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, ET AL.,

*Petitioners, Cross-Respondents*,

v.

AURELIUS INVESTMENT, LLC, ET AL.,

*Respondents, Cross-Petitioners.*

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

## BRIEF FOR AURELIUS AND ASSURED

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Additional Captions Listed on Inside Cover

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AURELIUS INVESTMENT, LLC, ET AL.,
*Petitioners,*

v.

COMMONWEALTH OF PUERTO RICO, ET AL.

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OFFICIAL COMMITTEE OF UNSECURED CREDITORS,
*Petitioner,*

v.

AURELIUS INVESTMENT, LLC, ET AL.

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UNITED STATES,
*Petitioner,*

v.

AURELIUS INVESTMENT, LLC, ET AL.

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UTIER,
*Petitioner,*

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ET AL.

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## QUESTIONS PRESENTED

1. Did the appointments of the members of the Financial Oversight and Management Board for Puerto Rico violate the Appointments Clause of the United States Constitution?

2. Does the *de facto* officer doctrine allow courts to deny meaningful relief to successful separation-of-powers challengers who are suffering ongoing injury at the hands of unconstitutionally appointed principal officers?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. The parties to the proceedings below were as follows:

Petitioners and Cross-Respondents the Financial Oversight and Management Board (the "Board") for Puerto Rico and the United States were appellees in the court of appeals. The Board, the United States, and the appellee-respondents listed below are referred to herein as "petitioners."

Respondents and Cross-Petitioners Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC (collectively, "Aurelius"), Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (collectively, "Assured"), and Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER") were appellants in the court of appeals. Aurelius, Assured, and UTIER are referred to herein as "cross-petitioners."

Respondents the Commonwealth of Puerto Rico (the "Commonwealth"), José B. Carrión III, Andrew Biggs, Carlos M. García, Arthur J. González, Ana J. Matosantos, José R. González, and David A. Skeel, Jr. (collectively, the "Board members"), the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), the Official Committee of Unsecured Creditors of All Title III Debtors Other Than COFINA ("Unsecured Creditors"), the American Federation of State, County & Municipal Employees ("AFSCME"), the Official Committee of Retired Employees of the Commonwealth of Puerto Rico ("Retirees" or "Retiree Committee"), the COFINA Senior Bondholders Coalition ("COFINA"), Fideicomiso Plaza, Decagon Hold-

ings 1, LLC, Decagon Holdings 2, LLC, Decagon Holdings 3, LLC, Decagon Holdings 4, LLC, Decagon Holdings 5, LLC, Decagon Holdings 6, LLC, Decagon Holdings 7, LLC, Decagon Holdings 8, LLC, Decagon Holdings 9, LLC, Decagon Holdings 10, LLC, GoldenTree Asset Management, LP, Old Bellows Partners, LP, Scoggin Management, LP, Taconic Capital Advisors, 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, Puerto Rico Electric Power Authority ("PREPA"), 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 were appellees before the court of appeals.

2. Counsel for Aurelius and Assured certifies as follows:

Aurelius Investment, LLC, is a limited liability company. It is not a corporation.

Aurelius Opportunities Fund, LLC, is a limited liability company. It is not a corporation.

Lex Claims, LLC, is a limited liability company. It is not a corporation.

Assured Guaranty Corp. is a wholly owned indirect subsidiary of Assured Guaranty Ltd., which is a publicly traded corporation. No entity owns more than 10% of the outstanding stock of Assured Guaranty Ltd.

Assured Guaranty Municipal Corp. is a wholly owned indirect subsidiary of Assured Guaranty Ltd.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the Constitution and the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016), 48 U.S.C. § 2101 *et seq.* ("PROMESA") are reproduced in an Appendix to this brief. App., *infra*, 6a-80a.

## INTRODUCTION

This case concerns whether the people of Puerto Rico are entitled to the protections of the Appointments Clause, and whether courts may wash away the consequences of violations of that constitutional provision by applying the *de facto* officer doctrine to validate both the past and future acts of unlawfully appointed officials.

These questions arise from PROMESA, which created the Financial Oversight and Management Board for Puerto Rico to oversee Puerto Rico's massive debt restructuring. While PROMESA purports to install the Oversight Board as part of the Commonwealth's territorial government, the Board's members are appointed, overseen, and removable by the federal government alone. PROMESA vests the Board members with substantial federal powers, including the exclusive power to administer and enforce that federal statute against third parties in federal court, to take testimony, to subpoena and receive evidence, and to administer oaths to appearing witnesses. The Board members also have exclusive power to initiate and prosecute—in federal court—the bankruptcy proceedings underlying this case, which constitute the largest restructuring of municipal debt in United States history.

Under the test developed and repeatedly applied by this Court, that ability to exercise substantial federal power marks the Board members as Officers of the United States. *See Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018); *Freytag* v. *Comm'r*, 501 U.S. 868, 880-82 (1991); *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam). And because they undisputedly have no superior officer and are removable only by the President of the United States, they are principal officers who must be nominated by the President and confirmed by the Senate.

Yet the Senate confirmed none of the Board members. Instead, Congress devised an alternative appointments mechanism through which it would arrogate to itself the power to name the Board members: PROMESA compelled the President to select the Board members from lists compiled by individual members of Congress. This usurpation of the Executive's appointment authority is incompatible with the Appointments Clause and the separation of powers.

In essence, the Board and the United States claim that Congress's Article IV power to structure territorial governments includes the power to create offices that exercise federal power but nevertheless deviate from the Appointments Clause. But there is no "territories" exception to the Appointments Clause; the Appointments Clause applies to "all" continuing offices that exercise significant federal authority—even those that supervise or otherwise sit in a territory. And because the Board members—quite unlike those territorial officials who principally administer local laws—exercise substantial *federal* authority, they are Officers of the United States.

The First Circuit correctly held that the Board members' appointments violated the Appointments

Clause. But it erred when it applied the so-called "*de facto* officer doctrine" to declare all of the Board's admittedly unconstitutional acts—both in the past and prospectively—"valid" and affirmed the judgments below.

Just 24 years ago, this Court unanimously held in *Ryder* v. *United States*, 515 U.S. 177 (1995), that the *de facto* officer doctrine does not apply to Appointments Clause violations. And, even if the holding of *Ryder* admitted of some exception, this case—where PROMESA's violation of the Appointments Clause was so open and notorious that it was noted by multiple members of Congress debating the legislation—would be a particularly poor candidate for it. Indeed, application of the *de facto* officer doctrine here would impart to Congress only the lesson that it can violate the Constitution free of consequence and thus continue to aggrandize itself at the expense of the Executive Branch.

While the Board and the United States undoubtedly will urge that the exigencies of Puerto Rico's debt restructuring require the denial of any relief from the Board's past actions, "[t]he Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton* v. *City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). Where the Appointments Clause is concerned, that "stability" is vindicated through litigation by private parties, who will have no incentive—and perhaps no standing—to bring such litigation in the absence of the ability to obtain relief that is meaningful in the context of the proceeding in which it is sought.

Here, Aurelius timely moved to dismiss the Commonwealth Title III proceeding, and Assured filed an adversary complaint in another Title III proceeding

seeking to invalidate certain actions of the Board and enjoin the Board from further action.[1] Because it believed that the Appointments Clause does not apply to the selection of the Board members, the district court denied Aurelius's motion and dismissed Assured's complaint. Those decisions rested on an erroneous view of the law and should have been reversed. The First Circuit erred when, after finding that the Appointments Clause had been violated, it nevertheless *affirmed* the judgments of the district court on the basis of the *de facto* officer doctrine. The Appointments Clause is meant to be a vibrant structural safeguard with enduring relevance for the selection of those who lead our federal government, not just a paper tiger.

## STATEMENT

**1.** Enacted by Congress in 2016, PROMESA created a new federal entity: the Financial Oversight and Management Board for Puerto Rico. 48 U.S.C. § 2121. "Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island achieve fiscal responsibility and access to the capital markets." JA141.[2]

To achieve this objective, Congress vested the Board with "significant authority" under "the laws of the United States," including "the power to veto, rescind, or revise Commonwealth laws and regulations

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[1] The relevant Title III proceedings are those initiated for the Commonwealth and the Puerto Rico Highways and Transportation Authority ("PRHTA"). *See* Nos. 17-bk-3283 (D.P.R.); 17-bk-3567 (D.P.R.). Aurelius and Assured do not challenge Board actions in other Title III proceedings.

[2] All internal quotation marks, citations, and footnotes are omitted unless otherwise indicated.

that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed pursuant to it." JA165-66. The Board reviews and approves all Puerto Rico budgets. 48 U.S.C. § 2142. It has broad federal investigative and enforcement powers, including authority to hold hearings, take testimony, subpoena and receive evidence, and administer oaths. *Id.* § 2124(a), (f). It is the sole entity that "may seek judicial enforcement of its authority to carry out its responsibilities under [PROMESA]," and it does so in Article III courts. *Id.* § 2124(k). PROMESA even permits the Board to investigate "the disclosure and selling practices" of Commonwealth and instrumentality bonds, including any "conflicts of interest maintained by" brokers, dealers, or investment advisers—issues that extend far outside of Puerto Rico. *Id.* § 2124(*o*).

The Board also has authority to initiate a bankruptcy-like proceeding in federal court under Title III of PROMESA to adjust the debts of the Commonwealth and certain of its instrumentalities. 48 U.S.C. § 2164. In these proceedings, only the Board can represent and make decisions for the Commonwealth and its instrumentalities. *Id.* § 2175(b).

While PROMESA labels the Board "an entity within the territorial government," 48 U.S.C. § 2121(c)(1)-(2), the Board is an independent federal overseer of the Commonwealth and its finances, statutorily immune from "any control, supervision, oversight, or review" by the government or people of the Commonwealth. *Id.* § 2128(a)(1). Significantly, the Board members are removable *only* by the President, for cause. *Id.* § 2121(e)(5)(B). They are subject only to federal ethics laws, *id.* § 2129, and enjoy numerous trappings of federal power, *see*, *e.g.*, *id.* § 2122 (use of

federal facilities); *id.* § 2124(c) (use of federal information); *id.* § 2124(n) (support from General Services Administration).

Despite the pervasively federal nature of their powers, the Board members are not required to be nominated by the President and confirmed by the Senate. PROMESA instead provides for the President to select six of the Board's seven voting members—the "List-Members"—from lists submitted to the President by House and Senate leaders. 48 U.S.C. § 2121(e)(2)(A)-(B). The seventh may be selected "in the President's sole discretion," also without Senate confirmation. *Id.* § 2121(e)(2)(A)(vi).

PROMESA requires Senate confirmation only if the President makes "off-list" nominations. 48 U.S.C. § 2121(e)(2)(E). But if the Senate did not confirm an off-list nominee by September 1, 2016—only two months after PROMESA's enactment (during most of which time the Senate was in recess)—then PROMESA *required* the President to appoint "from the list." *Id.* § 2121(e)(2)(G); *see* JA147 ("[B]ecause the Senate was in recess for all but eight business days between enactment of the statute and September 1, one might conclude that, in practical effect, the statute forced the selection of persons on the list"; it was "arguably inevitable"). The House committee that drafted PROMESA boasted that PROMESA's appointment scheme would "ensure[] that a majority of [the Board's] members [were] effectively chosen by Republican congressional leaders on an expedited timeframe." H.R. Rep. No. 114-602, pt. 1, at 42 (2016).

The unconstitutionality of this scheme was no secret; it was debated on the floor of Congress. There, Senator Cantwell observed: "The appointments

clause requires that these officers, who are being appointed under the authority of Federal law, be appointed by the President and confirmed by the Senate," yet the bill would create "board members who have significant authority over Federal law" and "are not appointed by the President and … are not confirmed by the Senate." 162 Cong. Rec. S4687 (daily ed. June 29, 2016). "[I]t is going to be challenged constitutionally," she warned. *Ibid.* Senator Reid similarly "t[ook] issue with the oversight board and their excessive powers and appointment structure." *Id*. at S4685.

Once PROMESA was enacted, President Obama acceded to its appointment procedure. He chose all six List-Members from the congressional lists and appointed the seventh himself. None of the Board members was Senate-confirmed. JA147-48 & n.8.

**2.** In May 2017, the Board authorized Title III petitions on behalf of the Commonwealth and certain of its instrumentalities, including PRHTA, in the United States District Court for the District of Puerto Rico under 48 U.S.C. §§ 2164(a) and 2166(a). JA148.

Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC ("Aurelius") are beneficial holders of substantial amounts of outstanding general-obligation bonds issued or guaranteed by the Commonwealth. Assured Guaranty Corp. and Assured Guaranty Municipal Corp. ("Assured") insure general-obligation bonds issued by the Commonwealth and bonds issued by PRHTA. On August 7, 2017, Aurelius timely sought to dismiss the Board's Commonwealth Title III petition because the Board members' appointments violated the Appointments Clause and the Constitution's separation of powers. JA149-50. Assured later filed an adversary complaint

in the PRHTA Title III case that sought declaratory relief, invalidation of certain past actions of the Board (including the filing of the Commonwealth and PRHTA Title III cases), and injunctive relief requiring the Board to cease its activities. JA116.

