OF THE UNITED STATES, AND SUBJECT TO THE APPOINTMENTS CLAUSE.

Respectfully, the question presented must be answered in the affirmative. The Appointments Clause governs the appointment of the Board members for

reason that they hold a continuing office established by law, with their appointment and duties defined by statute. The Board members are therefore properly classified as officers of the United States, and subject to the Appointments Clause.

As with the immediately preceding point of argument, *Lucia* and *Freytag* step to the fore, and provide the rule for decision necessary to decide the case at bar. Yet, this time, it is *Freytag* which is the first among equals.

Critical to the Court's analysis in *Freytag* was the fact that the STJs in controversy there were serving in an office created by statute, with their precise tasks, salary, and means of appointment likewise specified by law. *Freytag*, *supra*, 501 U.S. at 881. On that basis, *Freytag* further promulgated two fundamental maxims for purposes of determining if an individual qualifies as an officer of the United States, and is therefore subject to the Appointments Clause.

First, the appointee must hold a continuing position established by law. *Id*. *Accord Lucia*, *supra*, 585 U.S. ___, 138 S. Ct. at 2056 (Thomas, J., concurring) (an ongoing statutory duty is the foremost defining attribute of an officer of the United States). Second, the "duties, salary, and means of appointment" for that office must be created by statute. *Id*.

The clarity of the foregoing precepts explains why, over two decades later, such maxims were adopted *in toto* by *Lucia*, and applied with equal ease in that subsequent landmark. *Lucia*, *supra*, 585 U.S. at ___, 138

S. Ct. at 2053. *See also id*., 585 U.S. at ___, 138 S. Ct. 2056 (Thomas, J., concurring) (*Lucia* is "indistinguishable" from *Freytag*).

A necessary counterpoint to the tandem of *Lucia* and *Freytag* is provided by *Germaine*, where the Court declared that medical doctors hired to administer physical examinations were "mere employees" of the government, and not officers of the United States. *Germaine*, *supra*, 99 U.S. at 511.

The significance of *Germaine* to the case at hand is that the former postulates that one who renders services occasionally or temporarily, but not on a continuous or permanent basis, is not an officer of the United States, and is therefore not subject to the Appointments Clause. *Id*. at 511, 512. *Compare Freytag*, *supra*, 501 U.S. at 881, 882 (noting special masters appointed by the Article III courts are not officers of the United States, for reason that the position is not established by law, its responsibilities are not clearly delineated by statute, and, lastly, special masters are hired on a "temporary, episodic basis").

In sum, the foregoing posits the following precepts. One who holds a continuing office, established by law, with the duties and means of appointment defined by statute, qualifies as an officer of the United States. In contrast, one who works temporarily or sporadically, and whose position otherwise lacks the other aforementioned characteristics, is a mere employee. The Appointments Clause governs the taking of office by the

first, but the Article II proviso is inapplicable to the second.

In light of these teachings, a review of the qualities defining the office held by the Board members in the case at hand tells us a great deal.

Addressing first whether these appointees hold a continuing office, PROMESA stipulates that the members of the Board serve an initial three year term. Nevertheless, their time in office may be longer, for reason that they can be reappointed or serve until a successor is named. *Aurelius Investment*, *supra*, 915 F.3d at 856, *citing* 48 U.S.C. § 2121(e)(5)(A), (C)-(D). Parenthetically at this juncture, it is worth observing that the Board members can only be removed by the Chief Executive, and then strictly for cause. *Id*., *citing* 48 U.S.C. § 2121(e)(5)(B).

Yet, speaking realistically, the tenure of the members of the Board is limitless. The supposed three year duration of office for each Board member is overwhelmed by PROMESA's explicit mandate that the Board shall not terminate until its members can certify that, *inter alia*, the Commonwealth is restored to reasonable access to the municipal bond markets, *and* enjoys at least four *consecutive* fiscal *years* of balanced budgets. Little wonder that the tribunal below anticipated the lifespan of the Board to be "indefinite." *Id*. at 846 and 846 n.7, *citing* 48 U.S.C. § 2149 (emphasis supplied). *See also id*. at 856, *citing* 48 U.S.C. § 2149(2).

