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

IN THE

Supreme Court of the United States

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

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA, *Petitioner*,
v.
AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

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

On Writ of Certiorari
To the United States Court of Appeals
For the First Circuit

CONSOLIDATED OPENING AND REPLY BRIEF OF THE OFFICIAL COMMITTEE OF RETIRED EMPLOYEES OF THE COMMONWEALTH OF PUERTO RICO

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Additional Captions Listed on Inside Cover

AURELIUS INVESTMENT, LLC, ET AL., *Petitioners*,
v.
COMMONWEALTH OF PUERTO RICO, ET AL., *Respondents*.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC., *Petitioner*,
v.
FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, ET AL., *Respondents*.

QUESTIONS PRESENTED

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

2. Does the de facto officer doctrine allow courts to deny meaningful relief to successful separation-of-powers challengers who are suffering ongoing injury at the hands of the unconstitutionally appointed principal officers?

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History demonstrates that the appointment of the members of the Financial Oversight and Management Board (the "Board") did not violate the Appointments Clause. And even if the appointments were invalid (and they were not), history likewise makes clear that the de factor officer doctrine applies, sustaining the Board's actions.

Congress created the Board pursuant to its expansive authority under the Territory Clause of Article IV and as an "entity within the territorial government" of Puerto Rico. 48 U.S.C. § 2121(b)(2), (c)(1); U.S. Const. art. IV, § 3, cl. 2. Since the earliest days of the Republic, Congress, this Court, and the Executive Branch have recognized that Congress may, consistent with its plenary power under Article IV, devolve local autonomy to the territories free from separation-of powers constraints. This is as true for the Appointments Clause as it is for other structural, separation-of-powers provisions like Article III.

Aurelius and Assured (collectively, "Aurelius") can contend otherwise only by advancing a selective and erroneous account of the history and an exception-laden understanding of the Appointments Clause and other separation-of-powers constraints. But it is not this Court's role to issue tickets good for this day (and this case) only, much less to do so based on an incomplete and revisionist review of history. A full and accurate understanding of the federal government's longstanding practice makes one thing clear: Article IV empowers Congress to act in the territories free from the

Constitution's structural constraints such as the Appointments Clause.

Aurelius's selective presentation of the de facto officer doctrine is similarly at odds with historical practice. Aurelius contends that the doctrine applies narrowly only to cure technical (and not constitutional) defects and to preclude abusive collateral attacks on title. But that is wrong. For over half a millennium, English and American courts have refused to unwind an official's public acts taken prior to final adjudication of his or her claim to title, even in circumstances where that title is constitutionally invalid. And this long historical practice rests on a firm and sensible foundation. As this Court explained over a century ago, a court's remedial discretion to sustain such acts is built "upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton v. Shelby County*, 118 U.S. 425, 441-42 (1886). Thus, the doctrine's consistency and longevity arise not merely from its equitable protection of individual reliance interests, but also from its shoring-up of the young (and now not-so-young) American democratic experiment. Aurelius's cramped and ahistorical view of the doctrine must be rejected.

ARGUMENT

I. Congress, This Court, And The Executive Branch Have Consistently Concluded That Structural Separation-Of-Powers Constraints Do Not Apply When Congress Acts In The Territories—And Aurelius Fails To Show Otherwise.

From the earliest days of our Nation, all three branches of the federal government have consistently recognized that Congress has authority to devolve such local autonomy to the U.S. territories as it deems warranted. That is evident in congressional legislation affecting the Northwest Territory, the Louisiana Purchase, and early mayoral appointments in the District of Columbia. It is evident in this Court's decisions governing the application of Article III to territorial judges and approving delegations of lawmaking authority to the President with respect to the territories. And it is evident in Attorney General opinions recognizing that territorial officials are not subject to constitutional restrictions that apply to Officers of the United States.

History thus confirms the long-held understanding that the Constitution grants Congress "broad latitude to develop innovative approaches to territorial governance" and to employ "inventive statesmanship" that is responsive to the unique local histories and needs of the territories. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016). And history likewise confirms that the appointments to the Board could proceed without advice and consent.

Aurelius contends just the opposite. In its view, history demonstrates that the Appointments Clause applies notwithstanding Congress's plenary power under Article IV—at least in this instance. Aurelius Br. 34, 38-44. But Aurelius is wrong.

To cobble together an argument that conforms to the flexibility reflected in actual historical practice, Aurelius relies on legal acrobatics that would make Cirque du Soleil proud. In Aurelius's view, the Appointments Clause applies to territorial officers (specifically, to territorial governors). Aurelius Br. 39. Except when it doesn't (to the elected governor of Puerto Rico, to purportedly "transitional governments" of certain territories, to inferior territorial officials, to territorial legislatures, and to the mayor of the District of Columbia). *Id.* at 40-41 & n.9, 42-43, 45-46. Similarly, Aurelius believes the nondelegation doctrine applies—except when Congress is delegating to territorial governments authority that would, in a state, be regulated by state law, *id.* at 36-37, and except when the President is exercising legislative power for a "temporary government," in which case the limitation on Congress's authority to delegate its legislative power gives way, too, *id.* at 37. And while Aurelius claims that in some (undescribed) circumstances, territorial judges may be Officers of the United States; in other circumstances Aurelius contends they are not. *Id.* at 37-38. How such an à la carte approach to the Appointments Clause emerges from the text remains a mystery.

To make matters worse, Aurelius altogether ignores other historical practices, set out in detail in the parties'

opening briefs, which do not fit neatly into its jury-rigged understanding of the Clause. Aurelius has no answer to this Court's longstanding holding that Article III's structural safeguards do not apply to territorial courts—even when those courts consider civil and criminal cases "arising under the general laws of Congress." *Palmore v. United States*, 411 U.S. 389, 403 (1973); Retirees Br. 24-27; Board Br. 19-20, 22 n.10; U.S. Br. 23, 37. Nor does Aurelius have any answer to the Executive Branch's consistent position that territorial officers are not "Officers of the United States" for purposes of appointment and removal. Retirees Br. 33-37; U.S. Br. 31-32.

In the end, rather than saving Aurelius, the exceptions and distinctions necessary to endorse Aurelius's bespoke theory place the theory's fatal flaws in sharp relief. The historically accurate understanding of the federal government's longstanding practice is that Article IV's plenary authority empowers Congress to act in the territories free from the Constitution's structural constraints such as the Appointments Clause.

1. Aurelius contends that the Appointments Clause inflexibly applies when Congress acts in the territories, and that the Board members are "Officers of the United States" whose appointment that Clause dictates. *See, e.g.*, Aurelius Br. 34. Aurelius attempts to draw support for its claim by analogizing the Board members to territorial officers "with substantial federal authority"—including, primarily, territorial governors. *Id.* at 38-40. And, in particular, Aurelius asserts that every civilian territorial governor appointed to a continuing office was

appointed in conformity with the Appointments Clause. *Id.* at 39.

