Nos. 18-1334, 18-1475, 18-1496, 18-1514 & 18-1521

In The
Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO
v.
AURELIUS INVESTMENT, LLC, ET AL.

AURELIUS INVESTMENT, LLC, ET AL.
v.
COMMONWEALTH OF PUERTO RICO, ET AL.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL THE TITLE III DEBTORS OTHER THAN COFINA
v.
AURELIUS INVESTMENT, LLC, ET AL.

UNITED STATES
v.
AURELIUS INVESTMENT, LLC, ET AL.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.
v.
FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ET AL.

On Writs Of Certiorari To The United States Court Of Appeals For The First Circuit

CONSOLIDATED OPENING BRIEF FOR PETITIONER UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.

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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 and whether the *de facto* officer doctrine allows for unconstitutionally appointed principal Officers of the United States to continue acting, leaving the party that challenges their appointment with an ongoing injury and without an appropriate relief.

PARTIES TO THE PROCEEDING

Petitioner and Cross-Respondent here, Appellant below, Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"), is a creditor and party in interest and filed an adversary complaint with assigned case No. 17-bk-0228, related to the case No. 17-bk-4780 initiated by Respondent and Cross-Petitioner the Financial Oversight and Management Board for Puerto Rico, in the district court for the District of Puerto Rico, on behalf of the Puerto Rico Electric Power Authority.

Respondents and Cross-Petitioners here, also Appellees below, are the United States; 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; the Puerto Rico Electric Power Authority; the Puerto Rico Fiscal Agency and Financial Advisory Authority; Andrew G. Biggs; José B. Carrión III; Carlos M. García; Arthur J. González; José R. González; Ana J. Matosantos; and David A. Skeel Jr.

Respondents and Cross-Petitioners here, Appellants below, Assured Guaranty Corporation; Assured Guaranty Municipal Corporation; Aurelius Investment, LLC; Aurelius Opportunities Fund, LLC; Lex Claims, LLC; Ad Hoc Group of General Obligation Bondholders; Cyrus Capital Partners, L.P.; Taconic Capital Advisors, L.P.; Decagon Holdings 1, LLC; Decagon

PARTIES TO THE PROCEEDING—Continued

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; GoldenTree Asset Management, LP; Old Bellows Partners, LP; Scoggin Management, LP; Aristeia Capital, LLC; Canyon Capital Advisors, LLC; Tilden Park Capital Management, LP; Aristeia Horizons, LP; Canery SC Master Fund, LP; Capital Management, LP; Crescent 1, LP; CRS Master Fund, LP; Cyrus Capital Partners, LP; Cyrus Opportunities Master Fund II, Ltd.; Cyrus Select Opportunities Master Fund, Ltd.; Cyrus Special Strategies Master Fund, LP; Merced Capital, LP; Merced Partners IV, LP; Merced Partners Limited Partnership; Merced Partners V, LP; Pandora Select Partners, LP; River Canyon Fund Management, LLC; SB Special Situation Master Fund SPC; Scoggin International Fund, Ltd.; Scoggin Worldwide Fund, Ltd.; Segregated Portfolio D; Taconic Master Fund 1.5, LP; Taconic Opportunity Master Fund, LP; Tilden Park Investment Master Fund, LP; Varde Credit Partners Master, LP; Varde Investment Partners Offshore Master, LP; Varde Investment Partners, LP; Varde Skyway Master Fund, LP; Whitebox Asymmetric Partners, LP; Whitebox Institutional Partners, LP; Whitebox Multi-Strategy Partners, LP; Whitebox Term Credit Fund I, LP; and Whitebox Advisors, LLC.

PARTIES TO THE PROCEEDING—Continued

Counsel for Petitioner and Cross-Respondent certifies as follows:

Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. (UTIER) is a labor union created as a close corporation under the Laws of the Commonwealth of Puerto Rico. Its stock is not traded, and it is not a "non-governmental corporate party" for purposes of Rule 26.1, therefore, does not require any disclosures with respect to it.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 915 F.3d 838 and reprinted in the Joint Appendix to all the parties ("Joint App.") at 134. The opinion of the district court, Joint App. 118, is 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 en banc filed by UTIER was denied on March 7, 2019. This Court granted certiorari on June 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

or in the Heads of Departments." U.S. Const. Art. II, § 2, cl. 2.

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

Relevant statutory provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq*. ("PROMESA"), are reproduced at Aurelius Pet. App. 133a.[1]

STATEMENT

1. a. There is no dispute that Puerto Rico is facing the worst financial crisis in its history. However, in an intent to solve this problem and protect the interests of U.S. taxpayers, Congress called again upon its extraordinary powers over the territories and enacted the Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA" or "the Act"), 48 U.S.C. §§ 2101-41. With PROMESA, Congress took away Puerto Rico's charters and imposed a supra-governmental and non-voted federal entity to enforce this federal law, not only stripping away the rights of

[1] The reference to the Appendix in this Opening Brief will be from Aurelius' Appendix in Case No. 18-1475 before this Honorable Court ("Aurelius Pet. App."), unless otherwise specified. Other references are made to the Joint Appendix filed by the parties on July 25, 2019.

the already limited self-government of Public Law 600 of 1950[2] and the 1952 Constitution of the Commonwealth of Puerto Rico, but also, in violation of the Appointments Clause of the United States Constitution, U.S. Const. Art. II, § 2, cl. 2.

The statute commands the establishment of a non-voted seven-member Financial Oversight and Management Board ("Oversight Board" or "Board") vested with all powers necessary to purportedly provide a method for Puerto Rico to achieve fiscal responsibility and access to the capital markets,[3] but all at the expense of the Puerto Rican People.

The Oversight Board obliterated the prerogatives of the Commonwealth's elected officials, rendering them as mere subordinates of the Board without authority to carry out any substantial political powers as invested in them by the Constitution of the Commonwealth of Puerto Rico. Also, one of the first actions of the Oversight Board was the imposition of a fiscal plan for PREPA that impaired labor rights and benefits – product of a collective bargaining agreement – such as sick leave, vacation days and health insurance coverage and occupational, health and safety issues.[4]

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[2] *The Puerto Rico Federal Relations Act of 1950*, Pub. L. No. 81-600.

[3] 48 U.S.C. § 2121(b)(1).

[4] UTIER filed an adversary complaint claiming violations to the collective bargaining agreement with assigned case No. 17-bk-0229, related to the case No. 17-bk-4780 initiated by Respondent the Oversight Board on behalf of PREPA, in the district court for the District of Puerto Rico that is pending adjudication.

b. On June 30, 2016, the President signed PROMESA into law and on August 31, 2016, he announced the appointment of the Board members. PROMESA specifically gave the President a limited time frame, until September 1, 2016, to decide between two options: (1) choose his own nominees who would be subject to advice and consent of the Senate, or (2) choose from lists provided by members of Congress. 48 U.S.C. § 2121(e)(2). But this was a "take it or leave it" choice, because Congress was to remain in session for merely *eight days* from the enactment date to the deadline of September 1, 2016. Therefore, the President was left with practically no choice but to resort to the list mechanism. Congress was very open about its interest that the Board members were appointed through the list mechanism when it was stated that the list mechanism "*ensures* that a majority of [the Oversight Board's] members *are effectively chosen by Republican congressional leaders on an expedited timeframe.*") [Emphasis added].[5] Therefore, Congress had a clear intent to deprive the President of the power of choice at his discretion that is essential under the Appointments Clause.

As such, the President selected the Board members through PROMESA's list mechanism, and none of the appointments went through the process of advice and consent of the Senate as provided in the

[5] House Comm. on Nat. Res., H.R. 5278, "Puerto Rico Oversight, Management, Economic Stability Act" (PROMESA), Section by Section, at 5, https://naturalresources.house.gov/UploadedFiles/Section_by_Section_6.6.16.pdf. (Accessed Aug. 16, 2019).

Appointments Clause. The seven members of the Oversight Board were vested with such significant authority that allows them to surpass the local government's policies, laws, rules and regulations in order to fulfill PROMESA's purpose. None of the residents of Puerto Rico, who are directly affected by the Board's actions, including UTIER members, were able to cast their vote for the members of the Oversight Board; nor were they able to vote for the members of Congress who prepared the lists from which the Board members were chosen and were also not able to vote for the President of the United States who appointed them. Yet, it is the Oversight Board the entity that, *at its sole discretion*, certifies fiscal plans and budgets and promulgates public policy in Puerto Rico since PROMESA's enactment.

PROMESA responds to a large-scale financial crisis that could only be solved with the exercise of broad federal powers. Even though PROMESA states that the Board is an "entity within the territorial government," *id.* § 2121(c)(1),(2), Congress vested the Board with significant federal authority to achieve the Act's purpose. It empowered the Board to initiate and prosecute in federal court, at its sole discretion, the largest bankruptcy in the history of the United States municipal bond market,[6] on behalf of the Commonwealth of Puerto Rico or its instrumentalities, 48 U.S.C. §§ 2141-2152; 2175(a). Such power is an exclusive federal

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[6] *See* Yasmeen Serhan, *Puerto Rico Files for Bankruptcy*, The Atlantic (May 3, 2017), https://www.theatlantic.com/news/archive/2017/05/puerto-rico-files-for-bankruptcy/525258/ (Accessed Aug. 16, 2019).

power according to Art. I, § 8, cl. 4 of the Constitution. *See Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938 (2016). With these bankruptcy-type proceedings, the Board has the authority to impair contractual obligations and rights of creditors, many of whom are based outside the territory's borders and do business globally. Thus, the Board can also impact interstate commerce.

Moreover, the Oversight Board has the authority to rescind laws enacted by the Commonwealth that "alter[ed] pre-existing priorities of creditors." 48 U.S.C. § 2144(c)(3)(B)(ii). No law can be enacted in Puerto Rico without the Oversight Board's approval. 48 U.S.C. § 2144(a)(1). The Board can even formulate public policy binding for the government of Puerto Rico. 48 U.S.C. § 2144(b)(2).

Also, PROMESA states that the Governor of Puerto Rico shall submit to the Oversight Board any proposed Fiscal Plan *as required* by it, but it is the Oversight Board that will determine *in its sole discretion* if the proposed Fiscal Plan complies or not with the requirements of PROMESA.[7] If the Board determines *in its sole discretion* that it does not comply, it shall submit *its own* fiscal plan which, according to PROMESA "shall be deemed approved by the Governor."[8] The exact same happens when submitting budgets to the Board.[9] Thus, the democratic form of

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[7] 48 U.S.C. §§ 2141(c)(2) and (3).

[8] *Id.* § 2141(e)(2).

[9] *Id.* §§ 2142(e)(3) and (4).

government conferred by the Commonwealth's Constitution was left totally useless.

The Board can enter into contracts of its own[10] and its authorization is required to allow the Commonwealth to issue or guarantee new debt, or to exchange, modify, repurchase, redeem, or enter into any similar transactions with respect to its debt.[11] Additionally, the Board has investigatory and enforcement powers, it can receive evidence at hearings and administer oaths, among other functions at its sole discretion.

In the end, the sole discretion and full authority remains in the Oversight Board, over the elected officials of the Government of Puerto Rico. PROMESA leaves no room for doubt as to the magnitude of the federal powers vested on the Oversight Board. However, their appointments were never subject to the advice and consent of the Senate as required by the Appointments Clause.

2. In May 2017, the Oversight Board authorized the filing of a Title III petition for the Commonwealth of Puerto Rico in the U.S. District Court for the District of Puerto Rico.[12] A few weeks later, on July 2, 2017, the Board filed a Title III petition for PREPA, employer of UTIER members.[13]

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[10] *Id.* § 2124(g).

[11] *Id*. § 2147.

[12] No. 17-bk-3283 (D.P.R.).

[13] No. 17-bk-4780 (D.P.R.).

On August 6, 2017, UTIER filed an *Adversary Complaint* and on November 10, 2017, filed a *First Amended Adversary Complaint*. UTIER sought judgment on the grounds that the Board members are principal officers who exercise significant federal authority that renders them "Officers of the United States" within the meaning of the Appointments Clause and the Board member's appointment did not comply with it. Also, UTIER requested an order declaring void *ab initio* all prior acts of the Board and barring all its further actions until it is constitutionally appointed.

The Board, the United States and other Opposing Parties,[14] moved the district court to dismiss the adversary complaint on the grounds that pursuant to PROMESA, the Board members are territorial officers and not Officers of the United States, thus, they are not subject to the Appointments Clause. They argued that when Congress acts upon the powers vested by the Territories Clause, it is not bound by separation of powers principles such as the Appointments Clause.

The district court sided with the Opposing Parties and concluded "that the Oversight Board is an

[14] The opposing parties before the district court were the United States, 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, the Puerto Rico Electric Power Authority, the Puerto Rico Fiscal Agency and Financial Advisory Authority, Andrew G. Biggs, José B. Carrión III, Carlos M. García, Arthur J. González, José R. González, Ana J. Matosantos, and David A. Skeel Jr.

instrumentality of the territory of Puerto Rico, established pursuant to Congress's plenary powers under Article IV of the Constitution, that its members are not "Officers of the United States" who must be appointed pursuant to the mechanism established for such officers by Article II of the Constitution, and that there is accordingly no constitutional defect in the method of appointment provided by Congress for members of the Oversight Board." Joint App. 90.