The Board, the United States, and five interested parties opposed Aurelius's motion to dismiss, arguing that the Board members are not Officers of the United States because Congress deemed the Board part of Puerto Rico's territorial government. JA149. The Board additionally argued that, because of Congress's plenary Article IV powers, "the Appointments Clause did not apply even if the [Board] members were federal officers." *Ibid.*

The district court denied Aurelius's motion. Congress had stated "that it was acting pursuant to its Article IV" authority in enacting PROMESA, and that assertion, the court concluded, "is entitled to substantial deference." JA78. Accordingly, "the Oversight Board is an instrumentality of the territory of Puerto Rico, established pursuant to Congress's plenary powers under Article IV of the Constitution," and therefore "its members are not 'Officers of the United States'" who must be appointed in conformity with the Appointments Clause. JA90. The district court later dismissed Assured's adversary complaint based on its denial of Aurelius's motion to dismiss. JA133.

**3.** The First Circuit unanimously reversed the district court's conclusion that the Board members were constitutionally appointed.

First, the court "reject[ed] [the] notion that Article IV" created an exception to the Appointments Clause, just as there is no Article IV exception to the Presentment Clause. JA155. Rather, the Appointments

Clause applies "to *all* … Officers of the United States." JA156.

The court concluded that "[i]t [could not] be clearer or more unequivocal that the Appointments Clause" applies to the Board members. JA155-56, 162. The Board members, the court held, meet the test for "Officers of the United States" under *Lucia*, *Freytag*, and *Buckley* because they (1) occupy "continuing position[s] established by federal law"; (2) "exercise[] significant authority"; and (3) do so "pursuant to the laws of the United States." JA164-65. This conclusion was confirmed by "the teaching of founding era history" in the territories. JA159.

Next, the court found that the Board members were principal officers because they are "answerable to and removable only by the President." JA173. Additionally, they possess "vast duties and jurisdiction," with the power to "formulate policy for the Government" over the entire "economy of Puerto Rico." JA174. The court therefore held that the Board members "should have been appointed by the President, by and with the advice and consent of the Senate," but were not, thus rendering their appointments "unconstitutional." *Ibid*.

The court of appeals nevertheless affirmed the judgments of the district court. The court invoked "the *de facto* officer doctrine" to declare all of the Board's past actions "valid," as well as all future actions taken by the Board until the court of appeals issues its mandate. JA178. The court initially stayed its mandate for 90 days "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause," *ibid.*, then extended the stay another 60 days, JA184, and finally extended the

stay until this Court renders its decision, JA190. The court thus "*affirm*[*ed*] … the district court's denial of appellants' motions to dismiss the Title III proceedings" and the dismissal of Assured's adversary complaint, even though the court of appeals had reversed the only legal rationale the district court had offered for its decisions. JA178 (emphasis added).

## SUMMARY OF ARGUMENT

**I.** The First Circuit correctly held that the Board members are principal Officers of the United States who were not appointed in conformity with the Appointments Clause.

**A.** There is only one test for whether an individual is an "Officer of the United States" within the meaning of the Appointments Clause: Whether the individual occupies a "continuing" position established by law and "exercis[es] significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051; *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126. The Board members are the only officers that may enforce, execute, and administer PROMESA, a federal statute, and they do so in federal court. They execute and administer that federal statute with a suite of expansive powers derived exclusively from federal law. They are appointed by the President and Congress and removable only by the President. They are Officers of the United States.

**B.** Contrary to petitioners' suggestion, there is no Article IV exception to the Appointments Clause. Congress's "plenary" power over the territories does not allow it to create offices that exercise significant federal authority to which the Appointments Clause does not apply. The Constitution's separation-of-powers limitations apply with equal force when Congress

legislates pursuant to Article IV. *See MWAA* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 270-71 (1991).

**C.** Allowing the Board members to exercise significant federal authority without constitutional appointments would upend centuries of constitutional history. Since the Founding, territorial officials that exercise substantial federal authority have been considered Officers of the United States to whom the Appointments Clause and the Commissions Clause apply. And since George Washington's appointment of the first governor of the Northwest Territory, every civilian governor of a territory installed by the federal government to a continuing office has been appointed and commissioned in conformity with those Clauses.

**D.** Nothing in the decision below threatens territorial home rule. Since the First Congress, it has been understood that purely local, territorial officers who enact and enforce primarily local law—such as territorial legislators and other local officials—are not Officers of the United States, and therefore may be elected or appointed in any manner of ways. Only Officers of the United States are subject to the Appointments Clause.

**II.** Because the Board members were selected in violation of the Appointments Clause, their actions cannot be given retroactive validation under the *de facto* officer doctrine. And there was no basis whatsoever for the First Circuit to validate the Board's actions prospectively, *i.e.*, after February 15, 2019, when the court of appeals held the Board unconstitutional.

**A.** This Court already has held that the *de facto* officer doctrine does not apply to constitutional violations. *Ryder* v. *United States*, 515 U.S. 177 (1995).

The First Circuit relied on *Buckley*, but seemingly overlooked that *Ryder* limited *Buckley* to its facts, which, as *Ryder* notes, did not actually involve any application of the *de facto* officer doctrine because plaintiffs had sought only prospective relief. This Court's cases confirm that when litigants bring successful constitutional challenges, they are entitled to relief from proceedings administered by unconstitutional officers. *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality). Here, that requires reversal of the district court's judgments against Aurelius and Assured and an order that the Commonwealth and PRHTA Title III petitions authorized by the unconstitutional Board be dismissed. Any other result would threaten the separation of powers by disincentivizing private litigants from bringing Appointments Clause challenges. *Lucia*, 138 S. Ct. at 2055-56. It would also encourage Congress to usurp executive authority, confident that it will suffer no repercussions. *MWAA*, 501 U.S. at 276-77. The *de facto* officer doctrine is entirely inapplicable here.

**B.** Even if the *de facto* officer doctrine could validate past actions taken by officials selected in violation of the Appointments Clause, it could not possibly validate the actions of unconstitutional officers prospectively, as the First Circuit did here. That peculiar result defies the logic even of the *de facto* officer doctrine itself. Once an officer has been adjudged *de jure* unconstitutional, there is no conceivable basis for declaring that officer's acts *de facto* valid.

**C.** The proper remedy is for the Court to order the reversal of the judgments of the district court and the dismissal of the Commonwealth and PRHTA Title III petitions, and then stay the effect of the judgment while a new Board is appointed consistent with the

Appointments Clause. A constitutionally appointed Board then could determine in the first instance whether there are grounds for ratifying the unconstitutional Board's actions, including the filing of the Commonwealth and PRHTA Title III petitions. If a constitutional Board appropriately ratifies the filing of those petitions before the stay expires, the district court would not need to dismiss the Title III petitions. This remedy would honor the separation of powers while permitting the Board to achieve its statutory purposes.

## ARGUMENT

### I. THE BOARD MEMBERS ARE PRINCIPAL OFFICERS OF THE UNITED STATES WHO WERE UNCONSTITUTIONALLY APPOINTED.

#### A. The Board Members Are "Officers Of The United States."

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all principal "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The provision "is among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997).

After being subjected to the British Empire's "manipulation of official appointments" to offices in the American territories, the Constitution's framers restrained that "insidious and powerful weapon of eighteenth century despotism" by "carefully husbanding the appointment power." *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991). The Appointments Clause thus vests the President with the appointment power to "prevent[] congressional encroachment," while "curb[ing] Executive abuses" by requiring Senate confirmation of

principal officers. *Edmond*, 520 U.S. at 659. This balanced procedure "was designed to ensure public accountability" for all appointments. *Id.* at 660. It is the exclusive means for appointing "*all* Officers of the United States," and "[n]o class or type of officer is excluded because of its special functions," *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (emphasis added), including those that oversee or otherwise serve in a territory.

Although the Board argued below that "the Appointments Clause did not apply *even if* [*its*] *members were federal officers*," JA149 (emphasis added), it has abandoned that argument. All parties now concede that *all* federal officers, even those whose jurisdiction is geographically limited to a territory—such as federal judges and United States Attorneys—are Officers of the United States to whom the Appointments Clause applies. *See* U.S. Br. 36 ("[T]he only dispute concerns the line between federal and territorial officers."); Board Br. 48-49 (conceding that a "federal fiscal oversight entity" for Puerto Rico would be subject to the Appointments Clause).

Petitioners now devote the bulk of their briefs to establishing a truism: That Congress may exercise its Article IV power to create purely local territorial offices occupied by officials who are locally selected or elected and are not subject to the Appointments Clause, such as territorial legislators and other local officials that promulgate and administer local laws. That point is not in dispute. The only question here is whether the Board members—who are appointed, overseen, and removable by the federal government alone and have exclusive authority to enforce and administer a federal statute—principally exercise federal power or territorial power that is local in nature.

That is the relevant inquiry because "territorial officials who are not appointed through Article II" are "consistent with the Constitution" only if they "exercise[] the executive power of the territory," but not if they exercise the power "of the United States." William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev., at 18 (forthcoming 2019). As explained below, the Board members exercise substantial federal authority and therefore are principal Officers of the United States, and the Appointments Clause applies in full force when the federal government creates and fills federal offices in the territories. The Board members' appointments therefore were unconstitutional.

### 1. Under *Buckley*'s controlling test, the Board members are Officers of the United States.

This Court has recognized only one test for determining whether officials are "Officers of the United States" within the meaning of the Appointments Clause, and has adhered to it for decades: Do the officials occupy a "continuing" position established by federal law, and do they "exercis[e] significant authority pursuant to the laws of the United States"? *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018); *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126. That straightforward test controls this case and compels the conclusion that the Board members' appointments are unconstitutional.

The Board members undisputedly hold continuing offices established by federal law. They have three-year terms, can be reappointed, and may serve until a successor takes office. 48 U.S.C. § 2121(e)(5). The

Board continues in existence indefinitely—until it certifies that various fiscal objectives have been obtained "for at least 4 consecutive fiscal years." *Id*. § 2149(2).

Congress also explicitly vested the Board with significant federal power. Officials exercise "significant authority under the laws of the United States" when they "execute," "enforce[]," or "administer" federal law. *Buckley*, 424 U.S. at 132, 134-35, 138; *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 78, 100 (2007). Indeed, only "Officers of the United States" subject to the Appointments Clause may have "primary responsibility" for executing federal law "in the courts of the United States." *Buckley*, 424 U.S. at 140-41. "[E]nforcement power, exemplified by discretionary power to seek judicial relief" and "conduct[] civil litigation in the courts of the United States for vindicating public rights," constitutes significant federal authority, because "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id*. at 138, 140.

The Board is the *only* entity that may enforce PROMESA, and it does so in federal court. 48 U.S.C. § 2124(k); *id.* § 2166(a) (exclusive federal-court jurisdiction). Indeed, the Board has twice used its enforcement power to sue the Commonwealth's Governor, seeking injunctive relief to force the Governor to "comply as a matter of federal law" with PROMESA's dictates. Compl. 17, 22, No. 17-bk-3283 (D.P.R.), Doc. 1180; Compl. 7, No. 17-bk-3283 (D.P.R.), Doc. 7830. The Board also has sued the Puerto Rico Senate President to enforce PROMESA's mandates, asking the

federal court to order him to provide financial data required by PROMESA. Compl. 12, No. 17-bk-3283 (D.P.R.), Doc. 5125. In defending these actions, the Board has insisted that it "is simply enforcing PROMESA," a "federal statute." Opp. to Mot. to Dismiss at 17 n.8, No. 19-ap-393-LTS (D.P.R.), Doc. 34. These examples refute the United States' assertion that the Board enforces only Puerto Rico law. U.S. Br. 41.

Significantly, the federal government also oversees the Board members throughout their tenure. The federal government selects them, and the President alone may remove them. 48 U.S.C. § 2121(e); JA173 (Board members "answerable to and removable only by the President"). Therefore, the Board members "must fear" and "obey" only the federal government. *Bowsher* v. *Synar*, 478 U.S. 714, 726-30 (1986). This is true even though the President may remove the Board members only for cause. *Id.* at 729-30. As the First Circuit observed, "[e]ssentially everything [the Board members] do is pursuant to federal law under which the adequacy of their performance is judged by their federal master." JA167.

This Court's *Buckley* test "recognize[s] [that] the source of [the officer's] authority" must "unavoidably help to determine whether an office exists." *Appointments Clause*, 31 Op. O.L.C. at 118. That is because the *Buckley* test "turns on whether the power wielded by a person or body has its source in federal authority." *Citizens for Abatement of Aircraft Noise, Inc.* v. *MWAA*, 917 F.2d 48, 53-54 (D.C. Cir. 1990), *aff'd,* 501 U.S. 252 (1991). Of course, non-federal officials, such as state officials and elected territorial officials, can have some non-exclusive authority to enforce federal law. *See* Board Br. 29. Unlike the Board, however,

those officials do not have "primary responsibility" to enforce federal law. *Buckley*, 424 U.S. at 140. The Board, in contrast, is the *exclusive* entity that enforces PROMESA, and implementation of PROMESA indisputably is the Board's "primary responsibility."