As the Retiree Committee explained, however, when Congress first passed legislation in 1803 dealing with a territory obtained after the Constitution was ratified, Congress specifically rejected arguments that it was bound by the Appointments Clause and other separation-of-powers principles in the territories. Retirees Br. 9-15. The statute Congress passed to establish a temporary government in Louisiana provided for the President, alone, to appoint territorial officials and delegated to those officials Article I legislative power. *Id.* at 11-12; *see* 2 Stat. 245, 245, § 2 (1803). Congress thereafter used the same statutory language when organizing governments in the territories of Florida, the Philippines, and the Panama Canal Zone. *See* 3 Stat. 523, 524, § 2 (1819) (Florida); 31 Stat. 895, 910 (1901) (Philippines); 33 Stat. 429, 429 § 2 (1904) (Panama Canal Zone).

Aurelius seeks to distinguish these early examples of territorial appointments by claiming that they each involved "temporary, interim offices . . . to which the Appointments Clause did not apply" and which were in place "only until Congress legislated for" the territories. Aurelius Br. 42-43 (citation omitted). For this position, Aurelius cites this Court's decision in *Cross v. Harrison*, 57 U.S. (16 How.) 164, 195 (1853). There, this Court upheld against legal challenge a duty imposed by an official the military commander in California had installed, as authorized by the President, after California was ceded to the United States but *before* Congress established a government in the territory. *Id.* at 190,

195. But unlike in *Cross*, in the case of Louisiana, Florida, the Philippines, and the Panama Canal Zone it is simply inaccurate to describe those initial governments as in place in lieu of congressional action and only "until Congress legislated for" the territories. Aurelius Br. 42 (quotation marks omitted). Instead, in each case, Congress specifically established the government by statute and, in the case of Louisiana, after extensive debate about the form of such government.

Moreover, Aurelius cites only its own say-so for the proposition that Congress considered itself unbound by the Constitution because it might, in the future, change the structure of those territorial governments. The congressional debate concerning Louisiana's territorial government focused on constitutional concerns surrounding the appointment of and authority delegated to the President's chosen territorial officials—concerns not pegged to the length of time that initial government would be in place. *See* 13 Annals of Cong. 498-514 (1803). Those concerns were put to rest by Congressman Rodney's argument that Article IV "vests [Congress] with full and complete power to exercise a sound discretion" with respect to the territories. *Id.* at 513-14. The constitutional objections to the bill's proposed territorial government were "decisively rejected" by reference to Congress's broad power under Article IV—not the calendar. David P. Currie, *The Constitution in Congress*, *The Jeffersonians 1801-1829*, at 113 (2001).

In addition, the Louisiana statutes themselves demonstrate that Congress did not view the initial territorial governments or the offices established

thereunder as "temporary" in any meaningful sense. In the subsequent statute Aurelius points to, which did provide for appointment of certain territorial officials with advice and consent, Congress *continued* to describe the territorial government as a "temporary government." *See* 2 Stat. 283, 283 (1804); *see also* 32 Stat. 691, 691 (1901) (describing act as one "[t]emporarily to provide" for the civil government of the Philippines). This puts the lie to any notion that Congress viewed the "temporary" nature of these governments as constitutionally significant.[1]

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[1] Further demonstrating that Congress did not view these offices as temporary or non-continuing in any meaningful sense is the fact that, even though Congress provided that the authority under the statutes establishing these governments would last for a pre-determined period of time—for example, in the case of the Panama Canal Zone, until the "the expiration of the Fifty-eighth Congress," 33 Stat. at 429—Congress did not always legislate again before such deadlines. Indeed, Congress did not legislate again for the government of the Panama Canal Zone until the *Sixty-second* Congress, *see* 37 Stat. 560 (1912). Given the absence of additional legislation, the Attorney General opined that the President's authority under the statute did not terminate when Congress failed to act, and that Congress did not "intend[] the Canal Zone to be without any legal government after the period fixed." *The President—The Government of the Canal Zone*, 26 Op. Att'y Gen. 113, 117 (1907). In fact, the Attorney General noted that Congress had continued to make appropriations for the Canal Zone, which directed the President to have those persons appointed by him estimate expenditures, even since "the period fixed"—indicating Congress did not intend for that government to terminate. *Id.* at 117-18. And, in the case of Florida, Congress in fact *reauthorized* the initial government—with its direct Presidential appointment of territorial officers—before legislating a third time to require that

Also telling is that Aurelius has no explanation for the fact that Congress often *retained* provisions delegating legislative authority to territorial officers even after Congress required those officers to be appointed with advice and consent. Indeed, Congress delegated to territorial governors (even those appointed with advice and consent) broad legislative powers without any intelligible principle to guide their discretion.[2] The same is true under the Northwest Ordinance.[3] But if these governors were "Officers of the United States" required to be appointed consistent with the Appointments Clause, then surely it would be unconstitutional for these same Executive Officers to exercise Congress's delegated legislative power without an intelligible principle. Aurelius offers no explanation for why the Appointments Clause, but not other structural limitations, would have applied to these officials.

Accordingly, although Congress eventually opted to require appointment of these territorial officials with advice and consent, that choice was not a constitutional

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certain officers thereafter be appointed with advice and consent. *Compare* 3 Stat. 523, 524, § 2 (1819), 3 Stat. 637, 639, § 2 (1821), *and* 3 Stat. 654, 657, § 8 (1822).

[2] *See* 2 Stat. at 284, § 4 (vesting legislative powers of the territory of Orleans (Louisiana) in governor and legislative council and extending that legislative power to "all the rightful subjects of legislation"); 3 Stat. at 655, §5 (providing for same in Florida).

[3] *See* 1 Stat. 50, 51 n.a, 52 n.a (1789) (permitting the governor and a majority of judges to adopt criminal and civil laws from the original States, as necessary, and delegating legislative power to the governor, legislative counsel, and house of representatives).

command. As the district court correctly concluded, "nothing in the Constitution precludes the use of [the advice and consent] mechanism for positions created under Article IV, and its use does not establish that Congress was obliged to invoke it." Pet. App. 81a; *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116-17 (2007); *see also Currie*, *supra*, at 114 ("Congress's earlier decisions respecting appointments and judicial tenure may have been based on policy considerations rather than constitutional compulsion.").

At any rate, even if one were to take at face value Aurelius's explanation that the Appointments Clause applies in the territories, but not to governments Congress considers "temporary," the Board satisfies that test. Congress undoubtedly established the Board as a temporary body. PROMESA provides that the Board "shall terminate" upon certification by the Board that Puerto Rico's government "has adequate access to short-term and long-term credit markets at reasonable interest rates to meet [its] borrowing needs" and that for at least four consecutive fiscal years Puerto Rico has "developed its Budgets in accordance with modified accrual accounting standards" and Puerto Rico's expenditures did not exceed its revenue. 48 U.S.C. § 2149. If history demonstrates only that the Appointments Clause does not apply to "temporary" bodies, the Board fits well within this definition.

2. Aurelius is forced to create further exceptions to explain away Congress's contemporaneous treatment of the mayor of the District of Columbia and the current status of Puerto Rico's governor.

As the Retiree Committee explained, in 1802 Congress passed a statute incorporating the City of Washington within the District of Columbia and providing for annual appointment of the mayor without advice and consent. Retirees Br. 18-19. Congress's treatment of the District of Columbia is particularly informative, given Congress's similar plenary authority over the District. U.S. Const. art I, § 8, cl. 17; *see Hornbuckle v. Toombs*, 85 U.S. (18 Wall.) 648, 655 (1873) (noting the "plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States"). In a footnote, Aurelius claims that the District's mayor's authority has always been "purely local." Aurelius Br. 41 n.9. But Aurelius points to no evidence that Congress's decision to appoint the mayor in this way was based on any such distinction.