By contrast, the United States Court of Federal Claims denied the United States motion to dismiss a Takings Clause suit on the basis that the Oversight Board is a *federal entity. See Altair Glob. Credit Opportunities Fund (A), LLC v. United States*, 138 Fed. Cl. 742 (2018) ("the court has determined the Takings Clause claim alleged in the October 31, 2017 Amended Complaint is not an action against the Oversight Board; *instead, it is an action against the United States*."). That ruling was based on the same case law UTIER has relied on in the instant case.

UTIER timely appealed the district court's *Opinion and Order* under 48 U.S.C. § 2166(e)(2) and 28 U.S.C. § 1291. Respondents, Aurelius and Assured also timely appealed. The court of appeals allowed the certified appeal and consolidated all appeals. Aurelius Pet. App. 121a-122a.

3. The court of appeals reversed. The Opposing Parties[15] misread the court of appeals' ruling by interpreting that the court ruled that the Appointments Clause applied to territorial officers. However, the court of appeals correctly applied the corresponding "significant authority" test and made a thorough analysis of the powers and responsibilities vested on the Oversight Board by PROMESA. The court assertively reasoned, first, the applicability of the Appointments Clause even though Congress has plenary power when acting pursuant to Article IV of the United States Constitution. After determining that Congress is bound by the Appointments Clause even when acting upon the Territories Clause, the court then turned to determine if the Oversight Board members were "Officers of the United States" as opposed to mere territorial officers. Such analysis requires the applicability of the *only* test available, which is the "significant authority" test.[16] Based on the authority and powers vested in the Oversight Board by PROMESA, the court concluded that the Board members, in fact, exercise significant authority pursuant to the laws of the United States. Therefore, it correctly determined that the Oversight Board members are Officers of the United States subject to the Appointments Clause.

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[15] The United States, the Financial Oversight and Management Board for Puerto Rico, the Official Committee of Retired Employees of the Commonwealth of Puerto Rico, the Official Committee of Unsecured Creditors, the Puerto Rico Fiscal Agency and Financial Advisory Authority (collectively "the Opposing Parties").

[16] *Lucia v. SEC*, 138 S.Ct. 2044 (2018); *Freytag v. Commissioner*, 501 U.S. 868 (1991); *Buckley v. Valeo*, 424 U.S. 1 (1976).

However, the court of appeals permitted the Oversight Board to continue operating for an additional 90 days after the judgment in order "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause." [citations omitted] During the 90-day stay period, "the Board may continue to operate as until now." Joint App. 178. On May 6, 2019, the court of appeals issued an order further extending the stay of the mandate for an additional 60 days, until July 15, 2019. Joint App. 184. On July 2, 2019, the court of appeals further stayed the mandate until final disposition of the case by this Court. Joint App. 186.

The court below relied on the *de facto officer* doctrine stating that the Oversight Board members acted without the appearance of being an intruder or usurper and in good faith, and that "the Board Members' titles to office were never in question until our resolution of this appeal." Joint App. 177. The court also "fear[ed] that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now." *Id.* Such ruling was issued even though UTIER specifically requested the annulment of the Oversight Board's acts and a stay of its operations as a remedy to their claim, based on the fundamental law principle that what is null does not produce valid rights and obligations. The court went even further and validated the Board's actions prospectively by

allowing it to continue operating indefinitely after it determined that the Board members were unconstitutionally appointed. Joint App. 184. By validating the Board's previous and future actions applying the *de facto* officer doctrine, UTIER was left with no appropriate and effective remedy. By allowing the Oversight Board to continue operating despite their unconstitutional appointments, UTIER members were left subject to the broad and unfettered powers of an unconstitutional Oversight Board exposing them to ongoing injuries and impairments to their labor rights as well as the obliteration of the democratic governance of the People of Puerto Rico.

4. On June 18, 2019, President Trump nominated the current Board members to serve in their current positions.[17] The Senate has not yet acted on the nominations. Even though the Oversight Board states that the President acted "in an abundance of caution," it seems more like the President is abiding the court of appeals ruling.

SUMMARY OF THE ARGUMENT

I. The Opposing Parties mischaracterized the ruling of the court of appeals as if it decided that the Appointments Clause applies to territorial officers. What the court of appeals ruled is that the Appointments

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

Clause applies to the Oversight Board members because they exercise significant federal authority. Thus, the Board members are not just territorial officers. The Opposing Parties sidestepped the issue of significant federal authority contending that territorial officers are a broad and immutable category outside the scope of the Appointments Clause and exempted of any constitutional scrutiny because Congress has plenary powers to govern the territories. However, Congress's plenary powers over a territory do not trump the requirements of other structural pillars of the Constitution like the Appointments Clause.

The Opposing Parties attempt to mislead this Court forecasting unsuspected and terrible consequences arguing that affirming the court of appeals ruling would render territorial governments unconstitutional. Congress has the power to make all needful rules and regulations respecting the territory or other property belonging to the United States,[18] including any sort of narrowly crafted territorial departments and offices without clashing with other provisions of the Constitution. Therefore, territorial officers, departments and forms of government that confine to the borders of the territories are constitutional and are not threatened by the court of appeals' ruling.

The problem arises, as in this case, when Congress's governance of the territories pursuant to Article IV clashes with other structural pillars of the Constitution, particularly, the separation of powers embodied

[18] U.S. Const. Art. IV, § 3, cl. 2.

in the Appointments Clause. This case cannot be the subject of crude generalizations; its facts are very narrow and specific. The question before this Court is not if the Appointments Clause is applicable to territorial officers. The question is if the members of the Oversight Board are Officers of the United States within the meaning of the Appointments Clause because they exercise significant federal authority. That is why historical practice, that is the main support of the Opposing Parties, even though may have relevant examples, it is not dispositive.

Congress can create offices or officers within the territorial government of Puerto Rico without any issue with the Appointments Clause. But, if in the process, Congress bestows such entity or officer with broad and exclusive federal powers, then it created an entity composed of Officers of the United States that should be appointed in conformity with the Appointments Clause. In *Palmore v. United States*, 411 U.S. 389 (1973), this Court ruled that if the territorial official has powers focused exclusively on the territory, they are not federal officials. Here, Congress vested the Oversight Board with powers that exceed the ones exercised by territorial officials. Affirming the court of appeals ruling does not affect the governance of Puerto Rico as a territory, nor the other territories. This Court's task is to analyze the authority of an entity created by Congress and determine if such authority is significant enough to render the officials in question as "Officers of the United States" within the meaning of the Appointments Clause; this Court will not rule on

the applicability of the Appointments Clause to *territorial* officers.

II. To sustain the broad and bold assertions that the Appointments Clause is not applicable to territorial officers and that the court of appeals' ruling will render the territorial governance unconstitutional, the Opposing Parties, without admitting it, are relying on the infamous *Insular Cases*.[19] The Opposing Parties intend to expand the scope of the double standard of constitutional applicability of the *Insular Cases* to include the structural provisions of the United States Constitution. This overextension of such infamous doctrine is another insult to the human rights and the dignity of the People of Puerto Rico that this Court should not allow. The history of the colonial domination of Puerto Rico through the Territories Clause as interpreted by the racist *Insular Cases* is untenable because it is contrary to the modern vision of individual and political rights that are protected by the United States Constitution and international covenants that are the Supreme Law of the Land.

On June 30, 2016, the President of the United States signed PROMESA into law. Neither UTIER's members nor any of the residents of Puerto Rico had the opportunity to cast a single vote to select or appoint

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[19] Among others, *DeLima v. Bidwell*, 182 U.S. 1, 200 (1901); *Goetze v. United States*, 182 U.S. 221-22 (1901); *Dooley v. United States*, 182 U.S. 222, 236 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392, 397 (1901); *Dorr v. United States*, 195 U.S. 138, 148 (1904).

the members of the Oversight Board. Our voting rights were severely impaired by the enactment of PROMESA and the enforcement of its provisions, since it obliterated the prerogatives of the Commonwealth's elected officials, rendering them as mere subordinates of the Oversight Board without any authority to carry out any substantial political powers vested in them by the Constitution of the Commonwealth. These are severe violations of international covenants that recognized the validity and ability to exercise individual and political rights of the inhabitants of the territories. Such imposition does not represent the principles of freedom embodied in the I, V, XIII, XIV and XV Amendments to the U.S. Constitution.

The interpretation that Congress's plenary power under the Territories Clause is not subject to other structural provisions of the Constitution signifies an overextension of the already infamous and indefensible doctrine of the *Insular Cases*. This doctrine constitutes an anachronism that not only validates a regime of discriminatory incorporation of some constitutional individual rights of 3.3 million American citizens, but reaches to the extreme of sidestepping the structural provisions of the Constitution that protect liberty against tyranny. The constitutional defects of the *Insular Cases* are the core of this controversy and are interposed to the remedy sought by UTIER, therefore warrants them to be overturned.

III. Through PROMESA, Congress created a unique mechanism to impose to the President the manner in which not only the selection process should

take place, but also on how the lists of possible candidates to conform the Oversight Board should be assembled. Evidently, such an imposition collides directly with the Appointments Clause, which provides that it is the President who should nominate and appoint with the advice and consent of the Senate. Due to the nature of the Oversight Board's federal powers, its appointees are clearly Officers of the United States and therefore, their nomination and appointment process failed under the Appointments Clause. Not only such provisions are unconstitutional, but the nominations, appointments and executions of the Oversight Board are also unconstitutional and null.

This Court has squarely held that when Congress takes action that has the purpose and effect of altering the legal rights, duties, and relations of persons outside the Legislative Branch, it must take that action by the procedures authorized in the Constitution. Congress has all powers, except such as have been expressly or by implication reserved in the prohibitions of the Constitution. Moreover, this Court has categorically rejected the contention that Congress's acts are immune from scrutiny for constitutional defects just because they were taken in the course of Congress's exercise of its power under the Territories Clause. The Appointments Clause protects liberty in the constitutional scheme of separations of powers. Therefore, it is essential and could not be circumvented even under the powers conferred by the Territories Clause.

IV. PROMESA responds to a large-scale financial crisis that could only be solved with the exercise of

broad federal powers. With the financial meltdown of Puerto Rico, the municipal bond market was severely affected, and the U.S. taxpayers are still in distress. This is not a strictly local or limited territorial issue. It is about the total restructuring of sovereign debt because, contrary to the Bankruptcy Code, PROMESA allows the central government of a territory to file for the protection of Title III, and to be able to submit a plan of adjustment of debt that would impair creditors and contractual obligations outside Puerto Rico's borders and that do business globally.

The broad executive and legislative powers granted to the Oversight Board over the government of Puerto Rico are evidently federal in nature; particularly, the power to commence and prosecute a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities that will impair the obligations to bondholders, hedge funds, insurers and other creditors that are based in the United States or do business globally. Such power is an exclusive federal power according to Art. I, § 8, cl. 4 of the Constitution. *See Puerto Rico v. Franklin California Tax-Free Trust*, *supra.* This in turn, has extensive impact in the interstate commerce, which only Congress is empowered to regulate. Therefore, the powers vested to the Oversight Board by PROMESA are significant and federal and could not be considered exclusively as territorial.

V. The court of appeals correctly held that the Board members have occupied their offices in violation of the Appointments Clause since the creation of the

Board three years ago. However, the court of appeals validated the Board's previous and future actions by incorrectly applying the *de facto* officer doctrine. Consequently, UTIER was left with no appropriate and effective remedy, despite that it requested an order declaring void *ab initio* all prior acts and barring all further actions of the Oversight Board until it is constitutionally appointed.

In *Ryder v. U.S.*, 515 U.S. 177 (1995), this Court undoubtedly stated that the *de facto* officer doctrine does not allow courts to validate governmental actions taken in flagrant violation of the Appointments Clause over an undefined period; otherwise, no "rational litigant" would bring such a structural challenge. Moreover, courts certainly cannot invoke the *de facto* officer doctrine prospectively to legalize any future actions by unconstitutionally appointed officers. Nonetheless, that is precisely what the court of appeals did. The court's remedial holding is in questionable conflict with this Court's precedents that dictate the latitude of the *de facto* officer doctrine. Reversal is warranted.

If the Oversight Board is unconstitutional, UTIER "is entitled to a decision on the merits of the question and whatever relief may be appropriate." *Ryder v. U.S.*, at 182-83. Therefore, this Court should remove the relevant language from PROMESA and order that all the Oversight Board's actions and determinations taken from the time of their appointments to the present are unconstitutional and void *ab initio* since they are in open violation of the Appointments Clause and the Separation of Powers doctrine of the Constitution

of the United States of America. It is evident that if a federal officer holds a position without legal authority, his previous and future actions are void until the legal or constitutional defect is corrected. *See Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886). Therefore, the Oversight Board should be enjoined of executing any of the powers vested upon by PROMESA and all the Title III proceedings should be dismissed.

ARGUMENT

I. IN SUPPORT OF THE APPOINTMENTS CLAUSE RULING

A. The Court of Appeals did not err in holding that the Oversight Board members are "Officers of the United States" within the meaning of the Appointments Clause.

