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

IN THE
Supreme Court of the United States

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

[Caption Continued on Following Page]

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

BRIEF OF THE AUTONOMOUS MUNICIPALITY OF SAN JUAN AS *AMICUS CURIAE* SUPPORTING THE APPOINTMENTS CLAUSE RULING AND CHALLENGING THE *DE FACTO* OFFICER RULING

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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.

QUESTIONS PRESENTED

1. Whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.

2. Whether the *de facto* officer doctrine can validate the prospective actions of an unlawfully appointed officer.

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INTEREST OF *AMICUS CURIAE*[1]

San Juan, amicus curiae, is the capital and most populous municipality of the Commonwealth of Puerto Rico, with an estimated population of 320,976 inhabitants (as of July 2018) and a daily number of visitors that bring it to more than approximately 1 million per day. The city is the island's educational, medical, legal, cultural and tourism center, and the location of most of its economic activity, hosting more than 10,000 businesses and 195,000 individual jobs.

San Juan provides its citizens with a wide array of essential public services such as security to 180 communities through a network of police stations strategically located throughout the city; a municipal hospital and several health centers; and a home for children who have been mistreated, abused or turned over voluntarily.

San Juan and Puerto Rico's other municipalities have also been at the front line of responding to natural disasters. When Puerto Rico endured the devastating effects of Hurricanes Irma and Maria in 2017, San Juan and the other municipalities deployed significant resources as part of the effort to save lives.

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[1] Pursuant to Rule 37.4 of this Court, as an autonomous municipality which is a city, county, town or similar entity for purposes of the Rule, and filing through its authorized law officer, San Juan files this brief as *amicus curiae*. The parties to these consolidated cases have filed blanket letters of consent to *amicus curiae* briefs. San Juan hereby certifies, pursuant to Rule 37.6 of this Court, that no party or counsel for a party has authored any part of the foregoing brief nor has any of the other parties and/or their attorneys made a monetary contribution to fund the filing of this brief. No person other than the *amicus curiae* or its counsel has made a monetary contribution to its preparation or submission.

San Juan and Puerto Rico's other municipalities are organized as autonomous self-governing municipalities under Puerto Rican law. As such, they provide Puerto Ricans with public services in a more direct manner than the central government and are democratically accountable at a more local level. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 342 (2008) (noting the "cardinal civic responsibilities" shouldered by municipalities, including "protecting the health, safety, and welfare of citizens" (footnotes omitted)). In that respect, Puerto Rico's municipalities are governed by a mayor "elected in each general election by the direct vote of the electors of the corresponding municipality," 21 L.P.R. § 4003, and a municipal legislature that is similarly subject to direct elections. *Id.* § 4153.

San Juan has a direct interest in the preservation of a system which enables and protects the democratic fundamental rights of the U.S. citizens living in Puerto Rico, which requires the enforcement of appropriate checks and balances over the Financial Oversight Management Board ("FOMB" or "the Board"). The FOMB has asserted control of the finances of San Juan and Puerto Rico's other autonomous municipalities by designating them as covered territorial entities under PROMESA. By asserting control over municipal budgets, the FOMB would debilitate Puerto Rico's and San Juan's home rule and substitute its own policy dictates for democratic self-rule. The FOMB is attempting to make these fundamental changes to municipal self-governance while at the same time avoiding the Congressional oversight of U.S. officers provided by the Appointments Clause. If it succeeds in doing so, the FOMB would deprive the people of San Juan, who are American citizens, of the important structural protections provided to them by

the Appointments Clause. San Juan therefore respectfully submits this amicus brief to explain the significance of the Appointments Clause in protecting its interests and in support of the First Circuit's decision below, except for its application of the *de facto* officer doctrine.

SUMMARY OF ARGUMENT

The First Circuit correctly held that the members of the Board are "officers of the United States" within the meaning of the Appointments Clause. In doing so, the First Circuit relied on this Court's only test for determining whether an individual is such an officer. Yet the Board and the United States urge this Court to apply in this case a test of their own invention, derived from inapposite case law and ill-suited for the task at hand, simply because the FOMB's functions concern the territory of Puerto Rico. In doing so, the Board and the United States ignore that the Appointments Clause protects the liberty interests of all American citizens, regardless of where they live. Moreover, the FOMB's proposed test defers to Congressional labels—such as the claim that the Board is an entity "within the territorial government" of Puerto Rico—and ignores the practical reality that federal control and supervision prevail over Congress' disclaimer of federal status. Such control and supervision matter because, as ongoing litigation against the Board has uncovered, the degree of control exercised by members of Congress and the United States Treasury Department over the Board is significant.