Even less convincing is Aurelius's explanation for why the popularly elected Governor of Puerto Rico is exempt from the advice and consent requirement. Aurelius claims that when Puerto Rico's Governor became elective in 1947, Congress simultaneously established the position of Coordinator of Federal Agencies to which all federal authority previously possessed by the governor was transferred. Aurelius Br. 45-46. But Congress's creation of that position clearly did not (and could not) have the constitutionally transformative effect Aurelius claims. First, the relevant Senate Report makes clear that Congress established the Coordinator position in an effort to "eliminate unnecessary duplication and waste" in the varied activities of at least fifty-eight federal agencies in

Puerto Rico—not to satisfy any constitutional concerns raised by the direct election of Puerto Rico's Governor. S. Rep. No. 80-422, at 3 (1947). Nor did Congress describe the Coordinator's role as taking on power previously reserved for the appointed governor. Instead, Congress noted that the Coordinator would have "no power except to make recommendations" to agency heads, the President, and Congress for coordinating or even eliminating certain federal regulation in the territory. *Id.*

Second, and even more tellingly, three years after creating it, Congress provided that the Coordinator position would be eliminated entirely once the Puerto Rico Constitution became effective. 64 Stat. 319, 320, § 5 (1950); *see also* David M. Helfeld, *The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico*, 21 Rev. Jur. U.P.R. 135, 151 (1952). And in the intervening few years, no official had even been appointed as Coordinator. The office was never filled. *See* José Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* 106 (1997); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 365 n.198 (1989). Aurelius offers no explanation for how this fleeting and since-eliminated position—which was not created to remedy constitutional issues in any event—distinguishes the Governor of Puerto Rico such that the Governor's selection by popular election does not, under

Aurelius's theory, also contravene the Appointments Clause.[4]

3. Nor can Aurelius explain this Court's clear holding in *United States v. Heinszen*, 206 U.S. 370 (1907), that when Congress and the President act in the territories, limitations on Congress's ability to delegate its legislative powers do not apply.

The argument that Congress could not delegate legislative power to the President was squarely presented to this Court in *Heinszen*. And the Court decisively rejected it. *Id.* at 384-85. Indeed, the First Circuit understood the import of *Heinszen*, explaining that the case "seems to allow Congress to delegate legislative power to the President, citing the territorial context as a justification," and outright conceding that the decision is "difficult to explain" if the Appointments Clause is to be applied in the territories. Pet App. 25a.

Aurelius (conveniently) ignores the facts, reasoning, and holding in *Heinszen*. Instead, Aurelius focuses entirely on the Court's citation to *Dorr v. United States*, 195 U.S. 138 (1904). Aurelius contends that *Dorr* upheld

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[4] The two authorities Aurelius cites do not show otherwise. Each makes clear that the federal Coordinator was proposed based of concerns about whether a popularly elected Puerto Rico governor could simultaneously be *accountable* to both the people and the federal government, and could serve both sovereigns' interests. *See* David S. Stern, *Notes on the History of Puerto Rico's Commonwealth Status*, 30 Rev. Jur. U.P.R. 33, 43-44 (1961); Rexford G. Tugwell, *The Stricken Land* 544-47 (1947). But, consistent with the legislative history, neither suggests that the Appointments Clause was considered a barrier to popularly electing a governor.

Congress's authority to authorize a temporary government. Aurelius Br. 37. Thus, the *Heinszen* Court's passing citation to *Dorr*, Aurelius concludes, must mean that its holding turned on the "temporary" nature of the government in that case. But the Court's reference in *Dorr* to the temporary character of the Philippines government had no bearing on the Court's *holding* in that case; it merely noted that the Philippines statute under review had been passed by a valid government. 195 U.S. at 153. Even farther afield is any suggestion that the "temporary" nature of the government played any role in *Heinszen* itself. One will search *Heinszen* in vain for any reliance by the Court on the purported "temporary" status of the government of the Philippines to sustain Congress's delegation of legislative power to the President.

4. That this Court has long held Article III's safeguards inapplicable when Congress creates territorial courts also cuts decisively against Aurelius's claim that Congress is restricted by the Constitution's structural provisions when legislating for the territories. Retirees Br. 24-27.

As early as Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*, this Court has held that territorial courts "are legislative Courts" and that Article III's "limitation[s] do[] not extend to the territories." 26 U.S. (1 Pet.) 511, 546 (1828). This Court has so held notwithstanding the fact that territorial courts exercise significant federal authority: territorial courts may enforce both territorial laws and "the civil and criminal laws of Congress," and "have regularly

tried criminal cases arising under the general laws of Congress." *Palmore*, 411 U.S. at 403.

Aurelius does not even cite (much less distinguish) *Canter*, or explain why the Appointments Clause would cabin Congress's exercise of authority in the territories, but Article III would not. This is particularly confounding because Aurelius claims that at least *some* territorial judges (those exercising "significant federal power") "are Officers of the United States" and must be appointed through advice and consent. Aurelius Br. 38. In other words, Aurelius would require the appointment of such territorial judges to comply with the Appointments Clause, but under *Canter* they would be exempt from Article III's protections. This is a theory tailor-made for this case.[5]

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[5] While claiming that territorial judges who exercise significant federal power are officers of the United States, but that others (those that exercise primarily local judicial power) are not, Aurelius Br. 37-38, Aurelius offers no explanation of how to distinguish between these two categories, and no evidence suggesting that Congress employed this distinction when creating territorial judicial offices. In fact, even some judges that Aurelius claims were clearly federal officers, like the judges of the Northwest Territory, *id.*, were delegated legislative power—suggesting that Congress did not view itself bound by the Constitution's structural constraints for even these territorial judges, *see* 1 Stat. at 51 n.a, 52 n.a (permitting the governor and a majority of judges to adopt criminal and civil laws from the original States, as necessary).

Also unavailing is Aurelius's reliance as evidence that some territorial judges were considered federal officers on this Court's decisions in *Freytag v. Commissioner*, 501 U.S. 868 (1991) and *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806). Aurelius Br. 38. In *Freytag*, this Court described a territorial court clerk as a federal

5. The Executive Branch's consistent view that judges appointed in the territories are not officers of the United States only further confirms that territorial officers are not subject to the Appointments Clause. Retiree Br. 33-37.

As the Retiree Committee noted, Attorney General Grundy interpreted "Officers of the United States" to exclude territorial judges—even when those judges are appointed with advice and consent—and thus that those judges are not subject to Article II impeachment. *Territorial Judges Not Liable to Impeachment*, 3 Op. Att'y Gen. 409, 411 (1839) (citing *Canter*, 26 U.S. 511); *see* Retirees Br. 33-35. Because the class of civil officers subject to the Appointments and Impeachment Clauses are the same, *Bowsher v. Synar*, 478 U.S. 714, 722-23 (1986), the Attorney General's position confirms that the Executive has not viewed territorial judges as subject to the Appointments Clause. The Executive has long adhered to this position. Retirees Br. 34-35.