It is of no moment that the members of the Board serve for a purportedly definite term. The reality is that Board members may be reappointed; they continue in office until replaced; and, most compelling of all, since the termination of the Board itself is predicated upon successfully rehabilitating the Commonwealth's finances, there is simply no telling when that goal will be reached, and the members of the Board relieved of duty. Put another way, it is impossible to dispute that the "continuing office" held by the Board members is anything other than continuous.

Given such, it is undeniable that the members of the Board hold an office that is continuing in nature, identical to the circumstances present in *Lucia* and *Freytag*, and, in counterpoise, the Board members most certainly do not occupy a temporary or episodic position, as encountered in *Germaine*.

The second precept of *Lucia* and *Freytag*, that the duties of office and the means of appointment thereto be established by statute, is met with equal ease. The extensive responsibilities of the Board members have already been comprehensively catalogued herein above. *See infra*. Finally, the means by which the seven members of the Board are to be appointed is described with great detail in the statutory text. *Id*. at 846, 847, *citing* 48 U.S.C. § 2121(e)(2)(A) (means of appointment) and § 2121(e)(1)(A) (specifying seven Board members). Clearly, the second parameter established by *Lucia* and *Freytag* is satisfied, given PROMESA's exquisite detailing of the responsibilities

of the office of Board member, and the methodology for appointment thereto.

It is evident that the case at bar lands on all fours with the factual predicates underlying *Lucia* and *Freytag*.

Only a little more than one year ago, Justice Kagan eloquently opined in *Lucia* that "*Freytag* says everything necessary to decide this case." *Lucia*, *supra*, 585 U.S. at ___, 138 S. Ct. at 2053, *citing Freytag*, *supra*, 501 U.S. at 881. The learned Justice could just as easily been referring to *Freytag* disposing of the case at hand. And when *Lucia* and *Freytag* are regarded in combination, it is simplicity itself to apply their exact maxims to the instant case, and reach an identical outcome.

For all these reasons, it is beyond argument that the members of the Board hold a continuing office established by law, with their appointment and duties clearly defined by statute. Thus, the Board members are properly classified as officers of the United States, subject to the requirements of the Appointments Clause.

Respectfully, the question presented must be answered in the affirmative.

III. THE APPOINTMENTS CLAUSE MUST GOVERN THE APPOINTMENT OF THE BOARD MEMBERS FOR REASON THAT THE RESOLUTION OF THE QUESTION PRESENTED HAS GREAT SIGNIFICANCE FOR RECURRING APPOINTMENTS CLAUSE CONTROVERSIES.

Respectfully, the question presented must be answered in the affirmative. The Appointments Clause must govern the appointment of the Board members, for reason that the appropriate resolution of the case at bar has great significance for recurring Appointments Clause controversies.

Proof of the constancy of Appointments Clause challenges is found in recently concluded, pending or anticipated Article II litigation.

First, there is the matter of Article II controversies recently concluded. Leading that category is *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (Kavanaugh, J.) ("*PHH I*"), *vacated, reinstated in part, and remanded*, 881 F.3d 75 (D.C. Cir. 2018) (*en banc*) ("*PHH II*"). While the *PHH I* tribunal forcefully declared that the statutory provisions insulating an agency director from removal by the Chief Executive was an irremediable violation of the Appointments Clause, *PHH I*, *supra*, 839 F.3d at 7-9, a sharply divided D.C. Circuit, sitting *en banc*, subsequently reversed, and declared that the sanctity of the Appointments Clause was not violated by the President's inability to unseat that agency chief. *PHH II*, *supra*, 881 F.3d at 137. *Compare Burgess v. Federal*

Deposit Insurance Corporation, 871 F.3d 297, 299, 304 (5th Cir. 2017) (staying an administrative law judge's directive for reason that the jurist was properly classified as an officer of the United States, but had not attained office in conformity with the Appointments Clause).

While the saga of *PHH I* and *PHH II* is seemingly concluded, it is not beyond the realm of possibility that similar, if not identical, Appointments Clause challenges shall ensue. Moreover, the executive agency at the heart of *PHH I* and *PHH II* gives indications of being an abundant source of Article II litigation, as the following evinces.

