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

In the Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *Petitioner*,

v.

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

AURELIUS INVESTMENT, LLC, ET AL., *Petitioners*,

v.

COMMONWEALTH OF PUERTO RICO, *Respondent*.

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

v.

AURELIUS INVESTMENT, ET AL., *Respondents*.

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

BRIEF FOR THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

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Additional Captions Listed on Inside Cover

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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

I. Respondents ask this Court to read the Appointments Clause in a manner that is radically at odds with the text of the Clause, this Court's precedents, longstanding historical practice, and fundamental constitutional principles. From the adoption of our Constitution to the present, Congress has exercised its Article IV power to create territorial offices that are filled in ways that do not comply with the Appointments Clause, and that do not comply with other separation-of-powers constraints that apply to the structure of the federal government. Before this case, no court had ever suggested that Congress lacked the power to do so.

Under the straightforward analysis established by this Court's precedents, the Board members are unquestionably territorial officers who need not be selected in the manner the Appointments Clause prescribes for "Officers of the United States." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973); *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322-323 (1937). In establishing the Board within the territorial government, Congress acted pursuant to Article IV to delegate to the Board only local authority to act *for the territory*. PROMESA establishes a legal framework applicable solely to the territories, and, as in *Palmore*, it confers on the relevant officers responsibility to administer that legal framework for, and in the interests of, the local territory. Aurelius's primary argument to the contrary is that the resolution of Puerto Rico's financial crisis, and therefore PROMESA, have nationwide implications. But territorial governance will *always* have broader effects in the United States. Those effects cannot be the meas-

ure of the Board's federal or territorial character. If they were, every territorial official would be an "Officer of the United States."

II. Because PROMESA does not violate the Appointments Clause, this case presents no occasion to consider whether the Court of Appeals properly exercised its remedial discretion. In all events, it did.

In according de facto validity to the Board's past acts, the First Circuit properly applied the centuries-old principle that any remedy for an appointments violation must balance the compelling public interest in avoiding the chaos caused by retrospective invalidation of government actions against private interests in meaningful relief. *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976).

Granting the retrospective relief that respondents seek—dismissal of the Title III cases—would threaten the Commonwealth and its people with devastating consequences. Creditors would be free to seek to collect billions of dollars as soon as the "brief" stay that Aurelius proposes (Br. 50) expires—which could be before Board members are confirmed and able to ratify their past actions. And Aurelius would remain free to challenge any ratification, thus creating further disruption, expense, and delay—burdens that the Puerto Rican people will bear.

In contrast, respondents' interest in retrospective relief is vanishingly small. Aurelius's argument for dismissal depends on its mistaken assertion that in filing the Title III cases, the Board acts as a prosecutor, bringing the government's enforcement power to bear. Nothing could be further from the truth. The Title III cases are quasi-bankruptcy proceedings, in which the Board asks for relief as the debtor-entities'

representative. From respondents' perspective, the Board is functionally indistinguishable from a municipal debtor representative that files for bankruptcy. Creditors like respondents routinely participate in bankruptcy cases instituted by private individuals or municipal officials not appointed under the Appointments Clause; Aurelius cannot explain why doing so here injures it in any way.

Instead, Aurelius advances the extraordinary argument that courts have no discretion whatsoever to leave an invalidly appointed officer's past actions in place—regardless of the nature of the officer's authority or the constitutional injury suffered. Aurelius invokes this Court's decisions concerning appointment defects affecting adjudicators and prosecutors. See *Ryder* v. *United States*, 515 U.S. 177 (1995). But the Board is not "adjudicating" the Title III cases in any respect. Nor does it have any prosecutorial authority. Aurelius has thus offered nothing that could justify invalidating the Board's past actions.

ARGUMENT

I. THE BOARD MEMBERS ARE TERRITORIAL OFFICERS WHO NEED NOT BE APPOINTED IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE.

A. The Appointments Clause does not govern congressionally created territorial offices that administer territorial law rather than laws of nationwide application.

The text of the Appointments Clause, two hundred years of precedent, historical practice, and basic constitutional principles establish that the nature and scope of an officer's authority is the critical dividing line for determining who is an "Officer of the United

States" within the meaning of the Clause. When Congress acts pursuant to Article IV to delegate to an official only "municipal authority" to act with respect to and for the territory, the Appointments Clause does not apply. Such officials are territorial officers, not officers of the United States. *McAllister* v. *United States*, 141 U.S. 174, 184-185 (1891); see *Palmore*, 411 U.S. at 407-411; *American Insurance Co.* v. *356 Bales of Cotton*, 26 U.S. 511, 546 (1829) ("*Canter*"); Board Opening Br. 16-26.

1. Respondents refuse to come to grips with a basic premise of our constitutional system: when Congress legislates under Article IV to provide for governance of the territories, it is subject to different constraints than when it legislates under Article I to provide for governance of the nation as a whole.

Because two hundred years of unbroken precedent leave it no choice, Aurelius is forced to concede (Br. 36-37) that the Constitution's Vesting Clauses and nondelegation principles do not restrict Congress's choices about how to structure territorial governments. Aurelius nonetheless insists (Br. 34) that "there is no Article IV exception to the Appointments Clause." But the Board does not rely on any Article IV *exception*; rather, like the Vesting Clauses, the Appointments Clause *by its terms* does not apply when Congress delegates only the authority to administer laws that govern territorial matters for the benefit of the territory. Aurelius offers no explanation for why the Appointments Clause, which plays an important but subordinate role in effectuating the separation of powers, would govern the structure of territorial government when those foundational separation-of-powers requirements do not.

Aurelius cites *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) ("*MWAA*"), for the proposition that Congress's exercise of its Article IV authority is subject to separation-of-powers scrutiny. If anything, *MWAA* confirms the error of Aurelius's approach. This Court engaged in separation-of-powers analysis only after concluding that the regional airport authority board "qualif[ied] as a congressional agent *exercising federal authority*." *Id.* at 267 (emphasis added). As the Court observed, airport-oversight authority had previously been lodged in federal agencies, and Congress created the board not to regulate any particular territory but to regulate national instrumentalities (the airports) to effectuate national policy. *Id.* at 255, 258, 266. The opposite is true here.

The reason that the Appointments Clause does not govern the selection of territorial officers is ultimately the same reason that the Vesting Clauses and the nondelegation doctrine do not limit the way territorial governments may be structured. Territorial executive officers "do not exercise the national executive power," *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 913 (1991) (Scalia, J. concurring), just as territorial judges do not exercise the judicial power of the United States, *Clinton* v. *Englebrecht*, 80 U.S. 434, 447 (1871), and territorial legislatures do not exercise the legislative power of the United States, *Cincinnati Soap Co.*, 301 U.S. at 322-323. Officials who exercise territorial power simply do not act as "Officers of the United States." So they need not be appointed in conformity with the Appointments Clause.

2. Whether the Appointments Clause governs a particular office thus depends principally on whether

Congress has conferred on that office the authority to implement laws of nationwide application, or laws of primarily territorial concern. In *Palmore*, this Court explained that the following considerations answer that question: (1) whether Congress is acting pursuant to its Article IV power (or its similar plenary power over the District of Columbia), rather than its Article I powers for the governance of the nation; (2) whether Congress characterized the resulting entity as federal or territorial; and, most importantly, (3) whether the powers of the office and the law that it enforces are of predominantly local concern or instead involve primarily laws of nationwide applicability and national concern. 411 U.S. at 406-408.

The first two *Palmore* considerations focus on whether Congress was exercising its Article IV powers to make needful rules for the territories, as opposed to its authority to make law for the nation as a whole. Contrary to Aurelius's argument (Br. 29), examining those considerations does not involve "defer[ring]" to labels; the "expression of the intent of the Congress" is unquestionably relevant in classifying an office. *Palmore*, 411 U.S. at 399. And placing an office within the territorial government has important substantive consequences: it reflects Congress's intent that the officeholders should act on behalf of the territory and its people. See *Barnes* v. *District of Columbia*, 91 U.S. 540, 546 (1875) (municipal official acts as the municipality's "representative").

The third, and ultimately determinative, *Palmore* consideration examines whether the officer has authority to enforce laws of nationwide application, or instead to address only matters of local territorial concern. This analysis is hardly "novel." Aurelius Br.

29. It addresses what has mattered in every separation-of-powers challenge to the structure of territorial government that this Court has considered—whether an official is exercising authority to govern the territory or the nation. *Cincinnati Soap*, 301 U.S. at 322-323 (nondelegation); *Binns* v. *United States*, 194 U.S. 486, 491-492 (1904) (Uniformity Clause); *Canter*, 26 U.S. at 546 (Article III).