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officer, 501 U.S. at 890, but cited *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839) for that observation—which in fact concerned a clerk for the United States District Court for the Eastern District of Louisiana (after statehood), *and not* a territorial clerk. Nor does *Wise* support the notion that the District of Columbia justices of the peace were officers of the United States. *Wise* merely considered whether a justice of the peace was an "officer of the government of the United States" as that phrase was used in the statute at issue there. 7 U.S. at 335-36. And Congress plainly did not understand D.C. justices of the peace to be officers of the United States for constitutional purposes: Congress later conferred the duties of the justice of the peace on the *popularly elected* mayor demonstrating that, as with the Northwest Territory, Congress did not believe structural constraints applied. 2 Stat. 721, 723, § 3 (1812).

As noted, Aurelius contends that certain territorial judges—the undefined class who exercise significant federal authority—are "Officers of the United States," Aurelius Br. 38, and that after ratification Congress felt compelled to adapt territorial systems to the Constitution's requirements for presidential appointment *and removal*, *id.* at 40. And yet, Aurelius never grapples with the Executive's longstanding view that territorial officers are not subject to impeachment. Indeed, nowhere in its brief does Aurelius acknowledge (let along distinguish) the Executive's consistent position on this question, which is fatal to Aurelius's argument.

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In the end, Aurelius offers this Court a view of the Appointments Clause that cannot be justified. It is not textual, as Aurelius perceives countless exceptions that the text does not acknowledge. It is not manageable, as Aurelius's ad hoc distinctions provide the Court no guidance to determine where the Clause applies rigidly and where it applies flexibly. And most important, it is at odds with our history, which makes clear that the Clause does not apply to territorial officials like the Board Members here. All of which brings us back to where we began. The text of Article IV and the long history of flexibility in the territories is designed to implement the Framers' vision that Congress have "broad latitude" to exercise "inventive statesmanship" in providing for territorial governance. It is that text, history, and vision that provide the clear answer in this case. The Appointments Clause does not limit

Congress's authority here, and the Board was constitutionally appointed.

II. The De Facto Officer Doctrine Has Applied In Instances Of Constitutional And Appointments Infirmities For Centuries.

The First Circuit was profoundly ahistorical in its application of the Appointments Clause, but its approach to remedy was—as a historical matter—spot on. The First Circuit held that the de facto officer doctrine applies to validate the Board's actions here. Aurelius contends that was error because, in its view, the de facto officer doctrine applies only to technical (not constitutional) defects and collateral attacks on title. Aurelius Br. 51-52. History makes clear, however, that the doctrine is far more expansive. For more than five hundred years the de facto officer doctrine has broadly protected the public's confidence in government actions arising in widely varying contexts—including when an official's mode of appointment is unconstitutional. This was true in the pre-Revolution English common law, and it has been true in the United States since the Founding. Indeed, the doctrine has been applied more expansively and consistently in the United States than it was in England, a phenomenon long attributed to the uniquely democratic and devolved nature of American government. *See* Albert Constantineau, *A Treatise on the De Facto Doctrine* 14-15 (1910). Further, although *one* purpose of the doctrine was to prevent abusive collateral attacks impeding government duties, its primary purpose was to validate public reliance on apparent public authority, both for the sake of equity and for safeguarding the rule of law.

Aurelius's brief, then, asks this Court to discard a common law remedial doctrine reflecting centuries of accumulated wisdom protecting the public's faith in free government, generally, and American institutional values, in particular. The Court should decline to do so. Under deeply-rooted historical practice, the de facto officer doctrine applies to the Board's actions.

A. The De Facto Officer Doctrine Has Been Universally Accepted Since The Founding Because It Protects Public Confidence In Our Free Government Institutions.

As Aurelius and its amici would have it, the de facto officer doctrine is narrowly drawn and rarely applied, some wispy ancient ghost serving little purpose in the government the Framers created. *See* Aurelius Br. 51-52; Chamber of Commerce Br. 7-8, 10. Not so. A complete historical accounting demonstrates it is in fact a necessary corollary to free government and to the American democratic experiment, in particular. Indeed, the doctrine has been continuously applied by English and American courts for centuries in nearly the same form it took when first reported in 1431—precisely because it has proven essential to public confidence in public institutions. *See, e.g.*, *Heath v. State*, 36 Ala. 273, 275 (1870) (The doctrine rests "upon great principles of public policy" and "dates as far back as the Year-Books, and it stands confirmed, without any qualification or exception, by a long line of adjudications, both in England and in the United States." (collecting cases)). Put simply, the doctrine is not important because it is old, it is old because it is important.

To start with, the Founding generation would be surprised to learn from Aurelius that such a basic rule of law in their time was somehow antithetical to the institutions they designed. Aurelius Br. 56-61. As described in the 1793 edition of Charles Viner's *General Abridgement of Law and Equity*, the rule (longstanding even then) was that "[a]cts done by an officer de facto, and not de jure, are good" and "not avoidable." Viner, 16 *Abridgement* 114 (2d ed. 1793).[6] Indeed, the authoritative English "definition of an officer de facto" was distilled by *Parker v. Kett*, 1 Salk. 97 (1701), a case decided at the turn of the eighteenth century and influential among American jurists. *See, e.g.*, *Brown v. Lunt*, 37 Me. 423, 428-29 (1854); *Petersilea v. Stone*, 119 Mass. 465, 467–68 (1876). Thus, by the time of the Revolution, the de facto officer doctrine was well established as a basic tenet of English governance.

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[6] *See also, e.g.*, *Knowles v. Luce*, 72 Eng. Rep. 473 (1580) (explaining that the acts of a steward and clerk without proper authority over a manorial court would not be undone because tenants should not be required in examine this authority); *Lord Dacre's Case*, 1 Leonard 288 (1553) (acts of a steward's servant who held manorial court without authority were good as to third parties); *Leak v. Howell*, 533 Cro. Eliz. 781 (1596) (acts of an agent would be binding even when he was appointed without proper authority); *Harris v. Jays*, 699 Cro. Eliz. (1588) (acts of manor steward appointed by a county surveyor rather than the lord, as required, were good as to third parties other than the Queen); *Knight v. Corporation of Wells*, Lutw. 508 (1688) (holding that a corporate bond issued by a legally unqualified individual, who was nonetheless elected mayor, was good due to his color of office).

Although firmly rooted in centuries of English common law leading up to the Founding, the de facto officer doctrine received its fullest development and expansive acceptance in the United States. *See State ex rel. Bockmeier v. Ely*, 113 N.W. 711, 713 (N.D. 1907) (discussing the expansion of the doctrine by American courts); Montgomery H. Throop, *A Treatise on The Law Relating to Public Officers and Sureties in Official Bonds* 587 (1892) (same); *see also* Constantineau, *supra*, at 14 ("With its essentially democratic institutions, . . . the American republic has offered the most propitious field for the development of the doctrine."). And for good reason. A new nation rapidly expanding westward and, eventually, overseas, created a constant need for new municipal, county, state, and territorial governments. Further, our nation's exceptional reliance on democratic institutions and local control led to a proliferation of elected officers to administer those governments. Constantineau, *supra*, at 14.

