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.

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

BRIEF FOR CROSS-RESPONDENTS COFINA SENIOR BONDHOLDERS' COALITION

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September 19, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

If this Court holds that there was a violation of the Appointments Clause, does the *de facto* officer doctrine ensure that the past actions of the Federal Oversight and Management Board are treated as valid?

RULE 29.6 STATEMENT

The COFINA Senior Bondholders' Coalition consists of the following entities: Aristeia Capital, LLC, Canyon Capital Advisors, LLC, GoldenTree Asset Management LP, Taconic Capital Advisors, L.P., Tilden Park Capital Management LP, and Whitebox Advisors LLC.[1]

None of these entities is owned by any parent corporation and no other publicly held corporation owns 10% or more of any of their stock.

[1] Old Bellows Partners LP and Scoggin Management LP are no longer members of the COFINA Senior Bondholders' Coalition because they have sold their COFINA bonds on the open market.

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INTRODUCTION

The COFINA Senior Bondholders' Coalition is a collection of entities that held billions of dollars in bonds issued by the Puerto Rico Sales Tax Financing Corporation (known by its Spanish acronym, "COFINA"), an instrumentality of the Commonwealth of Puerto Rico. The Financial Oversight and Management Board for Puerto Rico ("Board"), a body created by the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq.*, filed petitions under Title III of that statute for the Commonwealth of Puerto Rico and COFINA. After over a year of litigation and mediation, and after rejecting an Appointments Clause challenge to the Board, the district court confirmed a settlement in both Title III cases and a plan of adjustment for COFINA's debt (which represents over 20% of the Commonwealth and its instrumentalities' total indebtedness of approximately $74 billion). The plan, made effective February 12, 2019, resulted in the cancellation of approximately $17 billion in then-existing COFINA bonds and the issuance of approximately $12 billion in new COFINA bonds. Three days later, on February 15, 2019, the First Circuit held the appointment of the Board members unconstitutional, but applied the *de facto* officer doctrine to treat as valid the Board's prior actions, including the COFINA plan and the settlement with the Commonwealth.

The COFINA Senior Bondholders' Coalition agrees with the arguments of the Board and the United States that the Board appointments are constitutional. Nonetheless, if this Court disagrees, the COFINA Senior Bondholders' Coalition submits this brief to address the second question presented, concerning application of the *de facto* officer doctrine.

The First Circuit's decision applying the *de facto* officer doctrine should be affirmed. This is the paradigmatic case for application of the doctrine. It concerns the actions of officers in a valid office, entered into in good faith, and most crucially, any attempt to undo their actions would harm thousands of stakeholders and, indeed, wreak havoc with the entire economy of Puerto Rico. Aurelius and Assured (together, "Aurelius"), the Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"), and their *amici* attempt to downplay the potential impact of invalidating the Board's actions. But they fail to grapple with the actual relief sought, which includes invalidation of nearly all Board actions, including debt restructurings, fiscal plans, and budgets that have been relied upon by thousands of innocent third parties and are integral to Puerto Rico's recovery.

Furthermore, Aurelius and UTIER attempt to limit application of the *de facto* officer doctrine to only technical, statutory violations. But this Court has never placed such a limitation on the doctrine, and has expressly applied it to constitutional violations. That is in keeping with the way this Court has applied its equitable discretion to determine the proper remedy for many kinds of constitutional violations. The First Circuit correctly found that the equities here strongly favor maintaining stability in Puerto Rico over what is at most an extraordinarily narrow violation of the Appointments Clause.

Thus, if the judgment below that the Board members' appointments violated the Constitution is affirmed, then the judgment applying the *de facto* officer doctrine should also be affirmed. At a minimum, the *de facto* officer doctrine should be applied to actions of the Board prior to the First Circuit's decision.

STATEMENT

A. Factual Background

By 2016, the Commonwealth of Puerto Rico was in the midst of a debilitating financial crisis. *See* COMMONWEALTH OF PUERTO RICO, FISCAL PLAN 4 (Oct. 14, 2016). The Commonwealth's gross national product had fallen for nine of the previous ten years, *id.*, and its outstanding debt ($71.499 billion) exceeded its gross national product for the previous year ($68.521 billion), GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO, COMMONWEALTH OF PUERTO RICO: FINANCIAL INFORMATION AND OPERATING DATA REPORT 52 (Dec. 18, 2016). The Commonwealth's credit had a junk rating, and it had lost access to capital markets. *See* GOVERNMENT OF PUERTO RICO, FISCAL PLAN 5, 14 (Feb. 28, 2017).

Puerto Rico's economic crisis caused a humanitarian crisis. The Commonwealth was forced to drastically reduce its budget for education, health care, and social services, resulting in closure of 150 schools, and understaffed or even temporarily closed hospitals. *See* The White House, *Puerto Rico Hill Update—Humanitarian Crisis* 2-3 (Apr. 19, 2016). Government suppliers—owed more than $2 billion—threatened to stop providing essential supplies, including fuel for emergency vehicles and food for prisoners. *Id.* at 3. In one instance, the Commonwealth could not afford to pay contractors to empty overflowing septic tanks (breeding grounds for mosquitoes that spread the Zika virus) at schools. *Id*.

B. PROMESA

In response to the fiscal and humanitarian crises in Puerto Rico, Congress enacted PROMESA, 48 U.S.C. § 2101 *et seq*. PROMESA created the Board and gave

it two primary responsibilities intended to "provide a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a). Under Title II, the Board is authorized to oversee, approve, and enforce fiscal plans and budgets for the Commonwealth and its instrumentalities. *Id.* §§ 2121(d), 2141-44. A fiscal plan under PROMESA must, among other things, "provide for estimates of revenues and expenditures," *id.* § 2141(b)(1)(A); "ensure the funding of essential public services," *id.* § 2141(b)(1)(B); "provide for the elimination of structural deficits," *id.* § 2141(b)(1)(D); and "improve fiscal governance, accountability, and internal controls," *id.* § 2141(b)(1)(F). Budgets are submitted by the government of Puerto Rico and reflect anticipated revenue and spending for a given fiscal year. *Id.* § 2142. Congress vested the Board with "sole discretion" to determine whether the submitted budgets comply with the relevant fiscal plan. *Id.* § 2142(c)(1).

In addition to its responsibilities under Title II, the Board has sole authority under PROMESA to institute Title III proceedings on behalf of Puerto Rico and its instrumentalities. *Id.* § 2172; *see also id.* §§ 2161-77. Title III proceedings are modeled after Chapter 9 of the federal bankruptcy code, *id.* § 2170, allowing Puerto Rico "to effect a plan to adjust its debts," *id.* § 2162(3). As in traditional bankruptcy proceedings, the filing of a Title III petition automatically stays litigation against the debtor to give the debtor a breathing spell from creditors. *Id.* §§ 2161(a), 2170; 11 U.S.C. § 362(a). In Title III proceedings, the Board acts as "the representative of the debtor," 48 U.S.C. § 2175(b), is authorized to "take any action necessary on behalf of [Puerto Rico or its instrumentalities] to prosecute the case," *id.* § 2175(a), and has exclusive authority to "file a plan of adjustment of the debts of

the [Commonwealth or its instrumentalities]," *id.* § 2172(a). A plan is binding on all creditors once it is confirmed by the district court.

C. Appointment Of The Board

President Obama appointed the seven Board members in August 2016. Under PROMESA, the President had the choice of picking any members for the Board, who then would need to be approved by the Senate. 48 U.S.C. § 2121(e). Otherwise, the President could select six of the seven voting members of the Board from lists provided by congressional leadership and the seventh in his sole discretion. *Id.* President Obama chose the latter course, using the lists from congressional leadership.

D. Actions Of The Board

Since August 2016, the Board has approved numerous budgets and fiscal plans for the Commonwealth and its instrumentalities. For the Commonwealth alone, the Board has certified four fiscal plans—in May 2019, October 2018, April 2018, and March 2017. Most recently, the Board certified the 2019 Fiscal Plan, which "outlines a number of … structural reforms and fiscal measures that, if implemented … , will help to provide Puerto Ricans with a positive economic trajectory, a twenty-first century electricity grid, resilient infrastructure, and a more effective and efficient public sector." FINANCIAL OVERSIGHT & MANAGEMENT BOARD, 2019 FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH AND PROSPERITY 8 (May 9, 2019).

