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

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ET AL.
Petitioner, Cross-Respondents,
v.
AURELIUS INVESTMENT, LLC, ET AL.
Respondents, Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF FORMER PUERTO RICO GOVERNORS SILA M. CALDERON AND ALEJANDRO GARCIA PADILLA AS *AMICI CURIAE* IN SUPPORT OF THE FIRST CIRCUIT'S RULING ON THE APPOINTMENTS CLAUSE

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

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

QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former governors of Puerto Rico, elected pursuant to the mandates of the Commonwealth's constitution. The democratic legitimacy of the authority they exercised is being drawn into question in this case by the United States.

Amici, thus, have a substantial personal interest in the proper resolution of the question presented. They have, as former officers of the Commonwealth, a substantial interest in the implications of this case for the democratic foundations of the Commonwealth of Puerto Rico.

Sila M. Calderón served as the seventh elected Governor of Puerto Rico from 2001 to 2004. Prior to that, Governor Calderón was Mayor of San Juan from 1997 to 2000, and Secretary of State of the Commonwealth of Puerto Rico from 1988 to 1990.

Alejandro García Padilla served as the tenth elected Governor of Puerto Rico from 2013 to 2016. Prior to that, he served as Senator of the Commonwealth of Puerto Rico from 2009 to 2012.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In challenging the court of appeals' opinion that members of the Puerto Rico Fiscal Oversight and

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[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici curiae* or their counsel made a monetary contribution toward its preparation or submission.

Management Board are subject to the Constitution's Appointments Clause, the United States posits that "[i]f the Appointments Clause governed the selection of every local official who exercises significant authority under an act of Congress, all those local governments [including Puerto Rico's] would be unconstitutional, and the centuries-long practice of territorial home rule would come to an end." U.S. Br. 48.

The United States' rationale is that the Government of Puerto Rico—like the Fiscal Oversight and Management Board—is a creature of Congress as "there is no sovereignty in a Territory of the United States other than the United States itself." U.S. Br. 44. The fact that Puerto Rico elects its officers is of no consequence because, says the United States, Congress "may take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient." U.S. Br. 49. The United States may wish to humiliate the Puerto Rican people by muscular assertions that their democracy can be undone at the whim of Congress, but the truth lies elsewhere.

The Commonwealth of Puerto Rico is a creature of the people of Puerto Rico, not of Congress. Puerto Rico engaged in a democratic exercise of popular sovereignty in 1952 by adopting their *own* Constitution establishing their *own* government to enact their *own* laws.

To be sure, Congress authorized and ratified that exercise of popular sovereignty by the people of Puerto Rico. But that does not mean that the Puerto Rico Constitution emanates from Congress. To the contrary, the authorizing legislation, Public Law 600 of 1950, proposed a "compact" under which "*the people of*

Puerto Rico may organize a government pursuant to a constitution of their *own* adoption." Pub. L. No. 81-600, 64 Stat. 319 (1950). The people of Puerto Rico accepted that compact and adopted their own Constitution. Congress ratified that compact by approving the Puerto Rico Constitution with some conditions. *See* Pub. L. No. 82-447, 66 Stat. 327 (1952). Puerto Rico accepted the conditions and the Governor issued a formal proclamation declaring the establishment of the Commonwealth of Puerto Rico. *See Proclamation: Establishing the Commonwealth of Puerto Rico*, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 10.

This Court has described that process as "Puerto Rico's transformative constitutional moment." *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1875 (2016). It has noted that: "Those constitutional developments were of great significance—and, indeed, made Puerto Rico 'sovereign' in one commonly understood sense of that term." *Id.*

The Puerto Rico Constitution, thus, is not an act of Congress; rather, it is a manifestation of the sovereign will of the people of Puerto Rico. The Constitution makes that point clear on its face: its opening words specify that it was adopted by "[w]e, the people of Puerto Rico," and that "the will of the people is the source of public power." P.R. Const. pmbl.

As the First Circuit Court of Appeals observed more than half a century ago, to attribute the Puerto Rico Constitution to Congress, instead of the people of Puerto Rico, is "to impute to the Congress the perpetration of * * * a monumental hoax." *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

Despite the United States' denigrating statements, Puerto Rico elected officials are not elected pursuant to an act of Congress. They are elected pursuant to the sovereign will of the people of Puerto Rico. Thus, a holding that Board members—as federal officers performing federally mandated bankruptcy functions—are subject to the Appointments Clause does not carry the dire consequences of ending Puerto Rico's autonomous status, as the United States warns.

ARGUMENT

I. BACKGROUND

The United States gained possession of Puerto Rico by military occupation during the Spanish-American War of 1898. Spain formally ceded the island under the Treaty of Paris signed in December 1898 and ratified in April 1899. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Apr. 11, 1899, 30 Stat. 1754. After a brief period of military rule, Congress enacted an organic act (widely known as the Foraker Act) to establish a civil government in Puerto Rico. *See* Organic Act of 1900, Ch. 191, 56th Cong., 1st Sess., 31 Stat. 77 (1900). That Act provided for an Executive Branch headed by a Governor and an Executive Council, both appointed by the President of the United States with the advise and consent of the Senate, a House of Delegates elected by qualified voters of Puerto Rico, and a district court of the United States for Puerto Rico with a district judge appointed by the President of the United States for a term of four years. *See id.* §§ 17, 18, 27, 34. The Foraker Act was replaced in 1917 by a new organic act (widely known as the Jones Act), which created an elected Senate and gave the people of Puerto Rico a

bill of rights and United States citizenship. *See* Organic Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917). Under both the Foraker and Jones Acts, all laws enacted by the elected Puerto Rico legislature were submitted to Congress, which retained the power to annul them. *See* 31 Stat. at 83; 39 Stat. at 961.