As the First Circuit noted, "PROMESA empowers the Board Members to initiate and prosecute the largest bankruptcy in the history of the United States municipal bond market." JA165; *see* 48 U.S.C. § 2164(a). But the Board members also administer PROMESA in myriad other ways using powers functionally indistinguishable from those possessed by the judges in *Lucia* and *Freytag*. In *Lucia*, the Administrative Law Judges ("ALJs") of the Securities and Exchange Commission ("SEC") were Officers of the United States because they administer federal statutes by using their power to, among other things, "take testimony," "receive evidence," and "administer oaths" to "witnesses" at "hearings." 138 S. Ct. at 2053 (alterations omitted). The same was true of the tax court judges in *Freytag*. *See* 501 U.S. at 881-82. PROMESA gives the Board identical powers—the Board may "take testimony," "subpoena" and "receive evidence," and "administer oaths or affirmations to witnesses appearing before it" to administer PROMESA. 48 U.S.C. § 2124(a), (f). The Board also has investigative powers that sweep far beyond Puerto Rico, including the power to investigate nationwide "the disclosure and selling practices" employed for Puerto Rico bonds in the retail market and "relationships or conflicts of interest"

among brokers, dealers, and investment advisers. *Id.* § 2124(*o*).[3]

The Board members have many other badges of federal-officer status. Even though the Board purports to be part of the territorial government, PROMESA curiously forbids past or present officers of the territorial government from serving as Board members. 48 U.S.C. § 2121(f)(2). The Board members and its employees are subject to federal conflict of interest and ethics laws, not local ethics laws. *Id.* § 2129. The Board interprets and applies federal law each time it exercises its powers to veto, revise, or rescind Puerto Rico laws that the Board deems inconsistent with PROMESA or the Fiscal Plan established pursuant to that statute. *Id.* § 2144(a)(1), (5), (c)(3)(B). It can rule that a fiscal plan proposed by the Commonwealth is deficient, *id.* § 2141(c)(3); issue its own fiscal plan if it rejects the Commonwealth's proposed plan, *id.* § 2141(d)(2); and approve or disapprove Commonwealth budgets, *id.* § 2142. By design, the Board members stand *above*—not within—the Commonwealth's territorial government. "Neither the Governor nor the Legislature may … exercise any control, supervision, oversight, or review over the Oversight Board or its activities." *Id.* § 2128(a).

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[3] The Board's subpoena power is governed by Puerto Rico's "personal-jurisdiction statute," U.S. Br. 41, but federal court personal-jurisdiction procedures frequently depend on "state law," Fed. R. Civ. P. 4(e)(1), (g), (k), (n). And while the Board may hire counsel to assist in exercising these powers, U.S. Br. 40, other federal agencies may do the same, *see*, *e.g.*, 12 U.S.C. § 1819(a) (Federal Deposit Insurance Corporation); *id.* § 4513(c)(1); (Federal Housing Finance Agency).

These powers undoubtedly are "significant," and they differ sharply from those of local territorial officials who are not Officers of the United States. This Court has long recognized this distinction. In *Clinton* v. *Englebrecht*, the Court distinguished a territorial attorney and marshal from the territory's U.S. Attorney and U.S. Marshal, "who may properly enough be called the attorney and marshal of the United States for the Territory; for their duties in the courts have exclusive relation to cases arising under the laws and Constitution of the United States." 80 U.S. (13 Wall.) 434, 448 (1871). Likewise, in *Snow* v. *United States*, the Court held that the territorial attorney general, who had been appointed by the territorial legislature, was empowered to prosecute cases arising under the "[t]erritorial laws," while "[t]he proper business of" the presidentially appointed United States Attorney was to prosecute cases under federal law. 85 U.S. (18 Wall.) 317, 321-22 (1873).

The Board now advances the bizarre argument, never before pressed, that PROMESA is not a law of the United States at all, Board Br. 24, but that argument crumbles upon inspection. The Board itself has admitted elsewhere that PROMESA is a "federal statute." Opp. 17 n.8, No. 19-ap-393-LTS (D.P.R.), Doc. 34. And sensibly so, because Congress codified PROMESA in the United States Code, 48 U.S.C § 2105, a compilation of the "laws of the United States," 2 U.S.C. §§ 285a-285b. PROMESA also expressly adopts massive portions of the federal Bankruptcy Code, 48 U.S.C. §§ 2161(a), 2170, and amends other federal laws, *see* Pub. L. No. 114-187, §§ 403, 406, 408. Indeed, when the Board members invoked that authority to initiate the Commonwealth's Title III case, the Chief Justice was required to appoint a U.S. District Judge to adjudicate it. 48 U.S.C. § 2168.

This Court has held that a similar territorial debt-limitation statute was federal, not local. Guam's Organic Act contains a provision restricting the amount of bonds that Guam can sell. *Limtiaco* v. *Camacho*, 549 U.S. 483, 491 (2007). This Court concluded that the provision was "not a matter of purely local concern" but rather was a "federal statute" because it "protects both Guamanians and the United States from the potential consequences of territorial insolvency." *Ibid.* The same reasoning applies to PROMESA.

The Board's federal authority is more than sufficient to demonstrate on which side of the line its members fall. They are Officers of the United States subject to the Appointments Clause.

**2. *Buckley* provides the exclusive test for determining who is an Officer of the United States.**

Unable to deny that the Board members satisfy *Buckley*'s test, petitioners insist that *Buckley* serves only to distinguish federal officers from employees, not territorial officials. U.S. Br. 43-44; Board Br. 39-40. This Court has never limited the *Buckley* test that way, even though *Freytag* discussed territorial officials at length and observed that a clerk of a territorial court was an Officer of the United States. *See* 501 U.S. at 889-92. Instead, *Buckley* made clear that its test aims to identify "all persons who can be said to hold an office under the government." 424 U.S. at 125. Thus, lower courts have used *Buckley* to determine whether offices established under Article IV exercise "significant federal authority," and whether their occupants were "selected in violation of the Appointments Clause." *Hechinger* v. *MWAA*, 845 F. Supp. 902, 909 (D.D.C.), *aff'd*, 36 F.3d 97 (D.C. Cir. 1994).

Although the United States tries to rewrite history, the Executive Branch, prior to this case, routinely applied *Buckley* to determine when territorial officials become "Officers of the United States." It was the United States that urged the D.C. Circuit to apply *Buckley* to determine whether members of the Metropolitan Washington Airports Authority ("MWAA") were Officers of the United States. U.S. Br. 23-26, *Hechinger* v. *MWAA*, No. 94-7036, 1994 WL 16776877 (D.C. Cir.) ("U.S. *Hechinger* Br."). Earlier, the Attorney General testified before Congress that it would violate "*Buckley*" to give a territorial Governor the authority to have a federal agency "delay[]" and "reconsider" proposed regulations, or "to intervene in the administration of federal regulations," because the Governor would be exercising significant federal authority. *Hearings on S. 244 Before the S. Comm. on Energy & Nat. Res.*, 102d Cong., 1st Sess. 190, 197, 212 (1991) (statement of Richard Thornburgh, Attorney General) ("*Thornburgh Statement*"). Similarly, Justice Department officials opined that Congress cannot delegate to the Commonwealth the power to administer "federal laws and programs on the" Commonwealth or certify that a federal law or regulation "is inapplicable to Puerto Rico" because, under "*Buckley*," "the enforcement of federal laws cannot be vested in, or delegated to, persons not appointed in conformity with the Appointments Clause." *Hearings on S.710, S.711, and S.712 Before the S. Comm. on Energy & Nat. Res.*, 101st Cong., 1st Sess., pt. 3, at 19, 36-37, 46-47 (1989) (statement of Edward Dennis, Acting Deputy Attorney General) ("*Dennis Statement*"). This is because the "appointments power[] is a fundamental part of the Constitution, going like the Present[ment] Clause to the heart of the separation of powers," and there-

fore "applies necessarily … to the appointment of federal officers [even] in the insular areas." Letter from Harry Flickinger, Assistant Attorney General, to Linda Morra, U.S. Gen. Accounting Office 79 (Apr. 12, 1991), https://bit.ly/2JXUdJr ("*AAG Letter*").

**3. The Board is a federal entity.**

**a.** Petitioners do not dispute that the Board members are Officers of the United States under the test articulated in *Lucia*, *Freytag*, and *Buckley*. Instead, they assert that the proper question is "whether [the] entity established by Congress is federal or local." Board Br. 46. To answer *that* question, they urge the Court to apply their new test, adapted from *Palmore* v. *United States*, 411 U.S. 389 (1973).

Petitioners' framework applies the wrong test to the wrong question. The Appointments Clause applies to "Officers of the United States," not "entities." And officials serving within a territory are Officers of the United States under the Appointments Clause if they hold continuing office created by federal law and exercise significant federal authority. *Freytag*, 501 U.S. at 892. Indeed, the United States has recognized that it would violate the Appointments Clause to confer federal authority on a state or territorial government official, even though the governmental *entity* is non-federal. *See Thornburgh Statement* 197-212; *Dennis Statement* 37-47; *Appointments Clause*, 31 Op. O.L.C. at 100 n.10.

Even if the Board's governmental status were relevant, this Court already established a test for determining whether an entity is federal in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). The Board readily satisfies that test, as one court already has held. *Altair Glob. Credit Opportunities*

*Fund (A), LLC* v. *United States*, 138 Fed. Cl. 742, 760-65 (2018). Petitioners never dispute that the Board is federal under *Lebron*. *See* U.S. Br. 50-53.

In *Lebron*, this Court held that Amtrak was part of the federal government because Congress created Amtrak by a special law to further "governmental objectives," and the federal government "retains for itself permanent authority to appoint a majority of the" members of Amtrak's governing body. 513 U.S. at 394, 396, 399-400. There can be no serious question that the Board satisfies this test.

*First*, PROMESA is a "special law" because it determines the Board's "incorporation, structure, powers, and procedures." *Altair*, 138 Fed. Cl. at 761. Moreover, PROMESA is designed to further the federal government's objective of providing "a method for a covered territory to achieve fiscal responsibility and access to the capital markets." *Id.* at 761-62 (quoting 48 U.S.C. § 2121(a)).

*Second*, the federal government retains permanent power to appoint not just a majority of the Board, but *all* of the Board's members. 48 U.S.C. § 2121(e); *see also Altair*, 138 Fed. Cl. at 762. The United States argues that the federal government's absolute control over the Board's appointments (not to mention its ongoing removal power) is "not even relevant," U.S. Br. 51-53, but this Court has long considered this factor in determining the source of an officer's authority. In *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806), this Court determined that a D.C. Justice of the Peace was an "officer of the government of the United States" because the justice was "appointed, by the president, by and with the advice and consent of the senate." *Id.* at 336. "Deriving all his authority from the legislature and president of the United States, he certainly is not

the officer of any other government." *Ibid.* And in *United States* v. *Hartwell*, the Court concluded that a Treasury clerk was an Officer of the United States in part because he "was appointed by the head of a department within the meaning of the [Appointments Clause]." 73 U.S. (6 Wall.) 385, 393-94 (1867).

The United States itself classified "method of appointment" as a factor that courts consider "relevant" and that "may provide evidence of whether an office exists," even if it is not dispositive. *Appointments Clause*, 31 Op. O.L.C. at 115. Before this case, Executive Branch guidance acknowledged that "the historical understanding [is] that a constitutional officer is an individual who is appointed to his or her office *by the federal government*." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 145 (1996) (emphasis added). Indeed, during the *Freytag* oral argument, Justice Kennedy asked the government whether Congress itself could appoint a territorial governor, to which the Deputy Solicitor General answered: "No," because "when it's the Federal Government itself making the appointment, [the Appointments Clause] applies in full force." Tr. of Oral Arg. at 47, *Freytag*, 501 U.S. 868 (No. 90-762), 1991 WL 636473.[4]

Thus, under *Lebron*, the Board is *federal*. In fact, the Board's powers are substantially greater than those of the Board of Review for the MWAA—another Article IV entity that this Court held wielded "federal power." *MWAA* v. *Citizens for Abatement of Aircraft*

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[4] Petitioners cite *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U.S. 1 (1889), and *Barnes* v. *District of Columbia*, 91 U.S. 540 (1875), but those cases analyzed the D.C. officials only for *statutory* purposes, not under the Constitution. *Metro. R.R.*, 132 U.S. at 7-8; *Barnes*, 91 U.S. at 544.

*Noise, Inc.*, 501 U.S. 252, 269 (1991). The Board of Review consisted of members of Congress and had no unilateral power. It could only veto the MWAA's actions, such as the "adoption of a budget, authorization of bonds, promulgation of regulations, [and] endorsement of a master plan." *Id.* at 260; *cf.* 48 U.S.C. §§ 2142, 2147, 2144(a)(1), (5) (describing Board's veto power over Commonwealth's adoption of budgets, authorization of bonds, and legislation). This Court acknowledged that the Board of Review was created pursuant to "Art. IV, § 3, cl. 2," the Territories Clause. 501 U.S. at 270. Nevertheless, because Congress created it "to protect an acknowledged federal interest," delineated its powers, and retained "effective control over appointments" that were restricted to congressional officials, the Board of Review "necessarily exercise[d] sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny." *Id.* at 269. The Court concluded that the Board of Review violated the separation of powers. *Id.* at 277.