The Board has also acted on behalf of Puerto Rico and its instrumentalities in the Title III proceedings—filing a total of five Title III petitions. In May 2017, the Board initiated Title III proceedings on behalf of

both the Commonwealth and COFINA, Pet. App. 52a; *see* No. 17-bk-03284 (D.P.R.), Dkt. 560 ¶ 138, which, pursuant to court order, are jointly administered, No. 17-bk-03284 (D.P.R.), Dkt. 131. To date, the Commonwealth has paid over $121 million to finance the operations of the Board. *See* FINANCIAL OVERSIGHT & MANAGEMENT BOARD, FOMB ANNUAL REPORTS FY2017-19.

E. COFINA

COFINA is an instrumentality of the Commonwealth of Puerto Rico, created by statute in 2006, to issue bonds at a time when financial distress made it costly for the Commonwealth to borrow against its general creditworthiness. P.R. Laws Ann. tit. 13, §§ 11a-16. The statute creating COFINA therefore transferred a percentage of sales and use tax revenue from the Commonwealth to COFINA and created a securitization vehicle within the government. *Id.* § 12. As is typical with securitizations, bondholders of COFINA would have recourse only to COFINA's share of the sales and use tax, and COFINA was declared to be separate from the Commonwealth. From 2007 to 2011, COFINA issued bonds secured by the sales and use tax revenue ("COFINA Bonds"). *See* FEDERAL OVERSIGHT & MANAGEMENT BOARD, COFINA FISCAL PLAN 5, 10 (Oct. 18, 2018). At the time the Board filed the COFINA Title III petition, the aggregate principal and unpaid interest on the COFINA bonds totaled $17.64 billion, making it the largest bond issuer of Puerto Rico. No. 17-bk-03284 (D.P.R.), Dkt. 560 ¶ 138. Thanks to its securitization structure, Puerto Rico was able to obtain a higher credit rating and concomitant lower borrowing cost by using COFINA.

Before the Board initiated Title III proceedings, holders of Puerto Rico's general obligation bonds filed

an action for declaratory relief against the Commonwealth and COFINA, arguing that transferring the sales and use tax revenue from the Commonwealth to COFINA violated Puerto Rico's Constitution. *See* No. 17-bk-03284 (D.P.R.), Dkt. 560 ¶ 16. This issue was central to any restructuring of Puerto Rico's debt because together Puerto Rico's liabilities on its general obligation bonds and COFINA's liabilities on the COFINA bonds accounted for approximately 55% of the Commonwealth and its instrumentalities' total indebtedness (approximately $74 billion) to be restructured. No. 17-bk-03284 (D.P.R.), Dkt. 560 ¶ 13. And the amount in dispute was very significant—totaling $783 million for fiscal year 2019, and growing at 4% per year until it would reach $1.85 billion in fiscal year 2041, at which point it would remain fixed until the COFINA bonds were repaid in full. *Id.*

The Board's decision to file Title III proceedings on behalf of the Commonwealth and COFINA reflected its determination that the Commonwealth and COFINA should "resolve the impasse under the supervision of the Title III Court." *See id.* ¶ 21. The Title III court appointed independent agents of the Board to negotiate on behalf of the Commonwealth and COFINA in mediation, and a settlement was reached in June 2018, allotting 53.65% of the disputed sales and use tax revenue to COFINA, and 46.35% to the Commonwealth. *See id.* ¶ 36.

The settlement was subject to court approval in the Title III cases of both the Commonwealth and COFINA. As to the latter, because it concerned the entirety of COFINA's property, the settlement was incorporated into a plan of adjustment for COFINA's debt and subject to a vote of creditors. *See Third Amended Title III Plan of Adjustment of Puerto Rico Sales Tax*

Financing Corporation, No. 17-bk-03284 (D.P.R. Feb. 5, 2019), Dkt. 561-1. The plan provided for a comprehensive restructuring of COFINA's debt, including cancellation of existing COFINA bonds and issuance of new COFINA bonds backed by the reduced—but judicially confirmed—portion of the sales and use tax revenues. *Id.* Following the solicitation of over 10,000 creditors, and with overwhelming support, the Title III court confirmed the plan in early February 2019, *see Order and Judgment Confirming the Third Amended Title III Plan of Adjustment of Puerto Rico Sales Tax Financing Corporation*, No. 17-bk-03284 (D.P.R. Feb. 5, 2019), Dkt. 560, and the plan became effective on February 12, 2019, *Notice of Effective Date*, No. 17-bk-03284 (D.P.R. Feb. 12, 2019), Dkt. 587, shortly before the First Circuit's Appointments Clause decision. The parties supporting the plan included Aurelius, which agreed not to seek any remedy in this appeal that would undermine the settlement between the Commonwealth and COFINA. *See* No. 17-bk-03284 (D.P.R.), Dkt. 560 ¶ 40. The plan resulted in cancellation of the approximately $17 billion in then-existing COFINA bonds, and issuance of approximately $12 billion in new COFINA bonds. *See* Press Release, Financial Oversight and Management Board for Puerto Rico, *Cofina Debt Exchange Effective Today* (Feb. 12, 2019).

Since the effective date of the COFINA plan, the newly issued COFINA bonds have been traded more than 85,000 times, reflecting an aggregate volume of approximately $25 billion. *See, e.g.*, Electronic Municipal Market Access, *Puerto Rico Sales Tax Fing Corp Sales Tax Rev Restructured COFINA A-2 (PR)*, https://emma.msrb.org/Security/Details/A9DE887EA816693F74EE0E608F841D5BD (showing single-day trading volume). In addition, in early August 2019, based on an agreement with the Internal Revenue Service,

COFINA exchanged approximately $3 billion in taxable bonds for lower-interest, tax-exempt bonds. *See* Puerto Rico Fiscal Agency and Financial Advisory Authority, *Voluntary Notice With Respect To The Puerto Rico Sales Tax Financing Corporation Restructured Sales Tax Bonds, Series 2019A-2 And Series 2019B-2* (Aug. 12, 2019).

F. Appointments Clause Motion And Decisions Below

In August 2017, respondent and cross-petitioner Aurelius moved to dismiss the Commonwealth Title III proceedings on the ground that appointment of Board members violated the Appointments Clause. *See* Pet. App. 53a. The Board opposed the motion, the United States intervened to defend the constitutionality of the Board's appointment, Pet. App. 15a, and the COFINA Senior Bondholders' Coalition likewise supported the constitutionality of the Board.

The district court denied Aurelius's motion to dismiss, holding that the Board's "members are territorial officers"—not officers of the United States—and thus there was "no constitutional defect in the method of appointment." Pet. App. 79a, 81a.

The court of appeals reversed. Pet. App. 1a-45a. The court held that the Board members "should have been appointed by the President, by and with the advice and consent of the Senate." Pet. App. 40a.

The court then considered the appropriate remedy. The court concluded that application of the *de facto* officer doctrine was "especially appropriate in this case," and thus the court declined to dismiss the Title III petitions. Pet. App. 42a. The court explained that invalidating the Board's past actions would "cast a specter of invalidity over all of the Board's actions to

the present day." *Id.* The court also concluded that "awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now." Pet. App. 43a. The court further recognized that "summary invalidation of everything the Board has done since 2016 will likely introduce further delay into a historic debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017." *Id.* The court determined that, because the Board acted under color of authority in filing the Title III petitions (an act that is expressly the responsibility of the Board under PROMESA), and did so in good faith, the court's ruling "does not eliminate any otherwise valid actions of the Board prior to the issuance of our mandate in this case." Pet. App. 44a. In addition, the court stayed its mandate for 90 days, "so as to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause." *Id*.

The First Circuit denied rehearing *en banc*. Pet. App. 83a-84a. The First Circuit then extended its stay of the mandate pending final disposition in this Court. App. 190. On June 18, 2019, the President re-nominated the current Board members to their current positions, but the Senate has not yet acted on their confirmation.

SUMMARY OF ARGUMENT

If this Court determines that there was a violation of the Appointments Clause (and it should not), the First Circuit's judgment nonetheless should be affirmed because the *de facto* officer doctrine applies here.

I. The *de facto* officer doctrine is an equitable doctrine whereby courts can treat the past actions of invalidly appointed officers as valid where doing so is in the public interest. This Court adopted this doctrine over 170 years ago and has since applied it repeatedly when doing so is in the public interest. That is especially true in the context of officers with executive or legislative authority, as their actions have broad implications for the public as a whole, and invalidating their past actions generally would create widespread disruption.

