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

In The

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

v.

AURELIUS INVESTMENT, LLC, ET AL.

AURELIUS INVESTMENT, LLC, ET AL.

v.

COMMONWEALTH OF PUERTO RICO, ET AL.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL 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 THE CATO INSTITUTE AS *AMICUS CURIAE* CHALLENGING THE FIRST CIRCUIT'S RULING ON THE DE FACTO OFFICER DOCTRINE

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QUESTION PRESENTED

Can courts use the "*de facto* officer" doctrine to deny meaningful remedies to successful separation-of-powers challengers who suffer ongoing injury by unconstitutionally appointed principal officers?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case concerns Cato because individual liberty is best preserved when the Constitution's separation of powers is respected, consistent with the Framers' design. Specific to this case, Cato has an interest in challenging blatant Appointments Clause violations, which go to the heart of our constitutional structure.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises fundamental questions about government structure and our Constitution's separation of powers. The First Circuit wrongly applied the *de facto* officer doctrine to ratify *all* actions taken by the unconstitutionally appointed Financial Oversight and Management Board for Puerto Rico (the "Board"). In so doing, the court (i) effectively denied Respondents any meaningful remedy, (ii) improperly aggrandized the power of Congress at the expense of the

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[1] Rule 37 statement: All parties lodged blanket consents to *amicus* briefs. No party's counsel authored this brief in any part; *amicus* alone funded its preparation and submission.

president, and (iii) disincentivized private parties from seeking recourse for violations of the Constitution's structural protections. The First Circuit's erroneous application of the *de facto* officer doctrine is wholly out of line with this Court's established precedent and undermines the separation of powers.

This case arose from the restructuring of Puerto Rico's public debt under the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 ("PROMESA"), which created the seven-member Board. PROMESA's practical effect was to require the president to select the Board's members from "secret lists submitted to the President by the House and Senate leaders" without subjecting those appointments to Senate confirmation. Aurelius Pet. at 6; *see also* 48 U.S.C. § 2121(e)(2)(A)-(E). The president ultimately agreed to Congress's directive and chose six Board members off the "secret list," plus one "off-list" member himself. Pet. App. 15a.; 48 U.S.C. § 2121(e)(2)(E). None of these appointees were ever subjected to Senate confirmation. Pet. App. 15a. As the Aurelius parties ("Aurelius," singular) explained, the "dubious constitutionality of this scheme was obvious from the beginning." Aurelius Pet. at 7.

Given that the Board members' power is "pursuant to" federal law (all the power comes from PROMESA), they occupy "continuing positions" (appointments of three years or longer), and they exercise "significant authority" (power to prosecute and veto, rescind, and revise Puerto Rico laws and fiscal plans), the First Circuit concluded correctly that the Board members were principal federal officers subject

to the Appointments Clause (and therefore unconstitutionally appointed). At this point, the court should have—in line with this Court's precedent—stricken the unconstitutional grant of appointment authority, vacated the decisions issued by the Board, and corrected the constitutional defect by requiring new proceedings before a properly appointed Board. Instead, the court fashioned its own judicial remedy under the archaic *de facto* officer doctrine, effectively denying Respondents any meaningful relief. Ironically, in attempting to vindicate Congress's improper grant of appointment power to itself, the court made a policy judgment about how best to restructure Puerto Rico's debt, ignoring the constitutional violation and claiming for itself Congress's power to legislate.

This Court has held that private parties have an implied right of action to assert constitutional challenges for separation-of-powers violations. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). But this right means nothing unless those bringing successful challenges have access to meaningful remedies. As the Court put it in *Ryder v. United States*, "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. 177, 182–83 (1995) (emphasis added). Here, Aurelius made a timely challenge to the Board appointments, Pet. App. 109-110a, and therefore is entitled to appropriate relief, namely a new "hearing before a properly appointed" Board. *See Lu-*

cia v. SEC, 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder*, 515 U.S. at 183, 188). In applying the *de facto* officer doctrine to ratify the unconstitutional Board's actions—past, present, and future—the First Circuit denied Aurelius the relief to which it was entitled.

The Appointments Clause violation at issue here strikes at the very heart of our government structure. Courts must ensure meaningful relief for private parties bringing successful separation-of-powers challenges. That requires this Court to clarify once and for all that principal federal officers are *not* immune from the appointments procedure clearly established by the Constitution. To conclude otherwise would only undermine our basic constitutional design, deter future parties from seeking recourse for blatant constitutional violations, and incentivize Congress to continue overstepping its constitutionally defined role.