Puerto Rico is facing the worst fiscal crisis in its history, with around $71.5 billion in outstanding debt. To wrestle this national problem, the Puerto Rico Oversight, Management and Economic Stability Act of 2016 ("PROMESA" or "the Act"), 48 U.S.C. §§ 2101-41 was enacted. Accordingly, the Financial Oversight and Management Board ("Oversight Board" or "Board") exercises broad executive and legislative powers to carry out PROMESA's objectives. The Oversight Board enforces federal and local laws and has the power to enact and apply policies and to void or rescind territorial laws and regulations. Congress vested the Board with the federal sovereign authority of the President to

tackle, not just a territorial problem, but a nationwide problem. Therefore, the Oversight Board is not a territorial entity and it is subject to the Appointments Clause of the United States Constitution.

The complexity of the implementation of PROMESA responds to a hybrid of provisions from Chapters 9 and 11 of the Bankruptcy Code with other territorial provisions throughout the Act. Contrary to Chapter 9, PROMESA allows not only the territory's instrumentalities, but the central government to initiate a debt adjustment proceeding based on fiscal plans and budgets approved *at the sole discretion* of the Oversight Board.

The Opposing Parties misconstrued the court of appeals' ruling as if it held that territorial officials must be appointed in conformity with the Appointments Clause. However, that was not what the court concluded. The court applied the appropriate test to determine whether the Oversight Board members exercise "significant authority" in order for them to be considered "Officers of the United States" for purposes of the Appointments Clause. The court's reasoning is supported by this Court's precedents.[20] Therefore, the court below disregarded the Opposing Parties' contention that the Oversight Board members are territorial officers, despite the "made-for-litigation label" of PROMESA. Where "constitutional limits are invoked,"

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[20] *Lucia v. SEC*, 138 S.Ct. 2044 (2018); *Freytag v. Commissioner*, 501 U.S. 868 (1991); and *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

courts ignore "mere matters of form" and look instead "to the substance of what is required."[21]

The focus of the instant case is not the relationship between the national government and a territorial government. It is the significance of the authority that the Oversight Board members have pursuant to PROMESA and whether that makes them "Officers of the United States" for purposes of the Appointments Clause. Certainly, Congress's plenary power pursuant to Article IV of the United States Constitution cannot surpass the basic principles of separation-of-powers as embedded, for example, in the Appointments Clause.

The court of appeals applied the ancient canon of interpretation: *generalia specialibus non derogant* (the "specific governs the general") as a "helpful guide to disentangle the interface between the Appointments Clause and the Territorial Clause." Joint App. 155. With such guidance, the court concluded that the Territorial Clause is one of general application, whereas the Appointments Clause is one that contemplates a particular subject, which is the appointment of federal officers, thus, "the specific governs the general." *Id.*

The court of appeals turned to applying the "significant authority" test that is used to determine whether an official within the national government is an "officer" subject to the Appointments Clause in accordance with this Court's precedents. *Id.* at 164-72.

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[21] *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586-87 (1985) [Emphasis omitted] (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932)).

Therefore, notwithstanding the Opposing Parties' mischaracterization of the decision below, the court did not rule that the Appointments Clause applies to the appointment of territorial officials; it ruled that as "Officers of the United States," the Board members are subject to the provisions of the Appointments Clause.

B. Congress is bound by separation of powers principles even when acting pursuant to Article IV of the United States Constitution.

The Opposing Parties rely on Article IV of the Constitution to argue that Congress's power to enact PROMESA is omnipotent and unquestionable; thus, it is not subject to other structural provisions of the Constitution like the Appointments Clause. The Opposing Parties do not ascribe weight or significance to the existence of the People of Puerto Rico when it comes to supporting the magnitude of these plenary powers. Congress's power over the territories cannot simply override other constitutional provisions, especially those that protect the very essence of liberty for the People. "[T]here is no liberty" without the separation of powers. *Stern v. Marshall*, 564 U.S. 462, 483 (2011). "[T]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."[22] "The principle of separation of powers is embedded in the Appointments

[22] *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 501 (2010). *See also Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

Clause" and "the Appointments Clause is a structural provision of the Constitution." *Freytag v. Commissioner*, 501 U.S. 868 (1991). Moreover, the Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.[23]

The Opposing Parties are unfounded to contend that the separation of powers and other structural constitutional provisions – which limit Congress's power versus the other federal branches of government – do not constrain Congress when it acts regarding the territories. Although this Court has recognized the extension of Congress's power to deal with territorial governments, none of the rulings sustain the Opposing Parties' assertion that this power goes beyond and above the structural provisions of the separation of powers of the Constitution.[24] Congress's plenary power is still subject to the Constitution of the United States because "Congress, in the government of the territories as well as of the District of Columbia, has plenary power, *save as controlled by the provisions of the*

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[23] *Freytag*, 501 U.S. at 879.

[24] In *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), this Court held that "[o]ur basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not the power to decide when and where its terms apply*. *Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) [Emphasis added].

Constitution." *Binns v. United States*, 194 U.S. 486, 491 (1904) [Emphasis added]. *See also*, *e.g.*, *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879) ("Congress is supreme" and has all powers, "*except such as have been expressly or by implication reserved in the prohibitions of the Constitution*.") [Emphasis added]; *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) ("[T]he government of the United States" has full authority over the territories, except for "*such restrictions as are expressed in the constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself*.") [Emphasis added].

In *Metropolitan Washington Airport Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) ("MWAA"), this Court categorically rejected the contention that Congress's acts are "immune from scrutiny for constitutional defects" just because they were taken "in the course of Congress' exercise of its power" under "Art. IV, § 3, cl. 2." *Id.* at 270.

In *MWAA* the principal question presented to this Court was whether an unusual statutory condition, even though based in the Territories Clause, violated the constitutional principle of separation of powers, as interpreted in previous decisions of the Court.[25] Contrary to the Opposing Parties' position, *MWAA* held that, even when Congress legislates pursuant to the Territories Clause, the Court "*must* [] consider whether"

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[25] *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); and *Springer v. Philippine Islands*, 277 U.S. 189 (1928).

the statute is "*consistent with the separation of powers*."[26] [Emphasis added]. Furthermore, this Court squarely held in *MWAA* that "when Congress [takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch, it must take that action by the procedures authorized in the Constitution."[27] Finally, this Court concluded that Congress acted upon an "*extensive expansion* of the legislative power beyond its constitutionally confined role."[28] [Emphasis added].

Here, Congress may well have plenary powers pursuant to the Territories Clause. However, when Congress bestowed the Oversight Board with such significant authority, pursuant to a federal statute and in matters that go beyond the territory's borders, Congress created an entity whose members' appointment had to comply with the Appointments Clause.

C. The Oversight Board members meet the criteria of "Officers of the United States" within the meaning of the Appointments Clause

Article II, § 2, cl. 2 of the United States Constitution states that the President " . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the

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[26] *Id.* 271.

[27] *Id.* 276.

[28] *Id.* 276-77.

United States."[29] However, the clause does not expressly define who is an "Officer of the United States." There are numerous reasonable and founded efforts of its interpretation that have been outlining it. Courts have described the hallmarks of "office" around the elements of degree of authority, tenure, duration, emolument and continuing duties, among others.[30] Generally, Courts have agreed that "Officers of the United States" as used in the Appointments Clause infers "any appointee exercising significant authority pursuant to the laws of the United States."[31] The exercise of such significant authority cannot be discharged in any federal employee or person other than an Officer of the United States properly speaking. It marks the line between an officer and non-officer.[32] Thus, the test for determining whether officials are "Officers of the United States" within the meaning of the Appointments Clause, as it was applied by the court of appeals in the instant case, is: (1) the appointee occupies a "continuing" position established by federal law; (2) the appointee "exercis[es] significant authority"; and (3) the significant authority is exercised "pursuant to the laws of the United States." *See Lucia*, 138 S.Ct. at 2050-51; *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126.

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[29] U.S. Const. Art. II, § 2, cl. 2.

[30] Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 3:5 (2017).

[31] *Id. See also Buckley v. Valeo*, 424 U.S. at 126.

[32] *Edmond v. U.S.*, 520 U.S. 651, 662 (1997).

1. The Oversight Board members occupy a continuing position.

PROMESA states that each appointed member shall be appointed for a term of three years. 48 U.S.C. § 2121(e)(5)(A). The Board members may serve consecutive terms as appointed members and upon expiration of a term of office, they may continue to serve until a successor has been appointed. *Id.* § 2121(e)(5)(C),(D). Of significant importance is the fact that PROMESA provides that the power of removal relies only in the President "for cause." *Id.* § 2121(e)(5)(B). And even though the Board serves for a 3-year term, PROMESA stipulates that it will continue operating until it certifies that the Commonwealth has, for at least four consecutive years, developed its budgets in accordance with modified accrual accounting standards and the expenditures made by the government during each fiscal year did not exceed its revenues during that year. *Id.* § 2149(2).

Whether the position is continuing, could imply both a permanent position as to temporary position. "Continuing does not mean permanent," therefore "a temporary position may also be continuing if it is not personal, transient or incidental."[33] As the Department of Justice of the United States stated, "[t]he Constitution refers to an office as something that one 'holds' and 'enjoys' and in which one 'continues,' and these descriptions suggest that an office has some duration

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[33] Gary Lawson, *The "Principal" Reason Why the PCAOB is Unconstitutional*, 62 Vand. L. Rev. En Banc 73, 83 (2009).

and ongoing duties."[34] As for the personal factor, it implies that the position goes beyond the person that holds it, which means, "that the existence of the office is not contingent on a particular person holding it."[35] The second factor, transient, refers to whether it is "less fleeting and more enduring"[36] or is likely to be, which could establish its continuity. All these factors apply to the members of the Oversight Board.

2. The Oversight Board members exercise significant authority pursuant to PROMESA.

The Oversight Board members exercise significant federal authority. The Opposing Parties barely discuss the Board's significant authority in order to make this Court turn its attention to other issues that do not address the question presented: Whether the Appointments Clause applies to the Oversight Board members.

Certainly, the Appointments Clause only applies to Officers of the United States. However, the Opposing Parties fail to argue as to the fact that the Oversight Board, empowered by PROMESA (a federal law), has such a significant authority over the government of Puerto Rico that they can formulate public policy

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[34] *Officers of the United States within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 101 (2007), https://www.justice.gov/olc/file/477046/download. (Accessed Aug. 16, 2019).

[35] *Id*.

[36] *Id*. at 112.

binding the territorial government[37] and have the power to initiate and prosecute, *at its sole discretion*, the largest bankruptcy in the history of the United States municipal bond market.[38] The territory's adjustment of debt at the Board's sole discretion is the most significant of its exclusive federal power.[39] The United States recognized that with PROMESA, "Congress [shifted] some powers of the Legislative Assembly and Governor [of Puerto Rico], and [granted] yet additional authority to guide Puerto Rico through a newly created *bankruptcy* system." U.S. p. 42. The bankruptcy power is an exclusive federal power according to Art. I, § 8, cl. 4 of the Constitution. *See Puerto Rico v. Franklin California Tax-Free Trust*, *supra*. The court of appeals explained that the Board wields significant federal authority in the context of Title III restructuring proceedings because "the bankruptcy power [is] a quintessentially federal subject matter." Joint App. 165. Moreover, with the plan of adjustment of debt, the Board can impair the obligations to bondholders, hedge funds, insurers and other creditors that are based, and do business globally, such as Aurelius. Therefore, the Board's determinations with the proceedings under PROMESA, impact the national economy and interstate commerce, not just the territory's economy.

Furthermore, the Board can bind other parties outside the government. For example, it has the authority

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[37] 48 U.S.C. § 2144(b)(2).

[38] *See* Yasmeen Serhan, *supra.*

[39] 48 U.S.C. §§ 2164 and 2175(a).

to rescind certain laws enacted by the Commonwealth that "alter[ed] pre-existing priorities of creditors."[40] Also, it may enter into contracts of its own, *id*. § 2124(g), and its authorization is required to permit the Commonwealth to issue or guarantee new debt, or to exchange, modify, repurchase, redeem, or enter into any similar transactions with respect to its debt, *id*. § 2147. Under the extensive investigative and enforcement powers that the Board has, it can exercise its executive power by holding hearings, taking testimony, receiving evidence, administering oaths, and subpoenaing witnesses and materials. *Id.* § 2124(a),(f).[41] The Board may deploy these investigative powers to police "the disclosure and selling practices" of Commonwealth and instrumentality bonds, including any "conflicts of interest maintained by" brokers, dealers, or investment advisers, a power which extends the Board's regulatory scope far beyond Puerto Rico's borders. *Id.* § 2124(o).

Undoubtedly, the Oversight Board exercises substantial authority over Puerto Rico above and beyond the constitutionally elected government of the People of Puerto Rico and pursuant to the Constitution and the laws of the United States.[42]

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[40] 48 U.S.C. § 2144(c)(3)(B)(ii).

[41] *See Freytag*, 501 U.S. at 881-82 (Tax Court special trial judges are officers because they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.").