The *de facto* officer doctrine applies fully in the context of officers whose authority is challenged on constitutional grounds. This Court said so explicitly in two cases that Aurelius and UTIER ignore. *See Norton v. Shelby Cnty.*, 118 U.S. 425, 445-46 (1886); *Texas v. White*, 74 U.S. 700, 732-33 (1868). While Aurelius and UTIER cite cases rejecting the *de facto* officer doctrine, those cases arise exclusively in the context of adjudicative officers, where the disruption from overturning past acts is limited to individual cases. Moreover, none of these cases even remotely suggests that the doctrine is never applicable to constitutional claims. Aurelius and UTIER's argument for such a rule cannot be reconciled with *Connor v. Williams*, 404 U.S. 549 (1972), and *Buckley v. Valeo*, 424 U.S. 1 (1976). While this Court has cautioned against expanding the *de facto* officer doctrine beyond those cases, this case requires no such expansion, as it presents an even stronger basis for applying the existing doctrine, given the extraordinary harm that would arise here if the Board's past actions were invalidated.

The equitable approach to remedies embodied in the *de facto* officer doctrine is consistent with this Court's

approach in a wide range of constitutional contexts. Contrary to the suggestion of Aurelius and UTIER, this Court does not automatically provide a complete remedy for any constitutional violation. Rather, the remedy can and often does take account of the public interest, and in particular the legitimate reliance interests of third parties.

II. The First Circuit correctly found that the enormous disruption from attempting to invalidate past Board actions requires application of the *de facto* officer doctrine here. Aurelius and UTIER dramatically understate the harmful effects of the remedies they seek, which include invalidation of all past Board actions. If allowed, this would invalidate all of the efforts of the Board, the Commonwealth, and other parties to restructure tens of billions of dollars of the debt of the Commonwealth and its instrumentalities. Moreover, for COFINA, any attempt at invalidation would be extraordinarily problematic because new bonds have already been issued and traded tens of thousands of times among third parties who reasonably relied on the validity of those bonds. Aurelius and UTIER's approach also would potentially invalidate two years of budgets and fiscal plans for the Commonwealth, which govern countless appropriation decisions. While Aurelius suggests it wants only dismissal of the Commonwealth and PRHTA Title III actions, in fact it preserved below the right to challenge all Board actions (except the COFINA plan of adjustment), as have other parties.

The alleged Appointments Clause violation, even if accepted (as it should not be), does not outweigh this substantial, widespread harm. Any such violation here is merely formal, not functional, given that the President appointed the Board members, and there

was congressional participation in the selection of those members. The broad scope of power under the Territories Clause further demonstrates that any violation here was *de minimis* and certainly insufficient to justify the extraordinarily disruptive relief Aurelius and UTIER seek.

In addition, the Board and other parties plainly have acted in good faith. Aurelius and UTIER assert that there must be bad faith because they (and two Senators) have argued that the Board was improperly appointed. But there was no legal basis for the Board and the litigants in the Title III proceedings to assume that the appointments were invalid merely because they were challenged. And there was no practical basis for the Board and the litigants to sit on their hands for two years while the Appointments Clause litigation was being resolved.

Finally, the First Circuit properly stayed its mandate, thereby allowing the Board to function while this Court decides the Appointments Clause issue. Aurelius and UTIER attempt to frame this issue as allowing the Board to function after its composition has been adjudged invalid, but in fact there is no such effectual judgment until the mandate issues. The First Circuit acted well within its discretion to stay the issuance of the mandate pending this Court's review.

In the alternative, this Court should affirm the application of the *de facto* officer doctrine to Board actions prior to the First Circuit's decision. Those actions would be the most difficult and harmful to invalidate, and the Board unquestionably acted in good faith before the First Circuit issued its ruling on the Appointments Clause.

ARGUMENT

I. Under The *De Facto* Officer Doctrine, The Prior Actions Of Unconstitutionally Appointed Officers Are Deemed Valid When Doing So Is Equitable

A. The *De Facto* Officer Doctrine Is Well Established And Applies Especially Where The Public Interest Demands And Where The Officer Has Executive Or Legislative Authority

The *de facto* officer doctrine is a well-established feature of the common law whereby courts treat as valid the actions of an officer in a legally proper office, even if the election or appointment of the particular officer was unlawful. This doctrine has been recognized as early as the 1400s, in *The Abbe de Fontaine*, Y.B. 9 Hen.6, f.32, pl.3 (1431), which held that "a deed which was made before is good" even if the official responsible did not rightfully hold the office. *See State v. Carroll*, 38 Conn. 449, 458-59 (1871) (discussing *Abbe de Fontaine*). This Court first recognized the doctrine in *Cocke ex rel. Commercial Bank of Columbus v. Halsey*, 41 U.S. 71 (1842), where the Court examined the English common-law cases from the 1700s and U.S. cases from the early 1800s, which had treated acts by improperly appointed or elected officers as *de facto* valid. *Id.* at 84-86. The Court concluded that the improperly appointed clerk of probate at issue was a *de facto* officer and that his acts were therefore valid. *Id.* at 87-88. Since *Cocke*, this Court has repeatedly applied the doctrine in a variety of circumstances. *See, e.g.*, *United States v. Royer*, 268 U.S. 394, 397 (1925); *Waite v. Santa Cruz*, 184 U.S. 302 (1902); *Ex parte Ward*, 173 U.S. 452 (1899); *Nofire v. United States*, 164 U.S. 657 (1897).

There is no definitive test for application of the *de facto* officer doctrine, as it is a common-law doctrine responsive to the equities, but two factors are most relevant in the analysis.

First, the Court has recognized that the principal factor in deciding whether to apply the *de facto* officer doctrine is the public interest, and specifically whether the officer's actions implicate third parties and the public good. As *Cocke* stated: "[I]t is a well settled principle of law, that the acts of such persons are valid, when they concern the public, or third persons who have an interest in the acts done; and this rule is adopted to prevent the failure of public justice." 41 U.S. at 86 (quotation marks omitted). Similarly, in *Norton v. Shelby County*, 118 U.S. 425 (1886), this Court held: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons …." *Id.* at 446 (quotation marks omitted).[1] Thus, the public interest is paramount in deciding the

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[1] *See also Waite*, 184 U.S. at 322 ("[S]uch acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the *de jure* mayor and common council of the city. The rule that the acts of a *de facto* officer are valid as to the public and third persons, is firmly established …."); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 295 (1889) ("In the case of public officers who are such *de facto*, acting under color of office by an election or appointment not strictly legal, … their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice …."); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18 (2d Cir. 1981) ("[T]he primary purpose of the doctrine is to protect the public and the government agencies which act in reliance on the validity of an officer's actions.").

de facto validity of the actions of an unlawfully appointed or elected officer.

Second, the *de facto* officer doctrine applies with greatest force where the officer exercises executive or legislative authority. Indeed, the doctrine has been applied frequently and almost without exception in that context. *See, e.g.*, *Waite*, 184 U.S. at 322-24 (doctrine applied to city mayor); *Nofire*, 164 U.S. at 658-61 (doctrine applied to deputy clerk for Cherokee Nation); *EEOC*, 650 F.2d at 18 (doctrine applied to Chairman of EEOC). This is partly a function of the first factor: the harm to the public from invalidating the acts of an officer is generally at its apex for officers with executive and legislative authority because their actions often have wide-ranging implications for the public as a whole. In contrast, the potential harm for invalidating a judge's actions is often limited to the particular case or the handful of cases he or she has adjudicated that are not yet final. *See, e.g.*, *Ryder v. United States*, 515 U.S. 177, 185 (1995) (recognizing, in upholding challenge to judges on the Coast Guard Court of Military Review, that "[t]here is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner …. The parties agree that the defective appointments of the civilian judges affect only between 7 to 10 cases pending on direct review.").[2] The overturning of those cases therefore would be no different from the common situation where some cases are overturned on appeal.

The broader application of the *de facto* officer doctrine in the executive and legislative context, rather

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[2] Rulings of improperly appointed judges generally cannot be challenged after final judgment. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962).

than the judicial context, also reflects the different interests at stake. For executive and legislative officers, the interest in a properly appointed officer is a generalized interest of the public. The individual challenging the officer has no right to any particular executive or legislative action, or any special right to proper appointments. In contrast, for judicial officers, there is an individual right to a fair trial that may be directly implicated by improper appointment of a judge. Accordingly, in balancing the equities, the interest of the party in a proper appointment typically has greater weight when challenging a judge (who affects the litigant far more than the public as a whole) than when challenging an executive or legislative official (who affects the public as a whole far more than the litigant).

