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

In The
Supreme Court of the United States

FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO

v.

AURELIUS INVESTMENT, LLC, ET AL.

AURELIUS INVESTMENT, LLC, ET AL.

v.

COMMONWEALTH OF PUERTO RICO, ET AL.

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

v.

AURELIUS INVESTMENT, LLC, ET AL.

UNITED STATES OF AMERICA

v.

AURELIUS INVESTMENT, LLC, ET AL.

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

v.

FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO, ET AL.

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

BRIEF OF FORMER GOVERNOR OF PUERTO RICO, ANÍBAL ACEVEDO-VILÁ, AS *AMICUS CURIAE* IN SUPPORT OF THE RULING ON THE APPOINTMENTS CLAUSE

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

Governor Aníbal Acevedo-Vilá was elected and served as Governor of the Commonwealth of Puerto Rico from 2005-2008. Prior to serving as Governor, Mr. Acevedo-Vilá was elected and served as a Member of Congress (Resident Commissioner from Puerto Rico) from 2001-2004. While in Congress, Mr. Acevedo-Vilá served in the House Committee on Natural Resources, primary congressional committee with jurisdiction over the Commonwealth of Puerto Rico and other U.S. territories and possessions such as Guam, the Virgin Islands and the Northern Mariana Islands as well as Native American affairs. Prior to his tenure in Congress, Mr. Acevedo-Vilá was elected and served as a member of the Puerto Rico House of Representatives (1993-2000), where he was elected Minority Leader (1997-2000).

Furthermore, this *amicus curiae* has authored several books and Law Review articles including his most recent book about the Separation of Powers constitutional doctrine in Puerto Rico: *Separación de Poderes en Puerto Rico: Entre la Teoría y la Práctica, Ed. SITUM, 2018*. Currently, *amicus* is an Adjunct Professor of Constitutional Law in the University of Puerto Rico, School of Law and is a Guest Lecturer at the Inter

[1] The parties to these consolidated cases have filed blanket letters of consent to *amicus curiae* briefs. Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

American University of Puerto Rico, School of Law and the Pontifical Catholic University of Puerto Rico, School of Law where he teaches a course on Separation of Powers.

The reason why this *amicus curiae* has an interest in this matter is the fact that in their briefs, the United States, the Financial Oversight and Management Board, and the Puerto Rico Fiscal Agency and Financial Advisory Authority (AAFAF) as a representative of the elected territorial government of Puerto Rico, argue in one way or another that if this Court were to determine that the Appointments Clause applies to the seven members of the Financial Oversight and Management Board, then the democratically elected Territorial officers of the Government of Puerto Rico, particularly elected governors, were also non-conforming. *See* Petition in Case No. 18-1334, at pp. 13; 21-22; 33-34; Petition in Case No. 18-1514, at pp. 9; 11-15; 21-24; 32.

As no other elected Puerto Rico governor, former or current, has appeared in the instant matter, *amicus curiae* is uniquely qualified to address that particular argument.

SUMMARY OF ARGUMENT

Respectfully, the question presented must be answered in the affirmative and this Court must affirm the First Circuit Court's ruling on the Appointments Clause and uphold Separation of Powers principles.

While the Property Clause gives Congress broad discretion to make all needful Rules and Regulations with respect to the administration of the territories, such Rules and Regulations – as is the case in any other legislation – are unavoidably constrained by the provisions and limitations imposed by the Supreme Law of the Land and the fundamental doctrine of Separation of Powers, principles that are paramount to the U.S. Constitution.

ARGUMENT

A. The Property Clause Does Not Trump the Appointments Clause

The Financial Oversight and Management Board of Puerto Rico members are "Officers of the United States" and as such its appointments do not conform with the Appointments Clause of Article II, Section 2 of the U.S. Constitution. That status stems from the fact that the members of the Financial Oversight and Management Board exercised "significant authority" pursuant to the laws of the United States. *See Aurelius Investment, LLC, et al. v. Commonwealth of Puerto Rico, et al.*, 915 F.3d 838, 856-857 (1st Cir. 2019).