[42] *See generally Association of American Railroads v. U.S. Dept. of Transp.*, 821 F.3d 19 (2016).

While the United States and the Oversight Board omit to address the exclusive federal power that the Board has to file a bankruptcy-like proceeding for the territory, AAFAF argues it with a sense that the Board's role in the restructuring proceedings are just as a mere "representative of the debtor." AAFAF p. 46. It is argued that "the Board exercises rights as the Commonwealth's representative that any municipality would be entitled to exercise if it filed for a chapter 9 bankruptcy under the bankruptcy code." *Id.* p. 47. However, the Board's authority and controlling role goes beyond what AAFAF portrays. It contends that the Oversight Board has a state-like role that is exemplified by the requirement that the Board provide an entity a restructuring certification prior to the entity filing a petition. 48 U.S.C. §§ 2146, 2164(a). *See* 11 U.S.C. § 109(c)(2) (municipality may be debtor if "specifically authorized . . . by State law or by a governmental officer or organization empowered by State law to [so] authorize."). AAFAF pp. 46-47. This argument fails and only ratifies the unusual federal powers vested on the Oversight Board. Contrary to the powers of a State to authorize a municipality to file for bankruptcy under Chapter 9, the necessary determinations related to the restructuring certification are vested upon the sole discretion of the Oversight Board.

The Board is the *only* entity authorized to determine that a territorial instrumentality is "covered," 48 U.S.C. § 2121(d)(1)(a); to issue, at its sole discretion, a restructuring certification, *id.* § 2146; to become the "representative of the debtor," *id.* § 2175(b), to file the

petition, *id.* § 2164(a)(1), a plan of adjustment, *id*. § 2172(a)(2), and otherwise generally submit filings in relation to the case with the court, *id*. § 2172(a)(3). In a Chapter 9 proceeding, the debtor needs no representative and manages the proceedings before the bankruptcy court, whereas under PROMESA, the Oversight Board runs all matters of the Title III proceedings as a representative of the debtor. Thus, the Oversight Board's powers go beyond a possible comparison of it with a State in a Chapter 9.

This Court has repeatedly stated that an "Officer of the United States" is every official whose position is "established by Law" and who exercises "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 125, 126 (1976) (quoting U.S. Const. Art. II, § 2, cl. 2).[43] The term "officer" was thus "intended to have substantive meaning," *ibid.*, by delimiting that class of public officials whose appointments are subject to constitutional restrictions. In this manner, the Appointments Clause is "among the significant structural safeguards of the constitutional scheme," *Edmond v. U.S.*, 520 U.S. 651, 659 (1997), rather than a matter of mere "etiquette or protocol,"

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[43] Examples of Officers of the United States within the meaning of the Appointments Clause are: a postmaster first class and the clerk of a district court, *Buckley's* U.S. at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926); *Ex parte Hennen*, 38 U.S. 225 (1839)), "thousands of clerks in the Departments of the Treasury, Interior, and the other[ ] [departments]," *Germaine*, 99 U.S. 508, 511 (1878); engineers and assistant surgeons, *United States v. Moore*, 95 U.S. 760, 762 (1877); *United States v. Perkins*, 116 U.S. 483, 484 (1886); and federal marshals, *Ex parte Siebold*, 100 U.S. 371, 397 (1879).

Buckley, 424 U.S. at 125. Only those public officials who are properly characterized as mere "employees" – i.e., "lesser functionaries subordinate to officers of the United States" – fall outside the Appointments Clause's scope. *Buckley*, 424 U.S. at 126 n.162; *see also Freytag*, 501 U.S. at 881 (characterizing employees as officials who perform "ministerial tasks").

In *MWAA*, the Board's powers were far less than those granted by PROMESA to the Oversight Board and still were considered as "significant federal powers."[44] Contrary to the Oversight Board, in *MWAA* the Board had no unilateral power; it had only veto power over the state-created regional airport authority's "adoption of a budget, authorization of bonds, promulgation of regulations, [and] endorsement of a master plan." *Id*. at 255, 260. Though, in this case, the Oversight Board has veto power over the Commonwealth's adoption of budgets,[45] authorization of bonds and legislation.[46] It also has unilateral power to rescind Puerto Rico laws,[47] approve or disapprove fiscal plans for the Commonwealth and its instrumentalities, and issue *its own fiscal plan if it rejects the Commonwealth's plan*, to which the Governor and Legislature of the Commonwealth may not object.[48] Under PROMESA

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[44] *See MWAA* 501 U.S. at 260; *see also id.* at 287 (White, J., dissenting) (disputing that "the Board in fact exercises significant federal power").

[45] 48 U.S.C. § 2142.

[46] *Id.* § 2147, § 2147(a)(1), (5).

[47] *Id.* § 2144(c)(3)(B).

[48] *Id*. § 2141(c)(3), § 2141(d)(2), § 2141(e)(2).

neither the Governor nor the Legislature may exercise any control, supervision, oversight, or review over the Oversight Board or its activities.[49] These powers are "quintessentially executive."[50] The Government of Puerto Rico can't even enact, implement, or enforce any statute, resolution, policy or rule that would impair or defeat the purposes of PROMESA, as determined by the Oversight Board.[51] PROMESA has even preempted all local executive and legislative control over Puerto Rico's fiscal matters.[52] Moreover, the "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" is characteristic of an officer of the United States. *Buckley*, 424 U.S. at 140. PROMESA, a federal statute, is enforced only by the Oversight Board. Section 104(k) clearly states that the Oversight Board may "seek judicial enforcement of its authority to carry out its responsibilities under [PROMESA]" in the federal courts, 48 U.S.C. § 2124(k). The Board did just that when it sent the Governor a "Fiscal Plan Enforcement Letter" and then sued in federal court for an injunction to force him to comply with provisions of PROMESA.[53] In the Board's own words, the Oversight Board's job is

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[49] *Id.* § 2128(a)(1).

[50] *MWAA*, 917 F.2d at 56.

[51] 48 U.S.C. § 2128(a)(1).

[52] *Id.*

[53] *Financial Oversight and Management Board for Puerto Rico v. Hon. Ricardo Rosselló Nevares*, Case 17-03283, Docket No. 1180 at 17.

"to enforce compliance" with federal law "*through broad-based powers*" given to it by Congress.[54]

All the above contradicts the Opposing Parties' argument that the Oversight Board is simply a territorial entity. Indeed, as the Board further represented, Congress "empowered" the Oversight Board "with powers that *no other board in bankruptcy has ever had before*."[55] [Emphasis added].

In addition to such significant authority, the power to remove them, reappoint members to successive terms, and fill vacancies resides in the President alone. *See* 48 U.S.C. § 2121(e)(5),(6). The only source of control over the Oversight Board is the federal government with the President supervising its operations. Notwithstanding that PROMESA states that the Oversight Board is "an entity within the territorial government," it reports to the President. None of the territorial officials of the Commonwealth hold any control over the Oversight Board. On the contrary, it is the Oversight Board who holds control over the Commonwealth's fiscal decisions with "autonomy" from local elected officials. 48 U.S.C. § 2128. The Commonwealth's Governor may not remove Board members under any circumstances, since they may be removed only by the President. *See id*. § 2121(e)(5)(B). *See also Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (an officer "must fear" "only the authority that can remove him"). Also, the

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[54] *Oversight Board Basic Financial Statement and Required Supp. Info*., at 17 n.1 (June 30, 2017).

[55] *Supra*, note 53, at Docket No. 1153, Tr. 44-46.

provisions of PROMESA are crystal clear when it states that "[n]either the Governor nor the Legislature may . . . exercise any control, supervision, oversight, or review over the Oversight Board or its activities," 48 U.S.C. § 2128. Therefore, the Oversight Board is liable only to the continuous control of the President and cannot conceivably be considered as a component of the government of the Commonwealth.

The Board is not even subject to Congress's control or supervision because that role relies on the President. Even though PROMESA states that the Board must present annual reports to Congress,[56] such obligation to report does not represent any control of Congress over the authority that it vested the Board with. Members of Congress and the Senate have sent the Oversight Board several communications questioning the Board's decisionmaking, including the certification of fiscal plans.[57] But the only one that has the power to remove the Board members "for cause" is the President of the United States, not Congress, not the Government of Puerto Rico. Worst, the certification of the fiscal plan and budgets is not even subject to judicial review as PROMESA states that "[t]here shall be no jurisdiction in any United States district court to

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[56] 48 U.S.C. § 2148.

[57] Letter from Members of Congress, Dec. 6, 2018, https://www.warren.senate.gov/imo/media/doc/Bicameral%20letter%20to%20FOMB.pdf (Accessed Aug. 16, 2019).

review challenges to the Oversight Board's certification determination."[58]

Furthermore, the Opposing Parties compare the powers and responsibilities of the Oversight Board with the ones for the District of Columbia's Financial Responsibility and Management Assistance Authority, known as the "Authority" or "Control Board." Financial Responsibility and Management Assistance Act of 1995, 109 Stat. 97 (FRMAA). However, the comparison fails to mention that the Oversight Board has far broader powers than the District's Control Board.[59] The Authority did not have the power to initiate a bankruptcy-like proceeding of the debtor at its sole discretion. Nor did it have the authority to affect contractual obligations. The Control Board had the authority to review contracts or leases entered into by the District government *during a control year* that are executed after the Authority approved the financial plan and budget.[60] Also, if the Control Board determined that a contract was inconsistent with the approved fiscal plan or budget the FRMAA mandates that "*the Mayor* shall take such actions as are within the Mayor's powers to revise the contract or lease." If no revision of the contract could be made, the fiscal plan and budget would have to be revised "so that the contract or lease [would] be consistent with the fiscal

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[58] 48 U.S.C. § 2126(e).

[59] *Id.*

[60] FRMAA, § 203(b)(2)(A), (B).

plan and budget."[61] [Emphasis added]. On the contrary, PROMESA states that if a contract, rule, regulation, or executive order fails to comply with policies established by the Oversight Board . . . *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."[62] [Emphasis added]. Therefore, whereas the Control Board of the District of Columbia did not have any authority under the FRMAA to affect contractual obligations, particularly labor contracts entered into through collective bargaining agreements,[63] with PROMESA, the Board may prevent their execution or enforcement and take any action it considers necessary to ensure the contract is compliant with the fiscal plan.

The court of appeals considered the broad powers that the Oversight Board has pursuant to PROMESA, even the authority to formulate public policy and "overpowering" the Commonwealth's own elected officials. Joint App. 174. The court concluded that the Board members meet the requirements set by this Supreme Court's precedent. *See Lucia*, 138 S.Ct. at 2050-51; *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126. As such, the court of appeals correctly ruled that they

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[61] *Id.*

[62] 48 U.S.C. § 2144(b)(5).

[63] FRMAA, § 203(b)(1)(B).

"should have been appointed by the President, with the advice and consent of the Senate. Art. II, § 2, cl.2." *Id.*

3. The Oversight Board members exercise their authority pursuant to the laws of the United States.

There is no dispute that the Oversight Board "traces its authority directly and exclusively to a federal law, PROMESA." Joint App. 167. The court of appeals found an adequate comparison as it expressed that "the Board Members are, in short, more like Roman proconsuls picked in Rome to enforce Roman law and oversee territorial leaders than they are like the locally selected leaders that Rome allowed to continue exercising some authority." *Id.*

While the federal government remains the "ultimate" source of all sovereignty in Puerto Rico, local democracy makes the Commonwealth "sovereign" in the "ordinary" sense that the island has "a measure of autonomy comparable to that possessed by the states," and the "most immediate source" of Puerto Rico's authority to enact and enforce laws is the "Puerto Rico populace." *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1867-70 (2016). As of today, Puerto Rico's "political power emanates from the People and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the People of Puerto

Rico and the United States of America." Art. I, § 1, Const. Commonwealth of Puerto Rico.[64]

The fact that the Constitution of the Commonwealth of Puerto Rico, as well as all Commonwealth laws are product of the authority Congress has delegated by statute,[65] is not enough to conclude that the governor is exercising authority pursuant to the laws of the United States. *See Viqueira v. First Bank*, 140 F.3d 12, 19 (1st Cir. 1998) ("[T]he plaintiffs' complaint alleges manifold claims under Puerto Rico law, but it fails to assert any claim arising under federal law. Accordingly, no jurisdiction lies under 28 U.S.C. § 1331."); *Everlasting Dev. Corp. v. Sol Luis Descartes*, 192 F.2d 1, 6 (1st Cir. 1951) ("Of course, in so far as the controversy relates to the construction of an insular [Puerto Rico] tax exemption statute, that is not a federal question.").

D. The court of appeals ruling does not render the territorial governments unconstitutional.

The Opposing Parties argue that the court of appeals' ruling invalidates the democratically elected governments of Puerto Rico, since, after all, the Commonwealth of Puerto Rico was enacted pursuant to an act of Congress. Oversight Board p. 14.

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[64] L.P.R.A. Const. Art. I, § 1.

[65] *See also Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1875 (2016).