The question in *Palmore* was whether judges of the D.C. local court were exercising the judicial power "of the United States" within the meaning of Article III because Congress had created the court and its judges decided cases under a criminal code enacted by Congress. To answer that question, the Court examined whether Congress had exercised its plenary power to provide for local governance in the District, and whether the judges' authority was primarily "local," in that they decided cases under federal "statutes that are applicable to the District of Columbia alone," rather than statutes of "nationwide application." 411 U.S. at 406-408. Because both Article III and the Appointments Clause are textually limited, respectively, to courts and officers "of the United States," neither provision constrains Congress's use of its Article IV authority to provide for the appointment of officials acting primarily with respect to and for the benefit of the territory.

B. Board members are territorial officers who need not be appointed in accordance with the Appointments Clause.

Board members are territorial officers, not "Officers of the United States." Congress declared in PROMESA that it was exercising its Article IV authority to alter the structure of the Commonwealth government to include the Board, and the offices of

the Board members, as part of that government. 48 U.S.C. § 2121. The Commonwealth government pays for the Board's work. *Id.* § 2127(b)(1), (b)(2)(A). The federal government therefore has no "power of the purse" over the Board. And the Board is not subject to the full array of laws that would apply if it were a federal entity. Board Opening Br. 49-50. Moreover, by placing the Board in the territorial government, Congress signaled that the Board should act on behalf of the territory and its people. *Barnes*, 91 U.S. at 546.

Most fundamentally, the nature and scope of the authority Congress conferred on the Board make clear that it is a territorial entity. The Board has no power to enforce any federal law of "nationwide application." *Palmore*, 411 U.S. at 397. It does not exercise its authority "on behalf of the United States" as officers subject to the Appointments Clause do. *Edmond* v. *United States*, 520 U.S. 651, 665 (1997). To the contrary, PROMESA's provisions setting forth the Board's responsibilities fall squarely within the category of statutes directed to administration of local affairs. *Palmore*, 411 U.S. at 406-407. PROMESA is directed solely to the territories; it establishes a legal framework applicable solely to the territories; and it confers on the Board the responsibility to administer that legal framework for, and in the interests of, Puerto Rico alone.

1. The best evidence that PROMESA is directed to matters of territorial, not national, concern is that it establishes the Board to act in the interests of the Commonwealth on a matter of fundamental territorial concern: restoring Puerto Rico's economy to fiscal stability. PROMESA charges the Board with a single overarching mission: to "provide a method for [the]

territory to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a). PROMESA thus defines the Board's objective entirely in terms of the territory, and in pursuing that objective, PROMESA directs the Board to address a problem of territorial governance with profound direct consequences for the territory and its citizens.

First, PROMESA authorizes the Board to certify fiscal plans that, "*with respect to the territorial government or covered territorial instrumentality*, provide a method to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2141(b)(1) (emphasis added). PROMESA requires the Board to ensure that the Commonwealth's fiscal plans satisfy numerous requirements, all of which are directed to restoring the financial stability of the Commonwealth and advancing the interests of its people. For instance, the Board must ensure that a fiscal plan provides for "the funding of essential public services," "adequate funding for public pension systems," and "capital expenditures and investments necessary to promote economic growth" in Puerto Rico. *Id*. § 2141(b). The nature and scope of the Board's authority over fiscal matters is "applicable only within the boundaries of the particular territory." *Palmore*, 411 U.S. at 403.

Second, PROMESA authorizes the Board to act as "the representative" of the territorial government (not the United States) in filing Title III petitions to restructure the government's debts. 48 U.S.C. § 2175. In so doing, the Board acts *for the territory*: it takes actions "on behalf of the debtor" instrumentality, *ibid*., and it may file a Title III petition only if the territorial instrumentality desires it, *id*. § 2162(3). The Board thus pursues the interests of Puerto Rico,

not the United States, in PROMESA's Title III proceedings.

In both respects, PROMESA transfers to the Board fiscal planning, budgetary, and litigation powers that previously were lodged in Puerto Rico's executive and legislative branches. See Board Opening Br. 50-51. Moreover, PROMESA instructs the Board to act on behalf of the territory, and does not instruct it to consider any broader federal or nationwide interests. PROMESA is therefore directed to matters of territorial concern. And *Palmore* teaches that the Board members, whose sole responsibility is to execute that law of territorial concern, are not "Officers of the United States."

2. Respondents' contrary arguments are meritless.

a. Respondents contend that PROMESA is not "equivalent to [statutes] enacted by state and local governments * * * for the general welfare of their citizens" because the resolution of Puerto Rico's financial crisis is of national concern. Aurelius Br. 31 (citation omitted); UTIER Br. 48-55. But all territorial governance is, broadly speaking, of national concern. When Congress exercises its Article IV authority to organize territorial governments, it does so in part because it has determined that effective territorial governance is in the United States' interests. And given the realities of financial markets, territorial financing will necessarily have nationwide effects. Those effects cannot be the measure of the Board's federal or territorial character. If they were, then every territorial treasury secretary would be an "Officer of the United States."

Provisions in territorial organic statutes enacted by Congress often have financial implications for the

United States as a whole. But the territorial officials who implement those provisions have never been considered "Officers of the United States." For instance, Aurelius asserts (Br. 21) that Guam's federally established debt limit protects national, and not merely territorial, interests, 48 U.S.C. § 1423a; yet the Guam officials Congress charged with enforcing that limit are locally elected and appointed. See Board Opening Br. 44. Similarly, the Jones Act authorized the treasurer of Puerto Rico, who was appointed by the governor, to select U.S. banking institutions to serve as repositories of the territory's funds. 39 Stat. 951, 956, §§ 15, 34, 38-39 (Mar. 2, 1917).

In the modern era of territorial home rule, Congress has vested territorial governments with the power to enact laws with a significant impact on the United States and creditors nationwide—but no one would think that these territorial laws represent an exercise of federal authority or that territorial officials implementing them are "Officers of the United States." For instance, before PROMESA was enacted, the government of Puerto Rico enacted laws creating new classes of bonds and establishing territorial instrumentalities to administer the debt. Elizabeth Whiting, *Puerto Rico Debt Restructuring: Origins of a Constitutional and Humanitarian Crisis*, 50 U. Miami Inter-Am. L. Rev. 237, 247 (2019). The territorial executive then sold billions of dollars in bonds to creditors across the United States. *Id*. at 247-248. Under Aurelius's own definition, these actions are "equivalent to those [taken] * * * by state and local governments * * * for the general welfare of their citizens," despite their significant effects on nationwide financial markets. Aurelius Br. 31 (citation omitted). PROMESA is no different.

b. Aurelius next asserts (Br. 18, 31) that the Board has authority to bind parties throughout the United States. Not so.

PROMESA's Title III restructuring proceedings will be binding on creditors nationwide only by virtue of orders issued by an Article III court. The Board *litigates* Title III proceedings on behalf of the Commonwealth. Any restructuring must be *approved* by the court—and that confirmation is what has binding effect. 48 U.S.C. § 2174(b); 11 U.S.C. § 944(a). In that respect, Title III cases are no different from a bankruptcy proceeding brought by a private party or a municipality: the debt restructuring is binding on all creditors because the court orders it, not because the party invoking bankruptcy exerts any coercive governmental power. The Board has no more authority to bind creditors than did Detroit officials when they filed for bankruptcy on the city's behalf.

Nor can it matter (Aurelius Br. 16) that the Board files Title III petitions in federal court. Individuals and municipalities routinely invoke federal statutes in federal court. Again, no one would think that Detroit officials were acting as "Officers of the United States" because they filed for bankruptcy in federal court. Moreover, the Board does not file suit *on behalf of the United States*; instead, as PROMESA directs, it files on behalf of the Commonwealth. 48 U.S.C. §§ 2162, 2175. The Board's authority is therefore categorically different than that of the Federal Election Commission in *Buckley* (Aurelius Br. 16): the Commission had authority to file suit to enforce a nation-

wide Article I statute on behalf of the federal government. *Buckley*, 424 U.S. at 124.[1]

Aurelius also asserts (Br. 18) that the Board has powers to "investigate nationwide," including with respect to disclosure practices for Puerto Rican bonds in the retail market. 48 U.S.C. § 2124(o). But Congress has not given the Board the nationwide investigative authority that federal agencies possess. It has no more authority to conduct a nationwide investigation than does any other entity within the government of Puerto Rico. The Board's investigative jurisdiction is limited by Puerto Rico's long-arm statute, 48 U.S.C. § 2124(f)(1), and its subpoena authority relies on enforcement by Puerto Rico courts under Puerto Rican law, 48 U.S.C. § 2124(f)(2). Thus, the Board may exercise investigative powers beyond Puerto Rico only to the extent that any other territorial official could do so.[2]

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[1] Aurelius also observes (Br. 16) that the Board has sued the Governor. But entities within the same government can and do sue each other when they have independent litigating authority, as the Board does. 48 U.S.C. § 2124(k); see, *e.g.*, *Virginia Office for Protection & Advocacy* v. *Stewart*, 563 U.S. 247, 257 (2011).