The First Circuit erred, however, when it used the *de facto* officer doctrine to sanction *prospectively* the actions of the Board members. That decision not only misapplied the doctrine, but it also allowed the Board

members to engage in flagrant power grabs: after the finding that they had been appointed in violation of the Constitution, the Board members designated all seventy-eight of Puerto Rico's municipalities, including San Juan, as covered territorial entities under PROMESA, thereby seeking to seize control of municipal budgetary and fiscal policy from seventy-eight elected municipal legislatures and their mayors in one fell swoop. Not satisfied, the Board also filed a lawsuit to declare unenforceable legislation enacted by the democratically-elected Puerto Rican Legislative Assembly. But this Court's cases make clear that, whatever its limits, the *de facto* officer doctrine should not be used to perpetuate constitutional violations. This is especially true when, as here, using the doctrine in such a manner enhances rather than diminishes a *de facto* officer's illegitimate and unconstitutional conduct. Once the Board's illegitimacy became plain, then, by extension, so did its decisions. The prospective application of the First Circuit's remedy should be accordingly reversed.

ARGUMENT

I. THE MEMBERS OF THE BOARD ARE OFFICERS OF THE UNITED STATES SUBJECT TO THE APPOINTMENTS CLAUSE.

A. The Appointments Clause Protects the Liberty of American Citizens, Regardless of Where They Live.

The First Circuit's conclusion that the Territories Clause does not "displace" the Appointments Clause is consistent with the liberty interests protected by the latter provision. All American citizens, regardless

of where they live, are entitled to the protections offered by the Appointments Clause. Chief among these protections is the ability to hold the federal government accountable at all times to the separation-of-powers principles enshrined in the Constitution. Beyond this, the Appointments Clause also safeguards institutional concerns that do not disappear merely because an act of Congress concerns a territory of the United States.

1. The Appointments Clause Protects Liberty.

The Appointments Clause, like all of the Constitution's structural provisions, "is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." *NLRB v. Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (alteration, citation, and internal quotation marks omitted). It forms part of "the Constitution's core, government-structuring provisions," which are "no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Id.* at 570–71. "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) (citation omitted). To them, "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U. S. 714, 722 (1986).

"Liberty requires accountability." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). "By requiring the joint participation of the President and the Senate, the Appoint-

ments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond v. United States*, 520 U.S. 651, 660 (1997). The Clause also secures for American citizens everywhere accountability from the federal government by otherwise "preventing the diffusion of the appointment power" and "limit[ing] the universe of eligible recipients of the power to appoint." *Freytag v. Comm'r*, 501 U.S. 868, 878, 880 (1991); *see also* The Federalist No. 47, p. 324 (J. Cooke ed. 1961) ("No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of powers.). Indeed, the interests protected by the Clause are those of "the entire Republic." *Freytag*, 501 U.S. at 880.

The protections afforded by the Clause are therefore not geographically confined or limited to officers who will interact only with citizens within the fifty States. For example, ambassadors, who serve abroad, must be appointed pursuant to the Clause. U.S. Const. art. II, § 2, cl. 2. That residents of Puerto Rico do not elect a senator to the United States Senate or vote for President of the United States is therefore inconsequential. Their interest as American citizens in a federal government of checks and balances is just as strong as those of American citizens living in the States.

Moreover, Puerto Ricans living in Puerto Rico are not the only American citizens with an interest in the management of Puerto Rico's debt. There are millions of Puerto Ricans and many other American citizens living in the fifty States with investments and other interests in Puerto Rico's well-being. Yet by circumventing the Appointments Clause, PROMESA pre-

vents these American citizens from exercising political power to regulate the appointment of Board members that will implement policy choices they disagree with through their Senators, or from otherwise "preventing the diffusion of the appointment power." *See Freytag*, 501 U.S. at 878; *see also Citizens United v. FEC*, 558 U.S. 310, 354–55 (2010) (equating the suppression of speech to the "destroying [of] liberty").