After *MWAA*, Congress amended the statute to open the Board of Review's membership to any individuals "selected by congressional officials," and revoked its veto power, leaving it only with "the power to make 'recommendations.'" *Hechinger*, 845 F. Supp. at 906-07. Nevertheless, the D.C. Circuit held that the ability to delay MWAA action was "a sufficient exercise of federal power to violate the doctrine of the separation of powers." *Hechinger*, 36 F.3d at 105. Significantly, the United States also argued that, because the Article IV Board of Review exercised federal authority, its exercise of executive power by congressionally designated members "violates the Appointments Clause." U.S. *Hechinger* Br. 23. As the United States argued then—but disavows now—it was sufficient for finding an Appointments Clause violation that the

Board of Review members were selected "from lists supplied by Congress" and "play[ed] a key role in the execution and administration of the [federal] statutory scheme." *Id.* "This is true regardless of whether or not the Board acts as an agent of Congress." *Id.* The district court agreed that the amended Board of Review violated the Appointments Clause. 845 F. Supp. at 905, 909.[5]

Eschewing *MWAA*, petitioners argue that the Board was modeled on the D.C. Financial Responsibility and Management Authority, which Congress ostensibly created within the D.C. government. Board Br. 35; U.S. Br. 30. At the time, however, the United States concluded that the D.C. Authority was "peculiarly federal" because it "is an instrument of Congress's constitutional authority over the District of Columbia, a creature of federal law, vested with material attributes of federal authority, clearly and expressly distinct from the District of Columbia government, and composed of members appointed by the President." *Appointment of Vice Chair of Federal Reserve Board to Serve Concurrently as Chair of the District of Columbia Financial Responsibility and Management Assistance Authority*, 22 Op. O.L.C. 109, 113-15

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[5] Below, petitioners distinguished *MWAA* by suggesting that Congress's power over federal *property* was not as expansive as its power over federal *territories*. Gov't C.A. Br. 45. But Congress's power over each is derived from the *same Clause*: U.S. Const. art. IV, § 3, cl. 2. The term "territory" "is merely descriptive of one kind of property." *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). "Congress has the same power over" territories as "over any other property," *ibid.*, because "[i]t is the Property Clause … that provides the basis for governing the Territories of the United States," *Kleppe* v. *New Mexico*, 426 U.S. 529, 539-40 (1976).

(1998). The United States catalogued a "host" of other attributes "reflecting the federal character of the Authority," despite Congress's label to the contrary, including the fact that litigation arising out of the Act "must be brought in federal, rather than District of Columbia, court." *Id.* at 114. The United States also noted that "the federal nature of the Authority is evidenced by the fact that the Authority's powers are delegated and vested by federal statute, pursuant to specific constitutional authority, in individuals who are appointed by the President of the United States." *Ibid.*[6]

When compared to these past federal entities—and the prior views of the Executive Branch—it is clear that the Board is federal, and that its members are Officers of the United States subject to the Appointments Clause.

**b.** Spurning both the *Buckley*/*Freytag*/*Lucia* test and the *Lebron* test, petitioners adapt a new test from various statements in *Palmore*, a case having nothing to do with the Appointments Clause. According to petitioners, this Court should consider: (1) whether Congress invoked its Article IV power; (2) whether Congress labeled the entity "territorial"; and (3) whether the jurisdiction of the office and the laws it enforces

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[6] The Authority's federal nature was the very reason why the Vice Chair of the Federal Reserve Board was permitted to serve concurrently as Chair of the Authority under applicable conflict-of-interests laws. *See* 22 Op. O.L.C. at 113 ("Notwithstanding that the Authority was established as an 'entity within the government of the District of Columbia,' the D.C. Financial Responsibility Act, taken as a whole, reflects the peculiarly federal nature of the authority and leads to the conclusion that the interests to be represented by the Chair and members of the Authority are, for purposes of § 205, the interests of the United States.").

are geographically limited to the territory. Board Br. 47-48; U.S. Br. 37-38. This novel test has no footing in Appointments-Clause jurisprudence and it fails even on its own flawed terms.

The first two prongs of petitioners' test would call for courts simply to defer to Congress's "Article IV" and "territorial" labels. As this Court repeatedly has admonished, however, the "separation-of-powers analysis does not turn on the labeling of an activity" or "*ipse dixit*," even when Congress legislates expressly pursuant to "Art[icle] IV." *MWAA*, 501 U.S. at 267, 270; *accord Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008) ("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."). A court's "inquiry into" an entity's "status under the Constitution" must be "independent" of Congress's pronouncements, *Dep't of Transp*. v. *Ass'n of Am. R.R*., 135 S. Ct. 1225, 1231 (2015), and "it is not for Congress to make the final determination" regarding "status as a Government entity for [constitutional] purposes," *Lebron*, 513 U.S. at 392. This is true even in areas where Congress's power is "plenary." *MWAA*, 501 U.S. at 267. Otherwise, Congress could "switch the Constitution on or off at will" merely by invoking Article IV, subjecting the Court's exclusive power "to say what the law is" to "manipulation by those whose power it is designed to restrain." *Boumediene*, 553 U.S. at 765-66.

Only the third prong of petitioners' test, whether the entity's powers and duties are "local," even approaches the relevant inquiry. Board Br. 47; U.S. Br. 46. Petitioners rely on *Palmore*'s distinction between D.C.'s Article III courts and its non-Article III courts. *Palmore* recognized that, for the District's Article III

courts, adjudication of "'purely local affairs was obviously subordinate and incidental,'" and held that courts focused "primarily upon cases arising under the District of Columbia Code and to other matters of strictly local concern" were not entitled to Article III's tenure and salary protections. 411 U.S. at 407 (quoting *O'Donoghue* v. *United States*, 289 U.S. 516, 593 (1933) (alteration omitted)). Petitioners contend that *Palmore*'s "critical point" is "the geographic extent of the law." U.S. Br. 46. That is a strange inference to glean from *Palmore*, because *Palmore* itself recognized that courts that are jurisdictionally limited to the District *could* be Article III courts. *Palmore*, 411 U.S. at 407 (citing *O'Donoghue*, 289 U.S. at 548-49). And the inference necessarily would lead to the even stranger conclusion that the judges, the U.S. Attorney, and the U.S. Marshal of the United States District Court for the District of Puerto Rico all do not qualify as Officers of the United States because their authority generally is territorially limited to their district.

But petitioners fundamentally misapprehend this aspect of *Palmore* on which they seek to rely. As this Court later explained, when *Palmore* focused on the D.C. courts' authority over "'distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction,'" it was referring *not* to the law's "limited geographical impact," but rather to its "nature" as "equivalent to those enacted by state and local governments … for the general welfare of their citizens." *Key* v. *Doyle*, 434 U.S. 59, 67-68 & n.13 (1977) (quoting *Palmore*, 411 U.S. at 409). This is because Congress's "plenary" power to enact local laws for the territories and the District of Columbia is a "*municipal* authority," *McAllister* v. *United States*, 141 U.S.

174, 184-85 (1891) (emphasis added), and reflects "the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes," *Palmore*, 411 U.S. at 397.

PROMESA obviously is not a law "equivalent to those enacted by state and local governments … for the general welfare of their citizens," *Key*, 434 U.S. at 68 n.13, and the powers and duties conferred on the Board by that statute therefore cannot plausibly be described as local. Puerto Rico's debts are widely distributed throughout the Nation, and its fiscal crisis—and PROMESA's measures to resolve it—necessarily affects creditors nationwide. *See*, *e.g.*, *Franklin California Tax-Free Tr.* v. *Puerto Rico*, 805 F.3d 322, 326 n.2 (1st Cir. 2015), *aff'd*, 136 S. Ct. 1938 (2016). And any adjustment of Puerto Rico's debts would be binding throughout the nation. *See*, *e.g.*, 11 U.S.C. § 944(a); 48 U.S.C. § 2174(b). PROMESA itself urges that the solution for Puerto Rico's fiscal crisis include "a free flow of capital between possessions of the United States and the rest of the United States." 48 U.S.C. § 2241. That is consistent with PROMESA's express purpose of providing "a Federal statutory authority" and "a Federal restructuring authority" to restructure Puerto Rico's debts, 48 U.S.C. § 2194(m)(4), (n)(4), and achieve "access to the capital markets," *id*. § 2121(a). Because PROMESA addresses a problem that has national implications with solutions that are national in scope, the Board's powers are "federal," not "local." *Limtiaco*, 549 U.S. at 491.

Even if the geographic scope of the Board's powers were relevant, they extend well beyond Puerto Rico. The Board may investigate financial activities outside Puerto Rico. *See* 48 U.S.C. § 2124(*o*). The Board also

may establish an office anywhere, provided it maintains one in Puerto Rico. *Id*. § 2122. It may prosecute a Title III proceeding in any federal district court where the Board has an office. *Id.* § 2167(b)(1). These features destroy any claim that PROMESA is a "local" statute.

In urging the local as opposed to federal character of the Board, the United States asserts that the federal government "lacks financial control over the Board." U.S. Br. 40. But PROMESA *mandates*—as a matter of federal law—that the Commonwealth provide funding for the Board, and authorizes the Board to "use its powers" to "ensure that sufficient funds are available to cover all expenses of the Oversight Board." 48 U.S.C. § 2127(b). The Board's funding may flow from the Commonwealth, but it does so by federal decree, just as other federal entities are funded outside the federal appropriations process. *E.g.*, 35 U.S.C. § 42 (Patent and Trademark Office); 12 U.S.C. § 16 (Office of the Comptroller of the Currency); *id.* § 243 (Federal Reserve).

Petitioners' adaptation of *Palmore* therefore fails as a test to identify who is an Officer of the United States. PROMESA is not an exercise of Congress's municipal authority over the territories. Instead, Congress created a federal body as a federal solution to a federal problem that impacted millions of American citizens both in and beyond Puerto Rico.

### 4. Even if the Board members are not principal officers, their appointments still violate the Appointments Clause and the separation of powers.

The Board has abandoned another of its prior arguments—that the Board members should be deemed "inferior officers"—and the United States conceded this point below. Gov't C.A. Br. 40-41. Even if they were inferior officers, however, their appointments still would violate the Appointments Clause because the Board members were not appointed by "the President alone." U.S. Const. art. II, § 2, cl. 2. Rather, for six of the Board's seven voting members, the President selected their names from lists prepared by individual members of Congress. JA147.

Indeed, PROMESA's list mechanism independently violates the separation of powers because it seizes for members of Congress an appointment power vested in the Executive alone. "[T]he Legislature cannot exercise" "executive" "power." *Springer* v. *Gov't of Philippine Islands*, 277 U.S. 189, 201-02 (1928). And "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). Congress therefore can exercise no part of the appointments power; after Congress has created the office, it "ought to have nothing to do with designating the man to fill the office." *Myers* v. *United States*, 272 U.S. 52, 128 (1926).

The United States effectively conceded the unconstitutionality of PROMESA's list-mechanism when it urged the courts below to apply the "constitutional avoidance" canon to read PROMESA as "not hav[ing]

any constraining effect on the President's authority going forward." Gov't C.A. Br. 46; U.S. Br. 34 n.15, No. 17-bk-3283 (D.P.R.), Doc. 1929. If the Appointments Clause and the separation of powers did *not* apply to the selection of the Board's members, as the United States now urges, *there could be no constitutional problem to avoid*.

### B. There Is No Article IV Exception To The Appointments Clause.

Despite conceding that federal officers serving in the territories are subject to the Appointments Clause, U.S. Br. 36; Board Br. 48-49, petitioners nonetheless devote the bulk of their argument to the contention that Congress is effectively immune from separation-of-powers constraints when it legislates regarding the territories, U.S. Br. 16-36; Board Br. 15-45. Petitioners start from the uncontroversial premise that Congress enjoys plenary authority under Article IV to structure territorial governments. Board Br. 17; U.S. Br. 17. But that does not mean that *Congress* "is 'unrestricted' by the separation-of-powers constraints" when it legislates with regard to a territory. Board Pet. 17.

Quite the contrary, the text of the Appointments Clause unqualifiedly applies to "all" Officers of the United States. U.S. Const. art. II, § 2, cl. 2. It nowhere suggests that the applicability of its requirements varies depending on the source of Congress's authority to create the office.

The Board's own cases confirm that Article IV does not confer on Congress those powers that "have been expressly or by implication reserved in the prohibitions of the Constitution." *First Nat'l Bank* v. *Yankton County*, 101 U.S. 129, 133 (1879). Even when

legislating under Article IV, Congress is "subject" to the Constitution's "limitations and prohibitions." *El Paso & N.E. Ry. Co.* v. *Gutierrez*, 215 U.S. 87, 93 (1909). This Court thus has flatly 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." *MWAA*, 501 U.S. at 270. Even when Congress legislates pursuant to Article IV, courts "must … consider whether" the statute is "consistent with the separation of powers." *Id.* at 271. Petitioners have no response to this Court's holding in *MWAA* that separation-of-powers constraints—of which the Appointments Clause surely is one—apply with full force to offices established by Congress pursuant to its Article IV authority. Indeed, the Board and the United States nowhere even cite (much less distinguish) the case.