ARGUMENT

I. THE BOARD MEMBERS ARE SUBJECT TO THE APPOINTMENTS CLAUSE

A. The Board Members Clearly Satisfy the Test for Principal Federal Officers

The Appointments Clause provides the exclusive means of appointing all federal officers, and reads in relevant part: "[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law

vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Although the Constitution does not define "Officer of the United States," this Court has set forth a basic framework for determining which federal appointees are subject to the Appointments Clause. *See Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018); *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Applying this framework, the court below held unanimously that the Board members "readily meet" the test for "Officers of the United States" under *Lucia*, *Freytag*, and *Buckley*. *Aurelius Investment, LLC v. Puerto Rico*, 915 F.3d 838, 856 (1st Cir. 2019). The court further concluded that the Board members are "principal," rather than "inferior," officers. *Id.* at 860 (citing *Edmond*, 520 U.S. 651, 663 (1997)). Since the Board members are principal officers, they "should have been appointed by the President, by and with the advice and consent of the Senate," but were not. *Id.* at 861. Accordingly, the appointments are "unconstitutional." *Id*.

Under this Court's precedents, "Officers of the United States" subject to the Constitution's appointment procedure are those who (1) occupy a "continuing" position established by federal law, and (2) "exercise significant authority pursuant to the laws of the United States." *See Lucia*, 138 S. Ct. at 2051; *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126. Here, first the Board members clearly occupy "continuing" positions established by federal law. Section 209 of

PROMESA gives the Board itself an indefinite duration, with an initial duration of "at least 4 consecutive years." 48 U.S.C. § 2149(2). Given the expansive nature of the Board's responsibilities, it will almost certainly exist well beyond this initial period. As to the Board members themselves, their positions are "created by statute," down to their "duties, salary, and means of appointment." *Lucia*, 138 S. Ct. at 2052 (quoting *Freytag*, 501 U.S. at 881); *Freytag*, 501 U.S. at 881 (finding the officials at issue were officers because their position was "specified by statute," and were distinguishable from special masters, who are hired "on a temporary, episodic basis," and "whose positions are not established by law, and whose duties and functions are not delineated in a statute"). Furthermore, the Board members are appointed for *at least* three-year periods and can be reappointed indeterminately or until a successor is appointed to replace them. 48 U.S.C. § 2121(e)(5)(A), (C)-(D).

Second, the Board members exercise "significant authority . . . pursuant to the laws of the United States." *Aurelius*, 915 F.3d at 856; *Lucia*, 138 S. Ct. at 2051. Indeed, all their power is derived directly from PROMESA. *See Buckley*, 424 U.S. at 131, 141 (acknowledging that "responsibility under the public laws" and duties "exercised pursuant to a public law" are indications of officer status). Through PROMESA, Congress vested the Board with broad independent power to supervise and control "Puerto Rico's financial affairs" and help "the Island achieve fiscal responsibility and access to the capital markets." *Aurelius*, 915 F.3d at 844. Toward these ends, the Board has the power to review and approve all of Puerto Rico's

budgets. 48 U.S.C. § 2142. It can even force the Governor of Puerto Rico to accept a "fiscal plan" designed by the Board. *Id.* § 2141(d)(2), (e)(2). The Board may also "veto, rescind, or revise Commonwealth laws and regulations that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed pursuant to it." Pet. App. 31a-32a.

Importantly, the Board is the *sole* entity authorized to initiate bankruptcy-like proceedings in federal court, where the Board serves as both Puerto Rico's representative *and* the proceeding's decision-maker. *Id.* § 2175(b) (emphasis added). In this capacity, the Board holds hearings, takes testimony, receives evidence, administers oaths, and "may seek judicial enforcement of its authority to carry out its responsibilities under [PROMESA]." *Id.* § 2124(k); *see also* § 2124(a); 2141(b)–(c), 2142(e)(1)–(2), 2143(c)–(d); § 2124(f) (provisions granting the Board the power to "take testimony," "subpoena" and "receive evidence," and "administer oaths or affirmations to witnesses appearing before it"). These powers mirror those possessed by the officials at issue in *Freytag* and *Lucia*. *See Freytag*, 501 U.S. at 881–82 (concluding that the Tax Court's "special trial judges" [STJs] were officers because they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders"); *Lucia*, 138 S. Ct. at 2054 ("If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too."). Thus, if the Tax Court's STJs and the SEC's ALJs are officers, as *Freytag* and *Lucia* held, respectively, then the Board's members must be too.

Because the Board members hold continuing office and exercise significant authority pursuant to federal law they are "Officers of the United States," who are in turn subject to the Appointments Clause. While the default appointments procedure for all officers is presidential appointment with Senate advice and consent, the text of the Clause does provide for a potential exception to these requirements. The Clause reads that Congress "may by Law vest the Appointment of such *inferior* Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2 (emphasis added). These "inferior" officers may be appointed by the courts of law, heads of departments, or the president and are not mandatorily subject to Senate confirmation. "Principal" officers, however, are required to be nominated by the president and confirmed by the Senate. U.S. Const. art. II., § 2, cl. 2.