Thus, it is indisputable that the Appointments Clause protects the liberty of American citizens regardless of where they live. As some Petitioners concede, this Court has spent more than a century taking "for granted that even in unincorporated Territories the Government of the United States [is] bound to provide to . . . inhabitants guaranties of certain fundamental personal rights declared in the Constitution." *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (citation and internal quotation marks omitted); Unsec. Creditors Br. 21. Indeed, just eight years prior to the United States' acquisition of Puerto Rico, this Court thought it was "[d]oubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments." *Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 44 (1890). And 110 years after the acquisition, this Court continued to hold that while "[t]he Constitution grants Congress . . . the power to . . . govern territory, [it does not grant it] the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject to 'such restrictions as are expressed in the Constitution.'" *Boumediene*, 553 U.S. at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

Given this historical backdrop, the argument that the protections secured to all citizens by the Appointments Clause do not apply to those citizens living in Puerto Rico, *see* Unsec. Creditors Br. 12, is simply wrong.[2] The more than 3.4 million American citizens living in Puerto Rico—a population larger than that of twenty-one other states[3]—are entitled to "the per-

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[2] In making this argument, the Unsecured Creditors rely on two inapposite lower court decisions. First, the Unsecured Creditors ask this Court to prevent Puerto Ricans from accessing the safeguards of the Constitution because, in *Tuaua v. United States*, the D.C. Circuit did not extend birthright citizenship to the people of American Samoa. 788 F.3d 300 (D.C. Cir. 2015); Unsec. Creditors Br. 12. Whatever its relevance, the *Tuaua* court's holding made clear that it was simply "impractical and anomalous to impose citizenship by judicial fiat—where doing so requires us to override the democratic prerogatives of the American Samoan people themselves." *Tuaua*, 788 F.3d at 302 (citation and quotation marks omitted). By contrast, of course, the Puerto Rican people are already American citizens. Second, the Unsecured Creditors ask this Court to rely on the Second Circuit's dictum that "structural protections such as those embodied in the Appointments Clause stand on a different footing from personal constitutional rights." *Samuels, Kramer 7 Co. v. C.I.R.*, 930 F.2d 975, 984 (2d Cir. 1991); Unsec. Creditors Br. 12. But the *Samuels* court was not implying that the Appointments Clause is somehow less important than other personal constitutional rights; to the contrary, the court only distinguished the Appointments Clause because it is a constitutional protection that cannot be waived. *Samuels*, 930 F.2d at 984. To that end, the court held that "[i]f an official from the outset lacks the constitutional status that is a prerequisite to holding and to executive the duties of a particular office, we fail to see how a citizen can be deemed to consent to the decision making authority of this official through silence or mere submission." *Id.*

[3] *See* U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018*, https://factfinder.cen-

sonal liberty that is secured by adherence to the separation of powers," *Boumediene*, 553 U.S. at 797, as much as the American citizens living in any of the fifty States. *See Cleaners & Dyers v. United States*, 286 U.S. 427, 434–35 (1932) (explaining that in governing a territory, Congress can only act insofar as "other provisions of the Constitution are not infringed"); *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271–72 (1991) (Even when there is no doubt about Congress' power, it must still employ such power "consistent with the separation of powers."); *Torres v. Puerto Rico*, 442 U.S. 465, 476 (1979) (Brennan, J., concurring) ("[T]he concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government." (citation and internal quotation marks omitted)).

2. The Appointments Clause Protects Institutional Concerns as well as Liberty.

In the case of principal officers, the Appointments Clause does not merely protect the liberty of American citizens or the role of the Senate as a whole, but it also provides a mechanism by which individual Senators can carry out their constitutional duties. This is because the Clause is as concerned with "preventing the diffusion of the appointment power" as it is with preventing "one branch[] aggrandizing its power at the

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sus.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk# (last visited Aug. 27, 2019).

expense of another branch." *Freytag*, 501 U.S. at 878. Indeed, inherent in the mechanism by which the Appointments Clause protects individual liberty is the assumption that the Senate would hold hearings on, and debate the merits of, various nominees. That is because "[p]ublic hearings eliminate the shadow of secrecy and the obvious pale of cronyism, where exposure of bias and corruption is more likely to occur than if a confirmation was based on only a unilateral nomination and approval by the same branch." Josh Chafetz, *"Advice and Consent" in the Appointments Clause: From Another Historical Perspective*, 64 Duke L.J. Online 173, 178 (2015).