B. The *De Facto* Officer Doctrine Applies To Constitutional Violations

1. The *de facto* officer doctrine applies to constitutional violations, including structural violations, at least where significant disruption to the public would arise from invalidating the actions of an officer whose election or appointment was defective. This Court has said so explicitly in several cases.

First, this Court quoted *State v. Carroll*, 38 Conn. 449 (1871)—"an elaborate and admirable statement of the law"—for the proposition that the *de facto* officer doctrine applies "where the duties of the office are exercised … under color of an election or an appointment by or pursuant to a public *unconstitutional law*, before the same is adjudged to be such." *Norton*, 118 U.S. at 445-46 (emphasis added); *see also Royer*, 268 U.S. at 397 ("The leading case is *State v. Carroll*, 38 Conn. 449, 456-466, 472, 9 Am. Rep. 409, where the English and American cases are fully reviewed ….").

Indeed, *Carroll* held: "If then the law of the legislature, which creates an office and provides an officer to perform its duties, must have the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an officer so provided had no color of authority." 38 Conn. at 473-74. *Carroll* also exhaustively surveyed the law, and found that "[t]here is a large class of cases where the appointees were ineligible under the constitution, yet held officers *de facto*," and they are "unopposed by any conflicting decision." *Id.* at 477.

Second, in two more recent cases, this Court reaffirmed that, where officials are elected or appointed in violation of the Constitution, the proper remedy is *not* to invalidate past actions where it would cause substantial harm to the public. In *Connor v. Williams*, 404 U.S. 549 (1972), the plaintiffs argued that a reapportionment plan for the state legislature, which had a total variance of 18.9% between the largest and smallest Senate district and one of 19.7% between the largest and smallest House district, violated the Equal Protection Clause. *Id.* at 550. This Court held that, even if "the District Court's plan does not precisely square with Fourteenth Amendment requirements, it does not necessarily follow that the 1971 elections must be invalidated and new elections ordered. In the circumstances of this case, we decline to disturb these elections." *Id.* at 550-51. And this result accords with this Court's general approach in voting rights cases. *See, e.g.*, *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (holding unconstitutional Louisiana law granting only "property taxpayers" right to vote, but applying decision only prospectively to avoid "[s]ignificant hardships … on cities, bondholders, and others connected with municipal utilities").

Moreover, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court applied the same approach to a violation of the Appointments Clause. *Buckley* held that the appointment of four members of the Federal Election Commission by Congress, rather than the President, violated the Appointments Clause and separation of powers. Nonetheless, this Court held that the Commission's past actions were valid as the actions of *de facto* officers:

> It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date …. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan.

Id. at 142. The Court also allowed the Commission "to function *de facto* in accordance with the substantive provisions of the Act" for 30 days after the decision. *Id.* at 143.

Third, this Court applied the *de facto* officer doctrine to authorize the actions of unconstitutionally seated legislative officers in *Texas v. White*, 74 U.S. 700 (1868). In *White*, the Court recognized that the insurrectionist government of Texas was unconstitutional. *Id.* at 726 ("Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance,

were absolutely null. They were utterly without operation in law."). Nonetheless, the Court held that the Texas legislature was "a *de facto* government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid." *Id.* at 733; *see also id.* at 732-33 ("[A]cts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government.").

2. These cases belie Aurelius's suggestion (Br. 65) that there are no *de facto* officer cases dealing with constitutional violations, including structural violations. Petitioners ignore *Connor*, *White*, and the relevant language in *Norton* entirely. Indeed, their reasoning—that every constitutional violation demands that all prior acts of the unconstitutional official be invalidated—is inconsistent with those cases.

As to *Buckley*, Aurelius (Br. 54-56) and UTIER (Br. 70) rely almost entirely on one paragraph in *Ryder*, 515 U.S. at 183, distinguishing *Buckley*. That paragraph is inapposite here. *Ryder* mentioned that, in *Buckley* (and *Connor*), "the result reached in each case validated the past acts of public officials," but neither case "explicitly relied on the *de facto* officer doctrine." *Id.* However, *Buckley* held expressly that the past actions of the Commission were "*de facto* valid[]" and that the Commission would "function *de facto*" for an additional 30 days. 424 U.S. at 142-43. There is no other doctrine that would account for this holding, and

Aurelius and UTIER do not posit any such doctrine. In addition, the Federal Election Commission framed the issue in terms of whether they were "officer[s] *de facto*," quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895). *See* Brief of the Federal Election Commission at 10, *Buckley v. Valeo*, Nos. 75-436, 75-437 (S. Ct. Oct. 18, 1975). Regardless, whether the rationale is called the "*de facto* officer doctrine" or is given some other name (or no name), the principle and precedent remain the same: the remedy for a violation, even a constitutional violation, should not include invalidating past acts where such relief would cause widespread disruption and public harm.

Ryder also noted that, in *Buckley*, "the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." 515 U.S. at 183. However, the Court can do the same here if it affirms on the Appointments Clause (as it should not) by providing prospective relief to Aurelius and UTIER—both of whom seek such relief in addition to retroactive invalidation of past actions of the Board. *See infra* at 36-37. Aurelius contends (Br. 56) that the plaintiffs in *Buckley* received all of the relief they sought, and thus they too should receive all relief, but in fact *Buckley*'s decision that the Commission would "function *de facto*" for 30 days after the decision deprived the plaintiffs of the immediate injunction they sought. *See* Reply Brief of Appellants at 108-11, *Buckley v. Valeo*, Nos. 75-436, 75-437 (S. Ct. Nov. 3, 1975) (Section entitled "*The Appropriate Remedy for the Unconstitutionality of the Commission Is To End Its Existence*."). In any event, this reasoning plainly does not apply to *Connor*, where the plaintiffs explicitly sought and were denied invalidation of the old election and an immediate new election.

Finally, *Ryder* held that "we are not inclined to extend [*Buckley* and *Connor*] beyond their facts," 515 U.S. at 184, but regardless of *Ryder*'s efforts to limit those cases, those limitations do not apply to the very situation in *Buckley* and *Connor*, *i.e.*, where (as here) invalidation of the actions of officers exercising executive and legislative authority would create widespread harm. Indeed, the harm (discussed *infra* at 30-36) would be much *greater* here than in *Buckley*, which involved Federal Election Commission administrative rulings, or in *Connor*, which involved a state legislature elected only a few months before the ruling.[3]

3. Aurelius (Br. 51-52) and UTIER (Br. 71) err in arguing that only technical violations are subject to the *de facto* officer doctrine.[4] As noted above, this Court has repeatedly recognized and expressly held that the actions of unconstitutionally appointed or elected officers can be afforded *de facto* validity. The nature of the violation may be relevant in balancing

[3] *Ryder* also noted that "*Connor*, like other voting rights cases, did not involve a defect in a specific officer's title, but rather a challenge to the composition of an entire legislative body." 515 U.S. at 183. But the same is true here: the Board acts in both an executive and legislative capacity, and the challenge here would therefore concern the composition of an entire legislative body.

[4] Aurelius (Br. 52) and UTIER (Br. 71) also note that the *de facto* officer doctrine applies to "collateral" challenges. However, they do not suggest—nor could they—that this is a requirement for the *de facto* officer doctrine, but rather that the lack of a direct challenge is but one basis for application of the *de facto* officer doctrine. That does not change the fact that another basis exists—where the potential disruption demands it—and has frequently been applied to challenges just as direct as the one at issue here. *See, e.g.*, *Royer*, 268 U.S. at 397; *Waite*, 184 U.S. at 322-23; *Nofire*, 164 U.S. at 661. Indeed, there is no sense in which the claims in *Connor* or *Buckley* were less direct than the ones in the instant case.

the equities and determining a proper remedy, but it has never been treated as a requirement for application of the doctrine.

This approach conforms to the way this Court remedies constitutional violations in a variety of contexts. Contrary to the general principle espoused by Aurelius (Br. 58), whereby every constitutional violation must be fully remedied, this Court frequently balances the interests of the litigants and the public in determining what remedy, if any, is appropriate. For instance, a violation of Fourth Amendment rights made in good faith does not give rise to exclusion of evidence obtained in violation of the Constitution. *Davis v. United States*, 564 U.S. 229, 238 (2011). And qualified immunity means that a monetary remedy for a Fourth Amendment or other violation is often absent, unless there is a violation of a clearly established right. *See City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019).[5] Thus, courts retain discretion to determine the proper remedy for a constitutional violation, and the *de facto* officer doctrine is simply one well-established manifestation of that discretion. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion) (holding, in determining remedy for Establishment Clause violation, that "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable") (footnote omitted).