The First Circuit rightly concluded that the Board members are "principal," rather than "inferior," officers and thus subject to presidential appointment with the advice and consent of the Senate. *Aurelius*, 915 F.3d at 860. As this Court has explained, a "principal officer is one who has no superior other than the President." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring). The Board members are not "'directed and supervised at some level' by other officers appointed by the President with the Senate's consent." *Free Enter. Fund*, 561 U.S. at 510 (quoting *Edmond*, 520 U.S. at 664). Rather, they are directed and supervised by the president and are only removable by the president for cause. 48 U.S.C. § 2121(e)(5)(B). The Board members therefore meet the

definition of "principal" officers and are subject to presidential appointment.

Even if the Board members could somehow be considered "inferior" officers, their appointments would still violate the Appointments Clause. The appointment of inferior officers, if not made with the advice and consent of the Senate, may be made only by the "Courts of Law," the "Heads of Departments," or "the President alone." U.S. Const. art. II, § 2, cl. 2. But here, the Board members were not appointed by "the President alone." Instead, six of the Board members were essentially selected from secret lists prepared by individual members of Congress. Pet. App. 13a. Because Board members are "principal" officers that were not appointed by the "President alone" and "by and with the Advice and Consent of the Senate," their appointments are necessarily unconstitutional.

B. PROMESA's Procedure for Selecting Board Members Violates the Appointments Clause and Undermines the Separation of Powers

The Appointments Clause provides the *exclusive* means of appointing *all* federal officials who, like the Board members, are "principal" officers. *See Buckley*, 424 U.S. at 132 ("Unless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions."). Because the Board members are "principal" officers, Congress cannot exempt them from presidential appointment. Yet that is exactly what PROMESA purports to do.

Instead of requiring presidential nomination and Senate confirmation, PROMESA provides that six of the Board's seven members—recognized as "List-Members"—shall be selected from lists submitted to the president by individual members of Congress, while one is to be selected in the president's "sole discretion." 48 U.S.C. § 2121(e)(2)(A)–(B). It requires Senate confirmation only if the president picks "off-list." 48 U.S.C. § 2121(e)(2)(E). PROMESA further mandates that any Board vacancy "shall be filled in the same manner in which the original member was appointed." 48 U.S.C. § 2121(e)(6). PROMESA's appointment scheme was transparently designed to empower congressional leaders at the expense of the president. *See* H.R. Rep. No. 114-602, pt. 1, at 42 (2016) (report stating that the law was made to "ensure[] that a majority of [the Board's] members [were] effectively chosen by Republican congressional leaders on an expedited timeframe").

The Constitution carefully balances appointment power between the executive and legislative branches, giving the president the power to select appointments with the advice and consent of the Senate. Although the Constitution's structure is designed to obviate the danger to liberty posed by each of the branches, the Framers were particularly concerned with Congress's potential for overreaching action: "the tendency of republican governments is to an aggrandizement of the legislat[ure] at the expense of the other departments." The Federalist, No. 49 (Madison). They recognized that "the powers conferred on Congress were the powers to be most carefully circumscribed" and that there was a "'propensity'" of the

legislative branch "'to invade the rights of the Executive.'" *INS v. Chadha*, 462 U.S. 919, 947 (1983) (quoting The Federalist, No. 73 (Hamilton). Although Congress has authority to create offices and provide for the method of appointment to those offices, "Congress' power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" *Buckley*, 424 U.S. at 138–39 (discussing Congress's power under the Necessary and Proper Clause). Congress itself, however, may *not* directly exercise the appointment power. Nor may it set qualifications that "so limit selection and so trench upon executive choice as to be in effect legislative designation." *Myers v. United States*, 272 U.S. 52, 128 (1926). By diffusing the appointment power between the legislative and executive branches, the Constitution "prevents congressional encroachment," and "curb[s] Executive abuses." *Edmond*, 520 U.S. at 659.

This framework reflects the Framers' interest in assuring accountability and avoiding appointments that would be the result of secret deals by members of Congress. The Federalist No. 77 (Hamilton) ("Every council of appointment, however constituted will be a conclave, in which cabal and intrigue will have their full scope. . . .[T]he desire of mutual gratification will beget a scandalous bartering of votes and bargaining for places."). Were Congress able to usurp for itself the power to nominate *and* appoint federal officers, it could simply fill offices with supporters who would implement its preferred policies rather than following the directives of the president, whose central role in

our constitutional scheme is to see to the execution of the laws. *Printz v. United States*, 521 U.S. 898, 922–23 (1997). Such an upended system would upset our carefully balanced constitutional structure.