By vetting nominees, and representing the concerns of their constituencies, the advice and consent process affords individual Senators the opportunity to have their voices heard. Yet every Senator – including the thirty who voted against PROMESA[4] – has been deprived of the opportunity to carry out this vital function. *See Canning*, 573 U.S. at 593 (Scalia, J., concurring) (Whatever the Senate may do "as a body," the Court must safeguard its constitutional role in light of some legislators' willingness to allow "encroachment on legislative prerogatives . . . [by] leader[s] of their own party."). As the Framers recognized, subjecting appointments to the deliberation of the various Senators is "a strong motive to care in proposing [nominees]. The danger to . . . reputation, and, in the case of an elective magistrate, to his political existence,

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[4] U.S. Senate, Legislation and Records, Roll Call Vote 114th Congress – 2nd Session, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00116 (last visited Aug. 27, 2019).

from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier." The Federalist No. 76, pp. 494–95 (Modern Library ed. 1937).

It is of no consequence that in enacting PROMESA, the Senate voluntarily relinquished its advice-and-consent power or that the President abandoned his power of appointment. The Constitution does not allow for an end-run around the Appointments Clause. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948 (2017) (Thomas, J., concurring). It is therefore irrelevant that the "encroached-upon branch approves the encroachment," *id.* at 949 (citation omitted), because "[n]either Congress nor the Executive can agree to waive' the structural provisions of the Constitution any more than they could agree to disregard an enumerated right." *Id.* (quoting *Freytag*, 501 U.S. at 880). The opposite is true: when, as here, the legislative and executive branches collude to avoid the structural constraints of our Constitution, "[t]he Judicial Branch must be most vigilant." *Id.*; *see also Freytag*, 501 U.S. at 883 ("Despite Congress' authority to create offices and to provide for the method of appointment to those offices, Congress' power . . . is inevitably bounded by the [Appointments Clause] . . . because the power of appointment to offices was deemed [by the Framers to be] the most insidious and powerful weapon of eighteenth century despotism." (citations and internal quotation marks omitted)).

Beyond its circumvention of the Appointments Clause, PROMESA contains other features that increase and exacerbate its lack of democratic accountability. That the Board members are not accountable

to the residents of Puerto Rico or their elected of officials is clear. 48 U.S.C. § 2128(a)(1) ("Neither the Governor nor the Legislature may exercise any control, supervision, oversight, or review over the Oversight Board or its activities."). But PROMESA also removes traditional accountability tools from the federal government. For instance, the Board receives its funding, in an amount determined by the Board in its "sole and exclusive discretion," entirely from Puerto Rico. *Id.* § 2127(b). Yet the appropriations process has long been considered "the most potent form of Congressional oversight." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 147 (D.C. Cir. 2018) (Henderson, J., dissenting) (quoting 2 Senate Committee on Government Operations, Study on Federal Regulation: Congressional Oversight of Regulatory Agencies 42 (1977)); *see also* Michael J. Klarman, The Framers' Coup: The Making of the United States Constitution 16 (2016) (Founding generation "generally embraced the maxim that the power which holds the purse-strings absolutely will rule." (citation and internal quotation marks omitted)); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 43 ("To be sure, the power of the purse is one of the key ways in which democratic accountability is served." (citation omitted)). This additional accountability deficiency highlights the need for the structural protections afforded by the Appointments Clause.

B. The Board Members Are Officers of the United States, not Officers of the Puerto Rico Territorial Government.

The Appointments Clause mandates that "all" "Officers of the United States" be appointed pursuant to its provisions. U.S. Const. art. II, § 2, cl. 2. The

Clause requires that so-called "principal" officers be nominated by the President and confirmed by the Senate, but allows Congress to vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

PROMESA does not follow either appointment path. Instead, PROMESA provides that the President may select six of the seven voting Board members from lists submitted by the House and Senate leaders. 48 U.S.C. § 2121(e)(2)(A)-(B). If the President does not choose to fill one of these six positions from the lists, only then is Senate confirmation required for the President's choices. *Id.* § 2121(e)(2)(E). The seventh voting member may be selected by the President from outside the lists without Senate confirmation. *Id.* § 2121(e)(2)(A)(vi). But because the Board members are "officers of the United States" within the meaning of the Appointments Clause, these appointment provisions violate the Constitution. That is so whether the Board members are "principal" or "inferior" officers.