Perhaps that is because *MWAA* is just one of this Court's more recent explications of a longstanding principle. In *United States* v. *California*, 332 U.S. 19 (1947), for example, the Court noted that Congress had passed a joint resolution disposing of federal property that was vetoed by the President. *Id.* at 28. Although "the constitutional power of Congress" under Article IV "is without limitation," Congress's joint resolution nevertheless did "not represent an exercise of the constitutional power of Congress" under Article IV. *Ibid.* The Constitution's structural provisions, such as the President's veto power in Article I, Section 7, apply fully when Congress legislates with respect to the territories. Petitioners argue that the Presentment Clause involves the manner of enactment while the Appointments Clause involves the substance. Board Br. 38. But the Appointments Clause has to do with the "manner" in which every federal official must

be appointed. Just as "[e]very bill"—even those involving territories—must go through bicameralism and presentment, U.S. Const. art. I, § 7, cls. 2-3, so too must "all … Officers of the United States" be appointed consistent with the Appointments Clause, *id.* art. II, § 2, cl. 2.

Before this case, the Executive Branch recognized this basic principle. It explained that "the Appointments Clause," "like the Present[ment] Clause," applies even "in the insular areas." *AAG Letter* 79. The First Circuit also correctly understood that "[l]ike the Presentment Clause, the Appointments Clause constitutionally regulates how Congress brings its power to bear, whatever the reach of that power might be." JA156.

Petitioners also point to Congress's delegation of municipal legislative power to territorial governments, but there is a reason that the non-delegation doctrine does not restrict these delegations. Congress's power in structuring the territories is "*sui generis*" only "in *one very specific respect*: When exercising it, Congress is not bound by the Vesting Clauses of Articles I, II, and III." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2196 (2018) (Alito, J., dissenting) (emphasis added). That limited and "specific" exception is necessary so that Congress may "create[] institutions to govern the Territories and the District." *Ibid.* But the existence of this "*sui generis*" power does not imply a broader authority to vest significant federal authority in an individual without complying with the Appointments Clause.

For that reason, petitioners' reliance on *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322-23 (1937), is misplaced. The authority that Congress may "delegate to a territory" is limited to matters

that, in a state, would be "regulated by the laws of the state," *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 106 (1953)—that is, municipal matters. *See supra* at 29-31. In exercising the "powers of legislation which may be exercised by a state in dealing with its affairs," Congress can act only insofar as "other provisions of the Constitution are not infringed." *Atl. Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435 (1932). Congress could not, under Article IV, delegate to a territorial legislature the power to enact federal statutes such as PROMESA. *Cincinnati Soap* thus stands only for the proposition that Congress can allow a territorial legislature to enact *territorial* law.

Petitioners also cite *United States* v. *Heinszen*, 206 U.S. 370 (1907), which upheld a statute delegating to the President the power to set tariff duties under a temporary governance structure for the Philippines after the cessation of hostilities between the United States and Spain. 31 Stat. 895, 910 (1901). *Heinszen*'s cursory discussion of Congress's delegation power relied on *Dorr* v. *United States*, which upheld "[t]he right of Congress to authorize a *temporary* government." 195 U.S. 138, 153 (1904) (emphasis added). As explained below, the Supreme Court has justified these interim governments by citing the exigencies of transitioning newly acquired territory to federal control. *See infra* at 42-43.

Petitioners next draw an untenable equivalence between a judge's entitlement to Article III protections and status as an Officer of the United States. They suggest that if a court is not "of the United States," then its judges cannot be officers "of the United States." Board Br. 22-23. These two considerations have nothing to do with each other. Numerous

non-Article III judges are Officers of the United States subject to the Appointments Clause. *See*, *e.g.*, *Edmond*, 520 U.S. at 666. Judges that exercise significant federal power are Officers of the United States, even if they do not serve on Article III courts. *Ibid*.

Moreover, although petitioners suggest that no territorial judge has ever been an Officer of the United States, many judges seated in the territories have been considered federal officers. The First Congress classified the judges of the Northwestern Territory as "Executive Officers of Government" when establishing salaries for federal officers. 1 Stat. 68 (1789). Chief Justice Marshall's opinions in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803), and *Wise*, 7 U.S. 331, were bottomed on the proposition that non-Article III judges in the District of Columbia were Officers of the United States. And this Court has recognized that "clerks" of "non-Article III territorial courts," were "'inferior Officers' within the meaning of the Appointments Clause." *Freytag*, 501 U.S. at 892. *Territorial* judges that exercise primarily *local* judicial power are territorial officials, not federal officers. But that simply underscores the importance of the *Buckley* test here: The question is not *where* the officials sit, but whether they have been granted *significant federal authority*.

### C. Historical Practice Confirms That The Board Members Are Officers Of The United States.

Centuries of historical practice confirms that officers with substantial federal authority that served in the territories were Officers of the United States subject to the Appointments Clause. This "longstanding

practice" is a crucial guidepost for deciding separation-of-powers questions. *NLRB* v. *Noel Canning*, 573 U.S. 513, 524-26 (2014).

Petitioners do not dispute that *every* civilian territorial governor appointed to a continuing office was nominated by the President and confirmed by the Senate, or recess-appointed by the President alone, which is to say they were appointed in conformity with the Appointments Clause. *See* U.S. Br. 32. Nor do they deny that these governors held commissions signed by the President, as the Constitution requires of Officers of the United States. U.S. Const. art. II, § 3 (President "shall Commission all of the Officers of the United States").[7] Petitioners suggest that Congress's decision to follow these constitutional procedures does not *necessarily* mean that compliance was constitutionally compelled, U.S. Br. 46, but they present no evidence suggesting that Congress's consistent treatment of governors as Officers of the United States was gratuitous. That both the Legislative and Executive Branches appointed civilian territorial governors in conformity with the Appointments Clause for 230 years is "weighty evidence" that Congress "did not believe [it] had the power" to do otherwise. *Alden* v. *Maine*, 527 U.S. 706, 743-44 (1999).

Almost immediately after the Constitution's ratification, the First Congress amended the Northwest Ordinance to provide for presidential nomination and

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[7] *See*, *e.g.*, 1B *Permanent and Temporary Presidential Commissions 1789-1962*, at 1, 69, 302, 314, General Records of the Dep't of State, Record Group 59 (RG 59), National Archives College Park; 5 *Presidential Commissions*, *supra*, at 3, 10, 202, 244 (commissions of territorial governors); Aurelius Reply at 42-50, No. 17-bk-3283 (D.P.R.), Doc. 1833 (reproducing the commissions).

Senate confirmation of the territory's governor "so as to adapt the [Ordinance] to the present Constitution of the United States." 1 Stat. 50, 51 (1789). Leading scholars agree that the reason for this change was "to bring the Ordinance itself into conformity with Article II's requirement that federal officers be appointed by the President with Senate consent." David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829*, at 113 (2001); *see* Akhil Amar, *America's Constitution: A Biography* 264 (2006) (Congress was "'adapt[ing]' its territorial governance system to the Constitution's apparatus of presidential appointment and removal").[8]

Petitioners contend that Congress could not have had the Appointments Clause in mind when it amended the Northwest Ordinance because it allowed local territorial officials, such as legislators, to be selected in ways other than those listed in the Appointments Clause. To the contrary, the Ordinance shows that the founding generation understood that locally elected officials in the territories could coexist with federal officers appointed pursuant to the Appointments Clause. *See*, *e.g.*, *The Federalist Papers No. 43* (Madison) (Clinton Rossiter ed., 1961) (contemplating

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[8] Petitioners contend that by "adapt[ing]" the Northwest Ordinance to the "present Constitution," Congress was merely acknowledging that "the Confederation Congress no longer existed." Board Br. 29; U.S. Br. 34. The Ordinance, however, referred only to "Congress," not the "Confederation Congress," 1 Stat. 51-53 n.(a), so a change in nomenclature cannot account for the amendment.

a "municipal legislature" for the District of Columbia "derived from their suffrages"). Local territorial officials that exercise local, municipal authority—such as territorial legislators that enact *territorial* law—have never been considered Officers of the United States. Territorial governors, by contrast, exercised significant federal authority on the President's behalf, such as by negotiating treaties or granting temporary reprieves for offenses against the United States until the President could decide whether to grant a pardon. *See*, *e.g.*, 1 Sen. Exec. J. 18 (Aug. 20, 1789); 3 Stat. 654, 655 (1822) (Florida).[9]

Not only did Congress treat these individuals as Officers of the United States, it explicitly identified them as such. A month after amending the Northwest Ordinance, Congress classified the "Governor of the western territory," "the three judges of the western

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[9] Petitioners point to the D.C. Mayor as an example of an official who was not appointed pursuant to the Appointments Clause. U.S. Br. 28-30; Board Br. 31-32. Unlike territorial governors, however, the D.C. Mayor has never wielded significant federal authority. Whereas governors were presidential delegates in the territories vested with federal authority, the D.C. Mayor's powers were purely local from the beginning. *See* 2 Stat. 195, 197 (1802) (describing only municipal powers). The same is true for the other territorial officials that petitioners cite who primarily or exclusively enact or execute territorial laws, and thus are not Officers of the United States to whom the Appointments Clause applies. *E.g.*, Board Br. 28-35 (discussing territorial legislatures and other territorial officials who principally exercise power that is local in nature); U.S. Br. 26-31 (same). Such territorial officials "are not federal officers" because "[t]hey do not exercise significant authority pursuant to the laws of the United States"; instead, "they exercise authority pursuant to the laws of the territory." JA171. These examples say nothing about Congress's power to erect a federal oversight board for the purpose of executing and enforcing federal law.

territory," and "the Secretary of the western territory" among the "Executive Officers of Government" in the first Act establishing salaries for federal officers. 1 Stat. 67, 68 (1789). Similarly, when Alexander Hamilton prepared a "List of Civil Officers of the United States, Except Judges" for the Senate in 1793, he listed the governors and secretaries of the Northwestern Territory and the Territory South of the Ohio as Officers of the United States. 1 Am. State Papers/Misc. 59 (1834), https://bit.ly/30ZmRzJ; *see also* Gregory Ablavsky, *Administrative Constitutionalism in the Northwest Territory*, 167 U. Pa. L. Rev., at 3 n.10 (forthcoming 2019) ("The territorial governor and secretary [of the Northwest Territory] were officers of the United States."). Members of the territorial legislature and all other officials who exercised power that was purely local in nature, notably, were not included in Hamilton's list.

This unbroken practice stretches from the Founding until the advent of democratic home rule in the territories. The Retiree Committee claims that it has found an exception, pointing to the transitional governments of Louisiana, Florida, the Philippines, and the Panama Canal Zone established soon after territorial acquisition. Retirees' Br. 10-15. But these were temporary, interim offices—not "continuing offices"—to which the Appointments Clause did not apply. They continued only "until Congress legislated for" them, at which point Congress was again subject to the Constitution's structural restrictions. *Cross* v. *Harrison*, 57 U.S. (16 How.) 164, 195 (1853).

Thus, the Louisiana Territory's organic act authorized the President to "take possession of, and occupy the territory" and to "employ any part of the army and navy of the United States" in doing so. 2

Stat. 245, 245 (1803). As members of Congress explained in the same debates the Retiree Committee cites, "the extent of the power vested in the Executive … arises from necessity," and such power to "preserve tranquility and good order" would extend only "[u]ntil this House and the other branch of the Legislature shall make the necessary laws." 13 Annals of Cong. 507-08 (Oct. 27, 1803) (Rep. Eustis); *accord id.* at 512 (Rep. Rodney) ("[T]he exercise of the powers delegated will be confined to a short space, and will be of no further duration than shall be necessary to obtain the end of a secure possession of the territory."). Subsequent history bore out this prediction: In each of the Retiree Committee's examples, the temporary interim government of the new territory was soon replaced by a permanent government, with officers appointed pursuant to the Appointments Clause as appropriate. *See* 2 Stat. 283, 283 (1804) (Louisiana); 3 Stat. 523, 524 (1819) (Florida); 33 Stat. 429, 429 (1904) (Panama Canal Zone); 31 Stat. at 910 (Philippines); *see also* 2 *Official Letter Books of W.C.C. Claiborne, 1801-1816*, at 294 (1917) (letter dated Aug. 6, 1804) (territorial governor identifying the position of "Governor of Louisiana" as "[a]n Officer of the United States").

That the Appointments Clause applies to federal officials who oversee territories is further confirmed by the long history of Presidents using their power under the Recess Appointments Clause to fill vacant territorial offices. A President may use the recess-appointment power to fill only those offices to which the Appointments Clause applies, because "[t]he relation in which [the Recess Appointments Clause] stands to the" Appointments Clause "denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment." *The Federalist Papers No. 67*, at 409 (Hamilton). On

numerous occasions, from the Founding through the Twentieth Century, the President exercised his constitutional recess-appointment authority to appoint officers in the territories, *even when the statute provided no such authority*. The United States claims this has happened only five times in two territories. U.S. Br. 33. As detailed in the Appendix, however, this happened *dozens* of times in *numerous* territories for more than a century. *See* App., *infra*, 1a-5a. These recess appointments would have been unconstitutional if those officials were not Officers of the United States. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power … must stem either from an act of Congress or from the Constitution itself."). Below, the United States suggested that these dozens of recess appointments were "*ultra vires*," Gov't C.A. Br. 36, but the far more logical and intuitive explanation is that it was understood that the Appointments Clause empowered the President to appoint Officers of the United States while Congress was in recess, and that the offices in question fell within that power.