The Appointments Clause thus functions as an important restraint on Congress and as a key structural element in the separation of powers. The Clause reflects more than a "frivolous" concern for "etiquette or protocol." *Buckley*, 424 U.S. at 125. Instead, it acts as a "bulwark against one branch aggrandizing its power at the expense of another branch," *Ryder*, 515 U.S. at 182, and "preserves . . . the Constitution's structural integrity." *Freytag*, 501 U.S. at 878. And although the Clause may not always serve the executive branch's interests, neither Congress nor the president can evade its advice-and-consent requirement to appoint any "principal officer." *Freytag*, 501 U.S at 880. As the Court has recognized, it is quite possible that branches that are encroached upon may not challenge that encroachment. *See*, *e.g.*, *Free Enter. Fund*, 561 U.S. at 497 (executive branch defending legislation despite restriction of presidential power).

Indeed, that is exactly what happened here. When PROMESA was enacted, the president acquiesced to its unconstitutional appointment scheme and even *defended* the law, despite its encroachment on executive authority. But that acquiescence does not free the president of his constitutional duty. That the president voluntarily relinquishes his appointment power—and somehow waives Senate advice-and-consent—under the scheme does not make this end-run around the Appointments Clause constitutional. It is

irrelevant that "the encroached-upon branch approves the encroachment." *Free Enter. Fund*, 561 U.S. at 497. "Neither Congress nor the Executive can agree to waive" the structural provisions of the Constitution. *Freytag*, 501 U.S at 880.

PROMESA represents Congress's blatant attempt to supersede its constitutionally defined role in the appointments process. It eschews the exclusive means for appointing *all* principal federal officers: nomination by the president and confirmation by the Senate. The Appointments Clause, like the Constitution's other structural safeguards, exist to prevent the gradual usurpation of one branch's power by another. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified."). PROMESA's appointment procedure clearly violates the Appointments Clause and undermines separation-of-powers principles. If left to stand, the lower court's decision will only encourage Congress to continue usurping executive authority and render the Appointments Clause a matter of "etiquette" or "protocol," *Buckley*, 424 U.S. at 125, rather than one of the most "significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659.

C. The Territorial Clause Does Not Supersede the Appointments Clause

Article IV of the Constitution provides, in relevant part: "The Congress shall have Power to dispose of

and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl.2.

The Board argues that the Appointments Clause does not apply when Congress legislates for the territories pursuant to Article IV. The court below rejected this view, and rightfully so. *Aurelius*, 915 F.3d at 858–59 (stating that "consistent compliance with the Appointment Clause procedures in hundreds if not thousands of instances over two centuries" in the territories confirm the conclusion that the Board members are principal officers subject to the Clause).

Even when acting under the Territories Clause, Congress is still bound by the Constitution's structural provisions. *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) (stating that the government has full authority over the territories except for "such restrictions as are expressed in the constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself"). Just as there is no exception to the Presentment Clause—itself a key separation-of-powers provision—when legislating for the territories, neither is there one to the Appointments Clause. Like the Presentment Clause, the Appointments Clause regulates how the branches exercise their constitutionally enumerated powers relative to one another. If Congress were not bound by the principles of separation of powers when it legislates under the Territories Clause, then there would be no limit to its power to ignore other constitutional provisions with respect to the territories. That is not our law.

Whatever jurisdiction Congress regulates, its legislation is still subject to the Appointments Clause and other separation-of-powers provisions. As the First Circuit put it, "the Constitution's structural provisions are not limited by geography." *Aurelius*, 915 F.3d at 855; s*ee also Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (averring that certain constitutional "prohibitions go to the very root of the power of Congress to act at all, irrespective of time or place"). While "[t]he Constitution unquestionably grants Congress and the President the power to acquire, dispose of, and govern territory," it does not give the government "the power to decide when and where its terms apply." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). Regardless of where the "Officers of the United States" are situated, the Appointments Clause applies to "all" of them. U.S. Const. art II, § 2, cl. 2.

"[T]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Free Enter. Fund*, 561 U.S. at 501. Structural provisions like the Appointments Clause necessarily apply to the territories because they secure the individual liberty of the governed, wherever they might be. Giving the Board an exception to that principle would fundamentally alter the balance of power within the federal government, thereby undermining the separation of powers.