[2] Contrary to Aurelius's argument (Br. 18), the Board's investigative powers are entirely distinct from those of the administrative law judges in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018). *Lucia* held that ALJs' authority to *adjudicate* private rights—authority the Board does not possess—was significant enough that they qualified as officers, not mere employees. *Id.* at 2053. But more importantly, there was no dispute that ALJs, who act on behalf of federal agencies to enforce nationally applicable statutes enacted under Article I, were federal officers, unlike the Board's members.

c. Aurelius next highlights (Br. 19) aspects of the Board's relationship with the rest of the territorial government that, in Aurelius's view, indicate that Board members "stand above" that government. Aurelius mistakes independence for federal status.

The Board's ultimate authority to approve or reject fiscal plans and budgets does not mean it is federal. There is nothing intrinsically federal about having the final say within the territorial government on matters of fiscal policy. For example, the Commonwealth itself has established an independent agency, the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), to oversee other agencies' budgets, impose budget reductions, and make financial transactions on agencies' behalf. S.B. 211 § 8(b) (2017). Yet no one can credibly argue AAFAF officials are "Officers of the United States." And agency independence from the executive is hardly unusual; at the federal level, Congress has attempted to ensure that the Federal Reserve is insulated from excessive presidential control. 12 U.S.C. § 241.

Aurelius points to the fact that the Board members are appointed and removable for cause by the President. But, because Congress is the ultimate source of sovereignty in the territories, *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016), federal appointment and removal historically have been common attributes of territorial offices—including territorial judges. Those attributes have never sufficed to establish that an office is federal rather than territorial. *Territorial Judges Not Liable to Impeachment*, 3 Op. Att'y Gen. 409, 410-411 (1839); *McAllister*, 141 U.S. at 184-186, 188-189. Congress has provided that numerous territorial and D.C. officers would be appointed by the federal government,

but not in ways that conform to the Appointments Clause—including the first Mayor of Washington in 1802, the D.C. Financial Responsibility and Management Assistance Authority, and territorial judges in American Samoa. Board Opening Br. 29-35.

Indeed, this Court has recognized that federal appointment and removal, without more, does not render an agency "a department of the United States government." *Metropolitan R.R. Co.* v. *District of Columbia*, 132 U.S. 1, 7-8 (1889). Analogizing to municipal government, the Court explained that because a mayor exercises only "powers of local legislation and control," *id*. at 8, it does not matter whether he is "elected by the people, or * * * appointed by the governor with the consent of the senate," *Barnes*, 91 U.S. at 545-546. Although Aurelius protests that these decisions considered the agencies' character for statutory purposes, their reasoning parallels that of *McAllister*, *Palmore*, and *Cincinnati Soap* in the constitutional context. *McAllister*, for instance, emphasized Congress's complete discretion to provide for presidential removal of territorial judges—while also holding that they were not judges "of the United States." 141 U.S. at 188. What matters is the local nature of an official's authority, not who appoints and removes him.

In this case, federal appointment and removal simply address the "exigencies of the situation"—namely, the Board's need to remain independent of the Commonwealth's political branches. *Metropolitan R.R.*, 132 U.S. at 8. That independence is critical to the Board's effectiveness, and common in fiscal agencies. And federal removal does not, as Aurelius would have it, make the Board beholden to the President; to the contrary, the Board members may only be re-

moved for cause, not for policy disagreements. That the Board is funded by the Commonwealth also facilitates its independence: neither Congress nor the President can control the Board's funding without amending PROMESA; yet the Commonwealth is not free to deprive the Board of funds either. 48 U.S.C. § 2127(b).[3]

C. Aurelius's "significant authority" test is misconceived.

Respondents cannot prevail under the straightforward approach that this Court applies to distinguish territorial from federal officials, so they insist that this Court should instead ask whether the Board "exercise[s] 'significant authority under the laws of the United States.'" Aurelius Br. 16; UTIER Br. 27. But respondents' "significant authority" test finds no support in this Court's precedents, cannot distinguish federal from territorial officials in any sensible way, is irreconcilable with the longstanding practice of the political branches, and lacks any grounding in constitutional principle.

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[3] There is no merit to the suggestion made by amicus The Autonomous Municipality of San Juan (at 15-18) that certain communications between the Board and federal officials reflect federal control of the Board. Amicus relies solely on inaccurate press characterizations of nonpublic documents. In fact, many of these documents involve federal officials' requests for information to facilitate the federal government's own actions in Puerto Rico, including the hurricane response, and none demonstrates federal direction or control.

1. Precedent, logic, historical practice, and constitutional principles refute respondents' reliance on Buckley*'s "significant authority" test.*

a. "[T]he exercise of significant authority pursuant to the laws of the United States marks * * * the line between *officer and nonofficer*." *Edmond*, 520 U.S. at 662 (citation and internal quotation marks omitted) (emphasis added). It has never been deployed to mark the line between territorial officers and federal officers. The test focuses on the *significance* of the official's authority—whether his responsibilities are sufficiently important to render him an officer subject to the Appointments Clause, rather than an employee. It does not address whether an official's authority is territorial in nature and scope or is instead exercised for "the United States considered as a political body of states in union." *Cincinnati Soap*, 301 U.S. at 322-323.

Buckley makes this clear. In articulating the "significant authority" standard, the Court recognized that the Appointments Clause was intended to prescribe the method of selection for "all persons who can be said to hold an office under the government about to be established under the Constitution." *Buckley*, 424 U.S. at 125 (quoting *United States* v. *Germaine*, 99 U.S. 508, 509-510 (1878)). The "government about to be established under the Constitution" was the *federal* government. Territorial governments, in contrast, are "not organized under the Constitution" in the sense that *Buckley* and *Germaine* used the term. *Benner* v. *Porter*, 50 U.S. 235, 242 (1850). Thus, nothing in *Buckley* (or any other decision of this Court) supports using the "significant authority" test to resolve the question presented here.

b. It would make little sense to use *Buckley*'s "significant authority" test to mark the line between territorial and federal officers. *Every* territorial officer who exercises significant authority does so "pursuant to the laws of the United States" as Aurelius understands that phrase—in other words, pursuant to congressional delegations of authority. Historically, most have done so directly because Congress itself has created the office and vested it with authority. That is true today of the elected governor and legislature of Guam and the Virgin Islands, and has been true of territorial officials since the founding. See 48 U.S.C. §§ 1422, 1423, 1571, 1591; see also, *e.g.*, 1 Stat. 50, 51 & n.a (Aug. 7, 1789); 2 Stat. 331 (Mar. 3, 1805). Some do so indirectly because, as in Puerto Rico, Congress has enacted legislation delegating to territorial citizens the authority to decide on the structure of their own government or the substantive content of territorial law. *E.g.*, 64 Stat. 319 (July 3, 1950). But all necessarily exercise authority "pursuant to the laws of the United States." Territories, unlike States or tribes, have no independent sovereignty that predates the formation of the United States in the Constitution. That was the very point of this Court's ruling in *Sanchez Valle*. See 136 S. Ct. at 1875.

Perhaps recognizing that its approach is irreconcilable with *Sanchez Valle*, Aurelius attempts (Br. 46-47) to confine that decision to the Double Jeopardy Clause. But *Sanchez Valle* cannot be distinguished on that ground. The Court examined the *source* of a territorial official's authority to enforce territorial statutes—the very inquiry that Aurelius argues should dictate application of the Appointments Clause. Respondents do not explain—and there is no evident reason—why the Appointments Clause inquiry would stop at the territorial legislature, requir-

ing the Court to ignore the source of authority for both the legislature that enacts a law and the officials who carry it out.

To the contrary, "territorial and federal laws * * * are creations emanating from the same sovereignty." *Puerto Rico* v. *Shell Co. (P.R.)*, 302 U.S. 253, 264 (1937); *Snow* v. *United States*, 85 U.S. 317, 320 (1873). Congress may "legislate directly in respect to the local affairs of a territory," or it may instead create territorial legislatures and "transfer the power of such legislation" to them. *Binns*, 194 U.S. at 491. A territorial legislature has authority to enact local law only because Congress delegated that authority, and it exercises that authority subject to congressional limitation or revocation. *Ibid.*; *Snow*, 85 U.S. at 320; *Sanchez Valle*, 136 S. Ct. at 1876. Likewise, a territorial official who administers statutes enacted by the territorial legislature exercises "power * * * conferred" by Congress. *Simms* v. *Simms*, 175 U.S. 162, 168 (1899).

