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

In The
Supreme Court of the United States

FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO

v.

AURELIUS INVESTMENT, LLC, *et al*.

AURELIUS INVESTMENT, LLC, *et al*.

v.

COMMONWEALTH OF PUERTO RICO, *et al*.

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

v.

AURELIUS INVESTMENT, LLC, *et al*.

UNITED STATES OF AMERICA

v.

AURELIUS INVESTMENT, LLC, *et al*.

UNIÓN DE TRABAJADORES DE LA
INDUSTRIA ELÉCTRICA Y RIEGO, INC.

v.

FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO, *et al*.

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

BRIEF OF ELECTED OFFICERS OF THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* SUPPORTING THE APPOINTMENTS CLAUSE RULING

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INTEREST OF *AMICI CURIAE*[1]

The appearing *amici curiae* (whose names are specified in the attached appendix) are all elected officers of the Commonwealth of Puerto Rico, currently serving the third of their four year term as members of the Puerto Rico House of Representatives, the Senate and as mayors for various townships. All *amici* were elected in November 2016 while being part of the ticket of the Popular Democratic Party (hereinafter referred to as the "PDP"),[2] one of the two major political organizations within the territory.

It is the *amici's* duty under the Puerto Rico Constitution (particularly those who are members of the Legislative Assembly) to establish public policy through the enactment of legislation and by means of budgetary appropriations. In the summer of 2016, Congress decided to flex its Territorial Clause (Art. IV, § 3, Cl. 2) muscle to enact the Puerto Rico Oversight, Management and Economic Stability Act (hereinafter referred to as "PROMESA"), 48 U.S.C. § 2101, et seq.,

[1] All parties have noticed their blanket consent to the filing of *amici* memoranda in the instant case by submitting the requisite letters to the Clerk of the Court. *Amici* hereby certify, as per this Honorable Court's Rule 37.6 no party or counsel for a party has authored any part of the foregoing brief nor has any of the parties and/or their attorneys made a monetary contribution to fund the filing of this brief. No person other than the *amici* or their counsel have made a monetary contribution to its preparation or submission.

[2] Rep. Manuel Natal-Alvelo was elected on the PDP ticket but later declared himself as an independent. The Asociación de Alcaldes de Puerto Rico appears on behalf of the 45 PDP mayors.

establishing a new governance regime that severely undermined, not only the Governor's executive authority but also the Legislature's policy-making prerogatives. Since Congress, for all intents and purposes, enacted a new organic act for Puerto Rico while simultaneously leaving the 1952 Commonwealth Constitution in place, *amici* have a strong interest in defending their authority before the Financial Management and Oversight Board created by PROMESA. Indeed, *amici* owe it to their constituents to see that the autocratic authority of the seven unelected board members that have been placed above them only exercise their considerable power pursuant to applicable constitutional provisions, such as the Appointments Clause (Art. II, § 2, Cl. 2). It is of paramount importance to the *amici's* constituents that the Oversight Board's authority be curbed as much as possible so that Puerto Rico may retain the highest degree of democratic rule possible under PROMESA. To be sure, *amici* filed an adversary proceeding before the District Court (Adversary Case No. 18-00081 in Civil Case No. 17-BK-3283 (LTS)),[3] in which they asserted an Appointments Clause cause of action. Since the District Court adjudicated the matter by denying a tandem of motions to dismiss just as

[3] We must clarify that both the adversary proceeding filed before the District Court and the *amicus* brief filed before the First Circuit were presented by the same appearing legislators and a sizable representation of the PDP mayors. At this juncture, the *Asociación de Alcaldes de Puerto Rico* ("Puerto Rico Association of Mayors") has joined the instant action. The Asociación is a non-profit entity chartered in 1949 that currently encompasses all 45 mayors elected on the PDP's 2016 ticket (out of 78 total municipalities).

the *amici's* own claims were being filed, the latter opted to actively participate in the certified appeals before the First Circuit, since that proceeding would eventually engender an authoritative disposition of the matter. So active were the *amici* at the Court of Appeals level that they were allowed to participate at oral argument.