UTIER is not contending that the democratic election of territorial officers violates the Appointments Clause. On the contrary, when authority is derived directly from the consent of the governed, as opposed to immediately from Congress, the character of the office is fundamentally changed. Their authority is "ultimately delegated by the people of that state," and the local electorate or state officers "who appoint them are accountable for their actions."[66] As their authority derives from the consent of the People, the governor is not exercising significant authority pursuant to the laws of the United States.

The Opposing Parties attempt to mislead this Court forecasting unsuspected and terrible consequences arguing that affirming the court of appeals' ruling would render territorial governments unconstitutional. Congress has the power to make all needful rules and regulations respecting the territory or other property belonging to the United States,[67] including any sort of narrowly crafted territorial departments and offices without clashing with other provisions of the Constitution. Therefore, territorial officers, departments and forms of government that confine to the borders of the territories are constitutional and are not threatened by the court of appeals' ruling.

The problem arises, as in this case, when Congress's governance of the territories clashes with other

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[66] *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 99 (2007).

[67] U.S. Const. Art. IV, § 3, cl. 2.

structural pillars of the Constitution, particularly, the separation of powers embodied in the Appointments Clause. This case cannot be the subject of crude generalizations; its facts are very narrow and specific. The question before this Court is not if the Appointments Clause is applicable to territorial officers. The question is if the members of the Oversight Board are Officers of the United States within the meaning of the Appointments Clause because they exercise significant federal authority. That is why historical practice, that is the main support of the Opposing Parties, even though it may have relevant examples, it is not dispositive.

Congress can create offices or officers within the territorial government of Puerto Rico without any issue with the Appointments Clause. But, if in the process, Congress bestows such entity or officer with broad and exclusive federal powers, then it created an entity composed of Officers of the United States that should be appointed in conformity with the Appointments Clause. In *Palmore v. United States*, 411 U.S. 389 (1973), this Court ruled that if the territorial official has powers focused exclusively on the territory, they are not federal officials. The Opposing Parties would have this Court read *Palmore* as if it established three main requisites to conclude the territorial status of an office. The United States argues that "*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." Brief of U.S. pp. 37-38. While the United States focuses on the "strictly local concern" issue, it is possible to understand from *Palmore* that within its reasoning, the Court made a distinction between the courts in question based on, not only the "local concern" but also the authority that those courts had. In *Palmore,* this Court rejected the applicability of *O'Donoghue v. United States*, 289 U.S. 516 (1933), by comparing that

> "[t]he District of Columbia courts there involved, the Supreme Court and the Court of Appeals, had *authority* not only in the District, but also over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having *nationwide* application. These courts, as this Court noted in its opinion, were 'of *equal rank and power* with those of other inferior courts of the federal system.'" *Palmore,* at 405-06 [citations omitted, Emphasis added].

In contrast, this Court pointed that the Superior Court and the District of Columbia Court of Appeals "exercise the '*powers* of . . . a State government in all cases where legislation is possible.'" *Id*. at 407 [citations omitted, Emphasis added]. Therefore, *Palmore* did distinguish between the authority of the "office" in order to consider its status as territorial or federal. Still, to the point of "matters of strictly local concern," by vesting the Oversight Board with such significant authority and the power to impair contractual obligations of persons and entities well beyond the

territory's borders, the Board cannot be considered as purely a territorial entity.

Here, Congress vested the Oversight Board with powers that exceed the ones exercised by territorial officials. Affirming the court of appeals' ruling does not affect the governance of Puerto Rico as a territory, nor the other territories. This Court's task is to analyze the authority of an entity created by Congress and determine if such authority is significant enough to render the officials in question as "Officers of the United States" within the meaning of the Appointments Clause; this Court will not rule on the applicability of the Appointments Clause to *territorial* officers.

E. The Oversight Board members are not Territorial Officers.

The Opposing Parties state that the Oversight Board members are territorial officers that cannot be considered Officers of the United States and therefore, are not subject to the Appointments Clause. They argue that 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. U.S. p. 11.

UTIER does not contest that Congress 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). However, as much as Congress was careful enough to state that the Board is an "entity within the territorial government,"[68] the more appropriate conclusion would be that it is an entity that overpowers the territorial government. Statements made by Congress during the passage of PROMESA refer to the Oversight Board as a "federal oversight board."[69] In addition, the House Report on PROMESA directed the Congressional Budget Office to "treat the Oversight Board as a federal entity[,] because of the 'significant degree of federal control involved in [the Oversight Board's] establishment and operations.'" H.R. Rep. No. 114-602 at 72. Even if PROMESA states that the Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government,"[70] where a constitutional claim is at issue, "the practical reality of

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[68] 48 U.S.C. 2121(c)(1).

[69] *See, e.g.*, 162 Cong. Rec. S4699, S4700 (daily ed. June 29, 2016) (statement of Sen. Cornyn); *see also Discussion Draft, H.R., "Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)*": *Hearing Before the H. Comm. on Natural Resources*, 114th Cong. 56-59 (2016) (statement of Rep. Pierluisi); 162 Cong. Rec. S1848, S1849 (daily ed. Apr. 11, 2016) (statement of Sen. Inhofe); *The Need for Establishment of a Puerto Rico Financial Stability and Economic Growth Authority Oversight Hearing Before the H. Comm. on Natural Resources*, 114th Cong. 43 (2016) (statement of Rep. Pierluisi).

[70] 48 U.S.C. § 2121(c).

federal control and supervision prevails over Congress' disclaimer."[71]

With respect to *Palmore*'s reference to the entity's powers and duties primarily concerning local matters, the Oversight Board does not fit that criteria. The Board argued that Congress enacted PROMESA with a "purely territorial focus for the purpose of advancing the welfare of a territory's population," Oversight Board p. 20, and thus, "it is 'not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union.'" *Id.* (citing this Court's majority opinion in *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 322-23 (1937)). Based on these statements the Board supports its argument that Congress's intention by enacting PROMESA was to create a Board "part of the territorial government of Puerto Rico," rather than part of the federal government. *Id.* at 2. Therefore, it argues that the Appointments Clause does not apply to them. However, the discussion that follows affirms the Board's federal nature, as well as the effects that PROMESA will have, not only in Puerto Rico, but nationwide.

1. The Oversight Board's impact on Interstate Commerce and thus, its implications nationwide.

Article I, § 8 of the Constitution grants Congress enumerated powers, and among them is the power "[t]o

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[71] *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S.Ct. 1225, 1233 (2015).

regulate commerce . . . among the several States. . . ." U.S. Const. Art. 1, § 8, cl. 3. "It has long been established doctrine that the Commerce Clause gives exclusive power to Congress to regulate interstate commerce. . . ." *NW States Portland Cement Co. v. Minn.*, 358 U.S. 450, 458 (1959). This Court has expressed that Congress's power under the Commerce Clause "is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36 (1937). Moreover, "[t]he fundamental principal" of this power is to "enact 'all appropriate legislation' for its 'protection or advancement;' to adopt measures 'to promote its growth and ensure its safety;' to foster, protect, control and restrain." *Id.* Most important, that this power is plenary "and may be exerted to protect interstate commerce no matter what the source of dangers which threatens it." *Id*. (citing *Second Emp.'rs Liab. Cases*, 223 U.S. 1, 51 (1912)). As a matter of fact, "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.*

PROMESA empowers the Oversight Board to impact interstate commerce, which is an exclusive power of the federal government. *See* U.S. Const. Art. I, § 8, cl. 3; *NW States Portland Cement*, 358 U.S. at 458. The Board acts on behalf of the government of Puerto

Rico and its instrumentalities in the debt restructuring process.[72] Inasmuch PROMESA authorizes Board to enter into contracts[73] and to enter into extrajudicial negotiations with the Commonwealth and the instrumentalities' creditors,[74] which a vast majority are not local firms,[75] this has an impact in the interstate commerce. For instance, earlier this year, the Board, on behalf of PREPA, reached a Restructuring Support Agreement with PREPA's bondholders, who are multinational corporations, such as Assured Guaranty Corp.[76] Through this agreement, PREPA's bondholders will exchange their current bonds for new bonds. Consequently, the Oversight Board engaged in economic transactions that will go beyond the territory of Puerto Rico, subsequently impacting interstate commerce. This Court expressed in *N.L.R.B. v. Jones & Laughlin Steel Corp.* that "[t]he close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local." 301 U.S. at 38. Therefore, to achieve the Board's main purpose to restructure Puerto Rico's debt, it has to engage in activities that involve enforcing its

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[72] 48 U.S.C. § 2164(a).

[73] 48 U.S.C. § 2124(g).

[74] 48 U.S.C. § 2231.

[75] *See* Joel Cintrón Arbasetti, et al., *Who owns Puerto Rico's Debt, Exactly? We've Tracked Down 10 of the Biggest Vulture Firms*, Cadtm (Dec. 3, 2018), available at http://www.cadtm.org/Who-Owns-Puerto-Rico-s-Debt-Exactly-We-ve-Tracked-Down-10-of-the-Biggest (Accessed Aug. 7, 2019).

[76] *See* Case No. 17-BK-4780-LTS. Docket No. 1235.

exclusive federal powers, such as impacting interstate commerce, which concurrently, has nationwide implications.

2. PROMESA's legislative record demonstrates its implications nationwide.

PROMESA's Congressional Record shows that the Board members are federal officers. For instance, on June 3, 2016, Rep. Rob Bishop from the Committee on Natural Resources submitted a report ("Committee Report") to Congress that included the final version of PROMESA with several comments and an explanation of what it entailed.[77] It included the cost estimate of the Congressional Budget Office ("CBO"). In said report, the CBO stated that PROMESA "would create a legal framework *for the federal government to oversee* the fiscal and budgetary affairs of certain U.S. territories." [Emphasis added].[78] Also, that "keeping in guidance specified by the 1976 President's Commission on Budget Concepts, a control board established under [PROMESA] should be considered a *federal entity largely because of the extent of federal control involved in its establishment and operations*."[79] [Emphasis added]. Moreover, the CBO stated that although the Board will be financed by the Commonwealth, "[b]ecause it would be a *federal entity*, all cash flows related to the board's

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[77] H.R. Rep. No. 114-206, pt. 1 (June 3, 2016), https://www.congress.gov/congressional-report/114th-congress/house-report/602/1 (Accessed Aug. 7, 2019).

[78] *Id.* at 69.

[79] *Id.*

administrative costs should be recorded in the *federal budget*."[80] The CBO also reported that in general, oversight boards are only established at the request of territorial governments. However, PROMESA "would automatically establish an oversight board for [Puerto Rico]."[81]

The CBO was established by the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 621, *et seq*. Its essential role within the federal government and its expertise in evaluating the nation's finances and budget as a whole support the thorough and complete analysis of PROMESA and the conclusion of including the Board's administrative costs in the federal budget as a consequence of the "federal control involved in its establishment and operations."[82]

Furthermore, a hearing on PROMESA on June 9, 2016 held by the House of Representatives of Congress, Rep. Raúl Labrador stated the following: "[PROMESA] imposes fiscal reforms without spending a single dollar of U.S. taxpayer money to relieve Puerto Rico's debt. [PROMESA] protects taxpayers from bailing out a government that spent recklessly and avoids setting a horrible precedent that could tempt free-spending States

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[80] *Id.*

[81] *Id.* at 70.

[82] H.R. Rep. No. 114-206, at 69.

to walk away from their obligations."[83] Another similar comment was made by Rep. Garret Graves:

> . . . I also struggled with what the right conservative solution was in this case. Ultimately, there is just one right answer. Doing nothing will simply worsen the financial condition, will probably put more burden on us to actually bail out the Nation on Congress and on the White House to do that. I oppose a bailout, and I oppose putting taxpayer dollars on the hook to pay off nearly a dozen years of irresponsible spending of the Puerto Rican Government.[84] [Emphasis added].

The House Natural Resources Committee made the same expression:

> It's become very clear that PROMESA is essential to preventing a bailout. Thankfully, the measure, drafted by House Natural Resources Committee Chairman Rob Bishop (R-Utah), appears to be a good-faith attempt to balance competing concerns among Republicans and Democrats, the island's elected officials, and various creditors.
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> The Lights may be turning off in Puerto Rico, but the lights are turning on in the minds of policy makers. At the end of the day, we need

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[83] *Puerto Rico Oversight, Management, and Economic Stability Act of 2016: Hearing on H.R. 5278 Before the H. Comm. on Natural Resources*, 114th Cong., 2nd Sess. (June 9, 2016) (statement of Rep. Labrador), https://www.congress.gov/congressional-record/2016/06/09/house-section/article/H3600-1 (Accessed Aug. 10, 2019).

[84] *Id.* (statement of Rep. Graves).

> to help Americans residing on the Island by providing a better institutional framework to guide the territory out of this financial and economic crisis while also protecting mainland taxpayers from the threat of future bailout.[85] [Emphasis added].

These three statements demonstrate that Congress's purpose in enacting PROMESA was not the sake of Puerto Rico, rather, protecting U.S. taxpayers from the effects of Puerto Rico's financial crisis.