A focus on the source of a territorial official's authority thus sheds no light in this context. If applied in a principled manner, that inquiry will always yield the conclusion that the official is an "Officer of the United States"—including in myriad instances in which respondents agree (Aurelius Br. 20; UTIER Br. 42) the Appointments Clause does not apply, such as territorial legislators and officials who execute territorial law. That is why the correct inquiry must focus on the *scope and nature* of the official's authority rather than its source, *i.e.*, whether the official enforces statutes directed to the territories or the nation as a whole.

c. Longstanding historical practice also shows that Aurelius's "significant authority" test is miscon-

ceived. From 1789 onward, hundreds of territorial (and D.C.) officials have "exercised significant authority pursuant to the laws of the United States" as Aurelius understands the phrase, but have not been selected using Appointments Clause procedures. For example, Congress enacted the laws that created the offices of Governor of Guam and of the Virgin Islands, and all of the authority that the officers filling these offices exercise flows from—is "pursuant to"—those federal statutes. 48 U.S.C. §§ 1422, 1591. Yet the Governors are elected, not appointed in conformity with the Appointments Clause. The same was true of the popularly elected Governor of Puerto Rico under the statute Congress enacted in 1947.[4] 61 Stat. 770, 770-771, § 1 (Aug. 5, 1947). Similarly, under the Jones Act, which established the structure of Puerto Rico's government from 1917 until 1952, the commissioner of the interior, the treasurer, and other inferior officers held offices created, and vested with significant authority, by federal statute. 39 Stat. 951, 955-957 § 13, 15-16, 18-19 (Mar. 2, 1917). Yet the Jones Act gave the Governor the power to fill those offices, subject to confirmation by the Puerto Rico Senate.

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[4] Aurelius argues (Br. 45-46) that Congress took "federal" authority away from the governor of Puerto Rico when it made the governor popularly elected in 1947, thus demonstrating that the governor was a federal officer before home rule, but not afterwards. But in establishing the Coordinator of Federal Agencies for Puerto Rico (Br. 46), Congress assigned the Coordinator advisory authority that had not previously been exercised by *any* officer, because Congress perceived a need for increased coordination among federal agencies in Puerto Rico. S. Rep. No. 80-422, at 3 (1947). That step does not suggest anything about Congress's view of the governor's constitutional status.

The history of the District of Columbia illustrates the same point. Congress created the office of Mayor by statute in 1802 and vested it with local governing authority. 2 Stat. 195, 196-97, §§ 5, 6 (May 3, 1802). Yet Congress gave to the President alone the authority to fill the office, with no requirement of Senate confirmation for what would be a principal officer if the Appointments Clause applied. Every year from 1803 to 1812 (when Congress changed the structure of the local government), Presidents Jefferson and Madison made annual appointments to fill the office, without any apparent concern about the Appointments Clause. 2 Stat. 195 (May 3, 1802) ("the mayor * * * shall be appointed, annually, by the President"). Their conduct reflects the shared contemporaneous understanding that territorial (or D.C.) governance was a separate sphere from national governance, and was subject to different constitutional standards. "James Madison took it for granted that Congress could create 'a municipal legislature' for the District of Columbia." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2197 (2018) (Alito, J., dissenting). Because that legislature would be directed to "local purposes," the legislators' appointments could be "derived from [the] suffrages" of the local residents, rather than the methods in the Appointments Clause. *The Federalist No. 43*, at 289 (James Madison) (Jacob E. Cooke ed., 1961). More recently, the members of the D.C. Financial Responsibility and Management Assistance Authority, who were appointed by the President alone, had primary responsibility for administering the District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, § 101(b), 109 Stat. 97.

The Northwest Ordinance of 1789 provides especially powerful confirmation that Aurelius's "signifi-

cant authority" test is misconceived. 1 Stat. 50 (Aug. 7, 1789). Every officer of the territorial government created by the Ordinance exercised authority pursuant to the laws of the United States (*i.e.*, the Ordinance itself), and many of those officials exercised significant authority. Board Opening Br. 28-29. But apart from the Governor, none was selected in conformance with the Appointments Clause. One house of the territorial legislature was popularly elected. The other was composed of appointees chosen by the President using lists compiled by the elected house and confirmed by the Senate. 1 Stat. 50, 51 n.a (incorporating 1787 Northwest Ordinance §§ 9, 11). That process did not comply with the Constitution's method for selecting "Officers of the United States," or federal legislative officials for that matter. Congress also gave the Territory's governor the power to select magistrates and other inferior officers, *ibid*. (incorporating § 7), again departing from what the Appointments Clause would require if it applied.

The Appointments Clause was not the only separation-of-powers principle that the 1789 Congress considered inapplicable to the territories. The Northwest Ordinance violates the core separation-of-powers principles set forth in Federalist 47, and given force by the Constitution's Vesting Clauses. *The Federalist No. 47*, at 323-31 (James Madison). The Ordinance mixed executive and legislative functions. And it mixed judicial and executive functions. Opening Br. of the Official Committee of Retired Employees of the Commonwealth of Puerto Rico 23 & n.14.; contra *The Federalist No. 47*, at 323-24; see also *Freytag*, 501 U.S. at 914 (Scalia, J. concurring in part) ("Congress may endow territorial governments with a plural executive; it may allow the executive to legislate; it may

dispense with the legislature or judiciary altogether.").

It would have taken an extraordinary disregard for their oaths of office for Members of Congress to enact the Northwest Ordinance of 1789 and for President Washington to sign it into law had they thought that the Appointments Clause and other core separation-of-powers principles reflected in the Vesting Clauses governed the structure of the territorial government they were creating. Tellingly, however, no one raised any such concern.

Longstanding historical practice thus establishes that a host of territorial officials who were not appointed in conformity with the Appointments Clause have nevertheless exercised "significant authority" solely by virtue of direct grants of authority in federal statutes. See 1 Stat. 50, 51 & n.a (Aug. 7, 1789); 3 Stat. 493, 494, §§ 5, 7 (Mar. 2, 1819). This 200-year-old practice would be unconstitutional under respondents' test. But respondents are wrong, and this longstanding practice is constitutional, because these officials exercise only the power "of the Territory," *ibid*., and it is the nature of their authority, not its source, that establishes that these officials are not "Officers of the United States" within the meaning of the Appointments Clause. See William Baude, *Adjudication Outside Article III*, at 15-18 (forthcoming 133 Harv. L. Rev.). See generally *Printz* v. *United States*, 521 U.S. 898, 905 (1997) ("[C]ontemporaneous legislative exposition of the Constitution * * * acquiesced in for a long term of years, fixes the construction to be given its provisions.").

d. Respondents' effort to rebut this historical evidence reduces to two points: (1) Until 1947, Congress provided that territorial governors would be nomi-

nated by the President and confirmed by the Senate; and (2) on rare occasions, Presidents made recess appointments to fill vacant territorial offices. Those historical examples are, however, fully consistent with the overwhelming evidence establishing that the political branches have not thought that the Appointments Clause applies to territorial offices.

First, respondents note (Aurelius Br. 39) that in the pre-home rule era, territorial governors were usually appointed by the President with the advice and consent of the Senate. But if that practice reflected Congress's belief that territorial officials were "Officers of the United States," then Congress surely would have abided by the Clause's methods for appointing inferior territorial officers as well, and would have concluded that statutes establishing territorial legislatures—whose members are not appointed in conformity with the Appointments Clause—were unconstitutional. That is obviously not what Congress believed. And there is a perfectly reasonable explanation for why Congress nevertheless chose advice-and-consent procedures for territorial governors. Congress often chooses these procedures for policy reasons even when the Constitution does not require them. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116-117 (2007).

Second, Aurelius identifies (Br. 43-44) a smattering of instances in which the President appointed pre-home rule territorial governors and secretaries during a recess. The inference respondents draw is that the President's only source of authority to make such appointments was the Recess Appointments Clause, suggesting that these officials were officers of the United States. But the President had no need to rely

on the Recess Appointments Clause. Territorial statutes that confer on the President authority to appoint territorial officials with the Senate's advice and consent are reasonably construed, in light of the Constitution's parallel procedures, to implicitly confer recess appointment authority. See *Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (citation omitted)).[5]

In any event, Aurelius's argument is inconsistent with its own understanding of which officers are subject to the Appointments Clause. On multiple occasions, the President made recess appointments of officials who Aurelius would agree are *not* "officers of the United States." In particular, the President recess-appointed members of territorial legislative councils—territorial legislative bodies that were appointed by the President with the Senate's advice and consent but had the same authority as popularly elected territorial legislatures.[6] See, *e.g.*, 3 Stat. 750, 751 § 5 (Mar. 3, 1823). The only interpretation that accounts for the full historical record, therefore, is that presidents construed their statutory authority to

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[5] In addition, several of the appointments on which Aurelius relies were authorized by a statute conferring recess-appointment authority with respect to all officers (federal and territorial) appointed by advice and consent. See 14 Stat. 430, 430-31, § 3 (Mar. 2, 1867).