In 1945, after the Second World War, the United States contracted through the treaty establishing the United Nations Charter the obligation to develop the self-government of territories, including Puerto Rico, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement. U.N. Charter art. 73.

In 1947, Congress amended the Jones Act to give qualified voters of Puerto Rico the right to elect their own Governor. *See* Pub. L. No. 80-362, 61 Stat. 770 (1947).

Later, in 1950, confronting the tensions stemming from the post Second World War climate, facing growing dissatisfaction with the prevailing colonial structures, even serious eruptions of violence, Congress enacted Public Law 600, a landmark legislation that transformed the governance of Puerto Rico. *See* Pub. L. No. 81-600, 64 Stat. 319. That statute, "[f]ully recognizing the principle of government by consent," offered the people of Puerto Rico "in the nature of a compact" the authority to "organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b. Upon approval of the statute by the qualified voters of Puerto Rico in a referendum, the legislature was authorized to call a constitutional convention to draft a constitution for Puerto Rico. 48 U.S.C. § 731c.

In a popular referendum held on June 4, 1951, the people of Puerto Rico overwhelmingly accepted the compact offered by Congress, and a Constitutional Convention was held from September 1951 to February 1952. That Convention drafted the Puerto Rico Constitution. The proposed Constitution was then submitted to the people of Puerto Rico and again overwhelmingly approved (with over 80% of the vote) in another popular referendum on March 3, 1952.

The Puerto Rico Constitution is ordained and established by "[w]e, the people of Puerto Rico." P.R. Const. pmbl. It creates a new political entity, the Commonwealth of Puerto Rico ("*Estado Libre Asociado de Puerto Rico*"), and specifies that the Commonwealth's "political power *emanates from the people* and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America." P.R. Const. art. I § 1 (emphasis added); *see also id.* pmbl. ("We understand that the democratic system of government is one in which the will of the people is the source of public power."). It divides the Commonwealth's political power between officials in the legislative, judicial and executive branches of the new government, none of the members of which are appointed by the President of the United States or any other arm of the Federal Government. P.R. Const. art. I § 2, art. III § 1, art. IV § 1, art. V §§ 1, 8, art. VI § 4. Instead, all three branches of the government of the Commonwealth are "subordinate to the sovereignty of the people of Puerto Rico." P.R. Const. art. I § 2.

Pursuant to Public Law 600, the Constitution was then submitted to the President of the United States, who—after duly finding, among other things, that it

provided for a republican form of government—in turn submitted it to Congress for review. *See generally* 48 U.S.C. §§ 731c, d. Congress considered the proposed Constitution, likewise found that it provided for a republican form of government, and approved it conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments, and the elimination of section 20 recognizing a number of then-novel human rights. *See* Pub. L. No. 82-447, 66 Stat. 327. The Senate report accompanying that legislation explained that the Constitution's approval would mean that "the people of Puerto Rico will exercise self-government." S. Rep. No. 82-1720, at 6, 7 (1952).

President Truman echoed that view both when transmitting the Puerto Rico Constitution to Congress and when signing the Joint Resolution by which Congress approved the Constitution. Under the new Constitution, in President Truman's view, "[t]he Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed. No government can be invested with a higher dignity and greater worth than one based upon the principle of consent." *Public Papers of the Presidents, Harry S. Truman 1952-53*, at 471 (1966). He recognized that with the constitution: "full authority and responsibility of local self-government will be vested in the people of Puerto Rico." *Id.*, *quoted in Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 40 (1st Cir. 1981) (Breyer, J.).

The transformational nature of this process was summed up by Senator Lehman on the Senate floor:

> There is no more precious principle in the entire lexicon of American rights and traditions than

> the principle of self-determination. We have recognized that the people of Puerto Rico may and must have the right to improvise and develop, according to their own genius, the specific constitutional framework of their local government. Congress must, by its own act and volition, relinquish the people of Puerto Rico the right to determine the form and substance of the basic laws governing local affairs.

98 Cong. Rec. 7838 (1952) (statement Sen. Lehman).

Puerto Rico's Constitutional Convention thereafter accepted Congress' conditions "in the name of the people of Puerto Rico," *Resolution No. 34 of the Constitutional Convention: To Accept, on Behalf of the People of Puerto Rico, the Conditions of Approval of the Constitution of the Commonwealth of Puerto Rico Proposed by the Eighty-Second Congress of the United States through Public Law 447 approved July 3, 1952*, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 9, and the Governor issued a formal proclamation to that effect, *see Proclamation: Establishing the Commonwealth of Puerto Rico*, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 10. The Puerto Rico Constitution was accordingly amended by the Constitutional Convention and took effect on July 25, 1952. The amendments were overwhelmingly ratified by the people of Puerto Rico in yet another referendum on November 4, 1952. *See generally Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico*, P.R. Laws Ann. Hist. (Hist. L.P.R.A.) § 11. As a result, numerous provisions of the organic acts governing Puerto Rico—including provisions giving Congress the authority to annul Puerto

Rico laws—were repealed, and the remaining provisions were renamed the Federal Relations Act. *See* Pub. L. No. 81-600 §§ 4, 5, 64 Stat. at 319-20 (1950).