In the House Committee on Natural Resources Press Office article titled *Puerto Rico: 2 Truths and A Lie*, the Committee clarifies the far-reaching consequences that PROMESA was designed to address:

> CONSEQUENCES OF INACTION: Puerto Rico is headed for a full scale financial meltdown and humanitarian crisis. *A "let it burn" approach has even worse implications for U.S. Citizens on the Island and mainland.*
>
> TRUTH: Financial collapse on the Island "*affects most people with a mutual fund invested in the municipal bond market" including citizens on the mainland "whether they know it or not.*"[86]

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[85] *Puerto Rico Meltdown v. PROMESA*, The House Committee on Natural Resources Press Office (April 19, 2016), https://us11.campaignarchive.com/?u=27a292edb3dc0c5b58adad795&id=00a98c923b&e (Accessed Aug. 9, 2019).

[86] *See also Will Puerto Rico's Bankruptcy Filing Destroy Your Retirement?*, http://host.madison.com/business/investment/markets-and-

> TRUTH: *Failing to act is "more likely to disrupt the municipal market than providing a rational, comprehensive, and territory-specific legal framework to resolve this economic and fiscal crisis."*
>
> LIE: The rule of law and U.S. taxpayers will be better off if the Island's government is left to its own devices.

False.[87] [Emphasis added].

Thus, by enacting PROMESA Congress was not fixing a purely territorial issue, it was a matter of national concern.

On whether the Oversight Board is federal or territorial, on a Congressional hearing on the approval of PROMESA, Rep. Rob Bishop said that Section 407 of PROMESA [48 U.S.C. § 2195] – Protection from Inter-Debtor Transfers, "provides a *federal* remedy for Puerto Rico's creditors in certain circumstances."[88] [Emphasis added]. Further, U.S. Representative, Carolyn B. Maloney expressed that " . . . a *temporary Federal oversight*

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stocks/will-puerto-rico-s-bankruptcy-filing-destroy-your-retirement/article_b3afb13d-3efe-5975-91e5-a3775e263fa5.html.

[87] *Puerto Rico: 2 Truths and A Lie*, The House Committee on Natural Resources Press Office (April 27, 2016) https://us11.campaign-archive.com/?u=27a292edb3dc0c5b58adad795&id=301726c0b2&e=.

[88] *Puerto Rico Oversight, Management, and Economic Stability Act of 2016: Hearing on H.R. 5278 Before the H. Comm. on Natural Resources*, 114th Cong., 2nd Sess. (June 9, 2016) (statement of Rep. Bishop) https://www.congress.gov/congressional-record/2016/06/09/house-section/article/H3600-1 (Accessed Aug. 10, 2019).

board will help Puerto Rico make the structural reforms necessary to get its finances in order and set it on the path of economic growth."[89] [Emphasis added]. Three years after the enactment of PROMESA, on June 29, 2019, Rep. Bishop sent an *amicus curiae* brief to the U.S. Court of Appeals, First Circuit, to facilitate the interpretation of PROMESA according with *his* legislative intent.[90] Section 303 of PROMESA, 48 U.S.C. § 2163, expressed Bishop, "*preempts* the unilateral debt-related measures deployed by Puerto Rico prior to the passage of PROMESA, and prevents Puerto Rico from taking such actions while the Oversight Board exists."[91] [Emphasis added]. Preemption is an exclusive power of Congress and thus the federal government. *See Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1907 (2019).

All of these statements made by Members of Congress demonstrate that with PROMESA Congress created a *federal* Oversight Board for Puerto Rico. Thus, the Opposing Parties' argument that they are a strictly territorial entity falls short.

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[89] *Id.* (statement of Rep. Maloney).

[90] *Ambac Assurance Corporation v. Commonwealth of Puerto Rico, et al.*, No. 18-1214, on Appeal from the United States District Court for the District of Puerto Rico in No. 3:17-AP-00159-LTS. *Brief of Congressman Rob Bishop, Chairman of the House Committee on Natural Resources, as Amicus Curiae in Support of Neither Party*, at p. 3 (1st Cir. Jun. 29, 2018).

[91] *Id.*

F. The *Insular Cases* are unconstitutional and should not be the foundation to reverse the court of appeals' ruling on the Appointments Clause.

The Oversight Board and the United States conveniently mischaracterized the ruling of the court of appeals as if it decided that the Appointments Clause applies to territorial officers. Oversight Board pp. 9-10 and U.S. pp. 6-7. The court of appeals ruled that the Appointments Clause is applicable to the Oversight Board members because they exercise significant federal authority. The Opposing Parties sidestepped the issue of significant federal authority contending that territorial officers are a broad and immutable category outside the scope of the Appointments Clause and exempt of any constitutional scrutiny because Congress has plenary and omnipotent powers to do as it wishes with a territory. Oversight Board pp. 16-21 and U.S. pp. 16-18. To sustain such broad and bold assertions the Opposing Parties, without admitting it, rely on the infamous *Insular Cases*.[92]

The Oversight Board avoided the *Insular Cases* issue and the United States stated that they were not relevant. U.S. p. 25. But, the court of appeals did address the *Insular Cases* stating that:

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[92] Among others, *DeLima v. Bidwell*, 182 U.S. 1, 200 (1901); *Goetze v. United States*, 182 U.S. 221, 221-22 (1901); *Dooley v. United States*, 182 U.S. 222, 236 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392, 397 (1901); *Dorr v. United States*, 195 U.S. 138, 148 (1904).

> The only course, therefore, which we are allowed in light of *Reid* is to not further expand the reach of the "Insular Cases." Accordingly, we conclude that the Territorial Clause and the "Insular Cases" do not impede the application of the Appointments Clause in an unincorporated territory, assuming all other requirements of that provision are duly met. Joint App. 164.

Under the *Insular Cases* regime, Puerto Rico is subject to a double set of constitutional rules that sustain legal discrimination upon the citizen residents of Puerto Rico. The only way for the Opposing Parties to make sense on this constitutional conundrum is by recurring to an interpretation premised in the authoritarian and overreaching application of anachronist principles of an unfair double standard governance for the territories. This was formulated upon a racist interpretation of the reality of Puerto Rico at the beginning of the twentieth century that has not been fully examined in the context of modern constitutional law and international covenants on human rights. The history of the colonial domination of Puerto Rico through the Territories Clause is untenable and as long as the *Insular Cases* doctrine is the foundation of the Opposing Parties' contention, it is imperative for this Court to assess the validity of this case law. The constitutional defects of the *Insular Cases* are the core of this controversy and are interposed to the remedy sought by UTIER, therefore warrants them to be overruled.

In 1898, the United States illegally invaded Puerto Rico when it already had a national history of 405 years of political development, violently taking away our country of the Autonomic Charter and with it, the right to vote and elect political representatives with international treaty powers, granted by the Spanish regime, after a long and bloody anti-colonial struggle.

To make matters worse, this Court imposed the ignominious colonial judicial doctrine of the *Insular Cases*. In these cases, the colonial system of the United States was strengthened, and the unequal and immoral treatment of Puerto Rico was legitimized until this very day. Such cases determined that Puerto Rico is not a foreign country in relation to the United States, but an unincorporated territory, which belongs to, but is not part of, the United States, and to which only a few fundamental constitutional rights of the Constitution apply. That imposed the abhorrent condition of the deprivation of fundamental human rights upon the Puerto Rican People that is contrary to binding international law.

Contradicting 122 years of a history of proclamations to the world regarding the values of equality and freedom, the *Insular Cases* turned the United States into an empire as cruel as the kingdom from which they vigorously sought liberation with their war for independence.[93] These cases "stand at par with *Plessy v.*

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[93] *See* Nelson A. Denis, *War Against All Puerto Ricans: Revolution and Terror in America's Colony*, Nation Books (2015).

Ferguson[94] in permitting disparate treatment by the government of a discrete group of citizens."[95] This is a clear violation of the international regime of human rights.[96]

The *Insular Cases* reflect outdated theories of imperialism and racial inferiority that have outlived their usefulness.[97] The fact that race and alienage was a deciding factor in the rationale of the *Insular Cases* is evident when Justice Brown – the same Justice that decided *Plessy* – observed that because the "*alien races*" that inhabited the new territories that the United States had acquired differed from other Americans in "religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, *may*

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[94] 163 U.S. 537 (1896).

[95] Juan R. Torruella, *The Supreme Court and Puerto Rico, The Doctrine of Separate and Unequal*, Editorial de la Universidad de Puerto Rico (1985) p. 3. *"The 'redeeming' difference is that Plessy is no longer the law of the land, while the Supreme Court remains aloof about the repercussions of its actions in deciding the Insular Cases as it did, including the fact that these cases are responsible for the establishment of a regime of de facto political apartheid, which continues in full vigor.*" Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29:2 U. Pa. J. Int'l L. 283 (2007), p. 286.

[96] U.S. Const. Art. VI: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; *and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land*; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." [Emphasis added].

[97] Juan R. Torruella, *supra*, pp. 286-87.

for a time be impossible." *Downes v. Bidwell*, 182 U.S. 244 (1901) at 287. [Emphasis added]. The *Insular Cases* were fundamentally based on the badges and incidents of slavery in the United States that were supposedly forbidden by the I, V, XIII, XIV and XV Amendments to the U.S. Constitution.[98]

Under the Territories Clause and the *Insular Cases* doctrine of discriminatory incorporation of fundamental constitutional rights, Puerto Rico continues to be a colony inhabited by 3.2 million American citizens who do not have political or economic rights as do the resident citizens of the other States. Puerto Rico has more resident citizens than 23 States including the District of Columbia. Also, it is the largest and most populated of the eight current colonies. Nevertheless, we cannot vote in federal elections, we do not have the right to elect fully empowered political representatives, to receive federal funds on equal terms, nor do we have the power to exercise our sovereign powers to free ourselves from the limitations of the federal Commerce Clause, the preemption doctrine, the control of the currency, telecommunications, transportation and diplomatic and commercial relations with other countries. Therefore, as Puerto Ricans we are unable to manage our political and economic destiny to get out of this swamp in which we have stumbled because we don't have the most basic right to elect the

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[98] *See Civil Rights Cases*, 109 U.S. 3, 4, 3 S.Ct. 18, 27 L.Ed. 835 (1883) and *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906).

representatives that control all the fundamental aspects of our life.

Nowadays, to solve a major financial crisis in the United States municipal bond market, Congress called again upon the extraordinary and violent powers of the *Insular Cases*, and added insult to injury, taking away our charters by enacting PROMESA, that imposes a supra-governmental and non-voted federal Oversight Board, not only stripping away the rights of the already limited self-government of Public Law 600 of 1950[99] and the 1952 Constitution of the Commonwealth of Puerto Rico, but also, in violation of the Appointments Clause of the United States Constitution,[100] the Bill of Rights[101] and binding international law.

The Oversight Board, as imposed on Puerto Rico by PROMESA, has exercised many of the federal powers vested upon them by this federal statute. For example, they certified and imposed several Fiscal Plans as that constituted the mandate that the Commonwealth's Government and other governmental instrumentalities shall follow in the next five fiscal years; certified and imposed the Commonwealth's FY-19 budget against the political will of the Legislature of Puerto Rico; and has invalidated laws of the

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[99] *The Puerto Rico Federal Relations Act of 1950*, Pub. L. No. 81-600.

[100] U.S. Const. Art. II, § 2, cl. 2.

[101] Particularly the I, V, XIII, XIV and XV Amendments.

Commonwealth.[102] These actions nullified the power of the People of Puerto Rico to elect representatives with all the powers conferred by the Constitution of the Commonwealth of Puerto Rico. Wherefore, the Oversight Board is the actual power that is deciding over public policy in Puerto Rico, circumventing the elected Government in practically all fundamental issues.

Unfortunately, the Board is relying on the expansive powers grounded on the *Insular Cases* doctrine to sustain that PROMESA is constitutional. In an attempt to withstand the position that the Appointments Clause is not applicable to the Board members because the Territories Clause makes other structural constitutional provisions vanish, the Opposing Parties desperately and imprudently turned *sub silentio* to the condemned doctrine rooted in the *Insular Cases* intending to extend the double standard of constitutional applicability of the *Insular Cases* to expand their scope and include the structural provisions of the Constitution. This overextension of such infamous doctrine is another insult to the human rights and the dignity of the People of Puerto Rico that this Court should not allow.

Despite the anachronistic and race-based pronouncements of the *Insular Cases*, none of these cases held that structural provisions of the Constitution are inapplicable when Congress legislates with respect to

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[102] *Rosselló Nevares v. The Financial Oversight and Management Board for Puerto Rico*, 330 F. Supp. 3d 685 (2018); *Rivera-Schatz et al. v. The Financial Oversight and Management Board for Puerto Rico et al.*, 327 F. Supp. 3d 365 (2018).

a territory. None of the *Insular Cases* involved the Appointments Clause. And even if the *Insular Cases* had comprehended certain structural provisions of the colonial regime, these cases also recognized "restrictions of so fundamental a nature that they cannot be transgressed." *Dorr v. United States*, 195 U.S. at 147. Certainly, the Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond v. U.S.*, 520 U.S. 651, 659 (1997). The separation of powers in general is also unquestionably essential. "[T]here is no liberty" without the separation of powers. *Stern v. Marshall*, 564 U.S. 462, 483 (2011). "[T]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 501 (2010).[103] Therefore, structural provisions, like the Appointments Clause, necessarily apply to federal officers in the territories.