[6] See 3 J. Exec. Proc. 400 (1825) (member, Florida); 3 J. Exc. Proc. 314 (1822) (four members, Florida); 2 J. Exec. Proc. 464 (1814) (member, Missouri); 2 J. Exec. Proc. 131 (1809) (five members, Mississippi); 2 J. Exec. Proc. 9 (1805) (five members, Mississippi).

appoint territorial officials with advice and consent implicitly to include recess-appointment authority.

e. Respondents' "significant authority" test also lacks any grounding in the separation-of-powers principles that the Appointments Clause was designed to implement.

One reason the Appointments Clause insists on a presidential role in selecting principal "Officers of the United States" is to ensure that the President can choose and direct those who will assist him in exercising the Article II executive power. But territorial officers do not "exercise the national executive power." *Freytag*, 501 U.S. at 913 (Scalia, J., concurring in part); see also *Snow*, 85 U.S. at 321-322. So departing from Appointments Clause procedures does not infringe the President's Article II authority in any way. This helps explain why territorial officers can be selected by local election. No one thinks that Congress could provide for the election of the Secretary of the Treasury. But Congress can provide for the direct election of territorial governors precisely because they do not exercise the national executive power. *Freytag*, 501 U.S. at 913 (Scalia, J., concurring in part). To categorize territorial officials as "Officers of the United States" subject to the Appointments Clause because they "exercise "significant authority pursuant to the laws of the United States" is to miss this critical distinction, and to decouple the Clause from a principal reason for its existence.

Similarly, there is no reason to extend to territorial officials the mechanism of political accountability that the Appointments Clause identifies for the selection of "Officers of the United States." Territorial governments "are the creations, exclusively, of the legislative department, and subject to its supervision

and control." *Benner*, 50 U.S. at 242. Congress is ultimately accountable for the conduct of territorial governance no matter how particular territorial officials are selected. Congress is, in other words, just as accountable for the exercise of governing authority by the Board as it is for the exercise of such authority by locally elected territorial officials, who obviously are not selected in the way the Appointments Clause prescribes. Nothing about PROMESA diminishes Congress's accountability for territorial governance.

Finally, contrary to respondents' suggestion (Aurelius Br. 1), citizens who reside in Puerto Rico are not treated differently for Appointments Clause purposes than are citizens who reside in the 50 States. Federal officials who exercise the nationwide authority of the United States in Puerto Rico must be selected in conformity with the Appointments Clause. For example, the office of the U.S. Attorney for Puerto Rico is filled by nomination by the President and confirmation by the Senate, just as in all other judicial districts. 28 U.S.C. §§ 119, 541. Federal officials who administer nationwide programs in Puerto Rico are either officers appointed in conformity with the Appointments Clause or employees supervised by officers so appointed.[7] And federal judges who exercise the "Judicial Power of the United States" in Puerto Rico are likewise appointed in conformity with the Appointments Clause, just like federal judges everywhere else. 28 U.S.C. § 133. By the same token, territorial officials are not selected in accordance with

[7] Such officials include the Region II Director of FEMA, 6 U.S.C. § 313(a), (c)(1); 6 U.S.C. § 317(a), (b)(1), and the Region II Director of the EPA, 35 Fed. Reg. 15,623 (1970), 5 U.S.C. App. 1 Reorg. Plan 3 1970; 40 C.F.R. §§ 1.5, 1.7.

the Appointments Clause, just as state and local officials are not.

Indeed, respondents seem blind to the irony that their interpretation of the Appointments Clause *diminishes* the liberty of the Puerto Rican people. Were this Court to conclude that the Clause applies whenever territorial officials "exercise significant authority pursuant to the laws of the United States," Congress would have no choice but to provide for territorial governance by federal officials chosen in the manner the Appointments Clause prescribes. The citizens of Puerto Rico would lose the power they now have to choose their own form of government and elect their own officials. And the citizens of Guam and the Virgin Islands would lose their ability to elect their Governor and legislature.

2. The many contradictory adjustments respondents must make to their "significant authority" test make clear that the test is misconceived.

Throughout this litigation, Aurelius has shifted expediently from one ad hoc adjustment to another to obscure the incompatibility of its desired outcome with this Court's precedents, longstanding historical practice, and fundamental constitutional principles.

After insisting that *Buckley*'s "significant authority" test is the "only" test (Br. 10, 15), Aurelius abandons it when addressing the fact that Congress has often created territorial offices, vested them with significant authority, and provided for local election to fill them. The focus in those instances, Aurelius contends (Br. 47-48), should not be on the source of the authority but instead on whether federal officials played any role in filling the offices—because, conven-

iently, in the case of elected officials, they did not. Yet when it comes to territorial officers who *were* appointed by a federal official (like the presidentially appointed Mayor of Washington or D.C. Financial Responsibility and Management Assistance Authority members) the question of who made the appointments no longer matters. Instead, Aurelius contends (Br. 41 n.9) that the Appointments Clause does not apply in those instances because the officeholders' power extended only to local affairs. Once again, the consideration that respondents elsewhere claim is dispositive—whether an officer exercises authority pursuant to a congressional enactment—plays no role when they are pressed to explain these common historical cases.

That is not all. Historically, elected territorial officials have also been given responsibility to execute territory-specific substantive laws that Congress itself has enacted. To name just a few: Puerto Rico's governor and legislature have substantial duties under PROMESA, 48 U.S.C. § 2141-2142; the Governor of Guam administers a federally enacted income-tax scheme for the territory, 48 U.S.C. § 1421i; and the D.C. Chief Financial Officer exercises sweeping, federally conferred authority over the District's finances, Pub. L. No. 109-356, 120 Stat. 2019, 2029-2039 (Oct. 16, 2006). All of these officials "exercise significant authority under the laws of the United States" even under respondents' protean understanding of the phrase. So respondents must shift yet again, arguing that these officials are not subject to the Appointments Clause because enforcing congressionally enacted laws is not their "primary responsibility." Aurelius Br. 45 n.10. But respondents offer no principled basis for applying such a standard. Is it a 51%/49% test? A *de minimis* test? Respondents do not say.

Nor do respondents explain how it could possibly be consistent with their theory to vest territorial officials with authority to enforce *any* "significant" congressionally enacted provision if those officials were not selected in conformity with the Appointments Clause. Respondents' whole point is that separation-of-powers principles restrict the exercise of significant authority under statutes enacted by Congress to officials appointed in the manner the Appointments Clause requires.

That respondents are forced to shift constantly among contradictory rationales confirms that their "significant authority" approach cannot be correct. That is laid bare most vividly by the reason respondents give for conceding that the Appointments Clause does not apply to the Governors of Guam and the Virgin Islands, the 1947 Governor of Puerto Rico, the 1802 Mayor of Washington, all territorial legislators, and many territorial executives: their authorizing federal statutes conferred only local authority. Aurelius Br. 41 n.9, 45 n.10. What that shows is that it is *not* the "exercise of significant authority pursuant to the laws of the United States"—*i.e.*, the exercise of authority pursuant to congressional delegation—that triggers the applicability of the Appointments Clause. Rather, as Aurelius all but concedes in trying to deal with these many historical examples, the touchstone is whether the official is exercising authority to enforce laws of nationwide application or laws of primarily local territorial concern. That, of course, is the *Palmore* test. The only real disagreement, therefore, is whether the rationale that is most consistent with this Court's precedents, historical practice, and constitutional principle should apply to the present case, as well as to the many cases in which Aurelius con-

cedes it applies. The answer to that question is obviously yes.

D. Respondents' alternative *Lebron* test is also misconceived.

Perhaps because their "significant authority" test is so flawed, respondents also advance a fallback test drawn from *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). It is equally inapt.

As was true of the Court's "significant authority" analysis in *Buckley*, *Lebron*'s analysis addressed a question entirely distinct from that presented here: whether Amtrak was a governmental or private entity. 513 U.S. at 393-394. The Court had no occasion to, and did not, address whether a concededly governmental entity is territorial or federal.

The *Lebron* analysis is plainly unsuited to answering that question. The first prong of the test asks whether the entity was created by "special law to further governmental objectives." Br. 24 (citation and internal quotation marks omitted). That factor makes perfect sense when the Court is weighing whether an entity is private or governmental. But it has no purchase when, as here, the Court is assessing the nature of an entity that both parties *agree* is governmental. Every governmental entity—federal or territorial—is by definition created to further governmental objectives.

Nor is the fact that an entity is created by "special law" relevant to whether the entity is federal or territorial. According to Aurelius, a "special law" is one that decides an entity's "incorporation, structure, powers, and procedures." Aurelius Br. 24 (citation omitted). Yet there is no reason to think that a federal entity is more likely to arise out of such a law than

a territorial entity. And in the territorial context, this prong will *always* be satisfied: all federal organic statutes (or statutes addressing specific aspects of territorial governance) would qualify as "special laws," because they necessarily further governmental objectives and concern territorial governance.

