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

IN THE

# Supreme Court of the United States

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

*Petitioner,*

*v.*

AURELIUS INVESTMENT, LLC, *et al.*,

*Respondents.*

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

# CONSOLIDATED OPENING BRIEF AND REPLY OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA


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## QUESTION PRESENTED

The United States Court of Appeals for the First Circuit concluded that if it applied its Appointments Clause holding[1] retroactively to dismiss the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA")[2] Title III cases brought by the Financial Oversight and Management Board (the "Oversight Board" or the "Board"), doing so would have potentially devastating consequences for the people of Puerto Rico and the many thousands of other innocent third parties who had relied on the Board's actions.[3]

The question presented here is whether, under those circumstances, it was error for the court to accord *de facto* validity to the Board's prior actions and stay its mandate to allow for the political branches to solve the Appointments Clause defect it claimed to have identified, following the course marked out by this Court's decisions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), and *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976).

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1. For the reasons given in the Opening brief of the Official Committee of Unsecured Creditors other than COFINA (the "Committee") and *infra* at 25-49, the First Circuit's holding regarding the Appointments Clause was erroneous. The opinion of the court of appeals is reported at 915 F.3d 838 and is reprinted in the Joint Appendix at 134.

2. Pub. L. No. 114-187, 130 Stat. 549 (codified at 48 U.S.C. § 2101 *et seq.*).

3. *See* JA177 (quoting 48 U.S.C. § 2121(a)).

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## STATEMENT OF THE CASE

1. PROMESA was signed into law on June 30, 2016, the members of the Financial Oversight and Management Board it created were appointed in August, 2016, and the Board immediately began working to resolve the financial crisis that still imperils the Commonwealth. Between May 3 and July 2, 2017, the Oversight Board filed five jointly administered reorganization cases (one for the Commonwealth of Puerto Rico and one for each of four designated instrumentalities).[1] Combined, the cases form by far the largest bankruptcy case in United States history involving a governmental entity,[2] and one of the largest bankruptcy cases of any sort.

Immediately after these Title III cases were filed, the district court began putting the machinery in place to administer the sprawling litigation ahead. Among many other tasks, the court entered orders concerning the joint administration of the Title III cases, approved case management procedures, confirmed application of the automatic stay, and appointed a mediation team. It was not until August 7, 2017, after all of these steps and many others had been taken, that petitioner Aurelius

1. *See* Bankruptcy Case Nos. 17-BK-3283 (D.P.R. filed May 3, 2017), 17-BK-3284 (D.P.R. filed May 5, 2017), 17-BK-3566 (D.P.R. filed May 21, 2017), 17-BK-3567 (D.P.R. filed May 21, 2017), 17-BK-4780 (D.P.R. filed July 2, 2017). Aurelius disclaims any interest in three of these five cases, *see* Aurelius br. at 4 n.1, but the Court's disposition of this case will inevitably implicate all five.

2. *See*, *e.g.*, Heather Long, *Puerto Rico Files for Biggest US Municipal Bankruptcy* (CNN Business May 3, 2017), https://money.cnn.com/2017/05/03/news/economy/puerto-rico-wants-to-file-for-bankruptcy/index.html.

Investment, L.L.C., filed its motion to dismiss the Title III cases. Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc. ("UTIER") also filed its adversary proceeding seeking the same result on that day with respect to one of the designated instrumentalities, and Assured Guaranty Corp. and Assured Guaranty Municipal Corp ("Assured") filed theirs on July 23, 2018.[3]

Over the more than two years since Aurelius filed its motion to dismiss, the district court has resolved matters of unprecedented complexity and scope. Taken together, those cases involve over $100 billion in claims. In response to the district court's bar date order entered on February 15, 2018, creditors have filed approximately 165,000 proofs of claim, *see* Case No. 17-BK-03283, Dkt No. 4052 at 6 (D.P.R. Oct. 16, 2018), concerning, among other things, approximately $74 billion of bond debt and $49 billion of unfunded pension liabilities. *See* Special Investigation Comm., Fin. Oversight & Mgmt. Bd. for P.R., Final Investigative Report 2 (Aug. 20, 2018).[4] PROMESA, and the Oversight Board's reorganization activities it expressly authorized, have spawned over three hundred adversary proceedings, resulting in 56 district court opinions and 13 published decisions by the First Circuit.

In resolving the issues arising in these cases, the district court has fundamentally altered countless debtor-creditor relationships, and has induced uncountable third

3. Unless the context requires otherwise, all of the petitioners listed here are referred to collectively as "Aurelius" in this brief.

4. Available at: https://www.documentcloud.org/documents/4777926-FOMB-Final-Investigative-Report-Kobre-amp-Kim.html

parties to rely on its actions. For example, the district court has already confirmed a plan of adjustment for one of the Title III debtors, Corporación del Fondo de Interés Apremiante ("COFINA"). Dkt. No. 5048, Case No. 17-bk-3283 (D.P.R. Feb. 4, 2019). That plan incorporated a settlement of disputes between COFINA and the Commonwealth (which was represented in that settlement by the Oversight Board); that settlement in part restructured billions of dollars in legacy COFINA bond debt by issuing approximately $12 billion in new bonds. As a result of that settlement, those new bonds are already trading in the public debt markets.[5]

2. Having concluded (incorrectly, as explained elsewhere) that members of the Oversight Board had been improperly selected by the President, the First Circuit was faced with a daunting remedial challenge. It understood that in the three years since PROMESA's enactment, thousands of individuals and entities had relied in good faith on the existence of the Oversight Board and

5. After the COFINA settlement was reached, Aurelius entered into a contract in which it agreed, in return for millions of dollars, that it would not thereafter challenge the validity of the COFINA settlement. That agreement, however, created a "carve out" so that Aurelius could press the Appointments Clause issue with respect to COFINA. But the agreement, and its carve-out, were negotiated by the Oversight Board as the Commonwealth's agent, and was thereafter confirmed by the district court on the Oversight Board's motion. If, as Aurelius claims, the Oversight Board was void *ab initio*, then the agreement, the carve-out clause, and the Order granting the Board's motion would all be void too. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (at common law "an agreement void *ab initio* . . . is not a 'contract,' there is no 'written provision' in" it on which a party can rely).

the legitimacy of its actions (as well as those of the district court), and that retroactive application of its Appointments Clause holding would have a devastating impact on those innocent third parties. JA177.