II. MEANINGFUL REMEDIES FOR APPOINTMENTS CLAUSE CHALLENGES ARE NECESSARY TO PRESERVE THIS STRUCTURAL SAFEGUARD

A. Private Parties' Enforcement of Constitutional Structure Provides a Meaningful Check on Government

Although vesting the appointment power in the president alone "prevents congressional encroachment upon" the executive branch, *Edmond*, 520 U.S. at 659, and supports the president's authority duty to see to the faithful execution of the laws, *Printz*, 521 U.S. at 922–23, the Appointments Clause is much more. A central purpose of the is Clause to protect and secure individual liberty. *See Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (stating that the Framers' "ultimate purpose" behind separating certain federal powers, like that over appointments, was "to protect the liberty and security of the governed"). As Justice Scalia pointed out in his concurring opinion in *NLRB v. Noel Canning*, the Constitution's structural provisions are "designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (cleaned up); *see also Bond v. United States*, 564 U.S. 211, 222 (2011) (The Constitution's structural provisions "secured by the separation of powers protect the individual as well.").

Because protecting individual liberty is the end goal of the separation of powers, individuals are thus

the "intended beneficiaries" of structural provisions like the Appointments Clause. *See* Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 Ind. L.J. 665, 668 (2016) (citing *Bond*, 564 U.S. at 220–21). And, as this Court's precedents reveal, it not the claims of the federal government that have been the focus of judicial decisions regarding separation-of-powers violations, but rather those of *individuals*. *See*, *e.g.*, *Chadha*, 462 U.S. 919 (successful individual challenge to the so-called "legislative veto"); *see also Clinton v. City of New York*, 524 U.S. 417, 433–36 (1998) (finding that injured parties have standing to challenge the presidential line-item veto).

Against the backdrop of the Appointment Clause's role in protecting individual liberty, this Court has recognized that private parties have an implied right of action to assert separation-of-powers challenges based on structural provisions, including the Appointments Clause. *See Free Enter. Fund*, 561 U.S. at 491 n.2; *see also Bond*, 564 U.S. at 223 (stating that "individuals, too, are protected by the operations of separations of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies"); *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring) (private parties have a personal "interest in the regularity of the exercise of governmental power.").

Allowing challenges by private parties based on the Constitution's structural provisions holds the political branches accountable. After all, the branches do not always jealously guard their constitutionally defined roles when structuring government agencies.

In *Buckley*, for example, the president approved of appointment defects even though they diluted the powers of both the president and the Senate. And again, in *Chadha*, both the president and Congress diluted their own powers to approve legislative action. Private parties' ability to enforce structural provisions thus provides a meaningful check on inter-branch anti-constitutional collusion. In many cases, such as here, private parties serve as *better* guardians of the separation of powers than the branches or institutions that possess those powers themselves.

B. Private Parties Bringing Successful Separations-of-Powers Challenges Against the Administrative State Are Entitled to Meaningful Remedies

Our Constitution's structure is such that it protects and secures individual liberty above all else. When that liberty is compromised by unconstitutional government action, citizens ought to have a means of recourse. As described above, permitting and incentivizing separation-of-powers challenges by private parties is thus vital to our constitutional scheme. But simply allowing such challenges is not enough. Without meaningful remedies, the right to bring constitutional challenges is a hollow one. That is especially true for private parties bringing claims against the outsized executive branch, which regularly tramples on individual freedom in the name of bureaucratic necessity. *See* Philip Hamburger, *The Administrative Threat to Civil Liberties*, 2017–2018 Cato Sup. Ct. Rev. 15 (2018) (arguing that administrative power is the greatest threat to civil liberties in our era). Such is the case here where Aurelius was deprived of its

right to a bankruptcy process overseen by officials subject to the Appointments Clause's mechanisms for ensuring government accountability.

If a successful Appointments Clause challenge is timely raised, then the successful challenger is entitled to meaningful relief. *See Ryder*, 515 U.S. at 188. The proper remedy for a successful challenge is one that "afford[s] [the challenger] the relief requested pursuant to its constitutional challenge." *Id.* at 184 n.3 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982)). Providing real relief to successful challengers is crucial because an Appointments Clause violation "runs deeper than any immediate adverse governmental action a plaintiff may seek to avoid; it also entails the plaintiff's subjection to an exercise of power by an unconstitutionally appointed officer." *Pennsylvania v. United States*, 124 F. Supp. 2d 917, 922–23 (W.D. Pa. 2000). If an agency's "composition violates the Constitution's separation of powers," that agency fundamentally "lacks authority" to further enforce its organic statute. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (1993), *cert. pet. dismissed for want of jurisdiction*, 513 U.S. 88 (1994). Thus, if invalidly appointed officers take actions before curing their appointments, those actions are "*void ab initio*" and must be vacated. *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513; *Buckley*, 424 U.S. at 141–43, (concluding that because the members of the FEC had not been properly appointed, the FEC could not constitutionally exercise its powers); *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.").