The second prong of Aurelius's test—whether the federal government "retains for itself" the authority to appoint Board members—would thus always determine whether an official is an officer of the United States. Br. 24. That is contrary to the principles animating the Appointments Clause, not to mention this Court's precedents and longstanding historical practice. If Congress's decision to provide for federal appointment of an office is dispositive, that suggests that Congress could exempt an officer from the Clause simply by providing for territorial appointment or popular election. *Officers of the United States*, 31 Op. O.L.C. at 115-116 (such a construction would render the Clause "tautological").[8]

Focusing on federal appointment and removal is particularly inapt in the context of territorial governance for the reasons discussed above. See pp. 14-16, *supra*. Numerous territorial officials have been federally appointed and removed. And this Court has repeatedly held that federal appointment and removal do not render an officer who exercises local territorial authority part of the federal government. See pp.

[8] Aurelius incorrectly claims (Br. 25) that the Executive Branch has asserted that federal appointment is dispositive of the Appointments Clause's application. The Executive suggested only that federal delegation to state officials did not raise Appointments Clause concerns. *The Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 145 (1996).

14-15, *supra*. Aurelius's reliance on the method of appointment as dispositive therefore cannot be reconciled with precedent or history.

* * *

Faced with a crisis of unprecedented severity, Congress exercised its "broad latitude" under Article IV to alter the territorial government by establishing the Board as a territorial entity with the independence needed to accomplish its objectives. *Sanchez Valle*, 136 S. Ct. at 1876. PROMESA is simply the latest instance in Congress's 200-year-old practice of establishing Article IV offices and delegating to them authority to act on behalf of the territory, unconstrained by separation-of-powers limitations such as the Appointments Clause. Therefore, the Appointments Clause does not govern the Board members' appointments.

II. SHOULD THIS COURT FIND AN APPOINTMENTS CLAUSE VIOLATION, IT SHOULD AFFIRM THE FIRST CIRCUIT'S AWARD OF PROSPECTIVE, BUT NOT RETROSPECTIVE, RELIEF.

This Court need not consider remedial issues because the Board members were constitutionally appointed. In all events, the First Circuit properly exercised its remedial discretion to grant Aurelius[9] purely prospective relief, in order to avoid the potentially devastating consequences that would result from dismissing the Title III cases. Aurelius contends (Br.

[9] To avoid confusion, the Board will refer to the petitioners with respect to the remedial issue (Nos. 18-1475, 18-1521) collectively as "Aurelius."

49) that the First Circuit should have dismissed the Title III cases concerning the Commonwealth and the Puerto Rico Highway Transit Authority in which it is a creditor, and UTIER argues (Br. 20) that the court should have dismissed "all Title III proceedings." The parties rely on an indefensible reading of *Ryder* v. *United States*, 515 U.S. 177 (1995), and a meritless attempt to analogize the Board to an adjudicator or prosecutor.

A. Prospective, but not retrospective, relief is appropriate in this case.

1. Courts have long exercised remedial discretion to grant prospective relief, but limit retrospective relief, for separation-of-powers defects.

Aurelius agrees (Br. 58, 59) that the remedial question presented in this case is one of judicial discretion to craft "appropriate relief" for any Appointments Clause violation. *Ryder*, 515 U.S. at 183; *Lucia*, 138 S. Ct. at 2055. When federal courts find a constitutional violation, they have broad equitable discretion to determine the appropriate remedy. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Milliken* v. *Bradley*, 433 U.S. 267, 286 (1977). In so doing, courts must "take account of the public interest." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). When remedying a constitutional defect in the composition of a government entity, courts have long weighed the public interest in avoiding harmful disruption of government activities against the private interests in remedying whatever injury occurred.

For centuries, courts protected the public interest in avoiding disruption through the de facto officer

doctrine, which held that "the acts of an officer de facto (although his title may be bad) are valid so far as they concern the public or the rights of third persons who have an interest in the things done." *State* v. *Douglass*, 50 Mo. 593, 596 (1872); *State* v. *Carroll*, 38 Conn. 449 (1871). The doctrine, which prevented adjudication of appointments challenges, was intended to protect "the public and individuals whose interests may be affected" by retrospectively invalidating actions taken by an improperly appointed official. *Norton* v. *Shelby Cty.*, 118 U.S. 425, 441 (1886).

More recently, this Court has treated the validity of an unconstitutionally appointed official's past acts as a question of remedy, rather than a question of justiciability. In *Buckley* v. *Valeo*, for instance, the Court held that the commissioners of the Federal Election Commission were appointed in violation of the Appointments Clause, but accorded their acts "de facto validity" instead of retrospectively invalidating them. 424 U.S. at 142. The Court rejected the challengers' request to invalidate the Commission's enabling statute, Reply Brief of Appellants, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437), 1975 WL 171458, at *88-*90, *111, which would have nullified opinions and regulations already issued by the Commission. In granting only prospective relief, *Buckley* observed that the Court had done the same "with respect to legislative acts performed by" invalidly elected legislators. 424 U.S. at 142 (citing *Connor* v. *Williams*, 404 U.S. 549, 550 (1972)).

Similarly, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (plurality op.), the Court granted retrospective relief to the party before it in the context of a two-party contract action, but cited *Buckley* in holding that

broader "retroactive application" to other cases would "surely visit substantial injustice and hardship" upon other litigants. *Id.* at 88 n.41. And in *Free Enterprise Fund*, the Court remedied the separation-of-powers violation by granting declaratory relief, while leaving in place the investigative complaint that the improperly constituted Board had initiated against the challenger. 561 U.S. at 513.

2. The Board's role in filing Title III cases is much like that of a private or municipal bankruptcy petitioner.

Aurelius's argument that the Court must invalidate the Board's past acts, see pp. 43-49, *infra*, depends on its attempt to analogize the Board's authority to file a Title III case to that of a prosecutor who decides to bring the full force of the government's enforcement power to bear on a private party. Br. 59, 60. But while Aurelius repeatedly refers to the Board as a "prosecutor" (Br. 57, 60), that characterization is simply wrong.

a. Title III cases are not enforcement proceedings against creditors; they are collective bankruptcy-like proceedings to restructure public debts. Title III "is largely modeled on municipal debt reorganization principles set forth in Chapter 9 of the Bankruptcy Code." *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 919 F.3d 121, 125 (1st Cir. 2019); see also 48 U.S.C. § 2161(a) (incorporating sections of Bankruptcy Code). PROMESA confers on the Board authority to file a Title III case on behalf of an instrumentality upon determining that its debts need to be restructured, that consensual restructuring efforts have failed, and that the instrumentality, for which the Board becomes the Title III representative, desires to restructure its debt. 48 U.S.C. § 2146. The Board's

decision to file the Title III cases therefore reflected no determination that Aurelius—or any creditor—should be the target of government enforcement action. Rather, the decision was based solely on the Board's conclusions with respect to the territorial *debtor*.

The actor the Board most resembles is not a judge or prosecutor but a bankruptcy petitioner (or a bankruptcy petitioner's representative). Virtually any individual or corporate debtor may file a bankruptcy petition under Title 11. See 11 U.S.C. § 109(b). Municipalities, too, may file for bankruptcy under chapter 9. See *id.* §§ 109(c), 101(13). But a bankruptcy petitioner does not engage in a prosecutorial decision. Instead, it concludes that restructuring is necessary in light of its own insolvency. Moreover, as in an ordinary bankruptcy case, the Board's institution of a Title III case stays the legal claims of every creditor and allows creditors to submit proofs of claim for collective adjudication before an Article III judge. 48 U.S.C. § 2161(a) (incorporating 11 U.S.C. §§ 362, 501(a)). While as a practical matter Aurelius may have felt obligated to file proofs of claim to protect its claims to a portion of the bankruptcy *res*, the Board's decision to file did not legally compel Aurelius to participate.

The Board had little choice but to file the Title III petitions. On May 1, 2017, the automatic stay that went into effect upon PROMESA's enactment expired, and the Commonwealth was in default on billions of dollars of debt. Creditors immediately sued, threatening chaos that would prevent any orderly restructuring. David Skeel, *Reflections on Two Years of PROMESA*, 87 Revista Jurídica UPR 862, 876 (2018). Reinstituting the stay of creditor litigation by filing

Title III petitions was therefore "essential." *Ibid*. On May 2, the Commonwealth's Governor requested that the Board file the petitions. *Ibid*. On May 3, the Board filed for the Commonwealth, and it subsequently filed petitions for other instrumentalities following requests from the Governor. Luis J. Valentín Oritz, *Puerto Rico commences Title III cases for Highways Authority, Retirement System*, Caribbean Business (May 22, 2017); *Puerto Rico oversight board files for Title III debt restructuring for PREPA*, Debtwire (July 3, 2017).[10]

b. Once instituted, Title III cases proceed much like chapter 9 cases. The Board participates as the representative of the debtor instrumentality. 48 U.S.C. § 2175. "Any changes in creditors' rights with respect to their property can be imposed only through" a plan of adjustment proposed by the Board, litigated by creditors, and confirmed by the court. *In re The Financial Oversight and Management Board for Puerto Rico*, 300 F. Supp. 3d 328, 339 (2018). Thus, the ultimate authority to adjudicate creditors' claims lies with an Article III district judge. 48 U.S.C. § 2174(b). And the district court may approve the plan only after finding that the plan is "in the best interests of creditors," which requires considering whether creditors would receive a "greater recovery" under territorial law. *Id*. § 2174(b)(6).