The First Circuit also understood that the Oversight Board had worked assiduously for years to bring order to the Commonwealth's finances, and that retroactive application of its holding would result in "summary invalidation" of all of that progress. *Id.* Finally, the First Circuit acknowledged that the Appointments Clause question it had answered was one of first impression — that the "Board Members [had been] acting with the color of authority [when] they decided to file the Title III petitions . . . a power squarely within their lawful toolkit," and therefore that the Oversight Board's actions had been taken "in good faith." *Id.* On these facts, it decided to follow this "Court's exact approach in *Buckley* [*v. Valeo*, 424 U.S. 1, 142 (1976)], which [also] involved an Appointments Clause challenge," *i.e.*, to grant the prior actions of the Oversight Board *de facto* validity and to stay its mandate to allow for the identified Appointments Clause defect to be corrected by the political branches. *Id.*

## SUMMARY OF THE ARGUMENT

1. When this Court announces new rules of constitutional law, it typically applies the new rule both retroactively, to the parties before the Court and to all other pending cases. In rare cases, however, this retroactive application could work "substantial injustice and hardship"[6] or result in a "grave disruption" to

6. *N. Pipeline*, 458 U.S. at 51.

the administration of government.[7] In those unusual circumstances, the Court will apply a "purely prospective method" of announcing the new rule, "under which [that] new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (Souter, J. for the plurality) ("*Beam*").

The First Circuit properly concluded that this was a case in which such an unusual remedy was warranted. It acknowledged that retroactive application would upset the legitimate reliance interests of thousands of innocent third parties, "nullify[] the Board's years of work [and] cancel out any progress made towards PROMESA's aim of helping Puerto Rico 'achieve fiscal responsibility and access to the capital markets.'" JA177 (quoting 48 U.S.C. § 2121(a)). That decision was within the court's equitable power, and was entirely consistent with this Court's treatment of similar, exceptional cases. *See N. Pipeline*, 458 U.S. at 88, and *Buckley*, 424 U.S. at 142-43; *see also City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720–23 (1978).

2. Aurelius argues that the Oversight Board and its work are void *ab initio* or, alternatively, that as "successful separation-of-powers challengers," Aurelius, Assured, and UTIER should get special, bespoke treatment ("meaningful relief"), so that the new rule of constitutional law would apply to them, and only to them. *See* Aurelius Questions Presented and br. at 12, 58, 67-69. The first suggestion is irreconcilable with *N. Pipeline* and *Buckley*

7. *Ryder v. United States*, 515 U.S. 177, 185 (1995).

and the second is expressly foreclosed by this Court's decisions in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) and *Beam*, 501 U.S. at 534. In those latter cases, the Court expressly rejected just the sort of "selective application of new rules" Aurelius apparently seeks; *Harper* and *Beam* mandate that "similarly situated litigants . . . be treated the same" with respect to the retroactive or prospective application of new rules of law. *Beam*, 501 U.S. at 540; *see also Harper*, 509 U.S. at 97. After *Beam* and *Harper*, a "court [announcing a new rule of law] has only two available options: pure prospectivity or full retroactivity." *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004). Aurelius is entitled to no special treatment.

3. Even if special "meaningful relief to successful separation-of-powers challengers" were legally permissible, *see* Aurelius Question Presented, it would be effectively impossible here. This is not controlled by *Ryder v. United States* — the case on which Aurelius principally relies. There, a criminal defendant had his case heard by an improperly constituted appeals panel. Because the defect identified in *Ryder* was only relevant to a handful of individuals, and because retrospective application of the Appointments Clause rule threatened no "grave disruption" to the administration of the court's work, the Court held that Mr. Ryder should be given a new appeal proceeding before a newly constituted panel. 515 U.S. at 185.

This sprawling collection of cases involves hundreds of thousands of individuals and businesses, and their interconnected rights have been, and continue to be, adjudicated in decisions, settlements, and plans that balance and interact with the interests of *all* of these

disparate stakeholders. Like any bankruptcy, the goal of these cases is to ensure that the debtors can reorganize successfully while, so far as is possible, ensuring that no creditor individually takes on a disproportionate burden in the restructuring. There is no way for the Court simultaneously to excuse Aurelius, Assured, and UTIER from the cases (or any portion thereof) and yield a fair and comprehensive result for the debtors or the remaining stakeholders.

4. If the Court declines to accord *de facto* validity to the Oversight Board's actions taken to date, it should nonetheless ensure that the district court has the necessary breathing space to protect, so far as is possible, the interests of all stakeholders and third parties with respect to particular issues. Section 349(b) of the bankruptcy code, 11 U.S.C. § 349(b), expressly provides that when a case is dismissed, as Aurelius requests, the court hearing the case can and should consider separately individual measures taken during the pendency of the case in order to ensure that reliance interests are protected. To the extent the Court agrees with Aurelius on the *de facto* validity question, it should nonetheless ensure that its decision in this matter leaves it to the district court, in the first instance, to determine whether and how to apply section 349 to the enormously complex matters it has been managing for over two years.