### D. Territorial Home Rule Is Fully Compatible With The Appointments Clause.

The decision below poses no threat to territorial home rule. Whether territorial officials are Officers of the United States depends on whether they exercise significant federal authority. When this principle is understood, it is obvious that the people of Puerto Rico can enjoy home rule *and* the structural protections of the Appointments Clause.

This is no "special exception for elections," as the United States would have it. U.S. Br. 48. Certainly the United States Attorney for the Southern District

of New York could not be elected. *Id.* at 49. Nor could the United States Attorney for the District of Puerto Rico. Both are Officers of the United States. Local territorial officials and legislators who enact and enforce primarily local law, on the other hand, are *not* Officers of the United States, and thus may be elected. The election of local territorial officials does not violate the Appointments Clause so long as those officials do not exercise "significant governmental authority under the laws of the United States." *Thornburgh Statement* 212; *see also Snow*, 85 U.S. at 322. Accordingly, Congress may delegate local authority to the territorial electorate in the same way a state devolves power to a municipality, but it cannot delegate significant *federal* authority, such as the primary responsibility for the enforcement of federal law.[10]

Puerto Rico's own history with local elections is illustrative. In 1947, when Congress converted the Governor of Puerto Rico to an elected position, Congress established a new office, the Coordinator of Federal Agencies, that was presidentially appointed and

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[10] Petitioners note that the governors of Guam and the Virgin Islands "administer[] a territorial income tax imposed by Congress." U.S. Br. 47-48 (citing 48 U.S.C. § 1421i); Board Br. 34. But this local tax is "separate" from federal income taxes, and thus falls within local municipal authority. 48 U.S.C. § 1421i(b). To the extent those governors have some ability to enforce federal law, neither has "primary responsibility" to do so. *Buckley*, 424 U.S. at 140. They are no different than state attorneys general who have non-exclusive power to enforce some federal laws alongside federal enforcers. *See supra* at 17-18. As in every state, enforcement of federal law in those territories is *primarily* overseen by a United States Attorney, nominated by the President and confirmed by the Senate. 48 U.S.C. § 1424b(b) (Guam); *id.* § 1617 (Virgin Islands). The Board, in contrast, has *exclusive* power to administer, execute, and enforce PROMESA in federal court.

Senate-confirmed and was responsible for "coordinat[ing] the administration of *all* Federal civilian functions and activities in Puerto Rico." 61 Stat. 770, 772 (1947) (emphasis added). This office of Coordinator was created because, whereas "an appointive governor representing the President" could "carry[] out the dual functions" of "supervis[ing] the administration of local law on the one hand as well as seeing to the enforcement of the laws of the United States on the other," once "this office became an elective one, … the governor could no longer fulfill the federal part of his former dual role." David S. Stern, *Notes on the History of Puerto Rico's Commonwealth Status*, 30 Rev. Jur. U.P.R. 33, 43 (1961). Rexford Tugwell, the former Puerto Rico governor who first conceived of the Coordinator office, similarly reasoned that, "in the present Governor there were combined two functions: the administration of local government, and the representation of the United States. No *elected* Puerto Rican Governor could represent more than the Puerto Ricans who elected him." Rexford Tugwell, *The Stricken Land* 544 (1947). "[I]t would be clearly unconstitutional" to "give to the local [elected] Governor powers in Federal matters," thus necessitating the office of federal Coordinator. *Id.* at 547.

Citing *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863 (2016), petitioners argue that the distinction between local and federal law is meaningless because *all* territorial authority ultimately traces back to federal sovereignty. Board Br. 43. That proves too much. If petitioners were correct, it would follow that there could be no home rule in the territories because every territorial official would be exercising federal power and would therefore be subject to the Appointments Clause. But *Sanchez Valle*'s discussion of the "ulti-

mate source" of the "power undergirding the respective prosecutions" analyzed in that case was expressly limited to the Double Jeopardy Clause. 136 S. Ct. at 1871. It has no application here, and certainly poses no threat to home rule in the territories.

In double jeopardy cases, the critical question is whether successive prosecutions for the same offense are brought by separate sovereigns. *See Sanchez Valle*, 136 S. Ct. at 1870. In the double jeopardy context, uniquely, "sovereignty … does not bear its ordinary meaning." *Ibid*. Instead, "[f]or whatever reason," the test the Court has "devised to decide whether two governments are distinct," *ibid*., turns "not on the fact of self-rule, but on where it came from," *id.* at 1874. Applying this "ultimate source" test in *Sanchez Valle*, the Court held that the Commonwealth is not a separate sovereign from the United States for purposes of the Double Jeopardy Clause. *Id.* at 1876.

At the same time, the Court in *Sanchez Valle* also recognized that, in a more "commonly understood sense," the Commonwealth of Puerto Rico is a "sovereign" in that the people of Puerto Rico "exercise[] self-governance" and can "enact and enforce [their] own" laws—*viz.* the laws of the Commonwealth of Puerto Rico. 136 S. Ct. at 1870, 1874. Those are the laws that Puerto Rico's territorial officials—the government of the Commonwealth—administer and enforce. And while the federal government might be the "ultimate source" of the Commonwealth's authority to enact its laws, this Court recognized that "the most *immediate* source of such authority" is "the Puerto Rican populace" exercising self-governance over its local affairs in accordance with the Constitution of the Commonwealth of Puerto Rico. *Id.* at 1875 (emphasis added). That "immediate source" of authority, and its

municipal nature, marks the laws of the Commonwealth as local laws and makes clear that the Commonwealth officials enforcing those laws are exercising local, rather than federal power.

Accordingly, home rule is fully compatible with the Appointments Clause: When governmental officials principally exercise power that is local in nature, they are not subject to the Appointments Clause, because they are not exercising federal authority. That is what Puerto Rico's elected officials do.

* * *

The Board members hold a continuing office and exercise significant federal authority. They do so pursuant to a federal statute enacted to provide federal oversight of the Commonwealth's territorial government. Yet they were never Senate confirmed. Instead, the President selected them from lists compiled by members of Congress, a scheme devised to usurp the appointment power for Congress. Congress's blatant violation of the Appointments Clause cannot be justified by text, precedent, history, or logic. The Board members are Officers of the United States, and Congress's failure to provide a constitutional appointment method nullifies their invalid appointments.

## II. THE PREVAILING PARTIES ARE ENTITLED TO APPROPRIATE RELIEF FOR THE BOARD'S VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Although the First Circuit correctly determined that the Board's members were unconstitutionally appointed, it violated both principle and precedent by applying the so-called *de facto* officer doctrine to deny the prevailing parties appropriate relief to which they

were entitled—an order of dismissal of the Commonwealth and PRHTA Title III proceedings that the Board is prosecuting in order to adjust bonds owned or insured by the prevailing parties. To prevent that outcome, the First Circuit invoked the *de facto* officer doctrine to validate all past actions taken by the unconstitutionally appointed Board. The First Circuit then broke new ground and invoked the doctrine prospectively to validate *future* acts by the same unconstitutional Board. But this Court's unanimous decision of just 24 years ago in *Ryder* v. *United States*, 515 U.S. 177 (1995), precludes *any* application of the *de facto* officer doctrine here, never mind the First Circuit's dramatic and unprecedented expansion of the doctrine.

"The very essence of civil liberty … consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," for "where there is a legal right, there is also a legal remedy." *Marbury*, 5 U.S. at 163 (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). This principle is paramount when Congress violates "basic constitutional protections." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (plurality). Such violations demand a meaningful remedy for the aggrieved party.

*Ryder* resolves the remedial question presented. Where it applies, "[t]he *de facto* officer 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*, 515 U.S. at 180. But this prudential doctrine has never applied when the officer has "not been appointed in accordance with the dictates of the Appointments Clause."

*Id.* at 179. Nor has the doctrine ever been understood to immunize the *future* actions of an officer adjudged to be unconstitutionally appointed. If courts could excuse violations of the Appointments Clause in this manner, no "rational litigant" would bring such a structural challenge. 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).

This Court should hold that the *de facto* officer doctrine does not validate any actions taken by the unconstitutionally appointed Board because the doctrine has no application to acts of officers appointed in violation of the Appointments Clause. And the Court should make clear that there is no basis whatsoever for according *de facto* validity to the Board's actions *after* the First Circuit adjudged it unconstitutional on February 15. The first result is dictated by *Ryder*; the second, by the logic of the *de facto* officer doctrine itself.

The portion of the First Circuit's judgment affirming the judgments of the district court therefore should be reversed with directions that Aurelius's motion to dismiss the Commonwealth Title III proceeding be granted, and that judgment be awarded to Assured on its adversary complaint in the PRHTA Title III case. This Court then could stay its order for a brief period of time to permit Board members to be appointed in conformity with the Appointments Clause and to permit the lawfully constituted Board an opportunity to consider whether the unconstitutional Board's authorization of the Commonwealth and PRHTA Title III petitions should be ratified. If the new Board appropriately ratifies the filing of the Title III petitions before the expiration of this Court's

stay, the district court may not need to dismiss those proceedings, or start them anew.

### A. The *De Facto* Officer Doctrine Cannot Validate Past Actions Of The Unconstitutional Board.

**1.** Applying the *de facto* officer doctrine to validate actions taken by unconstitutionally appointed officials would expand the doctrine far beyond its traditional scope. The *de facto* officer doctrine allows a court, in limited circumstances, to accord *de facto* validity to the acts of an official who did not lawfully hold the office at the time of the challenged act. The doctrine developed from the fear that "multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question" could disrupt "the orderly functioning of the government despite technical defects in title to office." *Ryder*, 515 U.S. at 180. But the orderly functioning of government also requires governmental actors to adhere to constitutional constraints. *See INS* v. *Chadha*, 462 U.S. 919, 944 (1983). Accordingly, this Court long has limited the *de facto* officer doctrine to two narrow circumstances, neither of which is present here.

First, the Court has used the doctrine to limit relief flowing from "merely technical" statutory defects in an officer's appointment. *Nguyen* v. *United States*, 539 U.S. 69, 77 (2003). For instance, in *Wright* v. *United States*, 158 U.S. 232, 238 (1895), the Court held that a duly appointed deputy marshal was a *de facto* officer, even if, as the defendants argued, his oath of office had not been administered by the proper official. Where there is only a minor statutory irregularity in the manner of appointment that results in

"no trespass upon the executive power of appointment" or other "constitutional" error, the Court occasionally has determined that the public interest favors upholding the acts of *de facto* officers carried out "under color of authority." *McDowell* v. *United States*, 159 U.S. 596, 598, 602 (1895).

Second, the Court has applied the doctrine to excuse defects in an officer's appointment that are raised in a "collateral[] attack[]" on a judgment, such as in a habeas petition or post-trial motion. *Ex parte Ward*, 173 U.S. 452, 456 (1899); *see also Ball* v. *United States*, 140 U.S. 118, 128-29 (1891) (applying *de facto* officer doctrine to prevent "collateral attack" on judge's appointment). The Court has explained that applying the doctrine in this circumstance reflects the "obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden*, 370 U.S. at 535.

The Appointments Clause, however, is no mere technical "matter of etiquette or protocol." *Edmond*, 520 U.S. at 659. It "is among the significant structural safeguards of the constitutional scheme." *Ibid.* 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. That is why this Court held that the *de facto* officer doctrine cannot be applied when there has been "a trespass upon the executive power of appointment," *ibid.* (quoting *McDowell*, 159 U.S. at 598), or when the defect implicates "the

constitutional plan of separation of powers," *Glidden*, 370 U.S. at 536.[11]

Indeed, the question whether the *de facto* officer doctrine could validate the acts of an unconstitutionally appointed officer was conclusively resolved by this Court just 24 years ago—unanimously—in *Ryder*. Ryder challenged his court-martial conviction on the basis that two judges on the Coast Guard Court of Military Review had been unconstitutionally appointed. 515 U.S. at 179. The United States Court of Military Appeals had "held that the actions of those [unconstitutionally appointed] judges were valid" under the "*de facto* officer doctrine." *Ibid.*

This Court reversed. The Court explained that it had applied the *de facto* officer doctrine only in "several cases" where the party sought to "collaterally attack[]" the judgment. 515 U.S. at 181-82 (citing *Ball*, *McDowell*, and *Ward*). But Ryder had raised the challenge on direct review "before those very judges and prior to their action on his case." *Id.* at 182. Further,

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[11] The doctrine also cannot apply in cases involving serious statutory violations. For example, when a statutory appointment violation resulted in action that "could never have been taken at all" but for the violation, *Nguyen*, 539 U.S. at 79, this Court has declined to apply the *de facto* officer doctrine, and has instead invalidated the past actions of the unlawfully appointed officer, *see id.* at 77, 79 (*de facto* officer doctrine inapplicable to statutorily unlawful appointment of Article IV judge to Article III appellate panel). Such statutory appointment defects "invalidate a[ny] resulting order[s]." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Therefore, the *de facto* officer doctrine is "[a] fortiori" inapplicable "when the challenge is based upon nonfrivolous constitutional grounds," *Glidden*, 370 U.S. at 536, and even more so "if a violation [of the separation-of-powers] indeed occurred," *Ryder*, 515 U.S. at 183—as it has here.

