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, *Petitioner*,
v.
AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

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

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, *Petitioner*,
v.
AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,
v.
AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

UTIER, *Petitioner*,
v.
FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* CHALLENGING THE *DE FACTO* OFFICER RULING

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
rdeutsch@deutschhunt.com

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

The Appointments Clause Is A Structural Constitutional Safeguard That Requires Judicial Relief For The Prevailing Party When A Court Determines It Has Been Violated. 5

A. A Party Bringing a Successful Constitutional Challenge to the Validity of the Officer(s) Who Took Adverse Agency Action Against It Is Entitled to Judicial Relief from that Action. 5

B. The *De Facto* Officer Doctrine Does Not Permit the Courts to Paper Over Structural Constitutional Errors. 7

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Andrade v. Lauer,
729 F.2d 1475 (D.C. Cir. 1984) 8, 12, 14

Ball v. United States,
140 U.S. 118 (1891) 8, 9

Bowsher v. Synar,
478 U.S. 714 (1986) 13

Buckley v. Valeo,
424 U.S. 1 (1976) 7, 12

Chamber of Commerce of the United States of America v. *CFPB*, No. 17-cv-02670 (N.D. Tex. filed Sept. 29, 2017) 2

Clinton v. City of New York,
524 U.S. 417 (1998) 6

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 5

Freytag v. Comm'r,
501 U.S. 868 (1991) 5, 7

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 13, 15

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993) 6

INS v. Chadha,
462 U.S. 919 (1983) 14, 17

Leary v. United States,
268 F.2d 623 (9th Cir. 1959) 13

Lucia v. *SEC*,
138 S. Ct. 2044 (2018) 2, 6, 14

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 4

McDowell v. United States,
159 U.S. 596 (1895) 8, 9, 11

Nguyen v. United States,
539 U.S. 69 (2003) ....*passim*

NLRB v. *Noel Canning*,
573 U.S. 513 (2014) 2, 6

NLRB v. SW General, Inc.,
137 S. Ct. 929 (2017) 2

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 12, 13

Ryder v. United States,
515 U.S. 177 (1995) ....*passim*

Stern v. Marshall,
564 U.S. 462 (2011) 6

Stovall v. Denno,
388 U.S. 293 (1967) 7

SW General, Inc., v. NLRB,
796 F.3d 67 (D.C. Cir. 2015) 15, 16

Waite v. City of Santa Cruz,
184 U.S. 302 (1902) 11

Ex parte Ward,
173 U.S. 452 (1899) 8, 10

Zivotofsky ex rel. Zivotofsky v. Clinton,
566 U.S. 189 (2012) 14

<u>STATUTES</u>:

48 U.S.C.
§ 2124 15
§ 2124(k) 15
§ 2164 15

<u>OTHER AUTHORITIES</u>:

Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481 (2014) 16

3 William Blackstone, *Commentaries on the Laws of England* (1765) 4

Albert Constantineau, *Treatise on the De Facto Doctrine* (1910) 8

Gary Lawson & Guy Seidman, *The Hobbesian Constitution*, 95 Nw. U. L. Rev. 581 (2001) 7

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

The Chamber takes no position on the constitutionality of the particular appointments at issue in these cases or on their ultimate outcome. The Chamber submits this brief to make a single point: where a court agrees with a party that a federal officer has been unlawfully appointed in violation of the Constitution, the court should vacate or set aside the agency action taken by the officer that causes injury to the party, thus granting relief to remedy the constitutional violation.

The Chamber has multiple interests in advancing this point even though this specific dispute features business interests on all sides. First, as a recurring plaintiff or petitioner challenging the legality of final agency action taken by an unconstitutionally appointed or tenured officer, the

[1] Counsel of record for all parties consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its counsel, or its members made a monetary contribution intended to fund the brief's preparation or submission.

Chamber has an interest in obtaining relief where it prevails on the merits. *See, e.g.*, *Chamber of Commerce of the United States of America* v. *CFPB*, No. 17-cv-02670 (N.D. Tex. filed Sept. 29, 2017) (challenge to final rule promulgated by Director of the Bureau on ground that he was unconstitutionally protected by for-cause removal restrictions).

Second, the Chamber's Litigation Center, in its capacity as counsel representing businesses challenging the constitutionality of an appointment, has an interest in obtaining relief for the Chamber's member(s). *See, e.g.*, *NLRB* v. *Noel Canning*, 573 U.S. 513 (2014) (counsel for respondent business in successful constitutional challenge to President Obama's recess appointments to the National Labor Relations Board).