Another important reason why *amici* have a cognizable interest in this matter is the fact that both the Oversight Board and the United States have attempted to somehow place Puerto Rico's *elected* government in the same position as the seven *appointed* board members, in order to argue that, if board designations under PROMESA are subject to the Appointments Clause, so are the Governor and the members of the Puerto Rico Legislature. *See* Brief for the Oversight Board, at p.p. 33-39; Brief for the United States, at p.p. 47-53. *Amici* vigorously and successfully pushed back against this argument during oral argument before the Court of Appeals. As no other elected Puerto Rico officers have appeared in the instant matter, *amici* are uniquely qualified to address that particular argument.

We expect the parties to address the sheer substance of the Appointments Clause issue in depth, albeit some of them for motives that greatly differ from those of the *amici*.[4] We will therefore concentrate on

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[4] In this important regard, parties like Aurelius Investment, LLC attack the constitutional infirmities in the Board appointment provisions in PROMESA as part of an effort to derail

debunking the Government and the Board's crass attempt to use Puerto Rico's elected government as a human shield against the application of a mandatory constitutional provision.

SUMMARY OF ARGUMENT

The United States and the Oversight Board have a very tough sell to make before this Honorable Court, namely, they must argue that the Territorial Clause not only provides Congress with "plenary powers"[5] over territorial institutions but that it also extends over the constitutional prerogatives of other branches of government. In other words, the aforementioned parties contend that principal federal officers whose positions are created under Article IV are insulated from the application of the Appointments Clause, thereby overriding the President's prerogative to appoint such officers and the Senate's advise and consent role. Indeed, both the Government and the Board

ongoing reorganization proceedings and consequently collect directly from what is left of the Puerto Rico public purse.

[5] The Constitution does not use the phrase "plenary powers" to refer to the authority of any of the branches of government. The term however has been coined by the Court in various circumstances, including to describe Congressional authority over the territories. *See, e.g.*, *Binns v. United States*, 194 U.S. 486, 488 (1904) ("It must be remembered that congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories").

unabashedly propose that American citizens living in the various territories are not entitled to be governed under a Separation of Powers regime. This notwithstanding settled law to the effect that "[t]he ultimate purpose of this separation of powers is *to protect the liberty and security of the governed*," which is why "the Court has been sensitive to its responsibility to enforce the principle when necessary." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991) (emphasis added). Because, at its core, it is quite difficult to promote that Congress be allowed to operate in an extraconstitutional dimension, proponents of this idea resort to fear tactics. One of the fear tactics that has been deployed in this litigation and that has caused great anxiety in Puerto Rican citizens who follow these matters concerns the purported threat to whatever democratic rule exists in the territory.

So dismissive was Congress when drafting PROMESA of the most basic separation of powers principles that, not only did it design a board appointment proceeding that ignored the constitutional prerogatives of the President and of the Senate, but they also devised a scheme of territorial rule that was autocratic in nature. The Oversight Board created under PROMESA is vested with traditional prerogatives of the Executive Branch (such as budgeting expenses for the various agencies) and of the Legislative Branch (such as approving budgets), while placing some Board decisions outside the purview of the Judicial Branch. *See* 48 U.S.C. § 2126(e) (exempting fiscal plan certifications

from judicial review). In other words, the Oversight Board operates with authority to generate fiscal policy, implement said policy and interpret said policy. *See, e.g.*, 48 U.S.C. § 2128(a)(2) (establishing that the elected government of Puerto Rico may not "enact, implement, or enforce any statute, resolution, policy, or rule that would impair or *defeat the purposes of this Act, as determined by the Oversight Board*") (emphasis added). While the unfortunate scheme created by the Insular cases allows Congress to, in its sole discretion, determine territorial governance, such territorial governance must follow a separation of powers model. This is consistent with this Honorable Court's ruling more than a century ago, to the effect that:

> In view, however, of the terms of the Organic Act, of the prior decisions recognizing that the purpose of Congress in adopting it *was to follow the plan applied from the beginning to the organized Territories by creating a government conforming to the American system with defined and divided powers, legislative, executive and judicial*, in further view of the fact that the exercise of the judicial power here claimed would be destructive of that system, we are of opinion that it cannot be supposed that Congress intended by the clause in question to destroy the government which it was its purpose to create.

Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 276-277 (1913) (emphasis added).

Ever since the District Court certified the Appointments Clause issue for an interlocutory appeal, the Government and the Oversight Board have sounded the alarm that, if said constitutional provision is to be applied to the nomination scheme contained in PROMESA: 1) bondholders and other creditors would pick Puerto Rico's bones clean; and 2) Puerto Rico would lose its elected government, as local officials would need to be appointed by the President and confirmed by Senate. Regarding the first argument, it is axiomatic (as desegregation cases have shown) that courts have broad latitude to fashion remedies. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). In this case, the First Circuit reasonably applied the *de facto* officer doctrine[6] in order to protect ongoing debt restructuring efforts.[7] Because it directly threatens Puerto Rican democracy, we shall concentrate on the second argument.

The first reason why Puerto Rico's elective officials are excluded from the Appointments Clause is precisely because such officers are *elected* rather than

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[6] This exercise is amply supported by *Connor v. Williams*, 404 U.S. 549, 550-551 (1972).

[7] Where, as here, important policy considerations are present, courts enjoy broad authority in the crafting of remedies. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). Of course the wide latitude that courts enjoy in designing equitable remedies is not restricted to desegregation cases. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 542-543 (2011) (a California prison reform case). Puerto Rico can have both compliance with the Appointments Clause and debt restructuring. The former should not come at the expense of the former.

appointed. This is more than a semantical distinction. The argument relies on the false premise that, if the President must appoint the *nonelected* members of the Oversight Board as prescribed by the Constitution, the Governor and arguably the members of both legislative chambers must also be so appointed. To be sure, if Congress has not vested a particular territorial government with any democratic rights, those exercising local authority under the applicable organic act would have to be appointed as per Article II, § 2, cl. 2.[8] However, once the people of a territory are granted an elective franchise, it is the People of the territory and not any appointing authority that selects the officers that decide territorial day-to-day affairs. As such, the need to strike the balance between executive and legislative authority that the Appointments Clause seeks to create becomes unnecessary in the elected officer scenario.

Needless to say, Puerto Rico's elected officials are, by no stretch of the imagination, "principal federal officers" that exercise "significant authority" under federal law. It is undisputed that this Honorable Court, in resolving a double jeopardy issue, ruled that the ultimate source of the Puerto Rican government emanates from Congress. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1875-1876 (2015). However, the Appointments Clause concentrates on *immediate* rather than *ultimate* authority. The Oversight Board emanates *directly* from PROMESA, a congressional enactment. On

[8] Such was the case in Puerto Rico under the Organic Acts of 1900 (31 Stat. 77) and 1917 (61 Stat. 770).

the other hand, elected Puerto Rico officials derive their authority directly from the Puerto Rico Constitution and from the statutes enacted thereunder. The *Sánchez Valle* Court made it clear that Puerto Rico makes its own law and enforces them. *Sánchez Valle*, 136 S. Ct. at 1870. The concept of "territorial laws" as a binding source of authority separate from federal laws has been recognized for a long time. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 154 (1878) (holding that territorial law governed matters of criminal prosecution until such time as Congress does not decide to "assume control of the mater"). Not only is the concept of territorial law well settled but so is the concept of *territorial officers*. *See, e.g.*, *Jones v. St. Luis Land & Cattle Co.*, 232 U.S. 355, 363 (1914).

We will now delve deeper into the reasons why democratic rule is not in jeopardy with the application of the Appointments Clause to the principal federal officers that exercise substantial federal authority under PROMESA.

ARGUMENT

A) Elected Officers VS. Appointed Officers

The Appointments Clause undoubtedly seeks to strike a reciprocal check on the powers of the Executive and Legislative Branches in the dispensation of significant authority to public officers that are *designated* to wield such significant authority. This is so because the power of one man or woman (the President

of the United States) to make such determinations must necessarily be checked by a body that is more representative of the People, in this case, the United States Senate. No such concerns exist when the ultimate authority in the Republic, i.e., *the People*, directly select those who wield the powers of the state. As recently explained by this Honorable Court when validating Arizona's authority to hold a referendum to strip its legislature of its traditional role to adopt congressional districts:

> Our Declaration of Independence, ¶2, drew from Locke in stating: "Governments are instituted among Men, deriving their just powers from the consent of the governed." And our fundamental instrument of government derives its authority from "We the People." U.S. Const., Preamble. As this Court stated, quoting Hamilton: "[T]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540-541, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). In this light, it would be perverse to interpret the term "Legislature" in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be "chosen . . . by the People of the several States," Art. I, §2. *See* Cain, 121 Yale L. J., at 1817.

Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652, 2675 (2015)

A clear example of how the Government of Puerto Rico transitioned from an appointed model of governance to an elective one may be gleaned from analyzing the position of Governor. As correctly pointed out by the First Circuit, under the Organic Acts of 1900 and 1917, the Governor of Puerto Rico was appointed by the President with the advise and consent of the Senate. *See Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 857-858 (1st Cir. 2019). Then, in 1947, Congress enacted an amendment to the 1917 Organic Act, which at Section 1 provided that beginning in the General Election of 1948 and every four years thereafter, "the Governor of Puerto Rico *shall be elected by the qualified voters of Puerto Rico*." 39 Stat. 955 (1947) (emphasis added). This new formula replaced prior language that was consistent with the Appointments Clause and that applied to governors designated by the President. This shows that, even before Puerto Rico had a Constitution[9] setting forth the structure of its internal government, Congress was aware that elected officials need not be subjected to the rigors of the Appointments Clause.

We respectfully believe that the transcendental distinction between deriving authority from the will of

[9] The post-constitutional grant of authority to the People of Puerto Rico to elect their own government officials cannot be seriously questioned, insofar as it was explicitly recognized by this Honorable Court. *See Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671-672 (1974).

the People, as expressed in the polls, *vis-à-vis*, obtaining such authority from a presidential designation is enough to reject the Oversight Board and the Government's attempt to place Puerto Rican elected officials as equals with regards to the applicability of the Appointments Clause. As observed by this Honorable Court (in the context of discussing the Equal Protection provisions of the Fourteenth Amendment) "[t]he Constitution *does not require* things which are *different* in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (emphasis added). Elected officers – territorial or otherwise – are simply different and distinct from appointed officers.

B) Puerto Rico's Elected Officials May Never Be Deemed To Be "Federal Officers"

Under the so-called "Insular Cases," American territories have been forced to live under a new form of colonial governance.[10] The euphemism of the term "territory" as a replacement of the traditional term "colony" is nothing more than a distinction without a difference. The common thread between historical European colonialism and American "territorialism" is obviously that, in the former, ultimate power resided in the Crown and/or the Parliament and in the latter, ultimate power resides in Congress. The Oversight Board and the United States seek to use this legal

[10] For a more thorough discussion on this point, we suggest a reading of Torruella, J., *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283 (2007).

doctrine to support the concept that, since ultimate authority resides with Congress, Puerto Rico's elected officials are really federal officials. Upon this premise, the aforementioned parties posit that, if federal officers accountable to Congress and designated to exercise federal powers over a territory are subject to the rigors of the Appointments Clause, so are the "federal officers" that hold the main elective offices in Puerto Rico. This Honorable Court's body of jurisprudence does not support this theory.

The test employed to determine who is a "principal federal officer" for purposes of the Appointments Clause is well established, to wit, "[a]ny appointee *exercising significant authority pursuant to the laws of the United States*." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (emphasis added). The Oversight Board easily meets this standard, as it exercises almost absolute control over Puerto Rico's finances by virtue of a federal enactment (i.e., PROMESA).[11]

To be sure, Congress did provide that the Oversight Board should be considered as "an entity within the territorial government for which it is established in accordance with this title," further clarifying that the Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. § 2121(c). With very few

[11] There is a more nuanced distinction between "principal" and "inferior" federal officers which the Board seeks to exploit. The matter is more than adequately discussed in the parties' briefs and we will not engage in a secondary discussion on this point.

exceptions, this would be dispositive, as a statute's plain language usually suffices to clearly convey what Congress intended. *Ardestani v. INS*, 502 U.S. 129, 135-136 (1991). While it is clear that Congress wanted to affix this *label* to the Oversight Board, it is equally clear that it created something else entirely. In resolving constitutional questions, the Court has observed that substance prevails over "magic words" or "labels." *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992); *City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 492 (1958). It is clear that the designation of the Oversight Board as a territorial entity is, for the most part, a way to ensure that the Commonwealth pick up the considerable tab generated by the Board's business.[12] The hard fact is that there is not a single piece of Puerto Rican legislation that purports to provide the Oversight Board with any authority. Whatever authority the Board has is due solely to the fact that PROMESA exists. If PROMESA were to be repealed today, the Oversight Board would simply cease to exist.