## ARGUMENT

### I. IF THE APPOINTMENTS CLAUSE HOLDING IS AFFIRMED, PROSPECTIVE APPLICATION OF THAT RULE IS APPROPRIATE

In the ordinary case, a rule of law announced by this Court is applied both prospectively, to cases yet to come, and retrospectively, to all currently pending cases, including the case in which the new law is announced. When the decision undermines settled expectations by announcing an entirely new rule, or fundamentally shifts controlling law, however, "an assertion of nonretroactivity may be entertained . . . ." *Beam*, 501 U.S. at 534 (Souter, J.). In such cases, the Court may choose to apply a "purely prospective method" of announcing the new rule, "under which [that] new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision." *Id*. at 536 (Souter, J, writing for the Court on this point)[8] (citing *N. Pipeline*, 458 U.S. at 88,

8. Four Justices in *Beam* (Chief Justice Rehnquist and Justices O'Connor, White, and Kennedy) expressly endorsed pre-*Beam* case law permitting purely prospective decisions in suitable-but-rare instances, and Justice Souter (joined by Justice Stevens) saw no occasion to question it. Thus, *Beam* and *Harper* preclude only *selectively* prospective decision-making, in which a new rule is applied in the case in which it is announced by the Court but applies to no other parties or pending cases. *Harper* "clearly retained the possibility of pure prospectivity . . . ." *Glazner v. Glazner*, 347 F.3d 1212, 1216-17 (11th Cir. 2003) (en banc); *accord Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (after *Beam* and *Harper*, "a court announcing a new rule of law must decide between pure prospectivity and full retroactivity").

and *Buckley*, 424 U.S. at 142-43); *see also id.*, 501 U.S. at 546 ("[t]he propriety of [purely] prospective application of decisions in this Court, in both constitutional and statutory cases, is settled by our prior decisions") (White, J.).

The First Circuit correctly determined that this case presented one of those rare occasions that demands purely prospective relief. First, the First Circuit acknowledged that it had answered a question of first impression about territorial governance. *See* JA177 (issue had "never [been] in question until our resolution of this appeal"). Second, it observed that the "Board Members [had to that date been] acting with the color of authority" and exercising in good faith "power[s] squarely within their lawful toolkit.". *Id.* And finally, the court realized that prospective-only treatment of its decision was necessary to forestall chaos. It sought to protect the citizens of the Commonwealth and other third parties who would undoubtedly be harmed if its holding were allowed to erase indiscriminately actions already taken in trying to resolve the financial crisis facing Puerto Rico. *Id.* That decision fully accords with this Court's cases.

### A. According *De Facto* Validity to the Oversight Board's Actions to Date Was Appropriate Under *Buckley* and *Northern Pipeline*

By according prior actions of the Oversight Board *de facto* validity (and thereafter by staying its mandate), the First Circuit simply followed the course prescribed by this Court's prior cases. On two directly relevant occasions, this Court has announced new rules of constitutional law but has given those pronouncements prospective-only application because of the tumult that would have resulted had the holding been applied retroactively.

In *Buckley*, the Court concluded that the Federal Election Commission ("FEC") had been constituted in violation of the Appointments Clause. 424 U.S. at 142-43. Recognizing the destabilizing consequences that its decision would have on legitimate reliance interests if applied retroactively, however, the Court also held that the holding would "not affect the validity of the Commission's administrative actions and determinations to [that] date . . . . The past acts of the Commission [were] therefore accorded *de facto* validity, just as [the Court had previously] recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan." *Id.* at 143. And just as the First Circuit did here, the *Buckley* Court stayed its "judgment insofar as [the decision otherwise would have] affect[ed] the authority of the Commission to exercise the duties and powers granted it under the Act" for a period of time to "allow[] the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." *Id.*

Later, in *Northern Pipeline*, the Court held that in the Bankruptcy Act of 1978, Congress had unconstitutionally conferred Article III judicial power on bankruptcy judges who lacked life tenure and protection against salary diminution. The Court recognized, however, that "Congress' broad grant of judicial power to non-Art. III bankruptcy judges present[ed] an unprecedented question of interpretation of Art. III," and that "retroactive application would . . . surely visit substantial injustice and hardship upon those litigants who [had] relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *N. Pipeline*, 458 U.S. at 88. Accordingly, the Court held that its decision would "apply only prospectively," and

also granted a stay of its mandate to permit Congress to address its decision. *Id.*

To similar effect in a statutory context is *Manhart*. In that Title VII discrimination case, the Court held that it was unlawful for employers to rely on sex-linked mortality tables to demand larger contributions to its pension fund from female employees than from male employees in order to obtain the same benefit. The Court, however, refused to apply the statute's strong presumption in favor of retroactive relief because the ruling was a novel interpretation of the statute and because doing so would have been ruinous to pension funds around the country:

> [W]e must recognize that conscientious and intelligent administrators of pension funds . . . may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views . . . . Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. [Pension] plans, like other forms of insurance depend on the accumulation of large sums to cover contingencies. . . . The occurrence of major unforeseen contingencies [like this Court's decision], however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. . . . Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

435 U.S. at 720-21.

The First Circuit followed the prudent course marked out by these cases: in the words of *Buckley*, it "accorded *de facto* validity" to the Oversight Board's prior actions and stayed its judgment for a period of time to "allow[] [it] in the interim to function *de facto* in accordance with the substantive provisions of" PROMESA. *Buckley*, 424 U.S. at 142-43. The First Circuit did so because it knew that granting the relief Aurelius sought — immediate dismissal of the Title III bankruptcy cases and a declaration that everything done by the Oversight Board since PROMESA's passage in 2016 was a nullity — would merely add to the suffering of the people of Puerto Rico. JA177. The path followed by the First Circuit was entirely consistent with this Court's guidance, and in the circumstances presented, the only prudent course available.[9]