Hand in hand with the expansion of American democracy came the public's need to rely on those officials' apparent authority, so that individuals could freely order their own lives, businesses, and affairs in a vast and diverse republic. "[W]ithout it, the American people could not, with any degree of satisfaction, carry on the public affairs of the country, whether in relation to the State, the administration of justice, or municipal government." *Id.* The doctrine was therefore given "increased life and vigor" by "the American courts." *Id.* Indeed, "the American judges started where their English colleagues had left, and expanded its principles

to satisfy the needs and conditions of a new country, with a different form of government and a different mode of filling public offices." *Id.* The doctrine thus helped incubate and protect the exceptional American experiment in democracy, private enterprise, and local control—an experiment in liberty that, at the Founding, was particularly vulnerable to loss of public confidence.[7]

The authoritative American statement of the de facto officer doctrine was provided by the Connecticut

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[7] As one might expect for a rule of law so fundamental to the American legal system, the doctrine was consistently invoked as a matter of course by early treatises on a variety of subjects. *See, e.g.*, J.D. Wheeler, 7 *A Practical Abridgement of American Common Law Cases* 142 (1836) ("[T]he public acts of an officer de facto are valid."); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 751 (1868) (The de facto doctrine applies "for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights."); Thomas M. Cooley, *A Treatise on the Law of Taxation* 191 (1876) ("The clear and very strong preponderance of authority is, that the general policy of the law requires the acts of officers *de facto* to be sustained in tax cases, under the same circumstances and on the same imperative reasons that sustain them in others."); G.W. Field, *Field's Lawyers' Briefs Consisting of Treatises on Every Important Legal Subject* 99 (1886) ("The acts of officers de facto are, from public necessity, so far as third persons are concerned, regarded as of equal validity as if they were officers de jure."); John F. Dillon, 2 *Commentaries on the Law of Municipal Corporations* 841-842 (5th ed. 1911) ("In this country the doctrine is everywhere declared, that the acts of *de facto* officers . . . *are valid*" (emphasis in original)); Julius Puente, *International Law As Applied to Foreign States* 23 (1928) (describing the de facto officer doctrine as applied to foreign governments).

Supreme Court in *State v. Carroll* and adopted by this Court in *Norton v. Shelby County*, which gave *Carroll* "strong commendation as a land-mark of the law." 118 U.S. 425, 445 (1886). In *Carroll*, the Connecticut Supreme Court specifically rejected a restricted view of the de facto officer doctrine—though still far broader than the ahistorical rule Aurelius proposes—that, for the doctrine to apply, a de facto officer could only be appointed by the person or body having the proper appointment authority. 38 Conn. 449 (1871). After a careful review of English and American authorities, the court propounded a comprehensive list of officers to whose acts the doctrine applies:

> (1) those who induce reliance on their actions through reputation or public acquiescence;
>
> (2) those who were properly elected or appointed but failed to meet some technical requirement such as "tak[ing] an oath";
>
> (3) those who are legally ineligible for office or who were installed by a person or body lacking the authority to do so; *and*
>
> (4) those who serve "*under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such*."

Id. at 471-72 (emphasis added).

Carroll was quickly and universally recognized, including by this Court, as the touchstone for the de

facto officer doctrine. *Norton*, 118 U.S. at 445; *see also, e.g.*, 8 Joseph Walker Magrath, *De Facto* Officers, in *American and English Encyclopaedia of Law* 781 & n.6 (David S. Garland, et al. eds., 2d ed. 1898) ("Chief Butler's [d]efinition was given in *State v. Carroll* . . . after an exhaustive examination of the cases on the subject, and is very generally recognized by the courts as being correct and full.").

But *Carroll* broke no new ground: It merely summarized and distilled the expansive doctrine that most American courts had applied across hundreds of cases reaching back to the Founding. *See, e.g.*, *State v. Anderson*, 1 N.J.L. 318, 327 (N.J. 1795) ("[N]othing more is necessary to constitute an officer de facto than the form of an election . . . 'though that [election] upon legal objections may afterwards fall to the ground.'"); *People ex rel. Bush v. Collins*, 7 Johns. 549, 552 (N.Y. Sup. 1811) (noting the rule that a de facto officer's "acts are good until he is removed" is law "too well settled to be discussed" (citing Viner, *supra*, at 114)). For example, in *People ex rel. Ballou v. Bangs*, 24 Ill. 184, 187 (1860), the Illinois Supreme Court held that the doctrine applied even though the "portion of the law which provided for the election of a circuit judge was not authorized by the constitution"—indeed, the officer's "acts were as valid, of course, as if the law had been constitutional." *See also Fowler v. Bebee*, 9 Mass. 231 (1812) (holding that even if a governor lacked authority to appoint an officer, the officer's actions were valid); *Calloway v. Sturm*, 48 Tenn. 764 (1870) (same). Aurelius simply ignores these centuries of authority.

Likewise, Aurelius ignores this Court's own precedents. Early and often, this Court recognized the foundational nature of the de facto officer doctrine. Thus, by 1842, this Court refused to invalidate the past acts of an officer with invalid title, explaining that "this doctrine is now regarded as settled, as elementary in principle, and no longer open to discussion." *Cocke v. Halsey*, 41 U.S. 71, 79 (1842); *see, also e.g.*, *Bank of United States v. Dandridge*, 25 U.S. 64, 69-70 (1827) ("[T]he law . . . will presume that a man acting in a public office has been rightly appointed."); *Hussey v. Smith*, 99 U.S. 20, 24 (1878) ("The acts of such [de facto] officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a source of serious and lasting evils."); *Nofire v. United States*, 164 U.S. 657, 661 (1897) (Acts of de facto officer given "full legal force. As to third parties, at least, he was an officer de facto; and, if an officer de facto, the same validity and the same presumptions attached to his actions as to those of an officer de jure.").

Thus, from the beginning of our Republic the de facto officer doctrine helped provide the confidence in public officers and legal clarity that enabled America's fledging experiment in democracy and federalism. Rather than undermining American principles of free government, the de facto officer doctrine was pervasively adopted and widely embraced as necessary to those principles' survival.

B. The De Facto Officer Doctrine Has Always Applied To Constitutional Infirmities, Including Those Involving An Officer's Qualifications Or Appointment At Any Level.

Aurelius's argument that the de facto officer doctrine is limited to technical defects in title is belied by centuries of precedent. Aurelius Br. 51-52. Indeed, the early American precedents expressly and repeatedly applied the doctrine where, as Aurelius argues is the case here, an officer is found invalidly appointed (or elected) pursuant to a statute that does not comply with a constitutionally mandated procedure for filling the office in question.