Shortly thereafter, the United States informed the United Nations that it no longer considered itself bound to provide reports on conditions in Puerto Rico under U.N. Charter art. 73 requiring such reports from member states responsible "for the administration of territories whose people have not yet attained the full measure of self-government." As the United States explained, in light of the 1952 Constitution, Puerto Rico had become a self-governing jurisdiction. *See* Mem. by Gov't of U.S.A. Concerning the Cessation of Information Under Article 73(e) of the Charter with regard to the Commonwealth of Puerto Rico, *quoted in Córdova*, 649 F.2d at 41 n.28; *see generally* Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 12-13 (1953).

In response, the U.N. General Assembly acknowledged that "the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status," and "have effectively exercised their right to self-determination." G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., 459th plen. mtg. at 26 (1953), *quoted in Igartúa-De La Rosa v. United States*, 417 F.3d 145, 149 n.5 (1st Cir. 2005).

During the first decades of the Commonwealth, both Congress and Puerto Rico worked to perfect the relationship guided by respect for the sovereignty acquired by Puerto Rico through the constitutional process. In 1961, Congress passed Pub. L. No. 87-189, 75 Stat. 417, which provided that review of Puerto Rico Supreme Court judgments would now be before the

U.S. Supreme Court, as is the case with the states and instead of the territorial structure where appeals then were to the pertinent court of appeals. The Senate Report stated that: "[t]he committee agrees with * * * the Department of Justice that enactment of this legislation is appropriate in view of the change of the status of Puerto Rico from that of a territory to that of an associated Commonwealth under the Act of Compact." S. Rep. No. 87-735, at 2 (1961).

In 1961, Congress also passed Pub. L. No. 87–121 repealing the provisions in the Federal Relations Act dealing with Puerto Rico's public indebtedness, a matter subsequently incorporated to the Puerto Rico Constitution by the people of Puerto Rico through a referendum held on December 10, 1961.

In 1966, Congress passed Pub. L. No. 89-571, 80 Stat. 764, transforming the article IV territorial federal district court in Puerto Rico to an article III court. The Senate report recognized that:

> [T]he Commonwealth of Puerto Rico is a free state associated with and subject to the Constitution and laws of the United States, but not a state of the union. It has virtual complete local autonomy and it seems proper, therefore, to accord it the same treatment as a State by conferring upon the Federal district court there the same dignity and authority enjoyed by the other Federal district courts.

S. Rep. No. 89-1504, at 3 (1966); *see also* H.R. Rep. No. 89-135, 3 (1965); *see Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 595 n.26 (1976).

As this Court has recognized, the process initiated by Public Law 600 was "Puerto Rico's transformative constitutional moment," *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1875 (2016), through which Congress "relinquished its control over [the Commonwealth's] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States." *Id. at* 1874 (quoting *Flores de Otero*, 426 U.S. at 579). Transformative it was, providing the constitutional framework for investment and growth, and for the peaceful coexistence in the Commonwealth of factions holding otherwise irreconcilable, clashing tenets.

In the summer of 2016, the Commonwealth of Puerto Rico faced the most debilitating fiscal emergency in its history. The Commonwealth and its instrumentalities carried around $71.5 billion in outstanding debt, more than the whole annual output of the island's economy. Their credit ratings had been downgraded to junk, leaving them unable to borrow money on the bond markets. Nor could they get debt relief through the federal bankruptcy code. U.S. Br. 2.

This financial catastrophe precipitated a humanitarian crisis for the more than three million U.S. citizens living in Puerto Rico. U.S. Br. 3.

In June 2016, Congress enacted and President Obama signed Pub. L. No. 114-187, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2101 *et seq*., which Congress found necessary to deal with Puerto Rico's "fiscal emergency" and to help mitigate the Island's "severe economic decline." *See* 48 U.S.C. § 2194(m)(1).

Congress identified the Territory Clause, U.S. Const. art. IV, § 3, cl. 2, as the source of its authority to enact this law. *See* 48 U.S.C. § 2121(b) (2).

To implement PROMESA, Congress created the Financial Oversight and Management Board of Puerto Rico (the "Board"). Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island "achieve fiscal responsibility and access to the capital markets." *Id*. § 2121(a).

PROMESA's Title III created a special bankruptcy regime allowing the territories and their instrumentalities to adjust their debt. *Id*. §§ 2161-77. This new bankruptcy safe haven applies to territories more broadly than Chapter 9 applies to states because it covers not just the subordinate instrumentalities of the territory, but also the territory itself. *See id*. § 2162.

The First Circuit Court of Appeals held that PROMESA's Board members are federal officers subject to the Appointments Clause of the Constitution. In contrast, the court noted, a Puerto Rico governor is not a federal officer because he or she "is elected by the citizens of Puerto Rico, his position and power are products of the Commonwealth's Constitution, *see* Puerto Rico Const. art. IV, and he takes an oath similar to that taken by the governor of a state." App. 171, *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 859 (1st Cir.).

The court of appeals drew that contrast to reject the basic point the United States now restates before this Court, that if the Court finds that Board members must be selected by presidential nomination and Senate confirmation, then that would mean that all

elected Puerto Rico governors and legislators have been selected in an unconstitutional manner. *Id.*

II. THE PUERTO RICO CONSTITUTION IS NOT AN ACT OF CONGRESS

The United States argues that if members of the Fiscal Oversight and Management Board are federal officers subject to the Appointments Clause, then so too is Puerto Rico's Governor. All governors, thus, would have held office unconstitutionally. The United States asserts that such is the consequence because "there is no sovereignty in a Territory of the United States but that of the United States itself," U.S. Br. 44 (quoting *Snow v. United States*, 85 U.S. (18 Wall) 317, 321 (1873)); because "[b]oth the territorial and federal laws * * * are creations emanating from the same sovereignty," *id.* (quoting *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 264 (1937)); because all territorial officers "exert all their powers by authority of the United States," *id.* (quoting *Grafton* v. *United States*, 206 U.S. 333, 354 (1907)); and because "federal and territorial [officers] do not derive their powers * * * from independent sources of authority," *id.* (quoting *Puerto Rico v. Sanchez Valle,* 136 S. Ct. 1863, 1870 (2016)).