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9. Aurelius argues that members of the Oversight Board were operating in bad faith because the defect in their appointments became "open and notorious" when "Aurelius filed its motion to dismiss asserting the constitutional violation." Aurelius br. at 62. No such bad faith occurs, however, where an issue is debatable, or supported by the decisions of the lower courts (like the district court decision here) or agency views. In *Manhart*, 435 U.S. at 720, for example, the Court acknowledged that "courts had been silent on the question [it answered], and the administrative agencies had conflicting views"; under those circumstances, pension officials had no reason to anticipate Court's holding. In *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964), the losing parties "were [not] unreasonable in holding ... or acting upon" their view of the law because it was, in fact, "support[ed] by respected authorities, including the court below." *Id.* Under those circumstances, the Court has been "unwilling to apply the [new] rule against these appellants." *Id.* And even if, as Aurelius claims, the members of the Oversight Board "knew" their positions were improper *after Aurelius filed its motion to dismiss*, the motion was not filed until more than 90 days after the first Title III case was filed, and a great deal occurred during that period. Even under

### B. Neither of Aurelius' Proposed Alternative Outcomes Is Supported by this Court's Decisions

Aurelius suggests two remedial alternatives to the path marked out by *Buckley* and *Northern Pipeline* and then followed by the First Circuit. Neither proposal can be reconciled with this Court's cases.

#### 1. *Buckley* and *Northern Pipeline* show that the actions of the Oversight Board were not "void *ab initio*"

First, Aurelius argues that "the Title III proceedings initiated by the [Oversight Board should] be regarded as void." Aurelius br. at 59. Thus, according to Aurelius, the First Circuit should have immediately "dismiss[ed] the Title III proceedings" and invalidated all of the Oversight Board's prior actions, including those taken outside the courtroom to help Puerto Rico return to financial stability. *Id.* at 58-59; *see also id.* at 55, 67; UTIER br. at 19. Aurelius claims that *de facto* validity is unavailable as a remedy in the context of constitutional defects like the supposed Appointments Clause violations at issue here; constitutional errors of this sort are "structural" and therefore "subject to automatic reversal. . . ." Aurelius br. at 55-56 (citation omitted). Aurelius argues that prospective-only treatment is available only where the Court acts to correct "'merely technical' statutory defects in an officer's appointment." *Id.* at 51 (quoting *Nguyen v. United States*, 539 U.S. 69, 70 (2003)).

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Aurelius' theory, those actions would have been undertaken in good faith and would be *de facto* valid, and at the very least, the Court should protect those actions.

Together, *Buckley* and *Northern Pipeline* completely dispose of that contention; neither addressed "merely technical" defects in "an officer's appointment," both addressed constitutional errors, and both announced new rules of law, applicable prospectively-only. *Buckley* was itself an Appointments Clause case and in that respect is indistinguishable from this case, and in *Northern Pipeline*, the Court concluded that a "structural," "constitutional defect" in the Bankruptcy Act of 1978 offended Article III. Yet in both cases, the Court issued only prospective relief and accorded *de facto* validity to the officers' prior acts to forestall the systemic upheaval that otherwise would have resulted from those holdings. Aurelius' argument is thus incompatible with *Buckley*, *Northern Pipeline* or *Manhart.*

Aurelius' argument is almost entirely premised on an incomplete reading of *Ryder*. Specifically, the Court there held that "[o]ne who makes a timely challenge to the constitutionality of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question" because "[a]ny other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Ryder*, 515 U.S. at 177.

*Ryder's* "incentive" rationale made perfect sense there but simply does not apply here. Mr. Ryder had only one piece of business before the Coast Guard Court of Military Review — his own criminal appeal. A prospective-only ruling in his case would have helped *future* litigants appearing before *future* panels, but Mr. Ryder would not have benefited at all, and thus he would have had no incentive to raise the issue.

Aurelius, Assured, and UTIER, however, are among a handful of the district court's "frequent fliers." No matter what happens here — even if the Court were to order that the Title III cases be dismissed — they would be major players in new Title III cases, filed by a "properly" composed Oversight Board. Their class of debt would be the subject of the Oversight Board's conduct outside of this litigation. Thus, even if the rule announced in this case were only applied prospectively, they would benefit from it, and thus would have every incentive to raise the issue.

Even in *Ryder*, the Court instructed the lower court to determine what "relief may be appropriate if [an Appointments Clause] violation indeed occurred." *Id.* at 177. Thus, even where a *de facto* officer defense is rejected, "great care [must] be taken in granting relief to plaintiffs who succeed in attacking specific actions taken by government officials on the ground that the officials have no legal title to their office; in such circumstances a court must pay due attention to equitable factors, such as the reliance of 'innocent' third parties on apparently valid government action." *Andrade v. Lauer*, 729 F.2d 1475, 1500 (D.C. Cir. 1984). Here, prospective-only relief would be "appropriate" because it would give Aurelius (and the other parties to the case) the "benefit" of a reconstituted Oversight Board going forward, without upsetting the reasonable expectations of third parties.

*Buckley* and *Northern Pipeline* granted only prospective relief and accorded *de facto* validity to past actions of a government body because each was among the narrow category of cases where that was necessary to protect reasonable reliance interests and ensure the functioning of government. They represent an exercise of

the courts' robust equitable power to fashion appropriate relief. The First Circuit's remedy fits neatly within that tradition, in equally or more compelling circumstances. It should be affirmed.