Aurelius and UTIER cite no case law imposing a constitutional limitation on the *de facto* officer doctrine.

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[5] Constitutional claims raising political questions, like partisan gerrymandering claims under the First Amendment and Equal Protection Clause, also have no judicial remedy. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2494, 2508 (2019).

They rely on *Ryder*, but *Ryder*'s holding is expressly limited to the adjudicatory context: "We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer *who adjudicates his case* is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." 515 U.S. at 182-83 (emphasis added). As discussed *supra* at 16-17, the balancing of the equities is very different for improperly appointed judges than for officers exercising executive and legislative powers. Likewise, *Ryder* did not, as Aurelius suggests (Br. 52), "h[o]ld that the *de facto* officer doctrine cannot be applied when there has been 'a trespass upon the executive power of appointment.'" Rather, it mentioned that the claim at issue was "based on the Appointments Clause of Article II of the Constitution—a claim that there *has* been a 'trespass upon the executive power of appointment,' rather than a misapplication of a statute." 515 U.S. at 182 (quoting and distinguishing *McDowell*, 159 U.S. at 598). This factual distinction between *Ryder* and *McDowell* may be relevant in the analysis, particularly in the context of judges, but *Ryder* never even remotely suggested that all Appointments Clause claims are immune from the *de facto* officer doctrine. Indeed, if that were the Court's instruction, surely it would have made that clear in the discussion of *Buckley*, but the Court did not create any such categorical rule.

Aurelius (Br. 51) and UTIER (Br. 71) also cite *Nguyen v. United States*, 539 U.S. 69 (2003), but *Nguyen* began its discussion of the *de facto* officer doctrine by stating that its analysis was confined to the context of judges: "Whatever the force of the *de facto* officer doctrine in other circumstances, an examination of our precedents concerning alleged irregularities in the assignment of judges does not compel us to apply it in these cases."

Id. at 77. And the cases *Nguyen* cited were limited to those involving judges. *See id.* at 77-78. Moreover, even in the limited context of judges, *Nguyen* stated only that the cases "[t]ypically" involved a technical violation, not that they must or always did so.

The other cases Aurelius and UTIER rely upon to limit the *de facto* officer doctrine to so-called technical violations are likewise inapposite. They cite *McDowell*, 159 U.S. 596, another case involving judges, and one that held the *de facto* officer doctrine did apply. Notwithstanding this holding, Aurelius (Br. 60) pulls out of context a statement that the case did not involve a constitutional violation, but rather a statutory violation. *Id.* at 598. However, this statement concerned only what the Court was evaluating to determine whether a violation of law existed; it had nothing to do with—and certainly did not purport to establish a limit on—the *de facto* officer doctrine. That doctrine was discussed several pages later in the opinion with no reference to the nature of the violation. *Id.* at 601-02. Rather than stating some requirement of technicality, it defined the doctrine simply as follows: "[T]he rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." *Id.* Similarly, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), yet another case involving judges, the Court did not hold that only technical violations could be subject to the *de facto* officer doctrine. Rather, *Glidden* held that the *de facto* officer doctrine did not bar the claims because the interest at stake outweighed the minimal disruption at issue: "At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to

overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.* at 536.

Aurelius (Br. 58-61) and UTIER (Br. 73-75) also err in relying on cases not addressing the *de facto* officer issue at all. For instance, they cite *Lucia v. SEC*, 138 S. Ct. 2044 (2018), *Stern v. Marshall*, 564 U.S. 462 (2011), and *Bowsher v. Synar*, 478 U.S. 714 (1986). These cases are simply irrelevant because the *de facto* officer issue was not mentioned by the Court or raised by the parties. And there is good reason that the *de facto* officer doctrine did not arise in those cases: unlike here, there was no concern about widespread disruption. Rather, the effects of invalidating the officials' past actions were very limited. *See, e.g.*, *Lucia*, 138 S. Ct. at 2055 n. 6 (noting that the prior appointments had already been ratified); *Stern*, 564 U.S. at 502 ("We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute," and "our decision today does not change all that much …."); *Bowsher*, 478 U.S. at 734-35 (holding that statutory "fallback" provision governed the remedy and allowed for an orderly process).

Finally, Aurelius (Br. 55) and UTIER (Br. 72) argue that the Board's actions must be voided because Appointments Clause violations are "structural" errors, but they misunderstand the import of treating an error as structural. Where an error is structural, it means that the party need not demonstrate prejudice because such prejudice is assumed—as explained in the very cases Aurelius cites. *See Neder v. United States*, 527 U.S. 1, 8 (1999) (holding that when error is structural, "harmless-error analysis" does not apply); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481

U.S. 787, 814 (1987) (plurality opinion) ("Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this."); *see also id.* at 825 (Scalia, J., concurring in judgment). Thus, if there were an Appointments Clause violation here, Aurelius and UTIER need not show that a differently-appointed board would have reached different decisions. However, that says nothing about the *remedy* for a violation, and Aurelius and UTIER cite no cases treating structural violations as requiring any particular remedy. Indeed, doing so would conflict directly with *Buckley*.[6]

C. Aurelius Fails To Demonstrate That This Court Should Disregard The Practical Consequences Of Invalidating The Board's Prior Actions

Aurelius all but dismisses (Br. 62-65) the practical ramifications of invalidating the Title III proceedings, attempting to characterize them as a "case-specific plea for application of the *de facto* officer doctrine."

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[6] Aurelius also errs in arguing (Br. 65) that *de facto* validity would "signal to Congress that it can disregard the Constitution's allocation of the Appointment Power to the President and retain the benefits of its usurpation for at least the duration of any ensuing litigation." There is no plausible reason to believe that Congress would intentionally pass unconstitutional laws in the hope of this Court applying the *de facto* officer doctrine to actions taken in the temporal window between enactment and constitutional challenge. And in the unlikely event that Congress allowed appointments that were obviously unconstitutional, the appointed officer's actions and any reliance thereon could be considered in bad faith—but there is unquestionably good faith here. *See infra* at 42-43.

But as discussed above, protecting the public is a fundamental purpose of the *de facto* officer doctrine, and thus the practical effect of invalidating prior actions of a *de facto* officer must be considered heavily in determining whether to apply the doctrine. *See supra* at 15-16; *see also, e.g.*, *Lemon*, 411 U.S. at 203 (plurality opinion) ("It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy."). Indeed, even the cases Aurelius relies upon recognize as much. *See Ryder*, 515 U.S. at 180-81 ("'The *de facto* officer doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.'" (quoting 63A Am. Jur. 2d, Public Officers and Employees § 578, pp. 1080-81 (1984))).

Aurelius maintains (Br. 63) that this Court has "not hesitated to grant … vastly disruptive relief" in the past, but Aurelius cites no case where this Court has ever provided a remedy for improperly appointed officers that is even remotely as harmful as what is requested here. Aurelius cites *INS v. Chadha*, 462 U.S. 919 (1983), where this Court ruled that a one-house veto of executive action was unconstitutional because it authorized "essentially legislative" action without bicameral approval and presentment to the President. *Id.* at 952-59. But there is a fundamental difference between a wrongly appointed individual acting in a particular office—the basis for the *de facto* officer doctrine—and an entire branch of the legislature and the President not acting at all in purporting to pass a law. Indeed, the *de facto* officer doctrine

expressly does *not* apply where the office itself is invalid.[7]

Aurelius (Br. 57-58) and UTIER (Br. 82) also rely on *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), but this Court plainly considered the practical consequences of its holding—that Congress had unconstitutionally vested Article III functions in non-Article III bankruptcy courts—and shaped its disposition accordingly. It held that the decision "shall apply only prospectively" because "retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Id.* at 88 (plurality opinion). In addition, the Court stayed its judgment for more than three months—precisely to avoid "impairing the interim administration of the bankruptcy laws." *Id.* (citing *Buckley*, 424 U.S. at 143). Thus, rather than helping Aurelius and UTIER, *Northern Pipeline* supports the First Circuit's analysis that a remedy for a constitutional violation is improper where it would entail substantial disruption and hardship. To be sure, *Ryder* noted that *Northern Pipeline* still allowed dismissal of the one particular bankruptcy case challenged by the respondents. 515 U.S. at 184 n.3. However, the single bankruptcy case of the Northern Pipeline Construction Company obviously did not create the kind of widespread problems that dictate application of the *de facto* officer doctrine. And Aurelius provides

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[7] The analogous situation in the legislative context would be not where an entire house of Congress and the President do not vote, but rather where some members are elected based on an unconstitutional redistricting. And as noted *supra* at 18, the Court has not invalidated laws in that situation.

no explanation for why the outcome of *Northern Pipeline*—barring application for anyone but the singularly affected respondent there—makes sense under their restrictive view of the *de facto* officer doctrine.