Because actions taken by unconstitutionally appointed officers taint the entire administrative proceeding, this Court has held the "appropriate" remedy for an Appointments Clause violation is a new "hearing before a properly appointed" official. *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder*, 515 U.S. at 183, 188). But here, rather than providing the remedy that Aurelius requested and was otherwise entitled to receive, the First Circuit fashioned its own supposed remedy, which in effect denied Aurelius any meaningful relief at all. The lower court's decision to ratify the actions—past, present, and future—of the unconstitutionally appointed Board instead of ordering a new proceeding before a properly reconstituted Board is wholly out of line with this Court's precedent.

In *Ryder*, the Court vacated several decisions made by the Coast Guard Court of Military Review because the appointments of two of the court's officers were invalid. 515 U.S. at 177. Then again, in *Nguyen v. United States*, the Court vacated decisions made by a panel of a federal circuit court that included an Article IV territorial judge who was ineligible to sit by designation on an Article III court. 539 U.S. 69, 83 (2003). In both cases, the Court vacated the decisions of the improperly appointed officials and remanded the cases to their respective entities for consideration by properly appointed officials. *Ryder*, 515 U.S. at 188 (holding that the party "is entitled to a hearing before a properly appointed panel of the court"); *Nguyen*, 539 U.S. at 83 (remanding "for fresh consideration of parties' appeals by a properly constituted panel").

Unfortunately, for private parties bringing successful separation-of-powers challenges, courts sometimes "provide meaningless remedies, with little discussion, that may place prevailing regulated parties in a worse position than had they not brought their challenges at all." Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 Ind. L.J. at 668; *see also* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 517–36 (2014) (arguing that courts often provide remedies in separation-of-powers litigation that do not satisfy relevant remedial values). This has even been true in cases where the entire purpose of bringing the challenge was to remedy past actions taken by improperly appointed officials. *See*, *e.g.*, *Lucia*, 138 S. Ct. at 2055–56; *Noel Canning*, 573 U.S. at 557; *Stern v. Marshall*, 564 U.S. 462, 503 (2011); *Ryder*, 515 U.S. at 183; *N. Pipeline*, 458 U.S. at 88. Indeed, that is exactly what happened here. Despite the First Circuit's conclusion that the Board members' appointments were unconstitutional, the court refused to remedy this harm. Basing its reasoning almost entirely on prudential concerns, the court concluded:

> We fear that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now. In addition, a summary invalidation of everything the Board has done since 2016 will likely introduce further delay into a historic

> debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017.

Aurelius, 915 F.35 at 862.

While invalidating the Board's not-yet-final decisions might create some practical difficulties, providing Aurelius relief is still appropriate because Congress has blatantly ignored straightforward constitutional requirements. *See NRA Political Victory Fund*, 6 F.3d at 828 (concluding that when a litigant raises a "constitutional challenge as a defense," courts may not declare a federal agency's "structure unconstitutional without providing relief to the [challengers]"). Prudential concerns are insufficient to overcome the strong interest in maintaining the constitutional plan of separation of powers. *Clinton*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment."). This Court "cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948–49 (2017). "No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting

Chadha, 462 U.S. at 944). While adhering to the Constitution's structural provision and ensuring a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51 (Madison), "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *New York v. United States*, 505 U.S. 144, 187–88 (1992).

Besides, invalidating the Board's decisions would not necessarily spell administrative disaster. Other federal agencies have adequately dealt with similar concerns that resulted from improperly appointed officers who issued multiple decisions for numerous parties. In 2014, for example, the Court invalided nearly 700 decisions of the National Labor Relations Board in *NLRB v. Noel Canning*, 573 U.S. 513, after determining that the appointment of three of the board's members was unconstitutional. Even though the decisions of the improperly constituted board were void, the subsequent constitutionally appointed board could still initiate the same proceedings.

Moreover, Aurelius's requested relief is no different than the remedies courts typically provide in large civil disputes. As with a specific-performance remedy for breach of contract, the party bringing a successful constitutional challenge obtains all to which it was entitled under the "contract" between citizen and government. Similarly, with tort remedies, the party harmed by the constitutional violation is returned to substantially the same position the party would have been in but for the government's establishing a structurally defective agency. A new proceeding before a

constitutionally appointed board compensates the aggrieved party by ensuring that it receives the full extent of the Constitution's structural protections for all portions of an agency's decision-making process.

In contrast, a remedy that provides *de facto* validity to the past *and* future actions of unconstitutionally appointed officers fails both to compensate for past violations and to prevent future harms that flow from a structurally defective agency. The First Circuit's supposed remedy—which ratifies *past* actions and affords *prospective* validity to a powerful federal entity that has already been declared unconstitutional—offends the separation of powers. *See* Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 Ind. L.J. at 714 (arguing that only providing for "minimalistic remedies for prevailing parties in structural litigation undermine[s] structural safeguards").