### 2. The special status Aurelius seeks with respect to prospectivity is not available under the Court's cases

Aurelius' second gambit fares no better. Again relying on a snippet from *Ryder*, Aurelius claims that "[h]aving prevailed in their constitutional challenge to the Board members' appointments, *Aurelius and Assured* were 'entitled' to 'appropriate' relief *in their particular proceedings*," irrespective of the *de facto* relief accorded actions as to *others* in the cases. Aurelius br. at 56 (emphasis added) (citing *Ryder*, 515 U.S. at 183; *accord Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018)). Aurelius and Assured are seeking special status as indicated in their second Question Presented; they claim the court of appeals impermissibly "den[ied] [them] meaningful relief [as] *successful separation-of-powers challengers*," whatever happens to others involved. (emphasis added). *See also* Aurelius br. at 54 (quoting *Ryder*); *id.* at 67 ("*successful challengers* [are entitled to] relief in their particular proceedings, such as favorable action on the order on review") (emphasis added); *id.* at 69 (court of appeals "lacked power" to validate actions the "Board takes *against the successful challengers*") (emphasis added). The argument fails for multiple reasons.

### a. Gerrymandered special retroactivity is impermissable

First, special relief for the three "successful separation-of-powers challengers" is foreclosed by *Beam* or *Harper*. In *Harper*, the Court expressly rejected just the sort of "selective application of new rules" of constitutional law that Aurelius seeks here; *Harper* and *Beam* mandate that "similarly situated litigants . . . be treated the same" with respect to the retroactive or prospective application of new rules of law. *Beam*, 501 U.S. at 540; *Harper*, 509 U.S. at 97. After *Beam* and *Harper*, a "court [announcing a new rule of law] has only two available options: pure prospectivity or full retroactivity." *Crowe*, 365 F.3d at 93. "[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*." *Beam*, 501 U.S. at 544. Aurelius is entitled to no special treatment.

Aurelius does not mention *Harper* or *Beam*. Instead, it relies heavily on the fact that the "successful challenger" in *Northern Pipeline* got the relief it sought, but that aspect of *Northern Pipeline* does not help Aurelius. In *Northern Pipeline*, a debtor in bankruptcy brought a breach of contract damage action against one of its creditors in the bankruptcy court as part of its reorganization case. The creditor moved to dismiss the breach of contract claim, arguing that the bankruptcy judge had no jurisdiction to hear it, and this Court ultimately agreed. The Court's remedial order had three components: it (a) affirmed the order dismissing the claim before it; (b) held that its decision would otherwise be given prospective-only effect; and (c) stayed its mandate (later extended) to allow the

work of the bankruptcy system to continue unaffected by the decision while the political branches acted to repair the jurisdictional problem identified.

To the extent that *Northern Pipeline* can be read to authorize gerrymandered retroactivity, that option did not survive *Beam* and *Harper*.[10] Items (*b*) and (c), however, are still permitted under existing law, as the First Circuit understood. Thus the only aspect of *Northern Pipeline* on which Aurelius relies is the only aspect that is no longer good law.

### b. Special treatment for "successful challengers" is impossible here

Even if special treatment for the three "successful challengers" were legally possible, it would be impossible to achieve in this case as a practical matter. This case springs from the largest "municipal" bankruptcy in the nation's history, and one of the largest bankruptcy cases of any type —many billions of dollars in claims, and countless third parties have reasonably acted in reliance *for two years* on the settlements approved, orders entered, and outcomes mediated in the course of these cases. The dockets in the underlying Title III cases and their related adversary proceedings reflect more than 165,000 proofs

10. In a footnote, *Ryder* referred to the remedial outcome in *Northern Pipeline*, but only in showing that the decision was not "instructive": (a) *Northern Pipeline* was not a *de facto* officer case; (b) the Court was not prepared to extend *Northern Pipeline* beyond its civil context; (c) Mr. Ryder's claim threatened no "grave disruption"; and (d) good law or bad, the outcome in *Northern Pipeline* did not "support the Government in [that] case." *Ryder*, 515 U.S. at 194 n.3.

of claim filed, and nearly 20,000 orders, decisions, briefs, and other filings, all made by parties or rendered by the Court on the reasonable belief that the cases, and all that occurred in them, would be valid.

Providing bespoke relief to three entities, out of the *thousands* of direct participants and parties relying on these cases, simply because they are "successful separation-of-powers challengers," would undermine the very purpose of the bankruptcy. Bankruptcy exists "to provide a collective proceeding to treat *all* claims and interests in the property of a debtor's estate." 2 Collier on Bankruptcy App. 44, Part 2, Ch. 3 (16th ed. 2019) (emphasis in original); *see also* 1 Norton Bankr. L. & Prac. 3d § 3:9 ("A fundamental principle of the bankruptcy process is the collective treatment of all of a debtor's creditors at one time."). The process only works because it ensures that *all* of the creditors are included, and that *all* of those creditors share in the sacrifices necessary for successful reorganization. Gerrymandering the community of creditors in any case (but especially in one this size and complexity) to give certain creditors a "pass" simply means that others would unfairly sacrifice more than they otherwise would be asked to do.

To date, in the five "core" Title III cases and their hundreds of related adversary proceedings, the district court has made hundreds of decisions that affect Aurelius, Assured, and UTIER, directly in a few instances, and indirectly in many more, including orders approving the assumption or rejection of executory contracts or unexpired leases, orders disallowing proofs of claim against the Title III debtors, and orders granting relief

from the automatic stay to allow matters to move forward against the Title III debtors. All these orders (even those that do not *directly* implicate the claims of Aurelius, Assured, or UTIER) affect either (a) the debtors' assets or their capacity to repay their creditors or (b) the number and size of claims asserted against the Title III debtors, and as a result, these orders invariably (although often indirectly) affect the three "challengers" respective recovery from Title III debtors. Erasing all that has transpired simply to give the three challengers special treatment would be impossible and even trying would be unfair to all concerned.[11]

### 3. Even the *de facto* officer doctrine rejected in *Ryder* would not limit the Court's equitable discretion to accord *de facto* validity to past acts recognized in *Buckley* and *Northern Pipeline*.