Consequently, in as much as they exercise significant authority under federal law as the First Circuit ruled, there is no doubt that the seven individuals that sit on the Financial Oversight and Management Board by virtue of Public Law 114-187, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) are therefore "principal federal officers"

for purposes of the Appointments Clause and Congress had no authority to exempt their Presidential nominations from Senate advice and consent as required by Article II, Section 2 of the U.S. Constitution.

The underlying question of this case is whether in exercising its constitutional power under the Property Clause of Article IV, Section 3 of the U.S. Constitution (also known as the Territorial Clause), Congress can completely disregard the Appointments Clause of Article II, Section 2. We submit to you that while the Property Clause gives Congress broad discretion to make all needful Rules and Regulations with respect to the administration of the territories, such Rules and Regulations – as is the case in any other legislation – are unavoidably constrained by the provisions and limitations imposed by the Supreme Law of the Land and the fundamental doctrine of Separation of Powers, principles that are paramount to the U.S. Constitution. Moreover, the Property Clause is one of general application and does not extend to explicit constitutional subjects where the Constitution demands checks and balances, such as the appointment of federal officers.

The Appointments Clause is one of several constitutional safeguards within the structure of a republican form and system of government. It is also paramount to the principles of Separation of Powers. The Separation of Powers doctrine works as an instrumental tool to protect the fundamental rights of every citizen against tyranny. Yes, tyranny from the Executive Branch or tyranny by the Legislative Branch. The Separation of Powers structure is not a mere way to

organize a government. Its core is to protect the individual liberties of every citizen. As this Court has stated before, "The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. Because the Constitution's separation of powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation of powers principles." *Boumediene v. Bush*, 553 U.S. 723, 742-743 (2008).

These same Separation of Powers principles should be considered a requirement to Congress even when discharging its constitutional broad authority under the Property Clause. In the case of Puerto Rico, this should be even more evident. Since the enactment of the Foraker Act, 31 Stat. at L. 77 (1900), over a century ago, this Court has held in many prior occasions that "the purpose of Congress in adopting [the Foraker Act] it was to follow the plan applied from the beginning to the organized territories by creating a government conforming to the American system, with defined and divided powers – legislative, executive, and judicial. *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 276-277 (1913). Moreover, in *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-205 (1928), this Court, in the context of the organic act for a territorial government in the Philippines, held that

basic separation of powers principles is a paramount interest that could not be discarded in the administration of a territory. ("And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital – not merely a matter of governmental mechanism," Id., at page 201.)

The Constitution of Puerto Rico was promulgated under the Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950). Under the terms of that Act, the Constitution of Puerto Rico "shall provide a republican form of government." This is an example that even in exercising its authority making rules and regulations for the territory of Puerto Rico, Congress respected and even required Separation of Powers principles to be inserted in the Territorial Constitution. However, all that was destroyed by PROMESA. As Judge Gustavo Gelpí, Chief Judge for the U.S. District Court for the District of Puerto Rico, has expressed, "the republican form of government bestowed by Congress upon the Island's government in 1952 has been the facto trumped via" PROMESA. Gelpí, Gustavo, The Constitutional Evolution of Puerto Rico and other U.S. Territories, Inter American University of Puerto Rico, 2017, at page 218.

Of course, there is ample case law regarding the Property Clause, including the infamous Insular Cases. Even though we would love to see the day this Court finally reverses those cases, and invite this Court to do so, but, if that seems a bold move, there is no need to do that in the present matter. Even under

the Insular Cases parameters, the First Circuit judgement must be affirmed.