The Court has said that "Appointments Clause remedies" must be "designed not only" to advance the "structural purposes of the Appointments Clause," "but also to create incentives to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5. Affording the Board's actions *de facto* validity only "create[s] a disincentive to raise Appointments Clause challenges with respect to questionable . . . appointments." *Ryder*, 515 U.S. at 183. Without meaningful relief, private parties will stop bringing separation-of-powers claims. Even in *Buckley*, where the Court validated the past actions of unconstitutionally appointed officials—without explicitly invoking the *de facto* officer doctrine—it nevertheless awarded the challenging party the relief it sought. Similarly, in

Northern Pipeline, after the Court found *de facto* validity, it still afforded the plaintiff the relief requested under its constitutional challenge. 458 U.S. at 88. The Court here should, at the least, do the same.

Allowing the lower court's alleged remedy to stand would deprive Aurelius and other creditors of their right to debt-restructuring proceedings administered by a properly appointed agency. Aurelius is constitutionally entitled to a new "hearing before a properly appointed" Board. *Lucia*, 138 S. Ct. at 2055. To do otherwise would only subject the claimants to the same defective agency, thereby repeating the injury of adjudication before an unconstitutional authority.

III. THE *DE FACTO* OFFICER DOCTRINE IS INAPPLICABLE TO VIOLATIONS OF THE CONSTITUTION'S STRUCTURAL PROVISIONS AND CANNOT SAVE DEFECTIVE AGENCIES FROM SUCCESSFUL APPOINTMENTS CLAUSE CHALLENGES

A. The *De Facto* Officer Doctrine Cures Only Minor Statutory Defects in Appointments, Not Those That Violate the Constitution's Structural Provisions

The so-called "*de facto* officer" doctrine is an ancient tool of equity that ratifies acts performed by a government officer acting under color of official title even though it is later discovered that the officer's appointment is legally deficient. *Norton v. Shelby County*, 118 U.S. 425, 440 (1886). As the Court has explained, a *de facto* officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in

full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902). The precedents of this Court and the circuit courts reveal that the doctrine's reach is extremely limited. It exists primarily to "prevent[] litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a *technicality* of which they were previously aware." *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality op. of Harlan, J.) (emphasis added); *see also Nguyen*, 539 U.S. at 77 ("Typically, we have found a judge's actions to be valid *de facto* when there is a 'merely technical' defect of statutory authority.") (citing *Glidden*, 370 U.S. at 535). In these limited circumstances, the doctrine "protect[s] the public by insuring the orderly functioning of the government despite technical defects in title to office." *Ryder*, 515 U.S. at 180. The *de facto* officer doctrine does not, however, apply to constitutional defects, including appointments violations.

In *Ryder*, for example, the Court unanimously declined to invoke the *de facto* officer doctrine in the face of an Appointments Clause violation. 515 U.S. at 182–83. And in *Glidden*, the Court declined to invoke the doctrine to avoid deciding an Article III question, stating that the cases in which the Court had relied on that doctrine did not involve "basic constitutional protections designed in part for the benefit of litigants." 370 U.S. at 530. The Court has even been unwilling to apply the *de facto* doctrine to serious *statutory* violations. *See*, *e.g.*., *Nguyen*, 539 U.S. at 77, 79; *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960); *William Cramp & Sons Ship & Engine Bldg.*

Co. v. Int'l Curtis Marine Turbine Co., 228 U.S. 645, 650–51 (1913); *McClaughry v. Deming*, 186 U.S. 49, 64 (1902). In the limited situations in which the Court has employed the doctrine, it has declined to extend its use past the facts of the particular case. As the Court stated in *Ryder*, "To the extent these civil cases may be thought to have implicitly applied a form of the *de facto* officer doctrine, we are not inclined to extend them beyond their facts." 515 U.S. at 184.

The Court has never applied the doctrine to deny relief to parties bringing successful constitutional challenges. Instead, it has said that "one who makes a timely challenge to the constitutional validity of the appointment of an officer" is "entitled to a decision on the merits of the question and *whatever relief may be appropriate* if a violation indeed occurred." *Ryder*, 515 U.S. at 182–83 (emphasis added). "Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable . . . appointments." *Id.* at 183; *see also Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984) (holding that courts "should avoid an interpretation of the de facto officer doctrine that would" make it "impossible" to bring Appointments Clause challenges).