Finally, Aurelius notes (Br. 59) that 600 NLRB cases were at issue in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), but this Court did not decide whether these cases would be vacated. *Id*. at 688 (not addressing remedy, but rather simply reversing and remanding for further proceedings). Regardless, a delay in deciding 600 NLRB cases pales in comparison to the disruption to the entirety of Puerto Rico's economy and the investment-backed expectations of countless bondholders that would occur here if the *de facto* officer doctrine is not applied.

II. The Court Of Appeals Correctly Applied The *De Facto* Officer Doctrine Based On The Facts Here

A. *De Facto* Validity Of The Board's Actions To Date Is Required To Avoid Massive Disruption To Puerto Rico's Recovery Efforts

1. As the First Circuit correctly held, affording *de facto* validity to the Board's actions is necessary to avoid massive disruption to Puerto Rico's economy.

First, dismissing the Title III proceedings would delay long-needed restructuring of Puerto Rico's enormous debt, in turn delaying Puerto Rico's recovery from its fiscal and humanitarian crises. The Commonwealth determined that restructuring was a necessary component of its recovery in 2015, *see* GOVERNMENT OF PUERTO RICO, COMMONWEALTH OF PUERTO RICO FISCAL PLAN 4 (Oct. 24, 2016)—before PROMESA was even enacted or the Board appointed—but Puerto Rico was

ineligible for the protections of Chapter 9 of the Federal Bankruptcy Code, *see Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016). Accordingly, Puerto Rico was unable to restructure its debt until PROMESA established Title III proceedings. The Board initiated Title III proceedings on behalf of the Commonwealth and many of its instrumentalities within months after its appointment, and those cases have progressed for over two years. As Aurelius itself recognizes (Br. 59), "[b]ecause it necessarily affects thousands of creditors nationwide, the decision to file a Title III case is one of the gravest and most consequential acts a Board can take under PROMESA."

Although "Puerto Rico [still] needs a comprehensive restructuring of its debt … to regain access to capital markets and create the basis for a sustainable economy," FINANCIAL OVERSIGHT & MANAGEMENT BOARD, FOMB ANNUAL REPORT FY2019, at 20 (July 31, 2019), the Board has made considerable progress. Regarding Puerto Rico's $50 billion in unfunded pension liability, in June 2019, the Board entered a plan support agreement with the Official Committee of Retired Employees, affecting the over 300,000 employees in Puerto Rico's public pension systems. *Id.* at 56. The Board also entered a plan support agreement regarding a new collective bargaining agreement with the Public Servants United of Puerto Rico (the local affiliate of American Federation of State, County, and Municipal Employees). *Id.* at 57. Each of those plan support agreements involved an understanding that, under the confirmed plan of adjustment, pension benefit accruals would be frozen, providing the Commonwealth considerable debt relief. *Id.*; *see also* Brief of *Amici Curiae* DRA Entities.

The Board separately reached an agreement with certain holders of Commonwealth bonds for a plan of adjustment that would serve as a framework to restructure claims against the Commonwealth totaling $35 billion. FINANCIAL OVERSIGHT & MANAGEMENT BOARD, FOMB ANNUAL REPORT FY2019, at 57 (July 31, 2019). Under the agreement, the Commonwealth's total debt service would be reduced from $43 billion to $21 billion over the next 30 years. *Id.* All of the progress that has been made to date in restructuring Puerto Rico's $74 billion debt would be lost if the Title III proceedings are dismissed, even though, as the Board has cautioned, "time is of the essence" for Puerto Rico's recovery. *Id.* at 20.

Second, application of the *de facto* officer doctrine would preserve the court-approved settlement with the Commonwealth and the corresponding confirmed COFINA plan of adjustment, which affects tens of thousands of bondholders and other third parties who have relied in good faith on the plan's confirmation. The plan represents an enormous step in the restructuring of Puerto Rico's debt, both because COFINA's debt represented a substantial portion of Puerto Rico's total liabilities and because the plan resolved the sales-tax-revenue dispute, thus providing clarity as to what funds are available to both the Commonwealth and COFINA to repay their debt obligations. The plan resolved $18 billion in bond debt and the largest class of bond claims against Puerto Rico, ultimately saving Puerto Rico approximately $17.5 billion. FINANCIAL OVERSIGHT & MANAGEMENT BOARD, FOMB ANNUAL REPORT FY2019, at 55 (July 31, 2019).

Moreover, since the COFINA plan became effective, approximately $17 billion of the prior COFINA bonds have been cancelled, and COFINA has issued

approximately $12 billion in new bonds. Those bonds have been traded more than 85,000 times, reflecting renewed confidence in Puerto Rico. Any attempt to unwind these transactions would result in a flood of litigation and improperly undermine the good-faith reliance of countless third parties.

Aurelius and UTIER have no right to challenge the COFINA restructuring plan, but the broad scope of their requested relief improperly threatens that plan. In particular, UTIER is not a creditor of COFINA, and thus has no standing to challenge the plan. Moreover, Aurelius was a party to the COFINA settlement. *See* No. 17-bk-03284 (D.P.R.), Dkt. 560 ¶ 40. As part of the settlement, in exchange for valuable consideration, Aurelius agreed not to seek any remedy in this appeal that would undermine the finality of the settlement between the Commonwealth and COFINA. Dist. Ct. Dkt. 6123 at 2. There is no legal basis for Aurelius to retract this agreement. Yet Aurelius's proposed relief undermines the foundation of the COFINA restructuring plan because the settlement underlying the plan was approved and made binding in the Commonwealth's own Title III case—a case that Aurelius seeks to dismiss.[8]

Third, dismissing the Title III proceedings would lift the automatic stay of creditor litigation against the Commonwealth, resulting in a chaotic and enormously disruptive wave of lawsuits seeking repayment of Puerto Rico's debts. Immediately upon expiration of the temporary stay resulting from enactment of

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[8] The COFINA Senior Bondholders' Coalition preserves its argument that the plan should also be maintained on equitable mootness grounds. While not referring to COFINA specifically, Aurelius (Br. 68) and UTIER (Br. 83) argue against the application of equitable mootness.

PROMESA, *see* 48 U.S.C. § 2194(b), (d), hedge funds holding billions of dollars in general obligation bonds (including Aurelius), other creditors, and bond insurers sued the Commonwealth, *see, e.g.*, Andrew Scurria, *Puerto Rico Creditors Sue Over Debt-Cutting Plans*, WALL STREET JOURNAL, May 2, 2017, *available at* http://www.wsj.com/articles/puerto-rico-hit-with-lawsuits-after-litigation-freeze-expires-1493732250. The automatic stay of such litigation, under 48 U.S.C. § 2170, was a primary consideration in the Board's decision to file Title III proceedings. *See* Press Release, Financial Oversight and Management Board for Puerto Rico, *Oversight Board Certifies Title III Filings* (May 3, 2017). In the event the Title III petitions are dismissed, there would be no basis for a stay, and Puerto Rico's creditors would be free to re-file lawsuits against the Commonwealth, drowning the Commonwealth in litigation and further impeding its recovery.

Fourth, refusing to apply the *de facto* officer doctrine would render voidable all other actions taken by the Board to stabilize Puerto Rico's economy and restore Puerto Rico's ability to pay debts as they come due—including the numerous balanced budgets and fiscal plans for Puerto Rico and its instrumentalities that the Board has approved and certified. *See, e.g.*, FINANCIAL OVERSIGHT & MANAGEMENT BOARD, FOMB ANNUAL REPORT FY2018, at 10 (July 30, 2018) ("[F]or FY2019, the Oversight Board implemented a consolidated budget review process … [and] certified budgets for each public corporation with its own fiscal plan."). Under PROMESA, a budget cannot exist unless it is certified by the Board and complies with the fiscal plan approved by the Board. *See* 48 U.S.C. §§ 2141-42. Thus, without application of the *de facto* officer doctrine, there is no valid Commonwealth budget and there has been none since the passage of PROMESA.