This, the United States contends, extends to Puerto Rico elected officers because "[t]he territorial people may be 'the most immediate source of such authority,' but '[b]ack of the [territorial] people * * * remains the U.S. Congress.'" U.S. Br. 48 (quoting *Sanchez Valle*, 136 S. Ct. at 1875). The United States is wrong.

This Court has noted that with the emergence of commonwealth status, the *Grafton* and *Shell Co* decisions are no longer controlling. *Sanchez Valle*, 136

S.Ct. at 1874. Those cases applied in "an earlier incarnation of Puerto Rico itself." *See id*. at 1873. *Grafton* dealt with the relations between the Philippines and the United States at a time when the Philippines had no constitution of their own. *Shell* involved the preemptive scope of the Sherman Act at a time when Puerto Rico was governed under an organic act of Congress, the Jones Act, Pub. L. No. 64-368, 39 Stat. 951 (1917). These cases are inapplicable after 1952, because "Puerto Rico became a new kind of political entity, still closely associated with the United States but governed in accordance with, and exercising self-rule through, a popularly-ratified constitution." *Sanchez Valle,* 136 S.Ct. at 1874.

The United States ignores this language from *Sanchez Valle* and attempts to bring the case in line with *Grafton* and *Shell* through a modified quote suggesting that the Court held that: "federal and territorial [officers] do not derive their powers * * * from independent sources of authority." U.S. Br. 44. But that it a gross distortion of *Sanchez Valle*.

In *Sanchez Valle* this Court drew a clear distinction between the peculiarities of the double jeopardy analysis at issue in the case and the broad analysis of sovereignty:

> Truth be told, however, "sovereignty" in this context does not bear its ordinary meaning. For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty. * * * In short, the inquiry (despite its label) does not probe

> whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity.

Sanchez Valle, 136 S. Ct. at 1870.

Speaking exclusively in the double jeopardy context, the Court stated that "federal and territorial *prosecutors* do not derive their powers *to prosecute* from independent sources of authority." *Id*. at 1873 (emphasis added). The United States attempts to widen this narrow holding by dropping the reference to *prosecutors* with a bracketed "[officers]" and the reference to *powers to prosecute* with the ellipsis "powers * * *." By inserting those changes it claims that this Court has held that "federal and territorial [officers] do not derive their powers * * * from independent sources of authority," U.S. Br. 44. Since the Court had emphatically asserted that the double jeopardy analysis did not apply to the general analysis of sovereignty, those alterations are unwarranted, even misleading and improper.

The same problem plagues the United States' other quote from *Sanchez Valle.* This Court did not state that in all matters of Puerto Rico legislation, "[b]ack of the [territorial] people * * * remains the U.S. Congress," as the United States quotes it. U.S. Br. 48. What this Court stated was that relevant for double jeopardy analysis—and only for that—is that "[b]ack of the Puerto Rican people and their Constitution, the 'ultimate' source *of prosecutorial power* remains the U.S. Congress." *Sanchez Valle*, 136 S. Ct. at 1875 (emphasis added).

The United States also misinterprets what the Court meant by "ultimate source." The Court explained that the double jeopardy analysis was historical, and thus required "looking at the deepest wellsprings," finding the ultimate source of authority. *Sanchez Valle*, 136 S. Ct. at 1871. "Ultimate source" in that context means original source and is unrelated to the actual source of authority. As the Court pointed out: "[i]f the dual-sovereignty doctrine hinged on measuring an entity's self-governance, the emergence of the Commonwealth would have resulted as well in the capacity to bring the kind of successive prosecutions attempted here." *Id*. at 1866. Thus, contrary to the United States' pretensions, an ultimate source analysis is not applicable to determine the source of authority for Puerto Rico's governors.

* * *

The Commonwealth's legal cornerstone is Public Law 600 of 1950, enacted amid demands for decolonization after World War II and the creation of the United Nations. That Law, which "was intended to end [Puerto Rico's] subordinate status," *Córdova*, 649 F.2d at 40, did not simply propose to revise the existing organic act governing Puerto Rico. Rather, it proposed the creation of an entirely new government.

Public Law 600 "fully recognizing the principle of government by consent" offered the people of Puerto Rico a "compact" under which they could "organize a government under a constitution of their *own* adoption." Pub. L. No. 81-600, 64 Stat. 319 (1950) (emphasis added). The people of Puerto Rico overwhelmingly accepted that compact, and convened a Constitutional Convention that drafted the Puerto Rico Constitution.

Public Law 600 on its face specifies that the Puerto Rico Constitution "shall provide a republican form of government." 48 U.S.C. § 731c. Puerto Rico met this requirement. When the Puerto Rico Constitution was duly submitted as required under 48 U.S.C. § 731d, both the President and Congress specifically determined that it created "a republican form of government." Pub. L. No. 82-447, 66 Stat. 327 (1952).