This Court's "framework" for determining whether an individual is an "officer of the United States" for purposes of the Appointments Clause was recently confirmed in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Pursuant to that framework, an individual is an "officer of the United States" subject to the Appointments Clause if (1) the appointee occupies a "continuing" position established by federal law; (2) the appointee "exercis[es] significant authority"; and (3) the significant authority is exercised "pursuant to the laws of the United States." *See Lucia v. SEC*, 138 S. Ct. 2044, 2050–51 (2018). Applying that framework, the First Circuit correctly held that the Board members are officers of the United States. JA164-65.

The Board and the United States do not disagree that the Board members meet this test. Instead, they rely heavily on PROMESA's statement that the Board is "an entity within the territorial government" of Puerto Rico and tout the Board's alleged independence from the federal government as a hallmark of the Board members' status as territorial officers. *See* Board Br. 2, 5, 14, 49, 52; U.S. Br. 11, 40. Indeed, the Board and the United States suggest that federal oversight would be evidence that the Board members are not territorial officers. *See* Board Br. 48–49 (suggesting that if the Board were "within the Department of the Treasury" its members would not be territorial officers); U.S. Br. 40 ("Those designations are substantive realities, not just formal labels. No federal official directs or manages the Board's operations.").

With this much San Juan agrees: the reality of federal control and supervision is strong evidence that an appointee is an "officer of the United States." As detailed below, this Court should therefore be mindful that a significant amount of federal supervision and control over the Board members has been uncovered by ongoing litigation in Puerto Rico, and should therefore not blindly accept the invitation to follow Congressional labels.

The United States and the Board also argue that *Lucia v. SEC*, 138 S. Ct. 2044 (2018), does not set out the appropriate test to distinguish between federal and territorial officers, and that different case law controls. *See* U.S. Br. 43–45 ("The more relevant distinction is between statutes that apply nationwide and those that apply only in a territory."); Board Br. 40 ("[I]t is not the source but rather the nature and scope of an office's authority that matters in determining whether an office is 'of the United States.'"). They

would thus have this Court apply a three-part test whereby "an office is territorial rather than federal if (1) Congress invokes its Article IV powers in establishing the office, (2) Congress places the office in a territorial government, and (3) Congress limits the office's powers and duties to territorial matters." U.S. Br. 37–38; *see also* Board Br. 47–48. This proposed test ignores the reality of federal control and supervision, and relies on inapposite case law.

1. The Practical Reality of Federal Control and Supervision Shows the Board Members Are Officers of the United States.

The approach advanced by the Board and the United States focuses formalistically on the labels that Congress chooses but ignores that "the practical reality of federal control and supervision prevails over Congress' disclaimer" of federal status. *See Ass'n of Am. R.R.*, 135 S. Ct. at 1233. The degree of federal control should be the centerpiece of any inquiry into the status of the Board members. *See id.* at 1234 (Alito, J., concurring) ("[S]tatutory label[s] cannot control for constitutional purposes."). If the Board members are in fact supervised, directed, or controlled by the federal Government, a Congressional declaration that they are officers "within the territorial government" cannot wash away the truth. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) ("If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.").

The reality of federal supervision and control over the Board members has been uncovered by ongoing litigation in Puerto Rico. Such supervision and control demonstrates that the Board members are officers of the United States and not officers of the Puerto Rico territorial government. In 2018, Puerto Rican journalists filed a lawsuit against the Board seeking a variety of public records. The district court in that case ordered the Board to provide the journalists with the information they requested. *See Centro de Periodismo Investigativo v. Fin. Oversight & Mgmt. Bd. for Puerto Rico,* No. CV 17-1743-(JAG), 2018 WL 2094375, at *16 (D.P.R. May 4, 2018) (hereinafter the "Centro-FOMB Litigation").