Puerto Rico's top elected officials (i.e., the Governor and the members of both Legislative Chambers) do not exercise their authority under any federal legislation but rather, under Articles III and IV of the Puerto Rico Constitution. Obviously, the Oversight Board and Puerto Rico's elected officials draw their authority from very different sources.

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[12] Under 48 U.S.C. § 2127(b), the Puerto Rican taxpayer is placed as the sole financier of the Board's lofty expenses.

Without a doubt, Puerto Rico has a constitution because Congress so authorized. *See* 64 Stat. 319 (1950); 66 Stat. 327 (1952). This, however, does not mean that the Puerto Rican Constitution or the laws enacted pursuant thereto are, *ipso jure*, "federal law." Quite to the contrary, this Honorable Court has observed that the Constitution is a device that allows the territory the authority to create its own body of law. *Calero*, 416 U.S. at 671-674.

The Oversight Board and the United States are not the first litigants to attempt to dress the Puerto Rico Constitution in federal clothing. The notion has been soundly rejected more than once by the First Circuit. *See United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985); *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956). Puerto Rico law is consistently treated as the working equivalent of state law and is contrasted as such where conflicts arise between it and Congressional enactments. *See, e.g.*, *Camacho v. Autoridad de Telefónos de Puerto Rico*, 868 F.2d 482, 488 (1st Cir. 1989); *United States v. Acosta-Martínez*, 252 F.3d 13, 19-20 (1st Cir. 2001), cert. denied, *Acosta-Martínez v. United States*, 535 U.S. 906 (2002). Indeed, 42 U.S.C. § 1983, a statute created to redress violations by officers acting "under color of state law" has been held to be fully applicable to injuries caused by those exercising authority under Puerto Rico law. *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976). This is utterly inconsistent with the notion that Puerto Rico law is ultimately federal law, and if that were the case, the

violation of federally protected rights would be enforced under *Bivens v. Six Unknown Agents of the DEA*, 403 U.S. 388 (1971) and not under § 1983. The Court explicitly referred to the term "persons acting under color of *territorial law*," where it could have readily referred to "federal territorial law," which seems to be the concept that some parties are attempted to promote in this case. *Flores de Otero*, 426 U.S. at 583 (emphasis added).

This Honorable Court's recent decision in *Sánchez Valle*, does not invalidate the above precedent. The issue in *Sánchez Valle* was simply whether or not Puerto Rico is a separate sovereign for purposes of double jeopardy. *Sánchez Valle*, 136 S. Ct. at 1867-1868. The Court decided the matter by holding that, unlike states and native American tribes, Puerto Rico never enjoyed its own independent sovereignty (which is the source of prosecutorial power) prior to beginning its relationship with the federal government. *Id.*, at 1874-1875. Interestingly enough, the Court pointed to the meaningful distinction between Puerto Rico's "ultimate" and "immediate" sources of authority. *Id.*, at 1876. For purposes of dual sovereignty that bars double jeopardy, the Court observed that what matters is the "*ultimate* source of authority," which in the case of Puerto Rico means federal law. *Id*. (emphasis added). But the same does not hold true for purposes of the Appointments Clause. Quite to the contrary, the clear language in *Buckley* shows that the Appointment Clause focuses on whether or not the officer at issue derives its authority *directly* from federal law. The *Sánchez Valle* Court

clearly stated that "the Commonwealth's power to enact and enforce criminal law now proceeds, just as petitioner says, from the Puerto Rico Constitution as 'ordain[ed] and establish[ed]" by "the people.' " *Sánchez Valle*, 136 S. Ct. at 1875. The same holds true for the authority to elect a Governor and a Legislative Assembly.