Second, there are Appointments Clause controversies extant, separate and apart from the case at bar, whose outcomes shall be influenced, if not outright decreed, by the eventual holding of the instant case. Among them is *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*, 332 F.Supp.3d 729 (S.D.N.Y. 2018), *appeal docketed*, No. 18-3156 (2d Cir. October 23, 2018), where the district court ruled, *inter alia*, that the immunity of the plaintiff agency's director from presidential ouster constituted an Appointments Clause violation. Notably, the trial court openly declared its alignment with *PHH II*'s dissent, and thereby created a rift with the D.C. Circuit with regard to this significant Article II issue. *RD Legal Funding*, *supra*, 332 F.Supp.3d at 784 (quotations and citations omitted).

In all likelihood, *RD Legal Funding* shall continue to percolate upward. Thus, the Court's promulgations

in the case at bar shall provide meaningful guidance, not only for any lower court adjudicating that specific litigation, but for other jurists confronting similar cases now pending.

Third, there is the admittedly speculative matter of future Appointment Clause challenges. Certainly, no one can accurately forecast the exact contours of the next Article II controversy.

But there shall always be conflict between "executive power and individual liberty." *PHH I*, *supra*, 839 F.3d at 5. Therefore, the next Appointments Clause case is most assuredly in a nascent state, if not on the docket already.

There is great value in, if not the outright necessity for, the Court continually augmenting the ranks of its Appointments Clause teachings, for reason of the recurring nature of Article II controversies. The instant case is an appropriate vehicle for "the amplification, clarification or extension (possibly all three) of the maxims now embodied in the conjoined holdings of *Freytag* and *Lucia*." Michael A. Sabino, "'Liberty Requires Accountability': The Appointments Clause, *Lucia v. S.E.C.*, and the Next Constitutional Controversy," 11 *William & Mary Business Law Review* ___, ___ (2020) (forthcoming).

In sum, the Appointments Clause must govern the appointment of the Board members, for the sake of present and future Article II challenges similar, if not identical, to the matter at hand.

Respectfully, the question presented must be answered in the affirmative.

IV. THE APPOINTMENTS CLAUSE GOVERNS THE APPOINTMENT OF THE BOARD MEMBERS FOR REASON THAT LIBERTY REQUIRES ACCOUNTABILITY.

Respectfully, the question presented must be answered in the affirmative. The Appointments Clause governs the appointment of the Board members, for reason that liberty requires accountability.

From the very inception of the Republic, one of the paramount motivations of the Founders was a justifiable concern for power concentrated in the hands of the one or the few, and, worse yet, such authority lacking accountability to the political will of the citizenry. It was this "fear that prompted the Framers to build checks and balances into our constitutional structure." *Dep't of Transportation v. Association of American Railroads*, 575 U.S. ___, ___, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring in the judgment).

Specifically to preserve our ordered system of liberty from the excesses of government power, the Framers acted upon a fundamental and inarguable precept. "Liberty requires accountability." *Id*., 575 U.S. at ___, 135 S. Ct. at 1234 (Alito, J., concurring).

That noble maxim animates the Appointments Clause, one of several "accountability checkpoints," which furthermore secures separation of powers and

checks and balances. *Id*., 575 U.S. at ___, 135 S. Ct. at 1237 (Alito, J., concurring). *See also id*., 575 U.S. at ___, 135 S. Ct. at 1244 (Thomas, J., concurring in the judgment) (the Appointments Clause exemplifies the Framers' "dedication" and "devotion to the separation of powers"); *Ryder v. United States*, 515 U.S. 177, 182 (1985) (The Appointments Clause is "a bulwark against one branch aggrandizing its power at the expense of another.").

In prescribing the manner by which officers of the United States assume their posts, the Appointments Clause assures that those who wield executive authority remain "accountable to the political force and will of the people." *Freytag*, *supra*, 501 U.S. at 884. *See also Dep't of Transportation*, *supra*, 575 U.S. at ___, 135 S. Ct. at 1238 (Alito, J., concurring) (the Appointments Clause assures that executive appointees remain "accountable to the President, who himself is accountable to the people"); *Edmond v. United States*, 520 U.S. 651, 659, 663 (1997) ("[D]esigned to preserve political accountability relative to important government assignments," the Appointments Clause ranks "among the significant structural safeguards of the constitutional scheme.").