Third, in regularly filing *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, *see, e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018); *NLRB v. SW General, Inc.,* 137 S. Ct. 929 (2017), the Chamber has an interest in ensuring that where a business brings a successful constitutional challenge to governmental action, that business may obtain relief.

The Chamber's membership includes businesses engaged in commerce throughout the nation, subject to the reach of virtually every federal regulatory agency. Its members, in varying degrees, must comply with a wide range of statutory schemes that federal officials are tasked with interpreting and enforcing; and they rely upon the structural protections of the Constitution's separation of powers

to delimit executive power and thus preserve private liberty.

SUMMARY OF ARGUMENT

The Chamber takes no position on whether the appointment of PROMESA's Board members violated the Appointments Clause, or the complexities of how Congress's powers under Articles II and IV of the Constitution interrelate.

But *if* the Court concludes that their appointment was unconstitutional, then the Chamber writes to urge this Court to reject the First Circuit's remarkable conclusion, Pet. App. 42a, that the *de facto* officer doctrine means that a reviewing court, even after finding a constitutional violation, need not vacate the agency action causing injury to the prevailing challengers.[2] The First Circuit's conclusion is clearly wrong. Affirming the First Circuit's remedial ruling would transform the high walls the Framers built to separate power across the branches of government into Potemkin barriers.

This Court has always provided a directly responsive remedy for a prevailing party in separation-of-powers cases. The successful party in such a case is entitled to an order vacating and setting aside as void the particular action taken by the unlawfully appointed officer. If the government still wants to proceed (with a rule, with an adjudication, or with some other agency action), then

---

[2] All Pet. App. citations are to the Petition Appendix in the lead case, No. 18-1334.

it may cure the constitutional violation and reinitiate the agency action.

The *de facto* officer doctrine—meant to avoid litigation over technical errors and ministerial mistakes—has never been applied by this Court to deny relief to a litigant facing adverse agency action at the hands of an unconstitutionally appointed officer. And nothing in the principles or history of the *de facto* officer doctrine justify what the First Circuit did here—deny relief to a plaintiff who successfully demonstrated to that court's satisfaction that there was a violation of the Appointments Clause.

The failure to provide any relief to a prevailing challenger in a case such as this will discourage those affected by similar structural violations of the Constitution from mounting meritorious challenges. And at the same time, the Congress and the Executive will have every incentive to color outside constitutional bright lines if this Court were to abdicate its duty to protect "[t]he very essence of civil liberty," which "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 v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)).

ARGUMENT

The Appointments Clause Is A Structural Constitutional Safeguard That Requires Judicial Relief For The Prevailing Party When A Court Determines It Has Been Violated.

If the Court concludes that there is a violation of the Appointments Clause here, then it should make clear that the *de facto* officer doctrine has no role to play in immunizing structural constitutional violations and denying relief to the party who successfully raises an Appointments Clause challenge as a defense to *ultra vires* governmental action.

A. A Party Bringing a Successful Constitutional Challenge to the Validity of the Officer(s) Who Took Adverse Agency Action Against It Is Entitled to Judicial Relief from that Action.

The structural safeguards erected by the Appointments Clause serve 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), and "preserve[] … the Constitution's structural integrity…." *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991). And the President's Article II powers of appointment and removal are designed not merely to augment executive power, but to protect individual liberty. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (recognizing implied right of action). "So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill

of Rights necessary.'" *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

It is thus well established in this Court's decisions that where a governmental action is born from a structural constitutional violation, the remedy is to invalidate the challenged rule, order, adjudication, or other official action, and to remand the matter to permit the government to try again once the underlying constitutional violation has been addressed. *See, e.g., Lucia*, 138 S. Ct. at 2055 (invalidating challenged proceeding and remanding for new adjudication before a properly appointed ALJ other than the original improperly appointed one); *Stern v. Marshall*, 564 U.S. 462, 469 (2011) (invalidating a bankruptcy court's order that impermissibly exercised Article III power, as requested by the prevailing party); *Nguyen v. United States,* 539 U.S. 69, 83 (2003) (returning "these cases to the Ninth Circuit for fresh consideration … by a properly constituted panel"); *Ryder*, 515 U.S. at 188 ("Petitioner is entitled to a hearing before a properly appointed panel of that court."); *Noel Canning*, 573 U.S. at 521, 557 (affirming court of appeals judgment vacating agency's order).

At a minimum, any prevailing parties here would be entitled to meaningful relief, as are any similarly situated non-parties that have raised timely challenges to the constitutionality of the Board's appointment still pending on direct appeal. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 90 (1993) (courts may not issue non-retroactive rulings on direct review of civil matters). Basic norms of constitutional adjudication require as much. *See*

Stovall v. Denno, 388 U.S. 293 (1967) (new rule applies in the case where it is announced).