The Opposing Parties' argument is based on the extension of the constitutional defects of the *Insular Cases* to make inapplicable the Appointments Clause to Puerto Rico. If this court agrees, this case would become the most recent of the discredited *Insular Cases* to the extent that this Court rules that the structural provisions of the Constitution and the separation of powers doctrine that protect freedom and that are embedded in the Appointments Clause do not apply to unincorporated territories when Congress acts pursuant

[103] *See also Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

to its Article IV plenary powers. Therefore, in order to sustain the constitutionality of the Oversight Board's appointments, if this Court were to reverse the court of appeals ruling it should address first the validity of the *Insular Cases*.

On the other hand, the United States tried to elude this scabrous issue arguing that the *Insular Cases* are not relevant because this Court has held before these cases that the issues of separation of powers do not apply to the territories. U.S. p. 25. However, none of the authorities mentioned support the proposition that the Appointments Clause is not applicable to officers vested by law with broad federal powers to act upon a territory.

Fortunately, the judicial tool to affirmatively address the problem of the *Insular Cases* is provided by *Mark Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*, 585 U.S. ___ (2018), 138 S.Ct. 54, 198 L.Ed.2d 780 (2018) ("*Janus*"). *Stare decisis* does not require retention of the *Insular Cases*. The *Insular Cases* were fundamentally based on the badges and incidents of slavery in the United States that are forbidden by the I, V, XIII, XIV and XV Amendments to the U.S. Constitution, therefore are unconstitutional and should be overruled according to *Janus*.

In *Janus*, the Supreme Court identified factors that should be considered in deciding whether to overrule a past decision. Five of those are relevant here: the quality of reasoning, the workability of the rule it

established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.

The colonial status of Puerto Rico and the racist determinations of the *Insular Cases* do not reflect the contemporary political standards of civil and human rights under international law. Undoubtedly, those civil and human rights constitute the Universal Freedom that is protected particularly by the I, V, XIII, XIV and XV Amendments of the United States Constitution.

To sustain the allegations that colonialism imposed through the Territories Clause as interpreted in the *Insular Cases* no longer represents the principles of freedom, UTIER urges to look upon the following sources of international obligations for the United States that are the Supreme Law of the Land: the *American Declaration of the Rights and Duties of Man*,[104] the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Organization of American States Charter*,[105] the *American Convention on Human Rights*,[106] the *Inter-American Democratic Charter*,[107] and the United Nations.

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[104] Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

[105] Adopted in Bogotá, Colombia, in 1948.

[106] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

[107] Adopted in a special session of the General Assembly, Lima Perú, Lima, September 11, 2001.

The development of this body of international law on civil and human rights establishes the scope and specific content of the concept of Universal Freedom encompassed in the Bill of Rights of the United States Constitution that is applicable to UTIER and all Puerto Rico residents.

II. THE *DE FACTO* OFFICER DOCTRINE CHALLENGE

STATEMENT

With the enactment of PROMESA in 2016 came the imposition on UTIER's members and the People of Puerto Rico of the Oversight Board. Its objective is for Puerto Rico to gain access to capital markets at a reasonable cost, but all at the expense of the People of Puerto Rico. UTIER challenged the appointment of the Oversight Board members on the grounds that the Board members are principal officers who exercise significant federal authority that renders them "Officers of the United States" within the meaning of the Appointments Clause. Thus, the advice and consent of the Senate was mandatory in the appointment process. The district court sided with the Opposing Parties and concluded that the Oversight Board members are territorial officers and, therefore, their appointments are not bound by the Appointments Clause. Joint App. 52-92. The court of appeals, on the other hand, applied the corresponding "significant authority" test and made a thorough analysis of the powers and responsibilities vested on the Oversight Board through PROMESA. As

such, the court concluded that the Board members, in fact, exercise significant authority pursuant to the laws of the United States. Therefore, the court below correctly determined that the Oversight Board members are Officers of the United States subject to the Appointments Clause. Joint App. 134-178.

The court of appeals correctly held that the Board members have occupied their offices in violation of the Appointments Clause since the creation of the Board more than three years ago. However, the court validated the Board's previous and future actions by applying the *de facto* officer doctrine. Consequently, UTIER was left with no appropriate and effective remedy, despite that it requested an order declaring void *ab initio* all prior acts and barring all further actions of the Oversight Board until it is constitutionally appointed.

Ryder v. U.S., 515 U.S. 177 (1995) undoubtedly states that the *de facto* officer doctrine does not allow courts to validate governmental actions taken in flagrant violation of the Appointments Clause over an undefined period; otherwise, no "rational litigant" would bring such a structural challenge.[108] Moreover, courts certainly cannot invoke the *de facto* officer doctrine prospectively to legalize any future actions by unconstitutionally selected officers. Nonetheless, that is precisely what the court of appeals did. The court's remedial holding is in questionable conflict with this

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[108] Kent Barnett, *To the Victor Goes the Toil – Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 509 (2014).

Court's precedents that dictate the latitude of the *de facto* officer doctrine. Reversal is warranted.

Moreover, the court of appeals misconstrued the *de facto* officer doctrine and applied it to an Appointments Clause challenge, contrary to this Court's precedents. Also, this doctrine was incorrectly applied by the court of appeals because the Oversight Board members do not comply with the basic requirement of holding an office in good faith, as they knew of the defects in their appointments, especially after the filing of UTIER's adversary complaint and with complete certainty after the judgment of the court below. By allowing the Oversight Board to continue operating despite their unconstitutional appointments, UTIER was left with no appropriate remedy. UTIER's members were left subject to the broad and unfettered powers of an unconstitutional Oversight Board exposing them to ongoing injuries and impairments to their labor rights as well as the obliteration of the democratic governance of the People of Puerto Rico. The ruling of the court of appeals on the issue of the *de facto* officer doctrine will allow Congress and the United States government to enact laws with constitutional defects in violation of the fundamental principle of separation of powers without any consequences as there would be no effective remedy for a challenging party.

A. The court of appeals misconstrued the *de facto* officer doctrine.

The court of appeals applied the *de facto* officer doctrine incorrectly as this Court has expressly refused its application with respect to Appointments Clause challenges. *See Ryder v. U.S.*, 515 U.S. at 183-84. The court below aggravated its mistake when it also allowed the Oversight Board to continue operating for an indefinite time, after it concluded that the appointments were unconstitutional. The remedy UTIER seeks should be granted. *See id.* at 183-84, 186, 188. Thus, all the actions of the Board should be declared null and void as they represent an injury to UTIER and the People of Puerto Rico. *See Canning v. N.L.R.B.*, 705 F.3d 490, 514 (2013), *aff'd in N.L.R.B. v. Canning*, 573 U.S. 513 (2014).

To validate the Oversight Board's previous actions according to the *de facto* officer doctrine, the court of appeals interpreted this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), "which involved an Appointments Clause challenge to the then recently constituted Federal Election Commission." *Id*. In *Buckley*, this Court established that the provisions of the Federal Election Campaign Act vested the Federal Election Commission with "broad administrative powers." *Id*. at 140. Those administrative functions are responsibilities and duties that can only be exercised by "Officers of the United States." *Id.* Therefore, the Act violated the Appointments Clause of the United States Constitution. *Id.* Notwithstanding, this Court allowed "*de facto* validity" to the past *administrative* actions

and determinations of the Federal Election Commission and sanctioned it to operate *de facto* for 30 days "in accordance with the substantive provisions of the Act," until Congress reconstituted the Commission, in compliance with the Appointments Clause. *Id.* at 142-43. Nonetheless, in *Buckley*, "the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." *Ryder*, 515 U.S. at 183.

However, in *Ryder* this Court clarified that *Buckley* did not explicitly rely on the *de facto* officer doctrine. That is why this Court made it clear that, although *Buckley* may be thought to have *implicitly* applied a form of the *de facto* officer doctrine, there is no inclination of this Court to extend them beyond their facts. *Id*. at 184.[109] Thus, the court of appeals relied on an overruled decision that applies a form of the *de facto* officer doctrine that this Court has established, since 1995, it has no inclination to extend beyond those facts.

In line with the aforementioned, since *Ryder*, this Court has abandoned the practice of validating past acts of an unconstitutionally constituted entity or office and has declined to extend or even analyze the "of-forgotten" *de facto* officer doctrine that has "feudal origins dating back to the 15th century," to an Appointments Clause Challenge. *See SW General Inc.*

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[109] Shortly after *Ryder*, *Buckley* was superseded by *McConnell v. FEC*, 540 U.S. 93 (2003), which at the same time was overruled by *Citizens United v. FEC*, 558 U.S. 310 (2010).

v. N.L.R.B., 796 F.3d 67, 81 (2015), *aff'd in* 137 S.Ct. 929 (2017).

Historically, this Court has limited the *de facto* officer doctrine to limit relief following "merely technical" statutory defects in an officer's appointment. *Nguyen v. United States*, 539 U.S. 69, 77 (2003); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962). Also, to excuse defects in an officer's appointment that are raised in a "collateral attack" on a judgment, such as in a *habeas corpus* petition. *See Ex parte Ward*, 173 U.S. 452, 456 (1899). In *Ryder*, this Court explained that, in these limited circumstances, the doctrine "protect[s] the public by insuring the orderly functioning of the government despite technical defects in title to office." *Ryder*, 515 U.S. at 180. However, the Appointments Clause is not a mere technical matter of "etiquette or protocol." *Edmond v. U.S.*, 520 U.S. at 659. It "is among the significant structural safeguards of the constitutional scheme." *Id.* It "preserves [. . .] the Constitution's structural integrity," standing as "a bulwark against one branch aggrandizing its power at the expense of another branch. . . ." *Ryder*, 515 U.S. at 182. "But it is more: 'it preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointments power.' " *Id.* (citing *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

In *Ryder*, "the petitioner challenged the composition of the Coast Guard Court of Military Review while his case was pending before that court on direct review." *Id.* at 182. This Court emphasized that a claim that is based on the Appointments Clause is "a claim

that there has been a 'trespass upon the executive power of appointment,' rather than a misapplication of a statute [. . .]." *Id.* (citing *McDowell v. U.S.*, 159 U.S. 596, 598 (1895)).

The *de facto* officer doctrine is inapplicable to constitutional defects like Appointments Clause violations because those errors are structural, *see Freytag v. Commissioner*, 501 U.S. at 878-80,[110] and therefore, subject to automatic reversal. *See Neder v. United States*, 527 U.S. 1, 8 (1999).[111] Thus, when a proceeding is "tainted with an appointments violation," the challenger "is entitled" to an entirely "new" proceeding. *Lucia v. SEC*, 138 S.Ct. 2044, 2055 (2018).

Moreover, the *de facto* officer doctrine should not be invoked on cases that involve "basic constitutional protections designed in part for the benefit of litigants." *Ryder*, 515 U.S. at 182 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). As a matter of fact, this Court emphasized in *Ryder* that "[. . .] one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits [. . .] and whatever

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[110] *Freytag v. Commissioner*, 501 U.S. at 880 (1991) (holding that "[t]he structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II. [. . .] The structural interests protected by the Appointment Clause are not those of any one of Government but of the entire Republic."

[111] *See also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) ("[A]n Appointments Clause violation is a structural error that warrants reversal.").

relief may be appropriate if a violation indeed occurred." *Id.* at 182-83. Also, acknowledging the importance and purpose of the Appointments Clause, this Court expressed that "[p]roviding relief to a claimant raising an Appointments Clause challenge [. . .] invalidates actions taken pursuant to a defective title." *Id.* at 185. Thus, in *Ryder* this Court reversed the judgment of the Court of Military Appeals which granted *de facto* validity to the actions of the civilian judges of the Coast Guard Court of Military Review. *Id.* at 188. Also, this Court held that petitioner was entitled to the remedy of a hearing before a properly appointed panel of the Coast Guard Court of Military Review. *Id.* "Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable [. . .] appointments." *Id.* at 183.

Therefore, according to *Ryder,* this Court should reverse the court of appeals' determination on the *de facto* officer doctrine, grant UTIER's remedy and forbid an unconstitutional Board from operating and making decisions that are irreparably affecting UTIER's members and the People of Puerto Rico.