The effect of invalidating two years of budgets for the Commonwealth after the fact would be disastrous. For instance, the most recent budget for the Commonwealth certified by the Board contains numerous appropriations to third parties, including an oncology hospital, a University of Puerto Rico scholarship fund, legal clinics, farmers, and museums. FY20 CERTIFIED BUDGET FOR THE COMMONWEALTH OF PUERTO RICO, at 16, 31, 33, 59, 66 (June 30, 2019). More generally, the budgets concern public services across Puerto Rico. These appropriations would all be called into question in the event the Court declines to apply the *de facto* officer doctrine, as creditors would undoubtedly attempt to claw back funds through interminable litigation. Indeed, the broad scope of the relief requested by Aurelius and UTIER, discussed *infra* at 36-37, establishes the seriousness of this risk.

Similarly, efforts to stabilize Puerto Rico's economy pursuant to the Board's certified fiscal plans would be called into question. The most recent fiscal plan certified by the Board—like its predecessors—proposed several structural reforms and fiscal measures "essential to restoring growth, opportunity, and prosperity to the people and businesses of Puerto Rico, and to making the Government of Puerto Rico more efficient, effective, and responsive to its residents." FINANCIAL OVERSIGHT & MANAGEMENT BOARD, 2019 FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH & PROSPERITY 9 (May 9, 2019). Among them, the May 2019 fiscal plan proposed human capital, power sector, infrastructure, and other reforms that could increase growth by more than 1%. *See id.* at 10. The plan likewise proposed fiscal measures—such as creation of a centralized office instituting fiscal controls and accountability, healthcare reform, and tax reform—that would increase revenue and reduce government

spending. *See id.* at 11. The government of Puerto Rico has taken steps to implement the Board's prior proposals. *See, e.g.*, FINANCIAL OVERSIGHT & MANAGEMENT BOARD, FOMB ANNUAL REPORT FY2018, at 6-7 (July 30, 2018). All of the steps would be voidable if the *de facto* officer doctrine is not applied here.

As the first fiscal plan approved by the Board acknowledged, it was "the first step toward a permanent resolution of the Commonwealth's ongoing crisis." GOVERNMENT OF PUERTO RICO, COMMONWEALTH OF PUERTO RICO FISCAL PLAN 4 (Oct. 24, 2016). Puerto Rico's recovery already suffered a major setback when Hurricane Maria devastated the island in 2017—causing "unprecedented and catastrophic damage to Puerto Rico, its people, and its businesses," and an estimated 4.7% decline in GNP for fiscal year 2018, *id.*—and should not suffer another from invalidation of the Board's actions to date.

2. Aurelius and UTIER err in attempting to minimize the disruption and harm that would occur here.

First, Aurelius (Br. 69-70) and its *amici* greatly understate the nature of the relief sought. According to them, the relief would concern only dismissal of the Commonwealth and PRHTA Title III proceedings. While Aurelius uses the word "dismiss," what it actually means is that all of the prior actions in those proceedings are void. *See, e.g.*, Aurelius 1st Cir. Br. 66-67 ("The Board's actions are invalid; it cannot act until it is properly constituted. … [T]he Board cannot act as the Commonwealth's … representative, and the Title III petitions should be … terminated."). And as noted above, the voiding of all actions in the Title III proceedings would be enormously harmful to the public.

Moreover, the relief requested goes beyond dismissal of the Title III actions. While Aurelius fails to mention it in its brief, it preserved much broader requests for relief in the district court: "The Board's *other actions, including certifying the Fiscal Plan, are also void*, and Aurelius reserves the right to challenge them in this proceeding." Dist. Ct. Dkt. 913 at 35 n.19 (emphasis added); *see also* Dist. Ct. Dkt. 6123 at 1 ("Aurelius … reserves its rights to challenge any and all actions taken by the Financial Oversight and Management Board for Puerto Rico … since the Board's inception ….").[9] Another party—Autonomy Capital (Jersey) LP—also joined this reservation of rights. Dist. Ct. Dkt. 5987. Similarly, UTIER's request for relief (Br. 8) seeks "an order declaring void *ab initio all prior acts of the Board* and barring all its further actions until it is constitutionally appointed" (emphasis added). To be sure, Aurelius and UTIER do not have standing to actually invalidate every action of the Board. Nonetheless, given the interconnected nature of bankruptcy proceedings (where paying one creditor may leave less for another), there is no question that their wide-ranging challenges would apply to an enormous number of Board actions. *See* UTIER Br. 69 ("The remedy UTIER seeks should be granted. Thus, all the actions of the Board should be declared null and void as they represent an injury to UTIER and the People of Puerto Rico.") (internal citations omitted). Neither Aurelius nor UTIER makes any attempt to reconcile their requests for relief with the damage

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[9] Aurelius also argued in the First Circuit that "the Board's certifications of Fiscal Plans are a nullity and cannot satisfy the requirements of PROMESA or otherwise make the Commonwealth or PRHTA eligible for relief under Title III." Aurelius 1st Cir. Br. 66-67.

caused by invalidation of the budgets and fiscal plans approved by the Board.[10]

Second, Aurelius's suggestion (Br. 69-70) that this Court should stay its decision "for a brief period" pending confirmation of a new Board, which could then "decide which of the unconstitutional Board's actions should be ratified," is highly speculative and unworkable. To begin with, Aurelius's concession that there is a need for such a stay shows that invalidating past Board actions would be unacceptable. Moreover, there is no way to know when, if ever, the Board members re-nominated to their positions (or new Board members) will be confirmed by the Senate. Aurelius ignores that the current Board members were in fact nominated (or re-nominated) by the President to their current positions over three months ago, and the Senate has yet to act on their confirmation. If the Board members are not confirmed during the brief period of the stay, then the chaos discussed above would ensue when the stay expires.

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[10] The breadth of the requested relief also disposes of Aurelius's (Br. 64-65) and UTIER's (Br. 81) argument that affording the Board's prior actions *de facto* validity would discourage Appointments Clause challenges or deprive them of Article III standing. This Court could grant Aurelius and UTIER dismissal of the Title III proceedings (though it should not do so), while still holding that the Board's prior acts (including in the Title III proceedings to date) are *de facto* valid. This relief would plainly be meaningful to Aurelius and UTIER because they would still be affected by the Board going forward. *See, e.g.*, UTIER Br. 83 ("[T]he continuation of the Board's operations—despite their appointments being unconstitutional—has aggravated (and will continue to aggravate) Petitioner's injuries, as well as for the People of Puerto Rico.").

Even if a Board is confirmed in time, Aurelius's theory depends on the uncertain proposition that the new Board would immediately ratify all (or nearly all) of the prior Board's actions. But there is no way to know whether the new Board would seek such ratification. And Aurelius's supposition that ratification will occur is disingenuous because, if it occurs, it would defeat the entire purpose behind Aurelius bringing its cross-petition and arguing against application of the *de facto* officer doctrine. Even assuming the Board did seek to ratify, the process would be far more difficult than Aurelius suggests, and would likely result in even more litigation. Ratification requires "full knowledge of the decision to be ratified" and a "detached and considered judgment," which can require "an independent evaluation of the merits." *See Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016). The Board has made countless decisions in its three-year existence, but even just "an independent evaluation of the merits" of the Board's decisions to institute Title III proceedings and to certify fiscal plans and budgets for the Commonwealth and its instrumentalities would be a monumental undertaking for any newly-composed Board. The difficulty is exacerbated by the fact that the Board members are uncompensated and do not work full time. In any event, a re-constituted Board's ratification decisions themselves would likely prompt more litigation over whether the ratification was adequate. *See Advanced Disposal*, 820 F.3d at 603.

Third, Aurelius wrongly asserts (Br. 64) that dismissing the Title III proceedings would result in only mild disruption "because only *timely* challenges can invalidate unconstitutional officers' actions," and "[e]very party in every Title III proceeding … has been on notice of the Board's constitutional defects for

years." As explained above, Aurelius and UTIER have already made a timely (if somewhat overbroad) challenge to *every* action of the Board. Moreover, even assuming that other parties to the Title III proceedings had to raise the issue earlier, there are countless individuals and entities affected by the Board fiscal plans and budgets that are not parties, have presumably waived nothing, and could potentially bring claims to invalidate the plans and budgets in the wake of this Court's decision.

B. Any Supposed Appointments Clause Violation Was Merely Formal, Not Functional, And Certainly Insufficient To Justify The Enormously Harmful Remedy Sought

In comparison to the overwhelming harm that would result from invalidating the Board's past actions, the violation of the Appointments Clause (assuming one exists) was minimal. The purpose of the Appointments Clause is to give the President broad authority but with some constraints from Congress. *See Ryder*, 515 U.S. at 183; *see also Edmond v. United States*, 520 U.S. 651, 660 (1997) ("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.").