As Justice Field explained in *Norton*, the de facto officer doctrine marks a fundamental and longstanding distinction between an unconstitutional mode of appointment, to which the doctrine applies, and an entirely unconstitutional office, to which it does not: "Where an office exists under the law, it matters not how the appointment is made, so far as the validity of [the appointee's] acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions." *Norton*, 118 U.S. at 444-45; *see also, e.g.*, Constantineau, *supra*, at 278 ("[N]otwithstanding the unconstitutionality of a law, altering the mode of filling a legal office, the persons elected or appointed by or pursuant thereto, will nevertheless be deemed officers de facto."); John D. Works, *Courts and Their Jurisdiction* 383 (2d ed. 1894) ("An appointment under an unconstitutional statute, purporting to authorize an appointment to an existing

office, before such statute is judicially declared to be unconstitutional gives color of title to the office."); T.C. Simonton, *Treatise of the Law of Municipal Bonds of the Municipal Corporations of the United States* 54 (1896) ("Although there can be no *de facto* officer where there is no legal office, yet there can be a *de facto* officer though he hold office under an unconstitutional act, if there be a legal office."); 8 *American and English Encyclopaedia of Law*, *supra*, at 789 ("[A] *de jure* officer may continue in office as a de facto officer after he has become ineligible to the office on account of a constitutional limitation of the length of time during which the office may be held by one person.").[8]

As discussed in Part II.A, *supra*, the authoritative American statement of the de facto officer doctrine was provided by the Connecticut Supreme Court in *State v. Carroll* and approved by this Court in *Norton v. Shelby County*. *See* 118 U.S. at 445. The four circumstances identified in *Carroll* in which an officer's past acts will not be voided include when the officer acts "under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be

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[8] This is in fact a particularly American approach: Departing from the British requirement of public acquiescence to de facto authority, American courts adopted the more forgiving rule that "any law enacted by a legislature is sufficient to impart color of title," meaning that "the degree of unconstitutionality of the law is immaterial" to application of the doctrine. Constantineau, *supra*, at 265; *see also* Throop, *supra*, at 590 ("[T]he more recent decisions recognize even a broader rule [than Lord Ellenborough's definition]; and tend to hold that actual possession of the office, without regard to the mode in which possession was acquired . . . suffices to constitute the incumbent a good officer *de facto*.").

such." *Carroll*, 38 Conn. at 472; *see also* Floyd R. Mechem, *A Treatise on The Law of Public Offices and Officers* 214 (1890) (*Carroll*'s definition of a de facto officer appointed pursuant to an unconstitutional law "extends to officers of all grades, executive, ministerial or judicial, and to inferior as well as superior officers."). Indeed, *Carroll* itself involved a dispute over the constitutionality of a law regarding the method of appointing acting judges.

In 1880, the District Court of Oregon provided a thorough overview of the previous century's "almost unbroken current of authority" concluding that "a statute, though it should be found repugnant to the constitution, will give such color" of authority in and of itself that the officer's acts will be held valid. *In re Ah Lee*, 5 F. 899, 912-13 (D. Or. 1880). The court observed that an unconstitutionally appointed officer nonetheless operates in the role de facto:

> Thus, for instance, the constitution requires that the justices of the supreme court shall be appointed by the governor, with the advice and consent of the senate; but if, either intentionally or from inadvertence, the governor should appoint and commission an individual as one of the justices of that court without having previously nominated him to the senate and obtained the consent of that body, and the person thus appointed should take upon himself the

> duties of that office, he would be a judge of the supreme court de facto.

Id. at 910-11.[9]

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[9] *See also, e.g.*, *Thompson v. Couch*, 108 N.W. 363, 364 (Mich. 1906) ("[T]here may be a de facto officer, whose apparent right arises out of action taken by the electorate or the appointing power under the supposed authority of an unconstitutional law before the same is declared unconstitutional."); *Erwin v. City of Jersey City*, 37 A. 732, 733 (N.J. 1897) ("This contention is . . . that the act under which the board of finance made the appointment was not within the constitutional power of the legislature to enact. The success[] . . . of this proposition might affect Erwin's title as an officer de jure, but . . . would be without effect upon his position as an officer de facto."); *Walcott v. Wells*, 24 P. 367, 371 (Nev. 1890) (denying a writ of prohibition intended to enjoin trial before a judge appointed under an allegedly unconstitutional statute, as he was a judge de facto "even if the act authorizing his appointment is unconstitutional"); *Stokes v. Acklen*, 46 S.W. 316, 319 (Tenn. 1898) ("[I]t is settled by a current of authority almost unbroken for over 500 years in England and this country, that ineligibility to hold an office does not prevent the ineligible incumbent, if in possession under color of right and authority, from being an officer de facto with respect to his official acts, in so far as third persons are concerned."); *State v. Gray*, 36 N.W. 577, 579 (Neb. 1888) (city councilmen elected under an ordinance redistricting the city are officers de facto though such ordinance was void because not legally passed); *Leach v. People ex rel. Patterson*, 12 N.E. 726, 729 (Ill. 1887) (rejecting a challenge to a board's past actions because "[t]he real cause of complaint is that the office legally existing was illegally filled. The cases are numerous which hold that the acts of a public officer elected or appointed under an unconstitutional law are valid as respects the public and third persons." (citing *Norton* and *Carroll*)); *State ex rel. Herron v. Smith*, 7 N.E. 447, 454-55 (Ohio 1886) ("[M]embers of a legislature seated by less than a constitutional quorum have [no] less color of title to their seats" as "the inconvenience that would result" from a different rule "would be intolerable."); *Chi. N.W. Ry.*

The American application of the doctrine to constitutional infirmities was nothing new. In fact, the very first reported case accepting the doctrine involved a fundamental legal defect in an officer's election—he lost the election yet assumed office anyway. The 1431 decision of *Abbe of Fontaine* arose from an action on a bond for goods issued by an individual illegally installed as an abbot despite being handily defeated in the election, and who was subsequently removed in favor of the winner. 9 Hen. VI, at 32(3) (1431). Assuming the ousted abbot's bond to be enforceable despite his clearly false title, Chief Justice Babington of the Common Bench explained that if an appointment is made by "a man who had no right," the appointed officer may be "ousted by legal process in as much as the patron had no right" to appoint him, "yet a deed which was made before him is good." *Id.* Similarly, in the 1600 decision of *Costard v. Winder*, the court held that despite being legally disqualified from religious office, a layman who had assumed the office of a parson was a "parson de

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Co. v. Langlade Cty., 14 N.W. 844, 851 (Wis. 1883) (applying the de facto doctrine when the legislature enacted a statute granting the governor authority to appoint certain county officers, in contravention of the state constitution's requirement that all such offices be elected); *Campbell v. Commonwealth*, 96 Pa. 344 (1880) (holding that judges elected by a county in contravention of the state constitution were officers de facto as to the public); *Patterson v. Miller*, 59 Ky. 493 (1859) (holding that one who is elected and acts as a sheriff is sheriff de facto even if constitutionally ineligible for the office); *Taylor v. Skrine*, 2 Tread. 696, (S.C. Ct. App. 1815) (holding the prior acts of judge appointed by the governor pursuant to a statute later declared unconstitutional were valid as "public acts of [an] officer[] de facto," for "the principle is too well established to admit of a doubt.").

facto" and, therefore, acts taken by him in that capacity were valid. Cro. Eliz. 775 (K.B. 1600). As the court explained, "everyone agreed, that all spiritual acts, as marriages, the administration of the sacraments, &c. by such [a person], during the time that he is parson, are good." *Id.*