As this Court has long explained, "the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Duncan v. McCall,* 139 U.S. 449, 461 (1891). In a republican form of government, in other words, "the people are * * * the source of political power." *Id.*

Congress hardly would have insisted that Puerto Rico adopt a republican form of government, and the President and Congress hardly would have confirmed that Puerto Rico had in fact done so, if that government exercised authority delegated by Congress, as opposed to the people of Puerto Rico.

Congress approved the proposed Constitution conditioned on minor revisions to provisions addressing compulsory school attendance and the process for constitutional amendments, and the elimination of section 20 recognizing a number of then-novel human rights. *See* Pub. L. No. 82-447, 66 Stat. 327. By approving the Constitution, Congress necessarily recognized that the people of Puerto Rico had exercised their *own* sovereignty to establish their *own* government to enact their *own* laws.

After the Puerto Rico Constitutional Convention formally accepted—"in the name of the people of Puerto Rico"—the conditions set by Congress and amended the Constitution, the Governor issued a proclamation, and the Puerto Rico Constitution took effect on July 25, 1952. Since that day, Puerto Rico governors have been elected pursuant to the sovereign authority delegated by the people of Puerto Rico, not from Congress.

There is no way to characterize the Puerto Rico Constitution as an act of Congress. The Constitution itself leaves no doubt about the source of its authority. The Preamble disavows the contention that the powers provided in the Constitution are delegated from Congress. It declares that "[we] the people of Puerto Rico in order to organize ourselves politically on a fully democratic basis, to promote the general welfare—do ordain and establish this Constitution for the commonwealth which in the exercise of our natural rights, we now create within our union with the United States of America." P.R. Const. pmbl.

The articles of the Constitution of Puerto Rico go on to make abundantly clear that the source of power creating the Commonwealth is the people of Puerto Rico. It creates a new political entity, the Commonwealth of Puerto Rico, and specifies that "[i]ts political power *emanates from the people* and shall be exercised in accordance with their will, within the terms of the compact agreed upon by the people of Puerto Rico and the United States of America." *Id.,* art. I § 1 (emphasis added). It creates the "legislative, judicial and executive branches" of the Commonwealth government, and provides that all three branches "shall be equally subordinate to the *sovereignty of the people of Puerto*

Rico." *Id.*, art. I § 2 (emphasis added). It vests "[t]he executive power" of the Commonwealth "in a Governor," *id.* art. IV § 1, "[t]he legislative power" of the Commonwealth "in a Legislative Assembly," *id.,* art. III § 1, and "[t]he judicial power" of the Commonwealth in "a Supreme Court, and in such other courts as may be established by law," *id.*, art. V § 1.

Neither Congress nor the President plays any role whatsoever in the selection of a Governor of Puerto Rico. Nor does the President have any power to select or remove any of the persons who enforce the laws of Puerto Rico, thereby underscoring that such persons cannot possibly be deemed to be exercising delegated federal power. *See*, *e.g.*, *United States v. Lara*, 541 U.S. 193, 216 (2005) (Thomas, J., concurring in the judgment).

The fact that Congress authorized the exercise of popular sovereignty that led to the adoption of the Puerto Rico Constitution in the first place does not render it any less an exercise of popular sovereignty. As professor Samuel Issacharoff has observed: "Congress may have initiated the constitutional writing process, but the voters of Puerto Rico made it a reality." Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What is Puerto Rico?*, 94 Ind. L. J. 1, 10 (2019).

Nor does the fact that Congress reviewed the proposed Puerto Rico Constitution, and conditioned its approval thereof on certain changes, in any way negate the exercise of popular sovereignty that led to the adoption of that Constitution. Every State after the original thirteen submitted its proposed constitution to either Congress or the President for approval as a

condition for admission to the Union.[2] The fact that Congress or the President reviewed and approved these state constitutions, of course, did not transform them into federal law.

That is true even where, as in several instances, Congress conditioned its approval of those constitutions on certain changes. Congress conditioned its approval of the Nebraska Constitution on the elimination of a provision that "deni[ed] the elective franchise" on the basis of "race or color," Nebraska Admissions Act, Ch. 36, 39th Cong., 2d Sess., 14 Stat. 391, 392 (1867), and conditioned its approval of the Missouri Constitution on the State's disavowal of a potentially problematic reading of a certain constitutional provision, *see* Resolution Providing for the Admission of the State of Missouri into the Union on a Certain Condition, Ch. 53, 16th Cong., 2d Sess., 3 Stat. 645, xxx (1821). Similarly, as a condition for approving the proposed constitutions of New Mexico and Arizona, Congress required the adoption of lengthy constitutional amendments *drafted by Congress* concerning recall elections and constitutional amendments. *See* Pub. L. No. 62-8, 37 Stat. 39, 40-41, 42-43 (1911). Again, it would be fanciful to suggest that such conditional approval transformed these state constitutions into federal law.

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[2] *See* 3 Stat. 489 (1819), 36 Stat. 557 (1910), 18 Stat. 474 (1875), 3 Stat. 428 (1818), 3 Stat. 289 (1816), 3 Stat. 289 (1816), 11 Stat. 166 (1857), 3 Stat. 348 (1817), 3 Stat. 545 (1820), 25 Stat. 676 (1889), 13 Stat. 47 (1864), 13 Stat. 30 (1864), 36 Stat. 557 (1910), 25 Stat. 676 (1889), 2 Stat. 173 (1802), 34 Stat. 267 (1906), 25 Stat. 676 (1889), 5 Stat. 797 (1845), 28 Stat. 107 (1894), 25 Stat. 676 (1889), 9 Stat. 56 (1846).