As so succinctly – and accurately – described by Justice Thomas, the Appointments Clause "maintains clear lines of accountability – encouraging good appointments and giving the public someone to blame for bad ones." *Lucia*, *supra*, 585 U.S. at ___, 138 S. Ct. at 2056 (Thomas, J., concurring). *Accord Free Enterprise Fund v. Public Company Accounting Oversight Board*,

561 U.S. 477, 498 (2010) (citation and internal quotations omitted) ("Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or a series of pernicious measures ought really to fall.").

In sum, by regulating the manner in which officers of the United States are appointed, the Appointments Clause upholds the immeasurably important maxim that liberty requires accountability.

Yet, when reviewing the operative facts of the case at hand, it is startling to find how that precept was, with all due respect, disregarded in the process by which the members of the Board took office.

It is beyond peradventure that the Board members were not, in a true sense, nominated by the President. Rather, PROMESA's alternative methodology compelled the Chief Executive to appoint at least six of the seven members of the Board from separate lists, each roster crafted independently by the leadership of *both* the House of Representatives and the Senate. Further congressional approval was conspicuously absent, in particular Senate confirmation. *Aurelius*, *supra*, 915 F.3d at 846, 847 (citations omitted) ("[I]n practical effect, the statute forced the selection of persons on the list."). *See also id*. at 848 ("It is undisputed that the President did not submit any of the Board member appointments to the Senate . . . at any . . . time.").

Parenthetically, we set aside for the moment any contention that the seventh Board member is an

"inferior" officer of the United States, capable of being appointed in the President's sole discretion. *See id*. at 847 ("PROMESA allow[s] the President to select the seventh [Board] member at his or her sole discretion.") (citation omitted). *See also* U.S. Const. art. II, § 2, cl. 2 (Congress may, by law, vest the appointment of inferior officers of the United States in the President alone, the Courts of Law or in the heads of Departments); *Edmond*, *supra*, 520 U.S. at 659, 660.

The methodology for appointing the members of the Board will invariably lead to the following, and most troubling, scenario. The President will claim, and rightly so, that he was denied his normally independent discretion to nominate officeholders of his choosing. The Chief Executive could assert that six of the seven Board members were foisted upon him by the congressional leadership – and he would be correct, because the harsh reality is that circumventing the lawmakers' candidates was not a viable option (we set aside as relatively insignificant the President's unrestricted power to make the seventh and last appointment to the Board at his sole discretion).

The foregoing is precisely the nightmarish situation the Appointments Clause was engineered to prevent. Since the President was not free to appoint the vast majority of the members of the Board, he can shirk responsibility for their actions. *Compare Free Enterprise Fund*, *supra*, 561 U.S. at 495 ("The result is . . . a President who is not responsible for the Board.").

With all respect, it must be admitted that the accountability required for liberty was never lost in PROMESA's statutory labyrinth – it never existed there in the first place. The procedure for appointing the Board members therefore constitutes a serious breach of Article II norms, and thereby threatens irreparable damage to separation of powers, checks and balances, and, most precious of all, the liberty interest safeguarded by accountability.

The dangerous setting portrayed in the case at bar is not unfamiliar. It is a threat to accountability, and, consequently, individual liberty. Once more, the "wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting), *quoted by PHH I*, *supra*, 839 F.3d at 8.

Indeed, the instant case makes for an apt comparison to *Morrison*. Like its antecedent, the case at bar is, at bottom, about one thing. "Power. The allocation of power among Congress, [and] the President, . . . to preserve the equilibrium the Constitution sought to establish." *Id*. (Scalia, J., dissenting). *See also id*. at 727 (Scalia, J., dissenting) ("The purpose of the separation of powers and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom.").

As it has done many times before, the Court must act appropriately to cabin executive power, consistent with the mandates of Article II. It can do so by utilizing the instant case to forge yet another adamantine link in the chain of Appointments Clause precedents

upholding inviolate axioms of separation of powers, and checks and balances. *See id*. at 697 (Scalia, J., dissenting).

It is true that the situation in the Commonwealth is dire. It is imperative that the Board's fiscal objectives, let alone its humanitarian mission, be fulfilled, and as soon as possible. But such noble goals cannot be achieved at the expense of the Constitution.

For all these reasons, the Appointments Clause governs the appointment of the Board members. Such an outcome in the case at bar shall cabin executive power, confirm separation of powers, complement checks and balances, and, most important of all, uphold the maxim that liberty requires accountability.