B. The *De Facto* Officer Doctrine Does Not Permit the Courts to Paper Over Structural Constitutional Errors.

Constitutional violations that strike at the heart of both the Constitution's structure and individual liberty are not excusable by use of the *de facto* officer doctrine. As this Court recognized in *Freytag*, Appointments Clause violations go "to the validity" of the underlying proceedings. 501 U.S. at 879. It follows that actions undertaken by unlawfully appointed officers are *ultra vires*. Courts may have remedial flexibility to validate acts taken by *de facto* officers when their title to the office is tainted by "merely technical" defects. *Nguyen*, 539 U.S. at 77. But this ancient doctrine was never meant to excuse structural constitutional wrongs. Because the Framers had a "less frivolous purpose in mind" than "etiquette or protocol" in how the Appointments Clause treats "Officers of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125 (1976), the *de facto* officer doctrine cannot be used to deny relief here.

The *de facto* officer doctrine has feudal roots dating to fourteenth-century England. *See* Gary Lawson & Guy Seidman, *The Hobbesian Constitution*, 95 Nw. U. L. Rev. 581, 595 (2001). In application, the doctrine had the effect of barring a "collateral" challenge to the legality of a specific action taken by an officer, and instead channeled a litigant into bringing a petition for a writ of *quo warranto*, which would directly challenge the legality

of the officer's *hold on his office* (as opposed to the legality of the officer's *action*). Albert Constantineau, *Treatise on the De Facto Doctrine* 9-10 (1910) (noting doctrine's origin in challenge to validity of abbey's bond issued by abbot who unlawfully occupied his office). Because "public offices were similar to a form of property right" in feudal times, "a *quo warranto* action was like an action [for] ejectment" brought by another party with a competing claim to the office. *Andrade v. Lauer,* 729 F.2d 1475, 1498 (D.C. Cir. 1984).

This Court first applied the doctrine as a limitation on collateral challenges to the validity of acts by federal officers in the late 19th century. In a trio of cases, the Court held that the doctrine barred a collateral challenge by a criminal defendant to a conviction where the basis for the challenge was an alleged legal defect in the assignment or appointment of the judge who presided over the conviction. *See Ball v. United States*, 140 U.S. 118 (1891); *McDowell v. United States*, 159 U.S. 596 (1895); *Ex parte Ward*, 173 U.S. 452 (1899) (original writ of habeas corpus).

In *Ball*, the defendant was tried, convicted, and sentenced in the Eastern District of Texas. *Ball*, 140 U.S. at 121-123. The initial district judge had fallen sick during the trial and was replaced (by order of a circuit judge from the Fifth Circuit) with a district judge from the Western District of Louisiana, who presided over the conviction and sentence. *Id.* at 119-120. Although Ball knew of the assignment during the trial, he did not object. *Id.* at 129. After he was found guilty and sentenced, he brought a collateral challenge to the sentence imposed by the assigned

judge. *Id*. at 127. The Court turned aside that challenge, holding that the judge "was judge *de facto,* if not *de jure*, and his acts as such are not open to collateral attack." *Id.* at 128-129.

Likewise, in *McDowell*, a district judge was assigned (by order of a circuit judge for the Fourth Circuit) from the Eastern District of North Carolina to the District of South Carolina to fill a vacancy in the latter district. *McDowell,* 159 U.S. at 597. The judge presided over McDowell's criminal conviction, and although McDowell—like Ball—knew about the assignment, he also did not object. On his subsequent collateral challenge to the conviction based upon the allegedly invalid assignment, the Court initially noted that McDowell's challenge "present[ed] a mere matter of statutory construction, for the power of Congress" to authorize the temporary reassignment of a district judge "cannot be doubted." *Id.* at 598. A reassignment "involves no trespass upon the executive power of appointment" and "[t]here is no constitutional provision restricting the authority of a district judge to any particular territorial limits." *Id.* "But, whatever doubts may exist" regarding whether the statute authorized the district judge to preside, the Court concluded that the *de facto* officer doctrine was "decisive of this case." *Id.* at 601. The Court, applying the rule in *Ball*, 140 U.S. at 129, concluded that the judge was a "judge *de facto*" and that "his actions as such, so far as they affect third persons, are not open to question." *McDowell,* 159 U.S. at 601 (citing *Ball*, 140 U.S. at 129).