As reflected in subsequent press accounts summarizing the production, the documents provided "show[] the boundless influence exercised by the U.S. government over the [B]oard." Luis J. Valentin Ortiz and Joel Cintron Arbasetti, *Emails Expose Federal Gov't Influence Over Puerto Rico's Fiscal Board*, Centro de Periodismo Investigativo (Nov. 28, 2018).[5] For instance, the United States Treasury Department is involved in issues that go from the approval process for the commonwealth's fiscal plans and the establishment of the Board's operations, to how much cash the Puerto Rico government has and the Community Disaster Loans following Hurricanes Irma and María. *Id.* Members of Congress are similarly involved in the work of the Board members to an astounding degree, directing Board members, including the Chairman of the Board, to take particular positions and asking for

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[5] *Available at* http://periodismoinvestigativo.com/2018/11/emailsexpose-federal-govt-influence-over-puerto-ricos-fiscal-board/.

updates about the minutiae of other specific matters. *Id.*

The Centro-FOMB Litigation is ongoing and more documents will be produced, but what that litigation has revealed so far—the reality of federal control and supervision over the Board—PROMESA confirms. At least one federal court has found, based on PROMESA's provisions, that "the Oversight Board is an entity of the Federal Government" for Constitutional purposes, and not an entity of the Puerto Rico territorial government.[6] *Altair Glob. Credit Opportunities Fund (A), LLC v. United States*, 138 Fed. Cl. 742, 760–63 (2018). This finding follows from provisions that, for instance, require the Board members to provide a budget each fiscal year to, among others, the President, the House Committee on Natural Resources, and the Senate Committee on Energy and Natural Resources, and must issue certifications in connection therewith. 48 U.S.C. §§ 2127(a), 2143(c). In addition, the Board members must make annual reports to the President and Congress. *Id.* § 2148.[7]

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[6] That the Board is not a part of the territorial government is made plain by its lack of accountability to the Puerto Rico government, and the fact that the Puerto Rico government does not control its affairs.

[7] Other provisions expressly authorize the Board to use federal government facilities or equipment, 48 U.S.C. § 2122; obligate the federal Administrator of General Services to provide administrative support to the Board, *id.* § 2124(n); and allow for federal employees to be hired by or detailed to the Board in accordance with the Intergovernmental Personnel Act of 1970, *id.* § 2123. In each case, the property, services or employees used by the Board from other federal government departments or agencies may be provided on either a reimbursable or non-reimbursable basis. *Id.* §§ 2122–24.

The level of supervision and control unearthed in the Centro-FOMB Litigation to date amounts to the kind of oversight that both the Board and the United States suggest would be evidence that the Board members are not territorial officers. *See* Board Br. 48–49 (suggesting that if the Board were "within the Department of the Treasury," its members would not be territorial officers); U.S. Br. 40 ("Those designations are substantive realities, not just formal labels. No federal official directs or manages the Board's operations.").

2. The Source of the United States and the Board's Preferred Test—*Palmore v. United States*, 411 U.S. 389 (1973)—Is Inapposite.

The United States and Board argue that *Lucia*, *Freytag*, and *Buckley* alone are inadequate to determine whether the Board members are officers of the United States because those cases did not directly deal with the difference between "federal and territorial officers." U.S. Br. 43–44. But neither did the source of their preferred test: *Palmore v. United States*, 411 U.S. 389 (1973). Instead, *Palmore* dealt with the difference between federal and local courts in the District of Columbia under Article I, Section 8, of the Constitution. There was no reason to discuss or consider the issue of federal control over purported territorial actors in that context.

That the Appointments Clause is meant to apply to the territories is confirmed by the First Congress, as explained by the First Circuit below:

[T]he evidence suggests strongly that Congress in 1789 viewed the process of presidential appointment

and Senate confirmation as applicable to the appointment by the federal government of federal officers within the territories. That first Congress passed several amendments to the Northwest Ordinance of 1787 "so as to adopt the same to the present Constitution of the United States." [An Ordinance for the Government of the Territory of the United States north-west of the river Ohio (1787), ch. 8, 1 Stat. 50, 51 (1789)]. One such conforming amendment eliminated the pre-constitutional procedure for congressional appointment of officers within the territory and replaced it with presidential nomination and appointment "by and with the advice and consent of the Senate." *Id.* at 53.