*Ball*, *McDowell*, and *Ward* involved the mere "misapplication of a statute"; Ryder's challenge, by contrast, was "based on the Appointments Clause of Article II of the Constitution." *Ibid.* The Court distinguished its decision in *Buckley*, which had accorded "*de facto* validity" to past actions of the Federal Election Commission ("FEC"), despite that agency's unconstitutional appointments procedure. 424 U.S. at 142. As the *Ryder* Court explained, the plaintiffs in *Buckley* had sought only prospective "declaratory and injunctive relief," and thus had been awarded all the relief they had sought. *Ryder*, 515 U.S. at 183; *see also FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("[T]he relief sought [in *Buckley*], declaratory and injunctive remedies, could have purely prospective impact."). Indeed, *Buckley* had not even "explicitly relied on the *de facto* officer doctrine." *Ryder*, 515 U.S. at 183. The Court accordingly concluded that, to the extent it "may be thought to have implicitly applied a form of the *de facto* officer doctrine, we are not inclined to extend [it] beyond [its] facts." *Id.* at 184.[12]

Thus, the Court in *Ryder* held 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 of the question and whatever relief may be appropriate if a violation indeed occurred." 515 U.S. at 182-83. "Any other

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[12] Moreover, the *Buckley* Court decided to accord *de facto* validity "without any briefing from the parties on the proper remedy." Barnett, *supra*, at 530; *see also Buckley*, 424 U.S. at 255 (Burger, C.J., dissenting) ("The [*de facto* doctrine] issue is not before us and we cannot know what acts we are ratifying. I would leave this issue to the District Court to resolve if and when any challenges are brought.").

rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Id.* at 183. Because of the Appointments Clause violation, the Court remanded for a new hearing before a panel of properly appointed officers. *Id.* at 188.

*Ryder* leaves no doubt that whatever the applicability of the *de facto* officer doctrine in cases involving minor statutory defects or collateral attacks on prior adjudications, the doctrine does not apply to a timely challenge to the acts of an officer on the ground that the officer was selected in violation of the Appointments Clause. As the D.C. Circuit has recognized, "the Supreme Court [in *Ryder*] has limited the [*de facto* officer] doctrine, declining to apply it when reviewing Appointments Clause challenges." *SW Gen., Inc.* v. *NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017).

The reason that the doctrine is inapplicable to constitutional defects like Appointments Clause violations is because those errors are "structural," *Freytag*, 501 U.S. at 878-79, and therefore "subject to automatic reversal," *Neder* v. *United States*, 527 U.S. 1, 8 (1999); *cf. Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815 (1987) (Scalia, J., concurring in judgment) (separation-of-powers error in prosecutor's appointment is "fundamental" and renders convictions "void"). Thus, when a proceeding is "tainted with an appointments violation," the challenger "is entitled" to an entirely "new" proceeding. *Lucia*, 138 S. Ct. at 2055; *see also*, *e.g.*, *Bandimere* v. *SEC*, 844 F.3d 1168, 1181 n.31 (10th Cir. 2016) (Appointments Clause violations are "structural errors" that "are subject to automatic reversal"); *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 regardless of whether prejudice can be shown.").

**2.** The First Circuit's remedial decision is irreconcilable with *Ryder*. Like the petitioner in *Ryder*, Aurelius and Assured brought "a timely challenge to the constitutional validity of the appointment of [the] officer[s]" that had initiated and are prosecuting their cases, and they prevailed in that challenge. *Ryder*, 515 U.S. at 182-83. And the First Circuit—like the United States Court of Military Appeals in *Ryder*, 515 U.S. at 180—purported to follow *Buckley* when it applied the *de facto* officer doctrine. JA178. But long before the decision below, *Ryder* had expressly limited *Buckley* to its facts and further held it to be "err[or]" for a court to "accord[] *de facto* validity to" the "actions" of unconstitutionally appointed officers. 515 U.S. at 188. Yet that is precisely what the First Circuit did here.

Having prevailed in their constitutional challenge to the Board members' appointments, Aurelius and Assured were "entitled" to "appropriate" relief in their particular proceedings. *Ryder*, 515 U.S. at 183; *accord Lucia*, 138 S. Ct. at 2055. Of course, when plaintiffs seek only prospective remedies, such as declaratory and injunctive relief, courts have no reason to disturb an unconstitutional officer's past acts; they simply are not implicated in the litigation. *See Buckley*, 424 U.S. at 142; *see also*, *e.g.*, *Free Enter. Fund*, 561 U.S. at 513 (granting plaintiffs the forward-looking "declaratory relief" they sought); *MWAA*, 501 U.S. at 262 (granting plaintiffs' request for prospective declaratory and injunctive relief). But, like the petitioner in *Ryder* (and unlike the challengers in *Buckley*), Aurelius and Assured each had challenged the Board's past actions,

including specifically the Board's initiation and prosecution of ongoing Title III proceedings to adjust bonds owned or insured by them. *See* JA116, 149-50. The constitutional violation in the Board members' appointments—their absence of legal authority under PROMESA—is a "structural" defect in the Title III proceedings that those Board members' initiated and are now prosecuting. *Freytag*, 501 U.S. at 878-79. The relief to which Aurelius and Assured are "entitled" therefore includes "new" proceedings "[un]tainted with an appointments violation." *Lucia*, 138 S. Ct. at 2055.

The remedy that this Court granted in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), further illuminates the First Circuit's error. In that case, respondent Marathon had argued that, because the bankruptcy courts violated Article III, the suit filed against it in the bankruptcy proceeding must be dismissed. The plurality agreed, and held that its decision "appl[ies] only prospectively" for actions not implicated in that litigation. *Id.* at 88 (plurality). For the case before it, however, the Court in *Northern Pipeline* "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." *Ryder*, 515 U.S. at 184 n.3. As the *Northern Pipeline* Court expressly stated: "It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon." 458 U.S. at 87 n.40; *see also id*. at 89 (Rehnquist, J., concurring in judgment) ("Marathon may object to proceeding further with this lawsuit on the [constitutional] grounds"); *NRA Political Victory Fund*, 6 F.3d at 828 (*Northern*

*Pipeline* "declared an aspect of the bankruptcy law unconstitutional and stated that its opinion would act prospectively. Still, the party who challenged the constitutionality of the statute was afforded relief.").

Decades later, this Court granted the same remedy in *Stern* v. *Marshall* when it ruled that, because the bankruptcy court lacked the Article III power to rule on a state-law counterclaim, that claim must be dismissed. 564 U.S. 462, 503 (2011). Therefore, "*Northern Pipeline* is not a case in which the Court invoked the *de facto* officer doctrine to deny relief to the party before it." *Ryder*, 515 U.S. at 184 n.3. Quite the contrary, the Court granted the successful challenger the same relief sought here by Aurelius and Assured: dismissal of the tainted proceedings.

When litigants timely and successfully challenge a proceeding brought by an unconstitutional entity, they are entitled to have the invalid action at issue vacated or dismissed. *See NRA Political Victory Fund*, 6 F.3d at 828 (when a litigant raises a "constitutional challenge as a defense to an enforcement action," courts may not "declare the Commission's structure unconstitutional without providing relief to the [challengers] in th[at] case"). In *Northern Pipeline*, the Court granted the prevailing party's motion to dismiss the suit filed against it by the respondent. 458 U.S. at 88; *accord Stern*, 564 U.S. at 503. In *Lucia* and *Ryder*, the Court vacated the adjudication before the unconstitutionally selected judge. *Lucia*, 138 S. Ct. at 2055 & nn.5-6; *Ryder*, 515 U.S. at 183. Here, Aurelius and Assured prevailed on their constitutional challenge, but the First Circuit nevertheless *affirmed* the district court's judgments against them. The court of appeals should have reversed the district

court's denial of Aurelius's motion to dismiss the Commonwealth Title III case, and should have reversed the entry of judgment against Assured on its adversary complaint and ordered dismissal of the PRHTA Title III case.

An order requiring dismissal of the Title III proceedings is entirely "appropriate" relief in these cases. Because it necessarily affects thousands of creditors nationwide, the decision to file a Title III case is one of the gravest and most consequential acts a Board can take under PROMESA. But the Board never possessed the legal authority to file those petitions. PROMESA requires that the Board have a five-member quorum when issuing a "restructuring certification," which is a prerequisite for any Title III petition, *see*, *e.g.*, 48 U.S.C. §§ 2146(b), 2164(a), yet the Board has never had a *single* properly appointed voting member, much less a quorum. Just as the NLRB's proceeding in *Noel Canning* was "void *ab initio*" because it was initiated when the NLRB "had no quorum," 705 F.3d 490, 493, 514 (D.C. Cir. 2013), *aff'd* 573 U.S. at 557, so, too must the Title III proceedings initiated by the quorum-less Board be regarded as void. Indeed, in *New Process Steel, L.P.* v. *NLRB*, this Court invalidated "almost 600" NLRB cases decided in violation of the NLRB's statutory quorum requirement, and refused to construe the quorum requirement to permit "*de facto* delegation to a two-member group." 560 U.S. 674, 678, 681 (2010). The First Circuit should have reversed the judgments of the district court, as PROMESA itself contemplates, because "the petition[s] do[] not meet [PROMESA's] requirements." 48 U.S.C. § 2164(b).

**3.** Previously, the Board attempted to distinguish cases like *Ryder* on the ground that they involved unconstitutional "adjudicat[ors]." C.A. Board Br. 53-54. But the adjudicators in *Ryder* were not Article III judges; rather, they were officers exercising delegated federal executive power, subject to the President's oversight, just like the SEC ALJ in *Lucia*. And *Ryder* never suggested that the application of the *de facto* officer doctrine turns on whether the unconstitutionally appointed officer performs an adjudicative or some other function. Instead, more than 100 years ago, this Court explained that the *de facto* officer doctrine would be inapplicable when there was any "trespass upon *the executive power of appointment*." *McDowell*, 159 U.S. at 598 (emphasis added). That "executive power of appointment" extends to "*all*" "Officers of the United States," whether they be "Ambassadors," "public Ministers and Consuls," "Judges of the supreme Court," or the members of the Board. U.S. Const. art. II, § 2, cl. 2 (emphasis added).

In fact, this Court has recognized that defects in the appointment of a prosecutor can be structural and thus require automatic dismissal. *See Young*, 481 U.S. at 809-10 (plurality). Justice Scalia, concurring in the judgment in *Young*, thought that the error was a constitutional one: that Article III judges lack the constitutional authority to appoint contempt prosecutors in the first place. *Id.* at 815 (Scalia, J., concurring in the judgment). But the remedy was the same: The "fundamental" error "requires reversal of petitioners' convictions." *Ibid.* Separation-of-powers defects in the appointment of the prosecutor, Justice Scalia explained, render the convictions "void." *Id.* at 815, 825. Therefore, he concluded, the court of appeals should have granted the defendants' motions to dismiss. *Id.* at 825; *see also NRA Political Victory Fund*, 6 F.3d at

828 (refusing to apply the *de facto* officer doctrine to validate an enforcement action brought by the FEC).

Similarly, in *Bowsher*, 478 U.S. at 736, this Court "affirmed" the decision of the three-judge district court panel—which included then-Judge Scalia—that had nullified a presidential order because it was premised on the action of an unconstitutional officer, *Synar* v. *United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986) (per curiam). The Gramm-Rudman-Hollings Act gave the Comptroller of the Currency the power to force the President to issue a "sequestration order" mandating spending reductions. *Bowsher*, 478 U.S. at 718. In affirming the district court, this Court agreed that it was unconstitutional for the Comptroller to wield this executive power, because he was removable only by congressional statute and was therefore an officer of Congress. *Id.* at 736. Neither court contemplated that the *de facto* officer doctrine could validate the invalid governmental actions, even though they certainly were not adjudicative acts. Instead, the three-judge panel gave the plaintiffs—union members whose retirement benefits were reduced by the sequestration order—the relief of nullifying that order, *Synar*, 626 F. Supp. at 1404, and this Court affirmed, *Bowsher*, 478 U.S. at 736.

There accordingly is no basis for limiting *Ryder*'s holding that the *de facto* officer doctrine cannot validate acts of unconstitutionally appointed officials to a class of cases involving the exercise of adjudicative power. The rationale for *Ryder*'s holding applies with equal force whether the unconstitutionally appointed official initiates and prosecutes the challenged proceeding or adjudicates it.

**4.** Even if the *de facto* officer doctrine could somehow apply to a direct Appointments Clause challenge—and it cannot—it still should not apply here. That doctrine applies only when the officers are acting "by virtue of an appointment *regular on its face*," *McDowell*, 159 U.S. at 601 (emphasis added), which is only "*later discovered*" to be unlawful, *Ryder*, 515 U.S. at 180 (emphasis added). To justify its application of the *de facto* officer doctrine, the First Circuit said that the Board members' "titles to office were never in question until [the court's] resolution of this appeal." JA177. But that is demonstrably incorrect. Congress's violation of the Appointments Clause was open and notorious before PROMESA even had been enacted into law, as Senators publicly acknowledged the constitutional problems with the Board's appointment mechanism. *See* 162 Cong. Rec. S4687 (daily ed. June 29, 2016) (Senator Cantwell); *id.* at S4685 (Senator Reid). And the constitutionality of the Board members' appointments indisputably was "in question" when Aurelius filed its motion to dismiss asserting the constitutional violations, early in the Title III proceedings, before the Board had taken any significant actions. *See SW Gen., Inc.*, 796 F.3d at 82 (*de facto* officer doctrine inapplicable because agency put on notice as soon as litigants brought their challenges). No precedent supports the First Circuit's application of the *de facto* officer doctrine to officials' acts taken after the constitutional challenge to their appointments has been raised.