Finally, *Ex parte Ward* concerned an original petition for writ of habeas corpus filed in this Court

to challenge the legality of the President's recess appointment of the district judge who had presided over Ward's criminal conviction. *Ex parte Ward,* 173 U.S. at 453. The Court noted that, although the judge had been appointed during the recess of the Senate, the Senate later confirmed his appointment. *Id.* The Court denied leave to file the petition without addressing the merits of the constitutional challenge, applying the "well-settled rule" that "although the judge holding the court may be only an officer *de facto*, … the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus." *Id.* at 454. After surveying the authorities, including *McDowell*, the Court held that "title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked." *Id.* at 456.

Although the writ of *quo warranto* has almost entirely disappeared from federal practice, the rule set forth in *Ball*, *McDowell*, and *Ex parte Ward*—that a criminal defendant cannot collaterally attack his conviction on the ground that the judicial officer who presided was not lawfully appointed—remains good law. *Nguyen*, 539 U.S. at 77.

As applied today, the *de facto* officer doctrine "springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite *technical defects* in title to office."

Ryder, 515 U.S. at 180 (emphasis added; internal quotation marks and citation omitted).

The remedial doctrine aims to discourage nitpickers from bringing vexatious challenges, especially collateral ones, involving "no trespass upon the executive power of appointment." *McDowell*, 159 U.S. at 598. Collateral attacks on the actions of a *de facto* officer who is "in unobstructed possession of an office" and discharges duties in public without "present[ing] the appearance of being an intruder or usurper," are not allowed. *Waite v. City of Santa Cruz*, 184 U.S. 302, 323 (1902). So "third persons . . . are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer." *Id.* The doctrine thus protects members of the public from having to undertake a title search on the appointment paperwork for each and every official before being able to rely on the validity of their acts.

But it is well established that the feudal distinction between collateral challenges to the validity of an officer's *actions* (traditionally barred by the *de facto* officer doctrine) and direct challenges to the validity of the officer's *entitlement to his office* (traditionally permitted) does not bar appropriate judicial relief to a prevailing plaintiff bringing "a timely challenge to the constitutional validity of the appointment of an officer." *Ryder*, 515 U.S. at 182-183. Where an action "could never have been taken at all," ex post validation via the *de facto* doctrine is off limits, even if the parties acquiesce, and even where the violation is statutory, not constitutional. *Nguyen*, 539 U.S. at 79, 80. *De facto* validation of a decision by

an improperly constituted appellate panel was denied in *Nguyen* because to "ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld." *Id.* at 80.

Such rationale applies with even greater force if the limits on authority have been "carefully withheld" in the Constitution itself. Courts have "avoid[ed] an interpretation of the *de facto* officer doctrine that would likely make it impossible for … plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable." *Andrade*, 729 F.2d at 1498. So, unsurprisingly, in no case has this Court used the doctrine to excuse a structural constitutional violation, or to deny relief to the prevailing challenger that timely challenged the constitutionality of the officer's authority on direct review.

Even where disruption concerns have caused the Court to carefully shape the remedy for separation-of-powers violations, it has still granted relief to the prevailing party. In *Buckley*, 424 U.S. at 117, the Court's ruling provided prevailing parties everything that they requested, because "appellants' claim [was] of impending future rulings and determinations by the Commission." And in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court affirmed the district court judgment dismissing the common law claims made in bankruptcy court before a non-article III judge, again

affording the prevailing challengers precisely the relief they requested. *Id.* at 57, 88. Neither case applied the *de facto* officer doctrine in the way the First Circuit did here—to deny the party before it the requested relief. And to the extent *Buckley* could be so read, because it purportedly blessed past actions of the Federal Election Commission that were not directly challenged (and thus were not before the Court), the *Ryder* court emphasized that such application should not extend beyond *Buckley*'s facts. *Ryder,* 515 U.S. at 184. *Buckley*, in short, provides no basis for the First Circuit's remedial punt.

Nor can a "good faith" gloss permit use of the *de facto* officer doctrine to salvage constitutional violations. In noting that "there is no indication but that the Board Members acted in good faith in moving to initiate [Title III] proceedings," Pet. App. 43a, the First Circuit referenced *Leary v. United States*, 268 F.2d 623 (9th Cir. 1959). But *Leary* involved "little more than a ministerial act" of a judicial substitution to which the parties knowingly consented. *Id.* at 628. Even if *Leary* remains good law after *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-537 (1962), *Ryder*, and *Nguyen*, the challengers here never consented to the exercise of the Board's authority, instead moving to dismiss the proceedings at the earliest opportunity. And the constitutional safeguards of Article II are far from ministerial. Rather, the "checks and balances" that provisions like the Appointments Clause safeguard are "the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

This Court's cases show that the *de facto* officer doctrine poses no bar to voiding an unlawful proceeding where an affected party timely challenges the constitutional validity of their adjudicator's appointment. On the contrary. "'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Lucia*, 138 S. Ct. at 2048 (quoting *Ryder*, 515 U.S. at 182).