Nor is the doctrine applied only to actions of low-level officers. *See Kottman v. Ayer*, 3 Strob. 92 (S.C. Ct. App. 1848) ("The reason of the rule, and the rule itself, embrace every officer from the highest to the lowest."); *State v. Gardner*, 54 Ohio St. 24, 32 (1896) ("The common law in relation to de facto officers had its origin in England; it was there laid upon a foundation as broad as their necessities required."); Constantineau, *supra*, at 22 (The de facto officer doctrine is "applicable to all classes of public officers, whether they be political, judicial, ministerial, municipal, military, or the like. The condition or rank of the officer is also immaterial, and it is of no consequence whether it be the highest or lowest in the land.").[10] The doctrine has long been accepted as

[10] As Blackstone illustrates in his Commentaries, the concept of a de facto officer applied even to the king. Upon the reclamation of the throne by the House of York in 1461, Parliament enacted a statute that indemnified those who had submitted to the previous kings of the House of Lancaster, thereby "provid[ing] for peace of the kingdom." 1 W. Blackstone, *Commentaries on the Laws of England* 197 (1765). The statute referred to the Lancaster kings as "late kings of England successively in Deed and not of Right," 1 Edw. IV. c. 1, 380 (1461), and Blackstone reports that King Edward referred to the Lancasters as "*nuper de facto, et non de jure, reges Angliae*," Blackstone, *supra*, at 197; *see also, e.g.*, *Jewell v. Gilbert*, 5 A. 80, 81 (N.H. 1886) (citing this history in support of the de facto doctrine); *Carroll*, 38 Conn. at 459 (same). In fact, Sir Edward Coke was a

applicable to high-ranking officers across all three branches of government. For example, in *State ex rel. Knowlton v. Williams*, the Wisconsin Supreme Court refused to void the enactment of legislation upon the governor's approval, despite the fact that the governor possessed office unconstitutionally at the time. 5 Wis. 308 (1856). The same was considered true for supreme court justices installed without the constitutional requirement of the legislature's advice and consent. *See In re Ah Lee*, 5 F. at 910-11. Likewise, "[l]egislators elected under an unconstitutional law redistricting a state for legislative purposes, before the same is declared unconstitutional, are officers de facto." 8 *American & English Encyclopaedia of Law* at 793 (discussing *Parker v. State ex rel. Powell*, 133 Ind. 178 (1893)).

In short, Aurelius's view that the de facto officer doctrine is limited in purpose, antithetical to the structure of American democracy, or inapplicable to constitutional defects simply cannot be reconciled with history. Aurelius Br. 51-52, 58-61. This Court can therefore either act in accordance with longstanding precedent and Founding-era understanding, or it can jettison centuries of common law wisdom to grant

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personal beneficiary of a variant on the doctrine. When his right to sit in Parliament was challenged in 1626, he was still granted legal privileges as "standing, *de facto*, returned a member of this House." C. Johnson, 2 *The Life of Sir Edward Coke* 173 (1837); Constantineau, *supra*, at 12; *see also id.* at 22 ("There may be a de facto king, a de facto president of the United States, a de facto governor, a de facto member of a legislative body.").

Aurelius the ahistorical remedy its seeks. It cannot do both.

C. The Primary Purpose Of The De Facto Officer Doctrine Is The Protection Of Public Reliance Interests And The Public's Confidence In The Rule Of Law.

Aurelius's assertion that the doctrine's *sole* purpose is preventing collateral attacks on title is similarly divorced from history. Aurelius Br. 51-52. To be sure, *one* purpose of the de facto officer doctrine is enabling effective and smooth government administration as "necessary to maintain the supremacy of the law and to preserve peace and order in the community at large." Constantineau, *supra*, at 5. Courts have therefore invoked the doctrine when turning aside challenges brought as a collateral attack on the officer's actions rather than a direct attack on the officer's title: If "every officer bound to uphold or defend his title against every one who might choose to deny or attack it in a collateral way, he would often be so much thwarted in the performance of his official duties that his efficiency as an officer might at times be greatly impaired." *Id.*; *see also Ryder v. United States*, 515 U.S. 177, 180-81 (1995) ("The de facto 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."). But this protection against abuse of the system comes at the price of potentially meritorious claims being dismissed without substantive review. *See Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984). Thus, when conditions are such that the risk of undue harassment via collateral

attack are minimal—such as when a claimant brings his or her claims promptly—there is less need to bar indirect challenges to title. *Id.* at 1499; *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality op. of Harlan, J.) (The doctrine "prevents litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality."). It is therefore completely consistent with the history and equitable purposes of the doctrine's gatekeeping role that courts should allow appropriate Appointments Clause challenges to proceed to the merits rather than be barred at the courthouse door.

But the doctrine's *gatekeeping* role, which conserves government resources by dismissing collateral attacks on title *before* reaching the merits, is quite distinct from its *remedial* role, which precludes retrospective voiding of official acts *after* the merits have been decided against the purported officer. *Compare Andrade*, 729 F.2d at 1497-98 (discussing the bar on collateral attacks as "depriv[ing] a plaintiff with an otherwise legitimate claim of the opportunity to *have his case heard*" (emphasis added)), *with EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18 (2d Cir. 1981) (Because "the 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," it may apply as a remedial matter regardless of whether an officer knew of his title defect at the outset of litigation.).

Thus, in *addition* to barring collateral attacks on title, the doctrine separately ensures that "the functions of an office shall not cease or be suspended because of a doubt about the title of the incumbent." Constantineau,

supra, at 288. This entirely separate purpose of protecting public reliance is in fact the primary motivation for the doctrine, as this Court long ago observed: "The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441; *see also People ex rel. Norfleet v. Staton*, 73 N.C. 546, 552 (1875) ("The convenience of the public is not the only reason given for the rule, but the convenience of the public and 'third persons.'"). Aurelius's argument that this Court should eliminate the doctrine's remedial role and categorically deny courts the authority to give equitable protection to reasonable reliance interests of third parties and the public is at odds with centuries of precedent.

Moreover, beyond fairness in any particular case, as discussed in Part II.A, *supra*, the de facto officer doctrine is a necessary corollary to the rule of law in a diffuse and complex society. As this Court observed in *Norton*:

> Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion

> would result if in every proceeding before such officers their title could be called in question.

118 U.S. at 441-42.

Members of public cannot be charged with determining the validity of every officer's title before ordering their private affairs, or be made to suffer potentially tremendous costs of otherwise valid government action becoming void ab initio. *Dugan v. Farrier*, 47 N.J.L. 383, 386 (N.J. 1885) ("[T]he eligibility of an officer is as difficult of ascertainment as his actual election, and sound policy requires that the public should be no more required to investigate the one than the other, before according respect to his official position."); *see also Scadding v. Lorant*, 10 E.R. 164 (1851) (Failure to apply the doctrine "would create uncertainty with respect to obedience to public officers, and it might also lead to persons, instead of resorting to ordinary legal remedies to set right anything done by officers, taking the law into their own hands."). Indeed, the foundational decision in *Carroll* expressly rejected as "fundamentally erroneous" the argument, urged here by Aurelius, that private citizens must bear the risk of "whether [a statute is] manifestly unconstitutional or not, and whether [the law] is to have the appearance and force of law or not." 38 Conn. at 472.