When conditionally approving the Puerto Rico Constitution, Congress did not simply impose the changes it desired. Instead, it specified that "the Constitution of the Commonwealth of Puerto Rico hereby approved shall become effective when the Constitutional Convention of Puerto Rico shall have declared in a formal resolution its acceptance *in the name of the people of Puerto Rico* of the conditions of approval herein contained," and when the Governor of Puerto Rico shall issue a proclamation to that effect. Pub. L. No. 82-447, 66 Stat. at 327-28 (emphasis added). Without this final sovereign act of acceptance by the people of Puerto Rico, the Puerto Rico Constitution never would have taken effect.

Post-1952 decisions of this Court involving Puerto Rico confirm that the Commonwealth's laws derive from sovereign authority delegated by the people of Puerto Rico, not from Congress.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court addressed the question as to whether the Three Judge Court Statute, 28 U.S.C. § 2281, requiring a three-judge panel whenever the constitutionality of a state statute was challenged in federal court, applied to the laws of the Commonwealth of Puerto Rico. The Court had ruled that the law did not apply to territories because: "In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory." *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949). The First Circuit Court of Appeals had likewise ruled in 1919 as to Puerto Rico. *Benedicto v. West India & Panama Tel. Co.*, 256 F. 417, 419 (1st Cir. 1919).

The Court held that with the advent of commonwealth status, *Stainback* and *Benedicto* could no longer apply. The Court noted that significant changes had occurred in the structure of government in Puerto Rico and quoted with approval from an opinion of the First Circuit contemporary with the creation of the Commonwealth, *Mora v. Mejias*, 206 F.2d 377 (1953), stating that:

> [I]t may be that the Commonwealth of Puerto Rico—'El Estado Libre Asociado de Puerto Rico' in the Spanish version—organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in Pub. L. 600, and by them accepted is a State within the meaning of 28 U.S.C. § 2281. The preamble to this constitution refers to the Commonwealth * * * which 'in the exercise of our natural rights, we (the people of Puerto Rico) now create within our union with the United States of America.' Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word, *Cf. State of Texas v. White*, 1868, 7 Wall. 700, 721, 74 U.S. 700, 19 L.Ed. 27 * * * It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.

Calero-Toledo, 416 U.S. at 672 *(*quoting *Mora v. Mejias,* 206 F.2d at 387). The Court concluded that treating Puerto Rico as a State for purposes of the Three-Judge Act served the purposes of the statute.

Calero-Toledo, 416 U.S. at 675. The Court thus abrogated the contrary ruling in *Benedicto* which predated the establishment of the Commonwealth.

The Court built upon *Calero-Toledo* two years later in *Flores de Otero*, 426 U.S. 572 (1976). The issue there was whether a federal statute giving federal district courts jurisdiction over actions "to redress the deprivation, under color of any *State* law * * * of any right, privilege or immunity" secured by federal law, applied to actions challenging laws of the Commonwealth of Puerto Rico. *Id*. at 574-75 & n.1 (emphasis added). In answering that question in the affirmative, the Court emphasized that Public Law 600 had authorized the people of Puerto Rico "to draft their *own* constitution," and that, in light of that Constitution, "Puerto Rico now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; * * * and amends its *own* civil and criminal code." 426 U.S. at 593, 594 (emphasis added; internal quotation omitted); *see also id.* at 597 ("[A]fter 1952, * * * Congress relinquished its control over the organization of the local affairs of the island and granted Puerto Rico a measure of autonomy comparable to that possessed by the States.").

In 1982, this Court upheld "[t]he methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system" against a federal constitutional challenge. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982). In so ruling, this Court held that those methods are entitled to "substantial deference" precisely because "Puerto Rico, like a state, is an autonomous political entity, '*sovereign* over matters not ruled by the [federal] Constitution.'" *Id.* (emphasis added;

quoting *Calero-Toledo*, 416 U.S. at 673, and citing *Córdova*, 649 F.2d at 39-42).

And in 2016, this Court "readily acknowledge[d]" that the Puerto Rico Constitution was a democratic manifestation of the people's will. *Sanchez Valle*, 136 S. Ct. at 1876. Viewing the constitutional process as transformative, the Court observed that: "[t]hose constitutional developments were of great significance—and, indeed, made Puerto Rico 'sovereign' in one commonly understood sense of that term. *Id.*, at 1866. And added that: [a]t that point, Congress granted Puerto Rico a degree of autonomy comparable to that possessed by the States." *Id.*

The Puerto Rico Constitution establishes a government of the people, by the people, and for the people of Puerto Rico. In this regard, the Constitution of Puerto Rico is no different than the constitutions of the fifty States; the latter simply led to Statehood, whereas the former led instead to the affiliated status of a Commonwealth (*Estado Libre Asociado*, or literally "Free Associated State"). While Puerto Rico thus "boasts a relationship to the United States that has no parallel in our history," *Sanchez Valle*, 136 S. Ct. at 1876 (quoting *Flores de Otero*, 426 U.S. at 596), the fact that its Constitution did not lead to statehood does not negate the exercise of popular sovereignty that established that Constitution in the first place.

In light of that Constitution, Puerto Rico governors are elected pursuant to the sovereign will of the people of Puerto Rico, not pursuant to the will of Congress.