Lastly, when enacting PROMESA, Congress was well aware that territorial laws are different from federal law. 48 U.S.C. § 2103 ("The provisions of this Act shall prevail over any general or specific provisions of *territory law*, State law, or regulation that is inconsistent with this Act"); 48 U.S.C. § 2106 ("Except as otherwise provided in this Act, nothing in this Act shall be construed as impairing or in any manner relieving a territorial government, or any territorial instrumentality thereof, from compliance with Federal laws or requirements or *territorial laws* and requirements implementing a federally authorized or federally delegated program protecting the health, safety, and environment of persons in such territory") (emphasis added). The statute even charges the Oversight Board with *enforcing* certain territorial laws. 48 U.S.C. § 2124(h). Simply put, the argument now being promoted by the Oversight Board regarding the characterization of Puerto Rico law as a form of federal law simply cannot be harmonized with the Board's organic act.

Congress' response to Puerto Rico's massive debt crisis was to take back some of the powers granted to its People and vest such powers upon a small group of

unelected individuals. These seven individuals, unlike the appearing *amici*, are not accountable to the People of Puerto Rico at the polls and, if exempted from the Appointments Clause, would not be accountable to the political body that has equal representation of all of the states (i.e., the Senate). It is enough of a limitation that Puerto Rico does not elect any senators that may speak on its behalf but confirmation proceedings at least ensure that presidential board appointees will be tested, under oath, by seasoned lawmakers of all political persuasions.

As punitive as Congress' decision to insert an unelected Oversight Board into its governance scheme may appear to those of us on its receiving end, the Puerto Rico Constitution has not been repealed and what authority our elected officials retain emanates from said Constitution. Unlike what happened in 1900, 1917 and 1952, Congress did not fully replace one scheme of territorial governance with a new one. Rather, PROMESA demands the very difficult balancing act of having an Oversight Board with considerable authority with retaining a democratically elected government that amounts to more than a cardboard figure. If Puerto Rico's elected government is going to remain more than a decorative feature, in place for the sole purpose of creating an illusion of democracy, PROMESA must be read restrictively and be subjected to the rigors of applicable constitutional provisions, such as the Appointments Clause.

At the end of the day, the Appointments Clause is designed to address an interest that is not implicated

in the Territorial Clause. While Article IV deals with how territories are governed, Article II is all about guaranteeing that Separation of Powers is observed by serving as "a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995). Furthermore, the Appointments Clause "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991). In other words, Congress cannot invoke the Territorial Clause and the fact that a principal federal officer is being designated to serve in a territory to justify a power grab against the authority that the Appointments Clause vests on the President and on the Senate.

The Oversight Board and the United States attempt to escape the above analysis by conceding that the Appointments Clause is indeed a corollary to separation of powers but arguing that separation of powers is a "structural" provision of the Constitution to which the citizens living in a territory may not avail themselves to. Not only is the notion that structural provisions are not applicable to territories unsupported by Supreme Court jurisprudence but, by its very nature, the concept of separation of powers is more than a mere rule on how the power of the state is to be divided among the three branches. Hence, while certainly being a structural provision, we respectfully posit that being governed under a separation of powers scheme is also an individual right. If separation of powers prevents tyranny, the lack thereof necessarily exposes

citizens to answering to a tyrannical (or at least autocratic) regime. This is consistent with the Court's statement to the effect that:

> The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. James Madison put it this way: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 324 (J. Cooke ed. 1961).

Freytag, 501 U.S. at 870.

Lest the above words ring hollow, the First Circuit's decision in the instant case must be affirmed, *in toto*.

CONCLUSION

Based on the above discussion, the Governor of Puerto Rico and the members of the Puerto Rico Legislative Assembly are territorial and not federal officers. Hence, the members of the Oversight Board must persuade this Honorable Court of their argument for exemption from the rigors of the Appointments Clause without taking what is left of Puerto Rican democracy and holding it hostage or otherwise arguing that the continued survival of Puerto Rico's democratic

institutions is somehow contingent upon the reversal of the First Circuit's Appointments Clause ruling.

Respectfully submitted,

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