Based on this Court's precedents, where there is a "nonfrivolous constitutional" challenge to an exercise of authority, *Glidden*, 370 U.S. at 536, or there has been "a trespass upon the executive power of appointment," *Ryder*, 515 U.S. at 181 (quoting *McDowell v. United States*, 159 U.S. 596, 598 (1895)), or when the defect threatens "the constitutional plan of separation of powers," *Glidden*, 370 U.S. at 536, the *de facto* officer doctrine *cannot* be used to save the government

from successful constitutional challenges. It would therefore be "err[or]" for a court to "accord[] *de facto* validity to" the Board's "actions" in the face of such a clear constitutional violation. *Ryder*, 515 U.S. at 188.

In line with this Court's precedents, several circuits have declined to apply the *de facto* officer doctrine in cases raising constitutional and serious statutory defects. As the D.C. Circuit recently explained, "the Supreme Court has limited the doctrine, declining to apply it when reviewing Appointments Clause challenges." *SW General, Inc.* v. *NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017); *see also NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (declining to apply the doctrine to a separation-of-powers violation). Similarly, the Fifth Circuit has acknowledged that *Ryder* "held that the *de facto* officer doctrine generally is inapplicable to a timely constitutional challenge to the appointment of an officer." *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 353 (5th Cir. 2013). The Ninth Circuit has also refused to apply the doctrine to an Appointments Clause violation. *Silver v. U.S. Postal Serv.*, 951 F.2d 1033 (9th Cir. 1991).

Other circuits have alas come to a different conclusion. Against this Court's precedents, the First, Second, and Tenth Circuits, have extended the *de facto* officer doctrine to cases of constitutional and serious statutory violations. *See*, *e.g.*, *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127 (10th Cir. 1991) (validating actions by an officer appointed in violation of the Appointments Clause); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981) (validating actions taken by an officer whose term had lapsed). The Court must clarify once and for all that

principal officers are never immune from the Constitution's appointments procedure.

B. The First Circuit's Application of the *De Facto* Officer Doctrine Contravenes This Court's Precedents

The First Circuit "ha[d] no trouble in concluding," Pet. App. 30a., that "the process PROMESA provides for the appointment of Board Members is unconstitutional." *Aurelius*, 915 F.3d at 861–62. Despite this conclusion, the court nevertheless employed the *de facto* officer doctrine, a remedy historically used to cure only minor statutory defects in officer appointments. Taking the doctrine a step further, the court permitted the unconstitutionally appointed Board to continue acting as-is even *after* the judgment was entered. Pet. App. 46a, 61a-62a. As described above, this contravenes longstanding precedent holding that the doctrine does not apply to Appointments Clause and other separation-of-powers violations, or even to serious statutory violations. *See, e.g.*, *Nguyen*, 539 U.S. at 69; *Ryder*, 515 U.S. at 177; *McDowell*, 159 U.S. at 596.

As an initial matter, the *de facto* officer doctrine cannot, by definition, apply here as the First Circuit would have it. The doctrine applies only to officers acting "by virtue of an appointment regular on its face," *McDowell*, 159 U.S. at 601, which is only "later discovered" to be unlawful. *Ryder*, 515 U.S. at 180. Here, Respondents made a timely challenge to the Board members' appointment, Pet. App. 109-110a, long before the Board rendered any decision in the proceedings. Both the Board and the public were put on notice

that Board members' appointments could be defective. *See Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987) ("The filing of the underlying suit . . . in and of itself notified the government."). This effectively rendered the *de facto* officer doctrine inapplicable. *See SW Gen., Inc.*, 796 F.3d at 82 (finding the doctrine inapplicable because the agency was put on notice as soon as litigants brought their challenges).

Moreover, the appointment of the Board's members here is not a mere "technicality" within the meaning of this Court's jurisprudence, but a clear constitutional defect. As the Court recognized in *Freytag*, Appointments Clause violations go "to the validity" of the underlying proceedings. 501 U.S. at 879; *see also Intercollegiate Broad. Sys., Inc.*, 796 F.3d at 123 ("[A]n Appointments Clause violation is a structural error that warrants reversal."). The Board members were appointed in violation of one of the Constitution's key structural safeguards. The *de facto* officer doctrine cannot save such a serious defect.

The First Circuit's application of the *de facto* officer doctrine conflicts with established and controlling precedent. As described above, the doctrine is extremely limited and does not apply to serious statutory defects, let alone blatant violations of the Constitution's structural provisions. Permitting its use here would create a significant disincentive for future parties to bring Appointment Clause and other separation-of-powers challenges. *Ryder*, 515 U.S. at 182–83.

CONCLUSION

The Court should affirm the finding of an Appointments Clause violation but reverse the ephemeral remedy that the lower court purported to fashion.

Respectfully submitted,

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