As noted above, nothing in *Ryder* undermines the equitable remedial discretion of courts to accord *de facto* validity to past acts of government officials in cases like *Buckley* and *Northern Pipeline*. Chief Justice Rehnquist understood that *de facto* officer cases like *Ryder* and *de facto* validity cases like *Buckley* and *Northern Pipeline* form distinct lines of authority, and he refused to confuse

11. Moreover, Aurelius has not specified a single order or decision of the district court that would have been resolved differently had the members of its *adversary* — the Oversight Board — been designated differently, nor has it suggested that once a new Oversight Board filed new Title III cases, the district court would treat the same controversies any differently.

the two.[12] *Ryder*, 515 U.S. at 183 ("*Buckley* [did not] explicitly rel[y] on the *de facto* officer doctrine, though the result reached in each case validated the past acts of public officials"; refusing to extend *de facto* validity doctrine of *Buckley* to the *Ryder* situation). Unlike the situation confronting the Court in *Buckley* (and, for that matter, in *Northern Pipeline* and *Manhart*), the Chief Justice saw in *Ryder* no risk of "grave disruption or inequity involved in awarding retrospective relief *to this petitioner* that would bring [*de facto* validity] into play," *id.* at 178 (emphasis added) — "grave disruption or inequity" being a definitional requirement for a *de facto* validity case. In other words, the Court found that prospective-only relief was inappropriate on the facts of that case, not that prospective-only relief was categorically barred whenever an Appointments Clause violation is found.

The failure to appreciate this distinction — between the "*de facto* officer" doctrine at issue in *Ryder* and *Nguyen* and the "*de facto* validity" remedy adopted by *Buckley*, *Manhart*, and *Northern Pipeline* (and employed by the First Circuit in this case) — constitutes a foundational error in Aurelius' approach. The two concepts are similar to a degree, in that each uses the phrase *de facto* and each has been used to "validate[] the past acts of public officials," *Ryder*, 515 U.S. at 183, but they are analytically and historically distinct.

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12. Although the First Circuit used the label "*de facto* officer doctrine" in providing for prospective-only relief, nomenclature aside, its analysis expressly "follow[ed] the Supreme Court's exact approach in *Buckley*, 424 U.S. at 1, which involved an Appointments Clause challenge to the then recently formed Federal Election Commission." JA177-78.

At common law, the *de facto* officer doctrine prohibited a plaintiff even from challenging an officer's qualifications for office "collaterally," that is, in the course of litigation over the decisions the purportedly "defective" officer had taken against the challenger. Instead, someone who sought to question the officer's title was required to challenge that title "directly," in a separate lawsuit exclusively devoted to testing the validity of the officer's claim to his or her office. *See*, *e.g.*, *Andrade*, 729 F.2d at 1496-97 (explaining collateral/direct attack distinction in traditional doctrine and modern reformation of that doctrine); *see also SW Gen., Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *aff'd sub nom NLRB v. SW Gen., Inc*, 137 S. Ct. 929 (2017).

This reading of the *de facto* officer doctrine was applied by the Court in a handful of 19th century cases in which statutory or technical defects in a judge's qualifications had been raised; the Court held that the acts of a "judge *de facto* . . . are not open to collateral attack." *Ball v. United States*, 140 U.S. 118, 129 (1891) (no attack on judge's qualifications permitted in the course of murder trial); *McDowell v. United States*, 159 U.S. 596, 601 (1895) (regardless of possible statutory defect, judicial officer "must be held to have been a judge *de facto*, if not a judge *de jure*, and his actions as such, so far as they affect third persons, are not open to question"). Thus, in these early cases, the Court *refused even to address* alleged defects in the judge's right to his position when they were raised "collaterally," in litigation that was otherwise about actions taken by the judge, and not about the judge's qualifications. In such a circumstance, "the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked, and . . . under such color, *we cannot enter on*

*any discussion of propositions involving his title to the office he held*." *Ex parte Ward*, 173 U.S. 452, 456 (1899) (emphasis added).

*Ryder* effectively distinguished or modified these early cases by holding that even in a case "about" the judge's actions, and not "about" his or her qualifications, "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and *whatever relief may be appropriate* if a violation indeed occurred." 515 U.S. at 182-83 (emphasis added). In other words, unlike in cases governed by the common law *de facto* officer doctrine, *Ryder* holds that a person adversely affected by an officer's actions is entitled to have his Appointments Clause challenge resolved on the merits, "collaterally," in the litigation in which the officer's acts (there, the results of the criminal appeal) are challenged, and is entitled to any relief that "may be appropriate" if the challenge succeeds. *See also Nguyen*, 539 U.S. at 70.

But this case does not concern the common law *de facto* officer doctrine addressed in *Ball*, *McDowell*, *Ex parte Ward*, *Ryder* or *Nguyen*; it concerns the equitable power of the courts to fashion relief treating as *de facto* valid certain official acts where necessary to avoid catastrophic consequences. Unlike *de facto* officer cases, which arise from technical defects in the qualifications of an officer, *de facto* validity cases like *Buckley*, *Northern Pipeline*, and *Manhart*, and like this one, arise rarely, when a threat of great consequence is posed to the public or "the orderly functioning of the government." *Ryder*, 515 U.S. at 180.

In the category of cases applicable here, courts are permitted to exercise broad remedial discretion to forestall calamity. In *Buckley*, giving retroactive application to the Court's Appointments Clause holding would have called into question many administrative decisions and actions taken by the FEC on which countless and unknowable parties had relied, undermining legitimate and important expectations. In *Northern Pipeline*, the Court ordered prospective-only relief because the alternative would have been to throw the nation's entire bankruptcy system (and the lives of all of those who had relied on it to get a fresh start) into chaos. In *Manhart*, the Court applied its ruling prospectively because doing otherwise would have threatened the actuarial health of the nation's pension funds (and thus devastated the retirement plans of millions).