Ryder involved "questionable judicial appointments." 515 U.S. at 183. But the need for judicial policing of the fundamental division of power is equally, if not more, important for executive officials. For Article III judges, administrative adjudicators, or executive officials who litigate in the name of the government alike, individuals have a constitutionally protected interest in "having the government act against them only through lawfully appointed agents." *Andrade,* 729 F.2d at 1497. And where questions involving the Constitution's structural provisions are presented in a justiciable case, the judiciary has a duty both to decide the question, and if a violation is found, remedy the wrong. "[C]ourts cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

Nothing in the rationale or history of the *de facto* officer doctrine, or in the cases themselves, suggests that it can be more freely applied to executive branch officers. Rather, the doctrine is off the table, and a remedy required, when there is a

structural constitutional breach that injures the litigant. Courts cannot *de facto* legitimize actions challenged on direct review by the injured party where the "the alleged defect of authority … relates to basic constitutional protections designed in part for the benefit of litigants." *Glidden*, 370 U.S. at 536. Such litigant-benefiting protections include the constitutional safeguard that a government official initiating government litigation be appointed in conformance with Article II. Here, whether acting as adjudicator or enforcer, if the Court concludes that the Board members are appointed in violation of Article II, the litigants involved have suffered a structural injury, and are entitled to relief.[3]

The D.C. Circuit thus had little difficulty in concluding that the *de facto* officer defense was unavailable in *SW General, Inc., v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *aff'd without addressing the de facto question*, 137 S. Ct. 929 (2017), a case where the petitioner argued that the former Acting General Counsel of the NLRB served in violation of the Federal Vacancies Reform Act. The challenge was raised "as a defense to an ongoing enforcement proceeding." *Id.* at 83. Recognizing that the Acting General Counsel "essentially exercises prosecutorial discretion…. [and] sets the enforcement priorities for the NLRB and generally supervises its lawyers," *id.*

---

[3] The Board has authority to hold hearings and subpoena evidence. *See* 48 U.S.C. § 2124. It is also the sole entity that may seek judicial enforcement of its actions, and it does so in Article III courts. *Id.* § 2124(k). Here, the Board was not acting as an adjudicator, but instead exercised its authority to initiate a bankruptcy-like proceeding in federal court under Title III of PROMESA. *Id.* § 2164.

at 80, the court declined to conclude appointment error was harmless, or to offer *de facto* validation. Why? It could not "be confident that the complaint against Southwest would have issued under a[] [different] Acting General Counsel." *Id.* So too, here. There is no guarantee that the same Board members would be appointed under different procedures, or that the same Title III proceedings would be initiated.

Beyond conforming to prevailing norms of constitutional adjudication, providing meaningful relief to the prevailing party provides litigants with sufficient incentive to bring structural challenges. *See Ryder*, 515 U.S. at 183, 186. "Without such an incentive, the wronged party will be unlikely to seek to vindicate the interest that the Court seeks to safeguard." 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). And a "remedy that offers no advantages at all to the remedy-seeking plaintiff will have little chance of "foster[ing] remediation of similar structural wrongs in the future." *Id.* at 521.

Yet the system depends on private parties to bring such challenges, particularly where—as purportedly happened here—the political branches acquiesce in the challenged practices. Even if the impinged-upon branch acquiesces in the infringement of its own authority, there is an inherent deep structural harm to our system of governance and the individual liberties it protects. If anything, the other branches' "enthusiasm" for blurring dividing lines "sharpen[s] rather than blunt[s]" the need for judicial

review encouraged by meaningful remedies. *See Chadha*, 462 U.S. at 944.

* * * * *

There can be no serious dispute that a failure to comply with the Appointments Clause is a structural constitutional error that requires a judicial remedy for the prevailing party that challenged invalid governmental action. Never before has the Court endorsed use of the *de facto* officer doctrine to excuse structural constitutional errors that go to the core of preserving political accountability and protecting individual liberty. If the Court concludes there is an Article II violation here, then it should not begin to do so now.

CONCLUSION

For the foregoing reasons, if this Court concludes that the Appointments Clause has been violated, then the Court should reject the First Circuit's application of the *de facto* officer doctrine, and remand for the Court of Appeals, or the District Court in the first instance, to vacate the action taken against the prevailing parties by the unlawfully appointed officers, unless and until the constitutional violation has been cured.

Respectfully submitted.

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
DEUTSCH HUNT PLLC

August 2019