As of the filing of this brief, only the COFINA Title III case has culminated in a confirmed plan of adjustment. The Board has not yet proposed plans of adjustment in the other cases, although it may pro-

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[10] https://www.debtwire.com/info/puerto-rico-oversight-board-files-title-iii-debt-restructuring-prepa.

pose some plans shortly. Hearings on whether to confirm the plans likely will not occur for many months. It is therefore possible that the Board members will be confirmed by the Senate (if that proves necessary) by the time the district court decides whether to confirm any other plans of adjustment.

3. Purely prospective relief is appropriate in this case.

In this case, the public interest in avoiding the severe disruption that would likely result from dismissing the Title III cases—even if accompanied by a brief stay—far outweighs Aurelius's minimal interest in retrospective relief.

a. The public interest in leaving the Board's past actions in place is immense. Aurelius does not seriously dispute that dismissing the Title III cases without a stay of this Court's judgment would inflict immediate devastating consequences on the Commonwealth and its citizens. The automatic stays of creditor litigation would be lifted, and creditors would race to the courthouse to collect on their debts, just as they did when the stay associated with PROMESA's enactment expired. *Puerto Rico hit with lawsuits after litigation freeze ends*, Seattle Times (May 2, 2017).[11] Such "a rush to the courts by aggrieved creditors" "could increase the impact of and accelerate Puerto Rico's debt crisis," endangering Puerto Rico's ability to regain fiscal stability. H.R. Rep. No. 114-602, at 52 (2016). Indeed, holders of General Obligation debt, like Aurelius, will assert that the Puerto Rico Consti-

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[11] https://www.seattletimes.com/business/puerto-rico-hit-with-1st-lawsuit-from-bondholders/.

tution entitles them to all available Commonwealth revenues, before the Commonwealth pays any other appropriation. In addition, because the Title III cases are collective proceedings, it is not possible to grant retrospective relief that affects Aurelius alone. Dismissal would vitiate the reliance interests of the thousands of other creditors.[12]

Recognizing the untenable consequences that would follow from ordering retrospective relief, Aurelius proposes (Br. 50, 69-71) that this Court stay any judgment granting such relief for an unspecified "brief period" to permit the Board members to be reappointed and decide whether to ratify the petitions' filing. But such a course may not forestall the consequences described above. While Aurelius asserts (Br. 70) that reappointment and any ratification "could" take place before this Court's judgment becomes effective, that is hardly certain. Neither the Board nor the Executive Branch has authority to ensure that the Senate's confirmation process is completed by a date certain. The stay could well expire, compelling dismissal of the Title III petitions, before the Board members had time to make a ratification decision. And as its actions in the court of appeals demonstrate, Aurelius would likely oppose extending this Court's stay. See, *e.g.*, Opp. to Appellees' Mot. to Stay the Mandate Pending Supreme Court Disposition, *Aurelius Inv., LLC* v. *Commonwealth of Puerto Rico* (1st Cir. Apr. 29, 2019).

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[12] UTIER apparently seeks vacatur of the COFINA plan of adjustment. The confirmed plan restructures billions of dollars in COFINA bond debt by issuing $12 billion in new bonds—bonds that are already being publicly traded. It is not clear how those actions could possibly be unwound.

Moreover, even if the properly appointed Board members were to ratify the filing of the Title III petitions, there is every reason to think that Aurelius would challenge the validity of the ratification. Litigants in separation-of-powers cases commonly bring such challenges. See, *e.g.*, Appellants' Principal Brief at 53-55, *CFPB* v. *All American Check Cashing, Inc.*, No. 18-60302 (5th Cir. July 2, 2018), 2018 WL 3382794. And the opportunity to challenge ratification is the only practical difference between Aurelius's proposed remedy and the First Circuit's remedy. Aurelius thus carefully observes (Br. 70) that under its proposed remedy, there would be no need to dismiss the Title III cases *if* the Board "appropriately" ratifies.

Litigation over ratification could lead to months-long delays in the Title III cases, further postponing Puerto Rico's return to fiscal solvency. Those delays will harm not only the Commonwealth's people, but also thousands of other creditors who have an interest in an orderly, expeditious restructuring. And the collateral ratification litigation will itself impose significant burdens on Puerto Rico.

b. Under these circumstances, Aurelius cannot come close to making the compelling showing necessary to justify the retrospective remedy it demands.

Aurelius's interest in having officials appointed under the Appointments Clause decide whether to institute restructuring cases is insubstantial. Like chapter 11 or chapter 9 cases, the Title III cases are the polar opposite of prosecutorial action: they are not in any sense coercive government action against a particular party, their filing did not legally compel any creditor to participate, and they reflect only a determination that the debtor instrumentality needs

to restructure its debts. And Aurelius's claims will be determined not by the Board, but by an Article III court. See p. 38, *supra*.

Moreover, Congress could have vested the authority to file a Title III petition *solely* in the Commonwealth itself, not the Board. Puerto Rico's governor could have constitutionally exercised that authority under Aurelius's understanding of the Appointments Clause (Br. 17-18, 45). And there is no need to speculate about what would have happened in that scenario: given that the Commonwealth requested that the Board file the petitions, there is no doubt that it would have done so itself. From Aurelius's perspective as a creditor, there is no material distinction between this alternative scenario and what actually happened.

In these circumstances, the First Circuit's purely prospective relief is meaningful and sufficient. A declaration requiring appointment by advice and consent ensures that the Board members are properly appointed by the time of the main event that will determine Aurelius's rights as a bondholder: the Article III court's confirmation of plans of adjustment.

* * *

If this Court holds that the Board members' appointments are invalid, it should affirm the First Circuit's remedy. The Court should also stay its judgment for 60 days to permit Senate confirmation.[13]

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[13] Such a stay would not, as Aurelius suggests (Br. 68), permit the Board to take "unreviewable" actions. Even once the Board proposes plans of adjustment, it will be many months before confirmation. If the court does confirm a plan, creditors could seek a stay to postpone the plan implementation that would

(footnote continued)

B. Aurelius's arguments that this Court must invalidate the Board's past actions are meritless.

In contending that the Board's institution of the Title III cases should be invalidated, Aurelius makes an argument as sweeping as it as unsupported. Aurelius argues (Br. 56) that, notwithstanding the tradition of remedial discretion discussed above, this Court in *Ryder* abrogated the courts' equitable discretion with respect to *all* Appointments Clause errors, regardless of the context in which they occur. Under that view, courts are *required* to retrospectively invalidate all officials' past acts in every case. That startling proposition finds no support in *Ryder* or any other decision of this Court.

1. *Ryder* concerned a defect in the appointment of the judge presiding over a criminal case. The Court's holding was expressly limited to improperly appointed *adjudicators*: "one who makes a timely challenge to the constitutional validity of the appointment of an officer *who adjudicates his case*" is entitled to vacatur of the improperly appointed adjudicator's decision and a new hearing. 515 U.S. at 182-183 (emphasis added); accord *Lucia*, 138 S. Ct. at 2055. It is undisputed here, however, that the Board does not adjudicate private rights. See pp. 36-38, *supra*.

In *Ryder*, this Court characterized the remedial question as discretionary, asking what relief was "appropriate." 515 U.S. at 183. The adjudicative

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otherwise raise equitable mootness questions. Aurelius is also wrong to suggest (Br. 68) that the Board has taken unreviewable actions since the First Circuit's decision. Aurelius is unable to identify a single such action.

context supplied the answer. First, because an individual subject of government enforcement action has a strong interest in having his rights adjudicated by properly appointed adjudicators, private interests are at their apogee. See *Ryder*, 515 U.S. at 182; *Andrade* v. *Lauer*, 729 F.2d 1475, 1497 (D.C. Cir. 1984). Second, because the constitutional violation is complete when the invalidly appointed adjudicator determines the litigant's rights, leaving that decision undisturbed would deny any relief whatsoever, disincentivizing Appointments Clause challenges. *Ryder*, 515 U.S. at 183 & 184 n.3. Indeed, *Ryder* distinguished *Buckley*, *Connor*, and *Northern Pipeline* on that ground. *Ibid*. In adjudicative circumstances, the private and public interests in favor of retrospective relief outweigh the public interest in avoiding the disruption caused by vacatur.[14]

2. Aurelius argues that *Ryder* suggested that Appointments Clause violations are "structural" and "therefore 'subject to automatic reversal.'" Br. 55 (quoting *Neder* v. *United States*, 527 U.S. 1, 8 (1999)). But whether a constitutional error is "structural," in the sense that it requires automatic reversal, turns not on the identity of the constitutional provision involved but on the error's *effect* on the proceeding. An error is structural if its effect is "necessarily" to

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[14] The pre-*Ryder* limitations that the Court placed on the de facto officer doctrine also pertain specifically to challenges to unconstitutionally appointed adjudicators. Given the private interest in relief in the adjudication context, courts invoke the de facto officer doctrine in such cases only when the defect was "technical" or untimely raised. See *Nguyen* v. *United States*, 539 U.S. 69, 77 (2003); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962).

deprive the proceeding of reliability or fundamental fairness. *Neder*, 527 U.S. at 8-9.