**5.** Throughout this litigation, the Board has warned of "chaos" that would ensue if Aurelius and Assured were granted relief from any of the Board's past actions. That evidently was persuasive to the First Circuit, which justified application of the *de*

*facto* officer doctrine by reference to the "fear" of "negative consequences" from "cancel[ing] out any progress made towards PROMESA's aim of helping Puerto Rico achieve fiscal responsibility and access to capital markets." JA177. Yet these exaggerated articulations of concern do not even pretend to formulate a legal principle guiding application of the *de facto* officer doctrine. For four reasons, this Court should reject the Board's case-specific plea for application of the *de facto* officer doctrine here.

First, "convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Free Enter. Fund*, 561 U.S. at 499 (alteration omitted). And this Court accordingly has not hesitated to grant meaningful—and sometimes vastly disruptive—remedies to violations of the constitutional separation of powers. *E.g.*, *Chadha*, 462 U.S. at 944-45 (invalidating hundreds of statutes on separation-of-powers grounds); *N. Pipeline*, 458 U.S. at 87-88 (striking down entire bankruptcy court system nationwide);[13] *see also New Process Steel*, 560 U.S. at 678, 688 (invalidating "almost 600" NLRB cases because of statutory quorum requirement violation, and noting that the requirement "must be given practical effect rather than swept aside in the face of admittedly difficult circumstances"). It is precisely when the stakes are high that the political branches are most tempted to violate basic constitutional protections and guarantees, and the Court's scrutiny should

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[13] Even though this Court stayed the effect of its ruling in *Northern Pipeline*, the Court's patience with Congress (which did not act within the time given by the Court) was limited. *See N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 459 U.S. 1094 (1982) (denying the Solicitor General's request "to further extend the stay of the judgment").

thus be "sharpened rather than blunted by [that] fact." *Chadha*, 462 U.S. at 944.

Second, petitioners' claims of "chaos" are vastly overstated, because only *timely* challenges can invalidate unconstitutional officers' actions. *Ryder*, 515 U.S. at 182; *Lucia*, 138 S. Ct. at 2055. Those parties who were aware of the defect, yet sat on their hands and acquiesced in the Board's activities, will have no success challenging the Board's past decisions. *Glidden*, 370 U.S. at 535 (plurality). Every party in every Title III proceeding (not just the Commonwealth's) has been on notice of the Board's constitutional defects for *years*. That fact will foreclose relief in proceedings where parties failed to raise a timely Appointments Clause challenge.[14]

Third, applying the *de facto* officer doctrine in this case "would create a disincentive to raise Appointments Clause challenges with respect to questionable … appointments." 515 U.S. at 182-83; *see also Lucia*, 138 S. Ct. at 2055 n.5 ("Appointments Clause remedies" must be "designed not only" to advance the "structural purposes of the Appointments Clause" itself, "but also to create incentives to raise Appointments Clause challenges"). Indeed, applying the *de facto* officer doctrine in constitutional cases may deprive private litigants not only of incentive, but perhaps even of Article III standing to sue. If the *de facto* officer doctrine validates an unconstitutional officer's past actions, it would raise doubts whether a litigant's injury from such past actions even is redressable. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561

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[14] For instance, DRA amici point to Title VI proceedings, DRA Br. 7-18, but those proceedings have not been challenged, and could not be challenged absent a timely suit.

(1992). That would place the constitutional separation of powers in great peril because, as this case well illustrates, the branches encroached upon may not challenge—and may even defend—the encroachment. *See*, *e.g.*, *Free Enter. Fund*, 561 U.S. at 497. "[T]he separation of powers" then will "depend on the views of individual Presidents []or on whether the encroached-upon branch approves the encroachment." *Ibid*.

Finally, applying the *de facto* officer doctrine here will encourage further congressional encroachments on the Executive's appointment power. If the Board's past actions are deemed valid acts of *de facto* officers, that would signal to Congress that it can disregard the Constitution's allocation of the Appointment Power to the President and retain the benefits of its usurpation for at least the duration of any ensuing litigation. Each new crisis faced by the federal government may then be met with a new innovation to accrue power over official appointments into Congress's "impetuous vortex." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995) (quoting *The Federalist Papers No. 48*, at 309 (Madison)).

The Board members have been wielding significant federal power in violation of one of the Constitution's core structural provisions for nearly three years—and since August 2017, Aurelius has been publicly challenging the constitutionality of the Board members' appointments. This Court has never applied the *de facto* officer doctrine to deny parties who prevailed in their timely constitutional challenge the relief they sought. The *de facto* officer doctrine should have no application here.

### B. In All Events, The *De Facto* Officer Doctrine Cannot Validate The Board's Future Actions.

There was no basis whatsoever for the First Circuit to apply the *de facto* officer doctrine to validate actions taken after the First Circuit's February 15 decision and judgment, yet that is what the First Circuit did. The court withheld its mandate, ultimately delaying its issuance until proceedings before this Court conclude, and declared that "the Board may continue to operate as until now" and that its constitutional ruling would not "eliminate any otherwise valid actions of the Board prior to the issuance of our mandate." JA177-78. Even the *de facto* officer doctrine could not justify this prospective blessing of the unconstitutional Board's future actions.

Where it applies, the *de facto* officer doctrine addresses challenges to actions of an official where it "is *later discovered* that the legality of that person's appointment or election to office is deficient." *Ryder*, 515 U.S. at 180 (emphasis added). The First Circuit's application of the *de facto* officer doctrine was expressly predicated on the notion that the Board members' appointments were "never in question until [the court's] resolution of this appeal." JA177. As demonstrated above, *see supra* at 62, that statement is factually inaccurate. But even if one accepted it as true, the Board members' appointments undeniably were "in question" after the First Circuit's decision. Certainly by that time, the unconstitutionality of the Board members' appointments had been "discovered." *Ryder*, 515 U.S. at 180. The *de facto* officer doctrine therefore could not conceivably validate any actions of the Board undertaken after February 15.

That follows from the axiom that, once it has been determined that an agency's "composition violates the Constitution's separation of powers," that agency "lacks authority" to further "enforce[]" its organic statute. *NRA Political Victory Fund*, 6 F.3d at 822. If invalidly appointed officers take actions before remedying their appointments, those actions are "void *ab initio*" and must be vacated. *Noel Canning*, 705 F.3d at 493. Thus, unconstitutionally structured agencies cannot take further actions unless and until they have been "reconstitute[ed]" in conformity with the separation of powers. *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996). That is why, in *Free Enterprise Fund*, the PCAOB could not take further actions until the Court had used severance and declaratory relief to reconstitute the PCAOB into a validly structured agency. 561 U.S. at 509-10. The petitioners were "entitled" to have the regulatory standards "enforced only by a constitutional agency accountable to the Executive." *Id.* at 513-14.

In conflict with these cases, the First Circuit has purported to allow seven federal officers to continue to act in an official capacity *after* they were determined to have been appointed unconstitutionally. On rare occasions, this Court has allowed an unconstitutional governmental entity—after a finding of unconstitutionality—to continue to operate. *See*, *e.g.*, *N. Pipeline*, 458 U.S. at 88 (temporarily staying judgment to "afford Congress an opportunity to reconstitute the bankruptcy courts … without impairing the interim administration of the bankruptcy laws"). Even then, however, this Court has been careful to award the successful challengers relief in their particular proceedings, such as favorable action on the order on review. *See Ryder*, 515 U.S. at 184 n.3 (noting that *Northern Pipeline* affirmed the grant of the successful

party's motion to dismiss). There is no precedent for the First Circuit's decision to permit officers adjudged to be unconstitutionally appointed to continue to operate in the challenged proceeding to the detriment of the successful challengers.

The First Circuit's decision to allow the unconstitutional Board to continue to operate is especially pernicious here because the Board evidently intends to use this interim period to confirm restructuring plans and thereby position the Board to invoke "the curious"—and likely invalid—"doctrine of 'equitable mootness'" to argue that Aurelius and Assured should be denied any relief at all. *In re Cont'l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (Alito, J., dissenting). Since the First Circuit's decision prospectively validating the Board's actions until issuance of its mandate, the Board has pressed to finalize as many actions as possible in advance of this Court's ruling. *See*, *e.g.*, *Oversight Board Reaches Agreement on a Framework to Restructure $35 Billion of Liabilities* (June 16, 2019), https://bit.ly/33PaacL. Less than a month ago, the Board notified the district court that it "intends to file a proposed Plan of Adjustment for the Commonwealth, if possible, within a few weeks, and in any event as soon as reasonably possible." Tr. of Omnibus Hr'g at 9, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-bk-3283 (D.P.R. July 24, 2019). The Board is *already* taking the position that other PROMESA-related litigation is equitably moot, *see* Appellees' Mot. to Dismiss Appeal as Equitably Moot at 2, *Elliot* v. *Puerto Rico*, No. 19-1182 (1st Cir. Apr. 12, 2019), and it has never disclaimed an intention to deploy the argument in an effort to thwart Aurelius's and Assured's constitutional challenge. If that gambit were successful, it would result in a profound injus-

tice. It would completely deprive Aurelius and Assured of the "appropriate" relief to which they are "entitled," *Ryder*, 515 U.S. at 183, and deprive the broader class of creditors and the public of their right to a debt-restructuring process conducted in conformity with the Appointments Clause.

But having declared the Board members' appointments unconstitutional, the First Circuit lacked power then to declare that future actions that the same Board takes against the successful challengers are valid. The First Circuit was free to stay its mandate to allow a new Board to be nominated by the President and confirmed by the Senate. But a court cannot prospectively validate any and all future actions that an unconstitutional entity might choose to take. None of the Board's actions in the relevant Title III proceedings—either before or after February 15—has *de facto* validity. They must either be ratified by a constitutionally appointed Board after due consideration, or else are null and void.

### C. This Court Should Direct The Lower Court To Dismiss The Title III Proceedings.

This Court should reverse the court of appeals' affirmance of the district court's denial of Aurelius's motion to dismiss the Commonwealth Title III proceeding and its judgment against Assured on its adversary complaint in the PRHTA Title III case with the additional direction that the relief requested by Aurelius and Assured below be granted. This Court then has the power to stay the effectiveness of its judgment for a brief period to allow the President to nominate and the Senate to confirm a new Board consistent with the Appointments Clause. Then, after a considered review, the constitutionally appointed Board members

could decide which of the unconstitutional Board's actions should be ratified. *See FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (describing process of ratification).

All this could take place *before* this Court's judgment comes into effect. And if the constitutionally appointed Board appropriately decides to ratify the filing of the Commonwealth and PRHTA Title III cases, there would be no need for the district court actually to dismiss them. This reasonable approach, which the court of appeals refused, honors the separation of powers while imposing minimal, if any, disruption to the ongoing Title III proceedings, and provides a clear path for the Board to fulfill its statutory mandate of aiding the Commonwealth and its instrumentalities in achieving "fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a). The Board's and the United States' claim that an order dismissing the Commonwealth and PRHTA Title III cases will result in chaos disintegrates in the light of this measured remedial approach.

This is essentially the same order of relief that Aurelius had suggested to the district court. As Aurelius explained below, the district court could stay its order of dismissal and the Board then could "revisit its prior acts taken pursuant to Title III, such as the decision whether to certify the Title III petition, after it is reconstituted consistent with the Appointments Clause." Reply 29, No. 17-bk-3283 (D.P.R.), Doc. 1833. Had that proposed relief been granted, a constitutionally appointed Board could have considered whether to ratify the filing of the Commonwealth and PRHTA Title III cases, obviating any need for their dismissal.

This approach also closely resembles that taken by lower courts after this Court's *Noel Canning* decision. In *Noel Canning*, this Court held that three of the five members of the National Labor Relations Board ("NLRB") had been invalidly appointed under the Recess Appointments Clause, thereby leaving the NLRB without a quorum to act. 573 U.S. at 520. The President and the Senate subsequently remedied the Recess Appointments Clause violation, and "all five members of a *properly* constituted Board" then ratified certain prior decisions. *Advanced Disposal Servs. E., Inc.* v. *NLRB*, 820 F.3d 592, 602 (3d Cir. 2016).

This remedy vindicates the separation of powers, and also is faithful to PROMESA's design. PROMESA purports to commit significant federal power to the Board members' "discretion." *E.g.*, 48 U.S.C. §§ 2121(d)(1)(A)-(E), 2141(a), 2142(a), 2146(a). The *de facto* officer doctrine, in contrast, effectively places substantive decision-making power in the hands of the judiciary. To date, no constitutional actor—save the First Circuit—has passed on the validity of the Board's actions. A constitutionally appointed Board should be permitted to decide in the first instance which of the Board's prior actions, if any, should have effect.

## CONCLUSION

The Court should affirm the First Circuit's conclusion that the Board members were unconstitutionally appointed and reverse its application of the *de facto* officer doctrine and affirmance of the district court's judgment against Aurelius and Assured.

Respectfully submitted.

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