After *Ryder*, this Court has not applied or even mentioned the *de facto* officer doctrine to cases where the plaintiffs have brought Appointments Clause challenges. In those cases, the past actions by the unconstitutionally appointed "Officers of the United States" have been declared void and null *ab initio*, and the remedies sought by the aggrieved party, granted. For example, in *N.L.R.B. v. Canning*, 573 U.S. 513 (2014), this Court did not mention the *de facto* officer doctrine

as to an Appointments Clause challenge. In this case, this Court affirmed the court of appeals' decision where three Board members were appointed in violation of the Recess Appointments Clause and declared null and void *ab initio* a determination of the National Labor Relations Board that the plaintiff violated the National Relations Act. *Id.*

Another instance of this Court's silence and thus, denial of application of the *de facto* officer doctrine to an Appointments Clause challenge, is *Lucia v. SEC*, 138 S.Ct. 2044 (2018). In that case, this Court concluded that the Securities and Exchange Commission's Administrative Law Judges are "Officers of the United States" within the meaning of the Appointments Clause. *Id.* at 2055. Relying on *Ryder,* this Court granted plaintiff the "appropriate relief" for an adjudication tainted with an appointments violation: "a new hearing before a properly appointed official." *Id*. As a matter of fact, this Court determined that the administrative judge who would conduct the hearing could not be the same as the one who was unconstitutionally appointed which issued the tainted decision, even if he received or will receive in the future a constitutional appointment. *Id.* In *Lucia*, the unconstitutionally appointed administrative judge affected the life of the plaintiff with his decision. In the present case, the Oversight Board is not affecting the life of just one person. Rather, it is affecting the lives of a labor union comprised of 3,600 members and the People of Puerto Rico as a whole. Therefore, pursuant to *Lucia*, this Court must reverse the decision of the court of appeals and not let

an unconstitutional Board continue operating in Puerto Rico, even though in the future, the same Board could be validated according to the Appointments Clause. Also, according to *Canning*, this Court should declare null and void *ab initio* all the previous actions and determinations of the Oversight Board that affected UTIER's members and the People of Puerto Rico.

B. The *de facto* officer doctrine and the requirement of good faith.

The court of appeals' application of the *de facto* officer doctrine is incorrect as this Court has refused its application as to Appointments Clause challenges. *Ryder v. U.S.*, 515 U.S. at 182. Moreover, this Court established in *Ryder* that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits and whatever relief may be appropriate if a violation indeed occurred." *Id.* at 182-83.

But even if the *de facto* officer doctrine was relevant to this case, it is not applicable for lack of good faith from the members of the Oversight Board. The Board knew of the constitutional defects of their appointments since the debate in the United States Senate when senators publicly acknowledged that the Board's appointment mechanism was unconstitutional, or at least dubious. *See* 162 Cong. Rec. S4687 (daily ed. June 29, 2016) (Senator Cantwell) ("The appointments clause requires that these officers [. . .] be appointed

by the President and confirmed by the Senate," and the law therefore "is going to be challenged constitutionally."). *Id.* at S4685 (Senator Reid) ("I take issue with the oversight board and their excessive powers and appointment structure."). PROMESA's unconstitutional appointment mechanism, thus, was clear from the beginning, but most certainly since August 6, 2017 when UTIER filed the complaint questioning the validity of the appointments and requesting the annulment of all previous and future actions and determinations of the Board.

Generally, an official must meet different requirements to be able to exercise his governmental functions and make the decisions that his position establishes. However, there are occasions when constitutional or legal requirements are not satisfied.[112] Obviously, this situation can create uncertainty about the validity of the determinations that the officer has taken. The ancient courts have developed the *de facto* officer doctrine to "prevent such uncertainty by precluding challenges to official actions on the ground of defective title in the acting official."[113]

The *de facto* concept is a judicial creation "based on considerations of public policy [. . .]." *Jersey City v. Dep't of Civil Serv.*, 153 A.2d 757, 765 (1959). In *Waite v. Santa Cruz*, this Court defined the *de facto* officer:

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[112] Kathryn A. Clokey, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1121 (1985).

[113] *Id*. at 1121.

> as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. 184 U.S. 302, 323 (1902).

In addition, this Court in *Ryder* noted that this doctrine "confers validity upon 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 or election to office is deficient." *Ryder v. United States*, 515 U.S. at 180 (citing *Norton v. Shelby County*, 118 U.S. 425, 440 (1886)).

When applicable, the doctrine validates "certain acts of those in apparent, though not lawful, authority."[114] Due to this apparent authority that the official has, this doctrine is based on the reliance that the citizens have in that officer, with respect to the fact that he or she exercises that power legitimately.[115] "The focus is on the appearance to the public of legitimate title in the official performing governmental duties."[116]

However, there is an important requirement regarding the *de facto* officer doctrine that the courts have taken into consideration: the good faith of the officer. Good faith means honesty; a sincere intention to

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[114] Clifford L. Pannam, *Unconstitutional Status and de facto Officers*, 2 FEDERAL LAW REVIEW 37, 40 (1966).

[115] *Id*. at 40.

[116] Clokey, *supra* note 3 at p. 1123.

deal fairly with others.[117] As mentioned, the official must avoid the appearance of being a usurper and for that "the official must have made a good faith effort to comply with legal prerequisite to title."[118]

Here, the court of appeals ruled that the appointments of the Oversight Board members are unconstitutional. However, based on the *de facto* officer doctrine, the court declined to dismiss the PREPA Title III proceedings and order to void the Oversight Board's past decisions. The court determined that, "the Board Members were acting with the color of authority [. . .] when, as an entity, they decided to file the Title III petitions on the Commonwealth's behalf [. . .] and *there is no indication but that the Board Members acted in good faith* in moving to initiate such proceedings." [Emphasis added]. Joint App. 177.

Since the Senate debate regarding PROMESA, the appointment through the list mechanism was questioned as unconstitutional. But just for the sake of the argument, we could say that for some time the Oversight Board members might have acted "with the color of authority and in good faith." However, their "good faith" ended when UTIER's complaint was filed and the constitutionality of their appointments was formally questioned. It is at that moment when the already existing red flag was confirmed regarding the

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[117] West's Encyclopedia of American Law, edition 2 (2008), retrieved February 26, 2019, from https://legal-dictionary.thefreedictionary.com/good+faith (last visited August 10, 2019).

[118] Clokey, *supra* note 3 at p. 1123.

possible illegality of their appointments. Furthermore, when the court of appeals issued its decision, the Board members definitely stopped fulfilling the different requirements that the courts have developed with respect to the *de facto* officer doctrine.

The honesty and sincere intentions that are inherent to the "good faith" concept totally faded away on August 6, 2017, when UTIER filed the complaint with a thorough explanation of why the Oversight Board's appointments were unconstitutional. The court of appeals then validated UTIER's contention. Absent the good faith requirement, this Court cannot allow the anomaly of having an unconstitutionally appointed Board, with specific knowledge of their illegality, acting upon an entire country without any controls, at their sole discretion and even without the possibility of judicial review of its determinations.

In *Waite v. Santa Cruz*, 184 U.S. 302 (1902), this Court determined that the *de facto* officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office." *Id.* at 323. With the filing of UTIER's complaint and subsequently, with the decision of the court of appeals, it cannot be concluded that the Oversight Board members are "in the unobstructed possession of an office," since their appointments have been questioned and already declared unconstitutional.

Another factor that the courts have considered in defining and developing the *de facto* officer doctrine is that the *de facto* officer does not "present the

appearance of being an intruder or usurper." *Id.* Likewise, the Oversight Board members no longer meet this requirement because they do not have an appearance of legality or have an apparent authority. On the contrary, there is actually a ruling of the unconstitutionality of their appointments from the court of appeals that is of public knowledge and concern.

Moreover, the *de facto* officer doctrine is based on the reliance that citizens have in that officer. That is, citizens must believe that the officer exercises his power legitimately.[119] It is evident that, due to the court of appeals determination, citizens no longer believe that the Oversight Board members are occupying their positions legally and legitimately. Also, the actions taken by said officer "must be within the power of that office."[120] Once the court of appeals determined that their appointments are unconstitutional, the Oversight Board members are not acting within the power of their office because, simply, there is no such office or power.

C. UTIER prayed and is entitled to a meaningful relief.

The court of appeals granted *de facto* validity to the Oversight Board because, presumably, its members comported in "good faith" while acting with the color of authority. On top of that, against this Court's determination in *Ryder*, the court of appeals did not grant

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[119] Pannam, *supra*, p. 40.

[120] Clokey, *supra*, p. 1123.

UTIER any remedy at all. Such determination is the same as the "practice of denying criminal defendants an exclusionary remedy from Fourth Amendment violations when those errors occur despite the good faith of the government actors." *Ryder*, 515 U.S. at 185. When a litigant raises a "constitutional challenge as a defense to an enforcement action," courts cannot make an unconstitutional determination "without providing relief to the [litigant]." *Accord FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). By not awarding any meaningful remedy, the court of appeals determination is just an advisory opinion. When a court makes a new constitutional ruling, it "ha[s] to give [the challenger] the benefit of that new rule"; this is "an unavoidable consequence" of Article III's prohibition against "advisory opinions." *Teague v. Lane*, 489 U.S. 288, 315 (1989) (citing *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987)).

It is evident that if a federal officer holds a position without legal authority, his previous and future actions are void until the legal or constitutional defect is corrected. *See Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.").

The proposition that the court of appeals can rule for UTIER and still somehow allow the Board to continue unimpeded is unprecedented because it largely relies on a misconstruction of the remedies granted in *Buckley*, *supra* and *Northern Pipeline Construction Co.*

v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In those cases, the prevailing challenger received relief. *Ryder v. United States*, 515 U.S. at 182-84 & n.3. In *Buckley*, although this Court blessed "the past acts of the [FEC]," it still awarded plaintiffs "the declaratory and injunctive relief they sought." *Id.* at 183. And in *Northern Pipeline*, the court held that the bankruptcy courts were unconstitutional "and applied its decision prospectively only," but "affirmed the judgment of the District Court, which had dismissed petitioner's bankruptcy action and afforded respondent the relief requested pursuant to its constitutional challenge." *Id*. at 184.[121] There is no precedent of a violation of the Appointments Clause that failed to grant the requested relief. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("[W]e are aware of no theory that would permit us to declare the [FEC's] structure unconstitutional without providing relief to the appellants in this case."). If the Oversight Board is unconstitutional, UTIER is entitled to a decision on the merits of the question and whatever relief may be appropriate. *See Ryder v. United States*, 515 U.S. at 182-83 (1995). Therefore, UTIER respectfully requests this Court to order that all the Oversight Board's actions and determinations taken since its inception are unconstitutional and void *ab initio*, since they are in open violation of

[121] *Ryder* expressly noted that "[t]o the extent these civil cases may be thought to have implicitly applied a form of the *de facto* officer doctrine, we are not inclined to extend them beyond their facts." 515 U.S. at 184.

the Appointments Clause and the separation of powers of the United States Constitution.

The court of appeals determination to allow the Board to continue operations after having been determined that the appointment of its members is unconstitutional is unprecedented. The court of appeals could not find case law to support this ruling.

Allowing an unconstitutional Oversight Board to continue to operate has been particularly destructive here because the Board evidently intends to argue that its actions in the Title III proceedings during this interim period render the cases "equitably moot." This course of conduct seems designed to position the Board to invoke "equitable mootness" before the constitutional issue can be adjudicated by this Court.[122] Moreover, the continuation of the Board's operations – despite their appointments being unconstitutional – has aggravated (and will continue to aggravate) Petitioner's injuries, as well as for the People of Puerto Rico. It would be entirely incongruous for equitable mootness to, in the end, preclude this Court from adjudicating the important constitutional issues in this appeal.

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[122] *See* Board's Mot. to Dismiss Appeal as Equitably Moot at 2, *Elliot v. Commonwealth of Puerto Rico*, No. 19-1182 (1st Cir. Apr. 12, 2019).

D. The remedy requested does not invalidate PROMESA and it is necessary to avoid serious violations to the separation of powers doctrine.

The remedy requested does not nullify PROMESA in its entirety, nor does it deny Puerto Rico of the protection of the Title III. On the contrary, it protects the Petitioner and the People of Puerto Rico from ongoing damages caused by an unconstitutionally appointed Board. The remedy sought merely gives the opportunity to the President to nominate, and the Senate to confirm, a new Oversight Board compliant with the Appointments Clause of the United States Constitution.

This newly constituted Board has the duty and authority to determine whether it ratifies the previous actions of the unconstitutional Board. Respectfully, validating the previous actions of the Board is not of the authority of this Court. The Court cannot assume the powers that PROMESA vested on the Oversight Board. This, by itself, would be a violation of the separation of powers doctrine because it is a *political question* that this Court must abstain to address. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Sanctioning as *de facto* valid the previous actions and determinations of the Board will submerge this Court in a universe of executive policy considerations that would be unwise to address.

The new Board will have the power to determine what it will ratify and what it will not. It can choose to

ratify everything, partially or even nothing at all. However, that power belongs to the newly appointed Oversight Board and not to the Court. *Munaf v. Geren*, 553 U.S. 674, 702 (2008) ("The Judiciary is not suited to second-guess [the Executive Branch] determinations."). That is why the remedy requested here is appropriate. UTIER has timely and properly raised the constitutional challenge of the Oversight Board members' appointment. If a constitutional violation occurred, UTIER must be afforded a full and non *pro forma* relief in the instant controversy.

CONCLUSION

For the aforementioned reasons, this Court should affirm the court of appeals' ruling with respect to the Appointments Clause challenge. On the other hand, this Court must determine that the actions taken by the Oversight Board members since its inception are null and void. Also, it must overrule the court of appeals' decision that allowed the Board members to continue exercising its powers up to this date. This Court must not allow, based on the inapplicable *de facto* officer doctrine, an unconstitutionally appointed Oversight Board with unprecedented and unlimited powers to make vital decisions for an entire country

that is going through one of its worst economic, political and social crises.

Respectfully submitted,

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