JA159.

II. THE *DE FACTO* OFFICER DOCTRINE DOES NOT APPLY PROSPECTIVELY.[8]

The First Circuit erred when it extended that protection to the Board's prospective actions by withholding its mandate, and declaring that "the Board may continue to operate as until now." JA178. As it turns out, the consequences of that decision have directly compromised Puerto Rico's governance and democratic order. The Board is illegitimate and, by extension, so are its decisions.

Instead of proceeding with consideration in the aftermath of the First Circuit's decision, the Board

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[8] San Juan agrees with UTIER that the Board's actions prior to the First Circuit's ruling are also invalid, but writes separately here to emphasize the particular defects in validating the Board's prospective actions, particularly as those relate to the Board's decisions to designate the municipalities as covered territorial entities and to challenge Law 29.

members have arbitrarily designated all seventy-eight of Puerto Rico's municipalities, including San Juan, as covered territorial entities under PROMESA.[9] This move means that in one fell swoop the Board is attempting to seize control of municipal budgetary and fiscal policy from seventy-eight elected municipal legislatures and their mayors, thereby gutting the autonomous self-governing nature of San Juan and other municipalities. Not satisfied, the Board has also filed a lawsuit to declare unenforceable legislation enacted by the democratically-elected Puerto Rican Legislative Assembly. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Hon. Wanda Vasquez Garced, et al.*, No. 19-00393(LTS) (D.P.R. filed July 3, 2019). That they have been found to be acting pursuant to an unconstitutional appointment has made no difference to the Board members and their decision-making.

Yet the Appointments Clause is a "basic constitutional protection," *Ryder v. United States*, 515 U.S. 177, 182-83, 115 S. Ct. 2031, 2035 (1995), and therefore "calls for prompt rectification." *Watson v. Memphis*, 373 U.S. 526, 532–33 (1963) ("The basic guarantees of our Constitution are warrants for the here and now and . . . are to be promptly fulfilled."). Even if the *de facto* officer doctrine applied to protect actions taken before the Board "present[ed] the appearance of being an intruder or usurper," the First Circuit's decision cast an indomitable shadow upon its legitimacy.

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[9] Luis Valentin Ortiz, "Puerto Rico oversight board extends reach to island's municipalities," REUTERS (May 9, 2019), https://www.reuters.com/article/usa-puertorico/puerto-rico-oversight-board-extends-reach-to-islands-municipalities-idUSL2N22L16F.

Waite v. Santa Cruz, 184 U.S. 302, 323 (1902). "As a result, none of the [Board's] future acts are protected from judicial scrutiny under the *de facto* officer doctrine." *Olympic Fed. Sav. & Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1200 (D.D.C. 1990); *see also Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984) (The *de facto* officer doctrine cannot protect actions taken after an "agency or department [] actually knows of the claimed defect."). The First Circuit's decision was especially inappropriate given that the *de facto* officer doctrine is a narrow remedy, designed to address "merely technical" defects, whereas the members of the Board were anointed in violation of a pillar of our constitutional scheme. *Nguyen v. United States*, 539 U.S. 69, 77 (2003).

And all the while, ordinary Puerto Ricans have been forced to watch a group of "intruders [and] usurpers," *Waite*, 184 U.S. at 323, take away their "right to participate meaningfully and equally in the process of government," *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 366 (2014) (Sotomayor, J., dissenting), without the protection of a constitutional safeguard that is "no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Canning*, 573 U.S. at 570–71 (Scalia, J., concurring). Given the foregoing, the members of the Board should not be allowed to avail themselves of the *de facto* officer doctrine, nor of any other tool of equity, to protect the actions they have taken after the public became aware of their illegitimacy. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (emphasis added) (Equitable relief "has long been recognized as the proper means for *preventing* entities from acting unconstitutionally."); *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)

("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (citations omitted)).

CONCLUSION

For the reasons set forth above, and in the consolidated Brief for Respondents and Cross-Petitioners, the Court should affirm the First Circuit's conclusion that the Board members are "officers of the United States" within the meaning of the Appointments Clause and reverse the First Circuit's prospective application of the *de facto* officer doctrine.

Respectfully submitted,

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