To decide this matter, there is an essential question to answer and that is to what extent the so-called "plenary powers" of Congress trump other parts of the Constitution making them totally inapplicable. In considering this question, this Court has to recognize that the words "plenary powers" are nowhere to be found in the text of the U.S. Constitution but rather a legal concept coined by this Court in early 20th Century. *See, e.g., Binns v. United States*, 194 U.S. 486, 488 (1904).[2]

This legal concept of "plenary powers" or "plenary authority" has been used by this Court to describe other congressional powers besides the Property Clause. In *Buckley v. Valeo*, 424 U.S. 1 (1976), in a matter regarding the specific application of the Appointments Clause, this Court recognized that Congress has "plenary authority" to regulate federal elections. Nevertheless, in that matter the Court specifically precluded the argument that such authority means that the Appointments Clause is inapplicable:

> *"Appellee Commission and amici urge that because of what they conceive to be the extraordinary authority reposed in Congress to regulate elections, this case stands on a different footing*

---

[2] *"It must be remembered that congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories." Binns v. United States*, 194 U.S. 486, 488 (1904)

than if Congress had exercised its legislative authority in another field. There is, of course, no doubt that Congress has express authority to regulate congressional elections, by virtue of the power conferred in Art. I, Sec. 4. This Court has also held that it has very broad authority to prevent corruption in national Presidential elections. Burroughs v. United States, 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484 (1934). ***But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction,*** *McCulloch v. Maryland, 17 U.S. 316 (1819),* ***so long as the exercise of that authority does not offend some other constitutional restriction****. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.*

The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. *Unless their selection is elsewhere provided for, all Officers of the United States are to be appointed in accordance with the Clause*." *Buckley v. Valeo*, at 131-132 (Emphasis Added). *See also INS v. Chadha*, 462 U.S. 919 (1983).

Let us compare the language of Article I, Section 4 of the U.S. Constitution with the Property Clause of Article IV, Section 3 of the U.S. Constitution.

Article I, Section 4 of the U.S. Constitution

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; ***but the Congress may at any time by Law make or alter such Regulations****, except as to the Places of choosing Senators.*

Article IV, Section 3, Clause 2 of the U.S. Constitution

The Congress shall have Power to dispose of and ***make all needful Rules and Regulations respecting the Territory*** *or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.*

We submit to you that *Buckley* should serve as guidance for this Court in this case. There are no rational, historical or constitutional reasons to make a distinction regarding congressional plenary powers under those clauses and the application of the Appointments Clause. To our knowledge there is no case even suggesting that if Congress acts pursuant to its broad authority under the Property Clause, it is exempted from conforming with the Appointments Clause, whether this be by virtue of the "*Insular Cases*" or otherwise.

B. The Appointments Clause does not apply for elected Territorial Governance

In their briefs, the United States, the Financial Oversight and Management Board and the Puerto Rico Fiscal Agency and Financial Advisory Authority, as a representative of the elected Territorial government of Puerto Rico, argue in one way or another that if this Court were to determine that the Appointments Clause were to apply to the members of the seven members of the Oversight Board, then the democratically elected Territorial officers of the Government of Puerto Rico, such as governors and legislators, were also non-conforming. The answer to that argument is quite simple, and it goes back again to the principles of Separation of Powers.

There is no doubt that the Appointments Clause is paramount to the republican form of government and the Separation of Powers doctrine. It ensures a fine balance between the Executive and the Legislative Branch boundaries. One cannot limit or curtail the partaking of the other. In *Buckley* this Court clearly expressed how the Appointments Clause should be read:

> "*But the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches. The debates during the Convention, and the evolution of the draft version of the Constitution, seem to us to lend considerable*

> *support to our reading of the language of the Appointments Clause itself.*" *Buckley*, at page 129.