III. NINETEENTH CENTURY AND EARLY TWENTIETH CENTURY TERRITORIAL CASE LAW IS INAPPLICABLE TO PUERTO RICO.

The United States contends that the fact that Puerto Rico officials are elected by the people pursuant to a popularly adopted constitution does not differentiate them from Board appointees. That is so, it argues, because both originate from the exercise of Congressional power under the Territory Clause (U.S. Const. art. IV, § 3, cl. 2). It says that Congress has both the power to govern a territory directly or by enlisting an intermediary such as a territorial legislature: "Congress may 'itself directly legislate for any Territory * * * in any particular that Congress may think fit,'" *United States v. McMillan*, 165 U.S. 504, 511 (1897); "'[i]t may entrust [to the territorial legislature] a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto,' *Binns* [*v. U.S.*, 194 U.S. 486, 491-492 (1904)].'" U.S. Br. 45. All said: "'It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient.' *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).'" U.S. Br. 49. The United States treats those cases as good law and PROMESA as if it were a new organic act. It is wrong on both counts.

PROMESA is a Federal bankruptcy statute for territories. As the court of appeals stated, it "creates a special bankruptcy regime allowing for territories and

their instrumentalities to adjust their debt." App. 143-44, *Aurelius Inv., LLC*, 915 F.3d at 845.

Bankruptcy is, as the court of appeals stated, "a quintessential federal, subject matter." App. 165; *Aurelius Inv., LLC*, 915 F.3d at 856. Pursuant to the statute, a Board is created that is truly an independent federal overseer of the Commonwealth and its finances, statutorily immune from "any control, supervision, oversight, or review" by the government or people of Puerto Rico. 48 U.S.C. § 2128(a)(1).

Congress may have drawn its authority to enact PROMESA from the Territory Clause's power to "make all needful rules and regulations respecting the territory," U.S. Const. art. IV, § 3, cl. 2, but where that clause comes into play here is in allowing Congress to treat Puerto Rico differently than a State *in the application of federal law*. *See Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (*per curiam*); *Califano v. Torres*, 435 U.S. 1 (1978).

Truth be told, PROMESA results in a federally appointed Board assuming control over matters entrusted by the people of Puerto Rico through their Constitution to elected officials. That brings two features of American federalism into collision: bankruptcy regulation and the state-like sovereignty this Court has recognized Puerto Rico acquired in 1952. Whether the manner in which that exercise of article IV authority interferes with Puerto Rico's sovereignty is constitutional or not, breaches the compact or not, is not a question before this Court.

Coincidentally or not, PROMESA parallels the norms set forth in international law for similar situa-

tions. The International Covenant on Civil and Political Rights allows for the temporary derogation of civil and political rights "[i]n time of public emergency which threatens the life of the nation" but only "to the extent strictly required by the exigencies of the situation." International Covenant on Civil and Political Rights, art. 4, U.N, General Assembly resolution 2200A (XXI) of 16 December 1966, 999 U.N.T.S. 17.

All parties are in accord that Puerto Rico faced a humanitarian crisis. Its impending fiscal collapse was a public emergency. Whether the powers conferred on the Board, or the manner in which it exercises them, fall within the limits dictated by the exigencies of the situation is questionable. They were, in any event, what Congress deemed necessary to carry out the purposes of the act.

As a temporary remedial measure, PROMESA cannot be said to *reorganize* Puerto Rico's government structure, as the United States claims. *See* U.S. Br. 53. It *intervenes* it with federal officers until fiscal stability is restored. The statute itself specifies that it may not be interpreted "to restrict Puerto Rico's right to determine its future political status." 48 U.S.C. § 2192. The people of Puerto Rico can choose to become an independent country, a state with the approval of Congress, or to remain a Commonwealth.

Cases like *United States v. McMillan* and *Murphy v. Ramsey* are inapplicable because they were decided in the different context of the continental expansion. The Supreme Court developed those norms under the premise that the entities created to govern the territories, populated by westward migration from the original states, were temporary. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the*

Territorial Clause of the U.S. Constitution, 50 Suffolk U. L. Rev. 587, 587-588 (2017). The plenary powers doctrine in those cases enabled Congress to autocratically use the constitutional power conferred upon it to govern those territories, while the foundational principles enshrined in the Declaration of Independence—that all men are created equal with the right to enjoy life, liberty and the pursuit happiness—would protect the populations of these territories once they acquired statehood. *Id.; see Scott v. Sanford*, 60 U.S. (19 How.) 393, 447 (1857) (territory is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority).

As soon as the basic premise of eventual statehood changed, so too did the Court's doctrine. The acquisition of noncontiguous territories through annexation, conquest, or purchase during the late nineteenth and early twentieth centuries led this Court to establish the doctrine of nonincorporation. It finds its origin in the so-called *Insular Cases. See generally Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Dooley v. United States*, 183 U.S. 151 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). For the first time in its history, the United States acquired territories without the intent of eventual statehood. That meant they could be held as territories indefinitely.

The foundational principles of this nation make it abhorrent to maintain territories indefinitely, without evolution, under the doctrines set forth in cases predicated on temporary territorial status. In this new historical context, some began to see in the language of

the Territory Clause a range of possibilities the United States had not needed to contemplate until then. In 1914, Felix Frankfurter, then the Law Officer in the Bureau of Insular Affairs at the Department of War, wrote:

> The form of the relationship between the United States and unincorporated territory is solely a problem of statesmanship.
>
> 1. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self- government with those of a confederated union. Luckily, our Constitution has left this field of invention open. The decisions in the Insular cases mean this, if they mean anything, that there is nothing in the Constitution to hamper the responsibility of Congress in working out, step by step, forms of government for our Insular possessions responsive to the largest needs and capacities of their inhabitants, and ascertained by the best wisdom of Congress.