For that reason, this Court has never suggested that Appointments Clause errors are categorically "structural" errors requiring automatic reversal. Aurelius relies on *Freytag* (Br. 55), but there the Court used the term "structural" in a different sense, observing that the Appointments Clause is a "structural and political" "separation-of-powers concept." 501 U.S. at 878; *id*. at 894-896 (Scalia, J., concurring in part). As Justice Scalia explained, the fact that the Appointments Clause is structural in the separation-of-powers sense does not suggest anything about the scope of the courts' discretion to remedy an Appointments Clause error after the fact. See *id*. at 898-900 (discussing forfeiture).

Nor does *Ryder* suggest that Appointments Clause violations are categorically "structural" in the sense of requiring automatic reversal. The violation in *Ryder* warranted reversal because, in light of the pervasive control that an adjudicator exercises over the proceeding, *all* constitutional defects in a judge's authority affect the fundamental fairness and reliability of the proceeding. *Rivera* v. *Illinois*, 556 U.S. 148, 161 (2009); *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd*., 796 F.3d 111, 120 (D.C. Cir. 2015). But that is not invariably true of appointments errors that do not affect the adjudicator; to the contrary, most errors in a proceeding are not structural. See *Neder*, 527 U.S. at 7-9.

3. Recognizing both the narrowness of *Ryder*'s holding and the non-adjudicative nature of the Board's authority, Aurelius argues (Br. 60) that under *Young* v. *United States*, 481 U.S. 787 (1987) (plurality opinion), "defects in the appointment of a prosecutor"

can also "be structural and thus require automatic dismissal." *Id*. at 813. But the Board is not a prosecutor, any more than it is an adjudicator, and *Young* simply reinforces the distinction. See pp. 36-38, *supra*.

In *Young*, this Court held that reversal of a contempt conviction was required when the prosecutor was an interested party. 481 U.S. at 808. The plurality held that *both* the substantial private interest in being subject to criminal enforcement only by a properly appointed prosecutor and the public interest in the integrity of the criminal justice system supported reversal. 481 U.S. at 811, 825. Justice Scalia, concurring in the judgment, held that the error required reversal because, given the breadth of prosecutorial discretion, "it would be impossible to conclude with any certainty" that the prosecutions would have been brought by valid officers. *Id.* at 825.[15]

None of these considerations are present here. In filing Title III petitions, the Board does not bring any coercive governmental power, much less criminal law-enforcement power, to bear against creditors. The method of the Board members' appointment hardly raises questions about the integrity of the Board's decision to file, made at the express request of constitutionally elected Commonwealth officials. And there is no question that a properly appointed Board, faced with the threat of creditor suits, would have made the same decision to file the Title III petitions immediately.

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[15] *Bowsher* v. *Synar,* 478 U.S. 714, 736 (1986), offers Aurelius no support. There, the Court invoked statutory "fallback" provisions that specified the remedy. *Id.* at 735.

4. Finally, Aurelius argues in passing (Br. 59) that a finding of an Appointments Clause violation (and, presumably, other appointments errors) renders the agency's past actions void *ab initio*.

Aurelius does not appear to seriously press this argument. If it did, it would seek vacatur of the Board's certification of fiscal plans. And even with respect to Title III cases, Aurelius and Assured have picked and chosen. They seek dismissal of the Commonwealth and HTA Title III cases, but not dismissal of *other* Title III cases, even ones in which they also have interests. For example, Aurelius participated in the recent consensual restructuring in connection with the COFINA Title III case, and agreed, "in consideration of the distributions made" as part of the restructuring, not to argue that the COFINA proceeding was invalid. See Order and Judgment Confirming the Third Amended Title III Plan of Adjustment of Puerto Rico Sales Tax Financing Corporation ¶ 36, 17 BK 3283, Dkt. No. 5048 (D.P.R. Feb. 4, 2019). Similarly, Assured has agreed to support settlement of its claims in the Title III case concerning the Puerto Rico Electric Power Authority. *Assured Guaranty Joins PREPA Restructuring Support Agreement*, Business Wire (May 3, 2019).[16] Aurelius's and Assured's acquiescence in the Board's authority when it serves their interests is inconsistent with any argument that the Board's actions are void *ab initio*.

In any event, if Aurelius were correct that a separation-of-powers defect renders the official's or agen-

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[16] https://assuredguaranty.newshq.businesswire.com/press-release/transactions/assured-guaranty-joins-prepa-restructuring-support-agreement.

cy's actions void *ab initio*, then *Buckley*, *Northern Pipeline*, and *Free Enterprise Fund* were all wrong. Aurelius's argument is, moreover, irreconcilable with the centuries-old distinction between validity of title and validity of act that animates the de facto officer doctrine. It is also inconsistent with the fact that defects in an official's authority can be forfeited or cured by subsequent review. See *Freytag*, 501 U.S. at 894-896 (Scalia, J., concurring in part); *Exec. Benefits Ins. Agency* v. *Arkison*, 573 U.S. 25, 39 (2014). Such after-the-fact limitations on relief presume that the error-affected decision remains effective and can be affirmed. *Ibid*.

The exception, of course, is when a constitutional error "deprive[s] the federal court of its requisite subject-matter jurisdiction." *Freytag*, 501 U.S. at 896. That explains why, in *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674 (2010), the NLRB's lack of a statutory quorum—a defect that deprived it of jurisdiction—rendered the affected decisions invalid. Appointments Clause errors, by contrast, are "nonjurisdictional." *Freytag*, 501 U.S. at 893 (Scalia, J., concurring in part); accord *id*. at 878 (opinion of the Court). Even if the Board members were invalidly appointed, then, the Board had authority to act, and the Board's past actions are not inherently void. The remedial question remains discretionary.

C. There is no basis for invalidating the Board's actions taken after the First Circuit's decision.

Aurelius argues (Br. 66) that even if this Court were to uphold the Board's filing of the petitions, it must invalidate all actions the Board took after the First Circuit's decision. This argument is waived and meritless.

Aurelius affirmatively urged *both* courts below to adopt the very remedy that it now attacks. In oral argument before the First Circuit, counsel for Aurelius assured the court that "you can stay the effect of your decision *and the board can continue to make decisions*" until a "constitutionally appointed board * * * can validate or ratify" the Board's past actions. Oral Argument 1:25:42-1:27:39 (1st Cir. Dec. 3, 2018).[17] In the district court, Aurelius represented that it would "consent to this Court's simply staying its order pending appeal" to allow the First Circuit to "deploy *Buckley*'s remedy of staying its mandate pending replacement of the Board." Reply in Support of Objection and Motion of Aurelius to Dismiss Title III Petitions 29, 17 BK 3283, Dkt. 1833 (D.P.R. Nov. 17, 2017). "*Buckley*'s remedy" permitted the Commission to continue to exercise enforcement authority during the stay. 424 U.S. at 143.

In any event, in staying its mandate to permit the political branches to remedy the constitutional violation, the First Circuit simply did what this Court has routinely done when deciding constitutional appointments disputes with potentially sweeping ef-

[17] http://media.ca1.uscourts.gov/files/audio/18-1671.mp3.

fects. See, *e.g.*, *Bowsher*, 478 U.S. at 736 (60-day stay); *N. Pipeline*, 458 U.S. at 88 (four-month stay); *Buckley*, 424 U.S. at 143 (30-day stay, "allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act").

Nonetheless, Aurelius makes the surprising argument (Br. 67) that once a court has held that an agency's composition is invalid, the agency lacks authority to take any further action. But staying a judgment of unconstitutionality delays the legal effect of the court's determination. None of Aurelius's authorities support the proposition that a court cannot stay its judgment to permit the agency to continue operating while Congress remedies the violation. But that is the unmistakable implication of accepting Aurelius's argument: courts will lack discretion to stay a judgment finding an appointments or other separation-of-powers violation, no matter what the potential disruption or collateral harm.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals concerning the Appointments Clause should be reversed. If this Court holds that the Board members' appointments are invalid, it should affirm the First Circuit's prospective remedy and should also stay its judgment for 60 days to permit Senate confirmation.

Respectfully submitted,

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September 19, 2019