Here, that functional purpose was fully realized, and there was at most a formal violation. The President chose every member of the Board, and while some were chosen from particular lists, the President always had the option of going outside the lists and having the other choices go through the advice and consent process in the Senate. Thus, any additional

constraint on the President was *de minimis*.[11] Moreover, while the Senate did not approve each member of the Board, it did approve PROMESA and its process for providing certain lists of members (by an overwhelming majority of 68 to 30). The opportunity for specific congressional members to provide lists further ensured a congressional check on the President. Thus, while the process did not comply in every detail with the Appointments Clause, any violation did virtually nothing to diminish the constitutional interest in accountability and separation of powers.

The minimal nature of the violation is especially clear based on the overlay of the Territories Clause. Given the well-established breadth of the Territories Clause, there is no dispute that the Board could be appointed in any manner if it exercised authority akin to the Puerto Rico governor and legislature. That must be true because the Puerto Rico governor and legislature are themselves not appointed, but elected (which has long been true for the governing bodies of numerous territories). But the distinction between exercising federal and territorial law is tenuous at best, given this Court's recognition that "federal and territorial [officers] do not derive their powers … from independent sources of authority." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016) (brackets, citation, and internal quotation marks omitted).

In any event, there is no question that a territorial government can exercise some federal authority. *See* Aurelius Br. 45 & n.10. Thus, the *only* possible objection to the Board here is that the authority it exercises is slightly too federal in character. Even assuming

[11] Indeed, President Trump re-nominated all of the current Board members even though he was not constrained to do so.

such an objection suffices for a constitutional violation (and it does not), it does not suffice to require a remedy that would undermine the Puerto Rico economy and harm thousands of bondholders and other innocent third parties, including those who depend on Puerto Rico's public services.

C. The Board Acted In Good Faith

The appointments here and the Board's exercise of its powers notwithstanding an Appointments Clause challenge were plainly reasonable and in good faith. Aurelius (Br. 62) and UTIER (Br. 75-79) argue that the *de facto* officer doctrine is inapplicable here because the nature of the appointments was questioned, first by a few Senators and then by Aurelius and UTIER. But there is no legal basis for giving two Senators or litigants an effective veto on the actions of officials simply by raising an Appointments Clause issue. Moreover, there was certainly, at the very least, a strong legal basis for the Board to believe it was properly appointed given the breadth of the Territories Clause and the district court ruling affirming the validity of the appointments. This Court has recognized that such a strong basis, even if ultimately rejected, suffices for good faith and for officials to enforce a statute even if there is a cloud of constitutional uncertainty over the statute. *See Lemon*, 411 U.S. at 207 (plurality opinion) ("That there would be constitutional attack on Act 109 was plain from the outset. But this is not a case where it could be said that appellees acted in bad faith or that they relied on a plainly unlawful statute. In this case, even the clarity of hindsight is not persuasive that the constitutional resolution of *Lemon I* could be predicted with assurance sufficient to undermine appellees' reliance on Act 109.").

Indeed, the implication of Aurelius's argument is that the Board should have sat on its hands and done nothing for years until the Appointments Clause litigation was finally resolved. But this would have upended the presumption of constitutionality favoring all laws. It also would have been nonsensical, in clear conflict with PROMESA (which required prompt action by the Board), and extraordinarily detrimental to all stakeholders in the Puerto Rico economic and humanitarian crisis. And as *Lemon* explained, such an approach would improperly undermine the initiative of the political branches. 411 U.S. at 207-08 (plurality opinion) ("Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike."). Accordingly, Aurelius and UTIER's contention that every party in every Title III proceeding should have acted on a presumption of unconstitutionality based solely on their arguments should be rejected.[12]

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[12] *Amici* raise two additional arguments against application of the *de facto* officer doctrine not advanced by the parties, but both are meritless. *First, amicus* Pacific Legal Foundation argues (Br. 4-8) that the *de facto* officer doctrine is inapplicable where the office itself is invalid. But here, there is no question that the office of the Oversight Board is legal, and that it could be filled if the members were appointed by the President and approved by the Senate. Thus, the *office* is valid. *Second, amicus* Washington Legal Foundation argues (Br. 9-12) that the Board members lack Article III standing, but there is no legal basis to say that Board members lack standing to defend their own appointment. The Washington Legal Foundation cites cases concerning whether an officer can appear on behalf of the United States,

D. The Court Of Appeals Properly Stayed Issuance Of Its Mandate Pending Final Disposition In This Court

The arguments of Aurelius (Br. 66-69) and UTIER (Br. 83) that the *de facto* officer doctrine could not validate actions taken after the First Circuit's February 15 decision erroneously disregard the stay of the First Circuit's mandate. The First Circuit's judgment—that the Board's appointment was unconstitutional—does not take effect until its mandate issues. *See* Fed. R. App. P. 41. The court initially stayed its mandate for 90 days, which Aurelius conceded was proper "pending a constitutional appointment of Board members." JA177; No. 18-1671, Aurelius Reply 40 ("The Board further agrees [with Aurelius] that the Court may stay its mandate …."). The First Circuit subsequently stayed its mandate pending disposition of proceedings in this Court, No. 18-1671, 7/2/19 Order, and plainly had discretion to do so.

Fed. R. App. P. 41(d)(2)(B)(ii) provides that, once a petition for certiorari has been filed, a stay of the court of appeals' mandate "continues until the Supreme Court's final disposition." *See, e.g.*, *June Med. Servs., LLC v. Gee*, 139 S. Ct. 663 (2019) ("In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court."). This is consistent with the purpose of a stay, which, like a preliminary injunction, "prevent[s] some action before the legality of that action has been *conclusively determined*." *Nken v. Holder*, 556 U.S.

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but the Board has not purported to do so—it is appearing on behalf of itself, and the United States has intervened separately, and both have standing to protect their interests.

418, 428 (2009) (emphasis added). Indeed, "a stay simply suspends judicial alteration of the status quo," *id.* at 429 (internal quotation marks and alteration omitted), and the First Circuit's stay of its mandate preserved the status quo—a functioning Board—pending conclusive determination of the constitutionality of the Board's appointment in this Court.

Aurelius attempts (Br. 67) to turn the status quo on its head in arguing that "the First Circuit has purported to allow seven federal officers to continue to act in an official capacity *after* they were determined to have been appointed unconstitutionally." The constitutionality of the Board's appointment will not be conclusively determined until this Court has decided the question, and Aurelius's argument thus amounts to a request for an injunction. But Aurelius was not entitled to an injunction immediately upon the First Circuit's determination that the Board's appointment was unconstitutional, and Aurelius makes no attempt to demonstrate that the First Circuit abused its discretion in declining to issue one. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.").

E. In The Alternative, The *De Facto* Officer Doctrine Should Be Applied To All Board Actions Prior To The Court Of Appeals' Decision

In the alternative, and at a minimum, this Court should affirm the application of the *de facto* officer doctrine to all Board actions prior to the First Circuit's decision on the Appointments Clause.

First, there is no plausible basis for questioning the Board's good faith in undertaking those actions. Before the First Circuit's decision, the district court had rejected the Appointments Clause challenge to the Board. Thus, the Board had no reason to believe that the appointments were unconstitutional, and every reason to perform its congressionally mandated work in restoring the economy of Puerto Rico.

Second, the greatest disruption would occur from invalidating the Board's actions taken before the First Circuit's decision. To be sure, the Board has engaged in very significant actions since that decision. However, it would be even more harmful to attempt to undo Board actions many months and even years in the past—including the COFINA restructuring plan and issuance of new COFINA bonds, and passage of fiscal plans and budgets.

Third, invalidating Board actions after the First Circuit's decision would ensure that Aurelius and UTIER receive very substantial relief. They unquestionably challenge numerous actions of the Board during that time. Accordingly, invalidating Board actions before the First Circuit's decision is not necessary to provide relief, and the balance of equities weighs strongly against doing so at the expense of thousands of innocent third parties.

CONCLUSION

The judgment of the court of appeals on the Appointments Clause issue should be reversed, but if it is affirmed, then the judgment on the *de facto* officer issue should be affirmed. In the alternative, the judgment on the *de facto* officer issue should be affirmed as to actions prior to the First Circuit's decision.

Respectfully submitted,

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September 19, 2019