Memorandum for the Secretary of War, in Hearings on S. 4604 before the Senate Committee on Pacific Islands and Porto Rico, 63d Cong., 2d Sess., 22 (1914) (cited in *Sanchez-Valle*, 136 S. Ct. at 1876).

Nothing in the text, structure, or history of the Constitution requires Congress to follow a one-size-fits-all approach to the governance of territories; or conversely bars Congress from "fully recognizing the

principle of government by consent" in a territory. Pub. L. No. 81-600. Congress' plenary power necessarily includes the power to allow the people of a territory to exercise their own political rights.

Nothing in the text of the Territory Clause prevents Congress from partial relinquishment of powers, as was recognized in a memorandum prepared by the U.S. Department of Justice's Office of Legal Counsel in 1963:

> [T]he Constitution does not inflexibly determine the incidents of territorial status, *i.e.*, that Congress must necessarily have the unlimited and plenary power to legislate over it. Rather, Congress can gradually relinquish those powers and give what was once a Territory an ever-increasing measure of self-government. Such legislation could create vested rights of a political nature, hence it would bind future Congresses and cannot be "taken backwards" unless by mutual agreement.

Memorandum, Re: Power of the United States to conclude with the Commonwealth of Puerto Rico a compact which could be modified only by mutual consent, 6 (July 23, 1963), https://www.justice.gov/olc/file/796061/download.

The Court appears to have recognized the partial relinquishment of plenary powers in *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937), when it observed that during transition to Philippine independence, "the power of the United States has been modified, [but] not abolished." *Id.,* at 319

The First Circuit Court of Appeals also hints at this, when it defined new legal boundaries in the United

States' relationship with Puerto Rico after it became a commonwealth:

> Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.

Cordova, 649 F.2d at 41 (cited in *Rodriguez*, 457 U.S. at 8).

Similarly, the Ninth Circuit Court of Appeals ruled as to the Commonwealth of Northern Mariana Islands that: "[e]ven if the Territorial Clause provides the constitutional basis for Congress' legislative authority, it is solely by the Covenant that we measure the limits of Congress' legislative power." *United States v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993).

If Congress could irreversibly grant independence to the Philippines, *see* Pub. L. No. 73-127, 48 Stat. 456 (1934), or permanently cede the Canal Zone to Panama, *see* Panama Canal Treaty, 33 U.S.T. 141 (1977), surely it could relinquish powers and allow the people of Puerto Rico to exercise their own political rights to create their own Constitution and laws in union with the United States, and, thus, establish new bounda-

ries to Congress' powers. Here, as noted above, Congress unmistakably did just that. *See* Pub. L. No. 81-600; Pub. L. No. 82-447.

In *Sanchez Valle*, this Court recognized "that Congress has broad latitude to develop innovative approaches to territorial governance" and invited territorial peoples to make "large-scale choices about their own political institutions." *Sanchez-Valle*, 136 S. Ct. at 1876. In that spirit, it recognized the unique relationship between the United States and Puerto Rico as a prime example of "inventive statesmanship." *Id*.

Indeed, the Commonwealth of Puerto Rico represents "inventive statesmanship" at its best: it allows Puerto Rico to remain in democratic union with the United States without becoming a State (and thereby subjecting itself to the uniformity requirements that Statehood would entail, which might conflict with Puerto Rico's distinctive history, economy, and society). As the leading scholars of federalism at the time saw it: the Commonwealth of Puerto Rico created "a new dimension of the federal principle, in that it places the old principle of 'unity with diversity' on a new basis." Robert R. Bowie & Carl J. Friederich, *Studies in Federalism* 715 (1954).

In his seminal essay, Chief Judge Magruder quoted the Commonwealth's great proponent, Governor Luis Muñoz Marín—in his speech at the ceremonies in San Juan incident to the formal proclamation of the Commonwealth of Puerto Rico on July 25, 1952—voicing the achievement of his people:

> This act will mark the establishment of the Commonwealth in a voluntary association of citizenship and affection with the United States

> of America. We shall see in this flag the symbol of the spirit of our people facing its own destiny and that of America as a whole. The flag of the smallest community of the hemisphere will fly together with the flag of the United States and will proclaim to the world that Democracy declares all peoples, as all men, equal in dignity. Puerto Rico is honored to see its flag wave side by side with the flag of the great American Union; and the Union, with its great democratic conscience, must feel gratified that the flag of a vigorous-spirited people pays it the tribute of voluntary companionship on the flagstaff of liberty.

Magruder, *Commonwealth Status*, 15 U. Pitt. L. Rev. at 20. Magruder weighed in: "I make bold to say that the United States will never take any action to crush or dampen the spirit of these eloquent words spoken by the chosen leader of the Puerto Rican people." *Id*.

The United States now asks this Court to do just that, arguing that Puerto Rico governors hold office through powers delegated from Congress and not from the people of Puerto Rico under their own Constitution and laws. For the United States, it seems, Puerto Rico's transformative moment is meaningless after all, a monumental hoax, if you will. The United States is asking this Court, after 67 years, to hold the Commonwealth option either illusory or unconstitutional, and thereby to return the island to colonial status.

This Court has stated that as a result of its constitution, "Puerto Rico today can avail itself of a wide variety of futures." *Sanchez Valle*, 136 S.Ct. at 1876. Exactly, it can avail *itself* of those futures. The United States needs to understand that.

CONCLUSION

The Court should reject the United States' consequentialist argument that if Board members are federal officers subject to the Appointments Clause of the U.S. Constitution, so too are Puerto Rico's elected officials.

Respectfully submitted,

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