In *Ryder*, by contrast, "appropriate relief" meant retrospective application in the petitioner's case *precisely because* "there [was] not the sort of grave disruption or inequity [involved in] awarding retrospective relief to this petitioner [which] would bring that doctrine into play." 515 U.S. at 185.[13] That relief was "appropriate" in *Ryder* because "the defective appointments [at issue] affect[ed] only between 7 to 10 cases pending on direct review." *Id.*

13. The distinction is made all the more obvious by the fact that Chief Justice Rehnquist wrote the opinion in *Ryder* for a unanimous Court, yet *agreed* with the Court's prospective-only rulings in *Buckley*, *Northern Pipeline*, and *Manhart*. *See Buckley*, 424 U.S. at 290 (Rehnquist, CJ, expressly agreeing with the portion of the Court's opinion providing for its prospective-only application); *N. Pipeline*, 458 U.S. at 92 (Rehnquist, CJ; "I also agree with the . . . plurality opinion respecting retroactivity and the staying of the judgment of this Court"). Chief Justice Rehnquist understood the difference between these lines of authority.

Thus, the comparison between the "appropriate relief" ordered in *Ryder* and *Nguyen*, on the one hand, and in this case on the other could hardly be more patent. The *Ryder* Court rejected prospective application on the facts of that case because it was not necessary "to protect the public [or] insur[e] the orderly functioning of the government," as it was in *Buckley* and *Northern Pipeline*, and as it was here. 515 U.S. at 180. The *Ryder* line of cases involves small-bore errors made with respect to the appointment of individual decision-makers, in individual litigations, that can be remedied easily by giving a litigant (or a handful of litigants) a new day in court. This case is a massive, years-long, multi-billion dollar bankruptcy on which countless individuals have relied in making life-altering decisions. What is "appropriate relief" in the *Ryder* cases will not come close to being "appropriate" in cases like this one.

## II. THE DISTRICT COURT RETAINS DISCRETIONARY AUTHORITY TO PROTECT SOME RELIANCE INTERESTS UPON DISMISSAL

Even if the Court denies the actions taken by the Oversight Board *de facto* validity, it should take great care in addressing what precisely that holding will mean for the work the district court has already done and must yet do in the Title III cases commenced by the Oversight Board. Although, as a general rule, courts dismissing a bankruptcy case will strive to return affected parties to the *status quo* existing on the date the case was filed, this Court has recognized that a bankruptcy case will often "change[] [the relations between parties] in ways that make a perfect restoration of the status quo difficult or impossible . . . ." *Czyzewski v. Jevic Holding Corp.*, 137 S.

Ct. 973, 979 (2017). For that reason, the Bankruptcy Code "permits the bankruptcy court, 'for cause,' to alter [the Code's] ordinary restorative consequences." *Id.*

That authority stems from section 349(b) of the Bankruptcy Code.[14] In that provision, Congress gave

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14. 11 U.S.C. § 349. Section 349 is made applicable to the cases brought by the Oversight Board by 48 U.S.C. § 2161. Section 349(b) provides (emphasis added):

> (b) *Unless the court, for cause, orders otherwise*, a dismissal of a case other than under section 742 of this title—
>
> (1) reinstates—
>
> (A) any proceeding or custodianship superseded under section 543 of this title;
>
> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

courts supervising dismissed bankruptcy cases both the power and the responsibility in certain instances to mitigate the inequities that otherwise could result from returning debtors, creditors and third parties to the *status quo ante*, as if the bankruptcy had never been filed. "The basic purpose of the subsection is to undo the bankruptcy case, *as far as practicable* [and to] make the appropriate orders [necessary] *to protect rights acquired in reliance* on the bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess., 338 (Sept. 8, 1977) (emphasis added); 1978 U.S. Code Cong. & Admin. News, 5963, 6294. Indeed, under section 349(b), "it is the task of the bankruptcy court to make whatever orders may be necessary and appropriate to protect rights acquired in reliance" on the case. 3 Collier on Bankruptcy ¶ 349.03 (16th ed. 2019); *see also In re Viper Servs., LLC*, No. 15-11259-J11, 2018 WL 1801208, at *2 (Bankr. D.N.M. Apr. 13, 2018) ("The Bankruptcy Code does not define 'cause,' leaving it to the bankruptcy courts to fashion equitable dispositions different from those that, unless the court 'orders otherwise,' would be dictated by § 349(b)") (citation omitted); *In re Derrick*, 190 B.R. 346, 351 (Bankr. W.D. Wis. 1995) ("the court's focus should be toward protecting rights acquired in reliance upon the bankruptcy").

Thus, in *In re Professional Success Seminars International, Inc.*, 22 B.R. 554, 555-56 (Bankr. S.D. Fla. 1982), the court had "cause" under section 349(b) sufficient to preserve a judgment avoiding a preferential transfer, notwithstanding the dismissal of the underlying bankruptcy case, because petitioning creditors reasonably relied on the filing. Similarly, in *In re Darden*, 474 B.R. 1, 12 (Bankr. D. Mass. 2012), the court found "cause" under section 349(b) to distribute certain settlement proceeds

as called for under the terms of the debtor's plan of reorganization, even though the case had been dismissed. In *In re Torres*, No. 99–02609, 2000 WL 1515170, at *2 (Bankr. D. Idaho Oct. 10, 2000) and *In re Hufford*, 460 B.R. 172, 178 (Bankr. N. D. Ohio 2011), two bankruptcy courts concluded that where the automatic stay had been in place for some time, it would be inequitable to creditors for the court to authorize dismissal without distributing monies accumulated during the case for payment to them, the *quid pro quo* for their having suffered the effects of bankruptcy's automatic stay.