Respectfully, the question presented must be answered in the affirmative.

V. THE QUESTION PRESENTED IS CONFINED TO WHETHER THE APPOINTMENTS CLAUSE GOVERNS THE APPOINTMENT OF THE BOARD MEMBERS; CONCOMITANTLY, THE SUBSIDIARY QUESTION OF WHETHER THE BOARD MEMBERS ARE "PRINCIPAL" OR "INFERIOR" OFFICERS OF THE UNITED STATES IS NOT PROPERLY BEFORE THE COURT.

Respectfully, the question presented is confined to whether the Appointments Clause governs the appointment of the Board members. As such, the subsidiary question of whether the members of the Board are

"principal" or "inferior" officers of the United States is not properly before the Court. Nonetheless, and for reason that the court below did address that secondary issue with unmistakable clarity, the following is noted for sake of completeness.

In accordance with the procedures set forth in Article II, a principal officer can only be appointed by the President, with the advice and consent of the Senate. In contradistinction, the appointment of inferior officers may be vested by law in the President alone, the courts, or in the heads of departments. U.S. Const. art. II, § 2, cl. 2. *See generally* Michael A. Sabino & Anthony Michael Sabino, "Challenging the Power of SEC ALJs: A Constitutional Crisis or a More Nuanced Approach?" 43 *Securities Regulation Law Journal* 369, 370, 371 (2015) (analyzing Appointments Clause challenges to the S.E.C.'s ALJs prior to the advent of *Lucia*).

Morrison v. Olson remains the standard bearer with respect to the means for distinguishing principal from inferior officers of the United States. With its emphasis upon examining the relative powers of the latter category of officeholder, *Morrison* postulates that an appointee who is restricted to a relatively narrow scope of duties, jurisdiction, and tenure, and is further subject to removal by a superior, is properly classified as an inferior officer. *Morrison*, *supra*, 487 U.S. at 671, 672. *See also Edmond*, *supra*, 520 U.S. at 663 (an inferior officer works under the direction and supervision of a superior, typically a principal officer who was appointed by the President, with the advice and consent of the Senate); *Free Enterprise Fund*, *supra*, 561 U.S. at

484, 485 (regarding members of an accounting industry regulatory board appointed and subject to removal by the principal officers comprising the Securities and Exchange Commission).

In the proceedings underlying the case at bar, the lower tribunal ably applied the foregoing precepts, and succinctly disposed of the principal versus inferior officer question, as follows. The panel first declared, with alacrity, that the members of the Board "are answerable to and removable only by the President, and are not directed or supervised by others who were appointed by the President with Senate confirmation." *Aurelius*, *supra*, 915 F.3d at 860 (citation omitted). *See also id*. at 856 (citation omitted) (the members of the Board can be removed, for cause, only by the President, and not by an intermediary).

Far more significant, opined the court below, is the fact that the Board members' "vast duties and jurisdiction are insufficiently limited," especially their power to make and implement policy. *Aurelius*, *supra*, 915 F.3d at 860 (citations omitted). *See also id*. at 844, 845 (citation omitted) (autonomy of the Board members).

Unsurprisingly, the lower tribunal decreed that the members of the Board are principal officers who "should have been appointed by the President, by and with the advice and consent of the Senate." *Id*. at 861. In short, the sweeping authority and relative independence enjoyed by the Board members compelled the court below to decree that these appointees

were principal, not inferior, officers of the United States.

It is true that the precise question presented in the case at bar does not include the subsidiary issue of whether the members of the Board are principal or inferior officers of the United States. *Compare Lucia*, *supra*, 585 U.S. at ___, 138 S. Ct. at 2050 n.1, *citing Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (declining to address a discrete issue not specifically incorporated within the question presented, for reason that "[n]o court has addressed that question").

Nevertheless, and in the belief that the Court shall confirm that the Appointments Clause governs the appointment of the members of the Board, it is respectfully submitted that, in the event of further proceedings, a pertinent instruction be issued to the courts below to address, if necessary, the principal versus inferior officer status of the Board members.

CONCLUSION

Respectfully, and for all the reasons set forth above, the Court should answer the question presented in the affirmative, find that the Appointments Clause governs the appointment of the Board members, and

affirm the lower tribunal's ruling on the Appointments Clause issue.

Respectfully submitted,

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