Some years later, in *Ryder v. United States*, 515 U.S. 177, 182 (1995) this Court again pressed the underlying principles behind this constitutional provision. ("The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch"). Two years later, in *Edmond v. United States*, 520 U.S. 651, 659-660 (1997) this Court again emphasized the connection between the Appointments Clause and the doctrine of Separation of Powers, citing James Hamilton and *The Federalist*:

> *"By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. . . . By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one. Hamilton observed:*
>
>> *"The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive for*

> *nominating, and the senate for approving, would participate, though in different degrees, in the opprobrium and disgrace."* Id., *No. 77, at 392.*
>
> *See also 3 Story*, supra, *at 375 ("If [the President] should . . . surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favour").*

The United States, the Financial Oversight and Management Board and the Puerto Rico Fiscal Agency and Financial Advisory Authority argue that if the Appointments Clause applies, then the election of Territorial officers is unconstitutional. That reasoning is clearly wrong. This is clearly an *argumentum in terrorem*, provoking fear to anyone that dares to challenge PROMESA. Their argument in essence is that in order to grant some limited self and local government to a Territory, the people of Puerto Rico and the territories have to accept that Congress has unrestricted powers to violate almost all the dispositions of the U.S. Constitution. That would be like saying that in order to end segregation you have to recognize that Congress and the states retain the power to bring slavery back. Such alliteration has no foundations in Constitutional Law, nor is based on any precedent of this Court.

From the readings and study of the Framers and these Court cases, it is clear that there is no violation of any Separation of Powers principles in allowing the residents of a territory to vote and democratically elect

those who would govern them. By allowing the people of the territories to vote, there is no "one branch aggrandizing its power at the expense of another branch," *Ryder*, nor "*congressional encroachment upon the Executive and Judicial Branches*," *Edmond*.

There is no doubt that the Appointments Clause is part of the Separation of Powers doctrine. It is a fine balance between the President and the Senate. One cannot limit or abridge the participation of the other. That is the main issue in this case, regarding the appointment of the members of the Board. But in allowing the residents of a territory to vote for those who would locally govern, there is no issue of separation of powers. By delegating to the people of the territories the power to elect their own governors and legislators, neither the President nor the Senate is overtaking the constitutional powers of the other. The check and balance remain intact.

This same argument was raised by the United States and the Oversight Board before the First Circuit Court of Appeals and clearly rejected with a basic and clear constitutional conclusion: the elected officials of a territory are not federal officers. Also, they do not "*exercise significant authority pursuant to the laws of the United States*" as the First Circuit determined. (Page 859). None of them got a presidential nomination nor needed Senate confirmation, but rather they were democratically elected by the People of Puerto Rico. Their authority originates directly from the democratic will of the Puerto Rican people, the Puerto Rico

Constitution and from the statutes enacted thereunder.[3]

CONCLUSION

The enactment of PROMESA by Congress was an insult to the dignity and democratic values of the People of Puerto Rico, and a denial of the principles of Separation of Powers and democracy that the United States reveres so much. The interpretations that the United States, the government of Puerto Rico and the Oversight Board are arguing before this Court is adding insult to injury. First, they are advocating for a theory that in the 21st Century will give Congress the power to govern the people of the territories, not only without their consent, but on top of that, with hardly none of the limitations established in the U.S. Constitution, such as the axioms of check and balances that are paramount to the Separation of Powers doctrine, particularly in regards to the application of the Appointments Clause.

To press their position, they submit the argument that if the People of Puerto Rico and the other territories are entitled to the constitutional protections afforded under the theory and practice of the Separation

[3] For an enlightening debate about the application of the Appointments Clause to elected officials in Puerto Rico, *see* Lawson, Gary and Sloane, Robert, The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered, 50 Boston College L. Rev. 1123, 1166-1184 (2009).

of Powers doctrine, then, those same people must be denied the right to self-government even on local matters. There is no constitutional basis for either argument. This Court has never decided that in order to guarantee a constitutional protection you must deny other basic constitutional and democratic principles.

Respectfully, and for the reasons set forth above, this Court should answer the question presented in the affirmative and affirm the First Circuit judgement with respect to the Appointments Clause question. That conclusion shall have no effect in the faculty of the people of the territories in electing their Governor and other elected Territorial officials. The Appointments Clause is not applicable in those circumstances. By delegating to the people of the territories the power to elect their own governors and legislators, neither the President nor the Senate is overtaking the constitutional powers of the other. The checks and balances axioms remain intact. And even if applicable, Territorial officers are not officials of the United States.

Respectfully submitted,

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