The public must act every day in reliance on government actions, regardless of whether an official's title has been or may in the future be challenged. As the D.C. Circuit has explained, challenges to an officer's title under the Appointments Clause may be timely brought not only when the office is first created or possessed, but also when raised as a defense to an enforcement action,

even years later. *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015). To keep the public in suspense about whether a government policy relied upon today may be undone retrospectively tomorrow—or even years later—would undermine the public's ability to order their own affairs without constant guidance and intervention from the government. *See, e.g.*, *United States v. Alexander*, 46 F. 728, 729-30 (D. Idaho 1891) ("It would be a disastrously inconvenient requirement that all who have business with an official person must, before it can be transacted, inquire into the validity of the officer's claim to the office, and that the acts of those who have not legal right, although the semblance thereof, must in all cases be held void."). In fact, cases have held that even if an officer's title is invalidated in a direct action, the public's right to functional government means that "[a]s a matter of public policy the courts may refuse to remove de facto officers of a municipality, on quo warranto, where there are no de jure officers claiming such offices, and such removal would cause a suspension of the functions of the [municipal] corporation." *State ex rel. Eckhardt v. Hoff*, 88 Tex. 297 (1895).

Further, the rule proposed by Aurelius—that the prior acts of illegally selected officers are void—has been rejected throughout American history because it would encourage lawlessness if the public could question an officer's authority whenever a defect, constitutional or otherwise, could plausibly (or implausibly) be raised. *Hussey*, 99 U.S. at 24 ("The acts of [de facto] officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a

source of serious and lasting evils."). For example, nineteenth-century authorities on American criminal law explain that resisting arrest by a law enforcement officer, even if the officer has no valid title, is indictable. *See, e.g.*, *Andrews v. State*, 78 Ala. 483, 485 (1885) ("[A] third person is . . . indictable for resisting one who is merely an officer de facto, or one who has the reputation of being a lawful officer, and yet is not a good officer in point of law." (citing 1 Bishop on Crim. Law § 464 (7th ed. 1882)); John G. Hawley & Malcolm MacGregor, *The Criminal Law* 266 & n.15 (5th ed. 1908) ("Obstructing and resisting an officer de facto is as much an offense as though he were an officer de jure." (collecting cases)).

This Court has long recognized that the risk of confusion and lawlessness, and the public's reliance interests, are all the greater when the defect in title applies not just to an individual officer but to a sovereign authority or a collective body, like the Board. In *Phillips v. Payne*, this Court brushed aside a challenge to a tax levied by the Virginia government following the retrocession of Alexandria from the District of Columbia. Regardless of the unconstitutional nature of the method of retrocession—a defect striking at the structural integrity of the Union—this Court refused a retrospective remedy, holding that "[t]he State of Virginia [wa]s de facto in possession of the territory in question." 92 U.S. 130, 133 (1875); *see also Texas v, White*, 74 U.S. 700, 732 (1868). Similarly, in *Connor v. Williams*, this Court refused to void the enactments of an unconstitutionally chosen legislature. 404 U.S. 549 (1972); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969); *Cipriano v. City of Houma*, 395 U.S. 701

(1969) (per curiam); *Ryder*, 515 U.S. at 183 (explaining that *Connor* "did not involve a defect in a specific officer's title, but rather a challenge to the composition of an entire legislative body"). And in *Buckley v. Valeo*, this Court refused to retrospectively void the collective decisions of the unconstitutionally appointed Federal Election Commission. 424 U.S. 1 (1976).[11]

Aurelius implores the Court to refuse to apply the de facto officer doctrine here because Appointments Clause concerns were "open and notorious before PROMESA even had been acted into law," citing debate in the Senate. Aurelius Br. 62. History's answer is simple: so what? The authorities are clear that a de facto officer's actions will stand until the moment of *judicial determination* of the invalidity of his or her title. *Ex parte Strang*, 21 Ohio St. 610, 617 (1871). Indeed, the de facto officer doctrine's application to all acts prior to a judicial ruling on the merits was so routine that American courts refused to enjoin an officer's actions while the challenge to title proceeded, as the claimant would rarely be entitled to unravel those actions even if successful on the merits. *See* Constantineau, *supra*, at

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[11] *Buckley* held unconstitutional the method of appointing FEC Commissioners, half of whom were nominated by congressional leadership. *Buckley*, 424 U.S. at 140. Although PROMESA also provides for Members of Congress to generate suggested candidate lists, Congress does not make Board appointments, the President does. PROMESA also authorizes the President to simply ignore the congressional suggestions and nominate anyone of his choosing—and that nomination would go through advice and consent. Thus, to the extent this Court's dicta in *Ryder* limited *Buckley*'s remedy to its facts, the present case falls well within those facts. *See Ryder*, 515 U.S. at 178.

290 ("[C]ourts will not interfere by injunction or prohibition to restrain officers de facto from exercising the duties and functions of their office, while the title thereto is in dispute."); *see also, e.g.*, *Dows v. Village of Irvington*, 13 Abb. N. Cas. 162 (N.Y. Sup. Ct. 1883) (a de facto tax assessor will not be enjoined from making an assessment).

Nor are the Court's more recent decisions in *Ryder* or *Nguyen v. United States*, 539 U.S. 69 (2003), to the contrary. The heightened due process concerns implicated by the improper appointment of an adjudicator in an individual enforcement action or criminal prosecution, and the much reduced reliance interests of the public in such an individualized proceeding, counsel against the application of the doctrine in such circumstances. It would be strange, to say the least, if this these cases had *sub silentio* erased centuries of precedent regarding a fundamental tenet of American government and English common law that has been well accepted and consistently applied throughout the nation's history, including by this Court.

In sum, Aurelius invites this Court to reject the de facto officer doctrine's longstanding application by American courts at every level, in nearly every circumstance. The Court should decline. For one, retrospectively voiding the acts of de facto officers creates immense inequities for parties who relied on government decisions in any particular case. The millions of Americans directly affected by Puerto Rico's insolvency should not be required to suffer the consequences if this Court were to void the Board's actions, in the Title III proceeding or otherwise. For

another, the general public cannot be required to investigate all possible constitutional objections to an official's authority before acting in reliance upon acts or policies involving that official.

But more importantly, the Court should decline Aurelius's invitation because the doctrine's ubiquity and longevity reflects the common law wisdom, accumulated over more than half a millennium, that a judge's unraveling the past acts of public officers is destructive to the rule of law, the certainty needed by private enterprise, and the legitimacy of free government. *See Norton*, 118 U.S. at 441-42; Constantineau, *supra*, at 8 ("It is a fundamental maxim, not of the law, but of civilized society, that the acts of officers de facto are valid. Without it, there would be no security for life, or liberty, or property." (quoting *Griffin's Case*, 11 Fed. Cas. 7 (D. Va. 1869)). This is as true today as it was at the Founding. A nation whose Founders depended on institutional design to protect individual liberty must also defend public confidence in those institutions. Undoing the reliance interests of millions of Americans by departing from common law wisdom and precedent, as Aurelius urges this Court to do, may serve the short-term interests of a few. But it hardly safeguards liberty, now or for future generations.

CONCLUSION

The judgment of the court of appeals should be reversed as to the Appointments Clause. Alternatively, if this Court concludes the appointment of the Board was invalid, the judgment of the court of appeals should be affirmed as to the remedial application of the de facto officer doctrine.

Respectfully submitted,

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