More specifically, when courts are confronted with bankruptcy petitions filed by individuals or entities who lack authority to file them, and thus dismiss them they must turn to section 349(b) to determine how to (and the degree to which they should) restore the *status quo ante* with respect to particular matters. *See*, *e.g.*, *In re Nica Holdings, Inc.*, 810 F.3d 781 (11th Cir. 2015) (assignee lacked authority to file bankruptcy case; remanding to bankruptcy court for dismissal for lack of jurisdiction), *dismissed*, *In re: Nica Holdings, Inc.*, No. 12-32686-JKO, Dkt. No. 216 (Bankr. SD Fla. May 20, 2016) (dismissing petition and disposing of assets pursuant to section 349); *In re Monroe Heights Dev. Corp., Inc.*, No. 17-10176-TPA, 2017 WL 3701857 (Bankr. W.D. Pa. Aug. 22, 2017) (petitioner lacked authority to file Chapter 11 case), *dismissed*, *id.* Dkt. No. 94 (Sept. 7, 2017) (dismissing "pursuant to 11 U.S.C. § 349").[15]

15. Typically, an order dismissing a case because the entity filing the petition lacked the authority to file it will come at the inception of the case, and thus too early in the case for creditors or third parties to have relied reasonably on the case's existence, and thus courts rarely have to apply section 349(b) to protect legitimate reliance interests. That is not the case here, of course.

Over the course of the past two years, the district court here has resolved matters of unprecedented complexity and scope, arising out of five separate Title III cases and related adversary proceedings that involve billions of dollars in claims. As it has resolved these issues, the district court has necessarily altered countless debtor-creditor relationships in fundamental ways, and has induced unknown and unknowable third parties to rely on actions taken in this case. For example, as described *supra* at 3, the district court has already confirmed a plan of adjustment for one of the Title III debtors, COFINA. Dkt. No. 5048, Case No. 17-BK-3283 (D.P.R. Feb. 4, 2019). As part of that plan, new bonds have been issued, and those bonds are already trading in the public debt markets. If, as section 349(b) requires, the reliance interests of third parties must be protected, it would be impossible simply to turn back the clock on these cases.

Thus, if the Court were, first, to find that the Oversight Board was unconstitutionally structured *and* second, to refuse to accord its actions to date *de facto* validity, the district court would have to determine how to balance section 349's basic presumption — that parties to a dismissed bankruptcy case should be returned to the *status quo* extant on the day the case was filed — with the statute's second goal: protecting reliance interests reasonably growing out of the case.

The district court, of course, has not exercised its discretion under section 349(b); indeed, it has not yet even been asked to do that. The parties have not briefed, here or in any other court, the scope of that discretion or addressed how it might apply in a case of this complexity, with the lives and livelihoods of so many in the balance.

It is obvious, then, that it is premature for this Court to render an opinion on these subjects. *Cf. United States v. Williams*, 504 U.S. 36, 42 (1992) (Court generally "will not review a question not . . . passed on by the courts below"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (Court will not consider a question that has "not been adequately briefed and argued"). Under these circumstances, if the Court affirms the First Circuit on the Appointments Clause issue, and reverses on the question of *de facto* validity, the Court should make it clear that its opinion resolving this case does not foreclose the district court from considering, and then resolving, those difficult questions in the first instance. Appellate review of the district court's exercise of discretion pursuant to section 349(b) would always be available thereafter, and that review could proceed on a full record.[16]

## REPLY ON APPOINTMENTS CLAUSE ISSUE

1. The Appointments Clause question presented here is whether the members of the Oversight Board, designated by Congress as territorial officials, are nonetheless employees "of the *Federal* Government," *Lucia*, 138 S. Ct. at 2051 (emphasis added), and "Officers of the United States" within the meaning of U.S. Const. Art. II, § 2, cl. 2. To be included within this constitutional phrase: (a) the job must be an Art. II, § 2, cl. 2 "Office" — that is, it must be a position of sufficient decision-making consequence that

16. Section 349(b) is not an alternative to *de facto* validity. First, much of the Oversight Board's work has been done outside the courtroom, and the district court can only exercise its discretion in a case or controversy before it. Second, the district court can hardly be expected to revisit each one of its nearly 20,000 orders. At best, section 349(b) provides only limited and piecemeal opportunities to avoid harm to reliance interests.

it requires appointment by the President and confirmation by the Senate; *and* (b) the position must be "of the United States" — that is, the incumbent must be an "employee[] of the *Federal* Government," *id.* (emphasis added), must act for the Federal government, on behalf of the Nation's citizens, pursuant to "national legislation" enacted by Congress for the States as a nation. *See Palmore v. United States*, 411 U.S. 389, 398 (1973).

From all that appears from its merits brief in this case, Aurelius is only concerned with the first of these questions. Aurelius focuses on three decisions of this Court that establish the test for determining whether employees who are indisputably *federal*, administering *national* legislation, for *national* purposes, on behalf of the citizens of *all* of the States, have responsibilities of sufficient consequence to require compliance with the Constitution's appointment scheme. *See* Aurelius br. at 2 (citing *Lucia*, 138 S. Ct. at 2051; *Freytag v. Comm'r*, 501 U.S. 868, 880-82 (1991); and *Buckley*, 424 U.S. at 126); *see also* UTIER br. at 21 & n.20, 27. Based on these cases and the test they apply, Aurelius argues that the Oversight Board's members are "officers of the United States" because their positions are ongoing, were created by PROMESA, and the members are responsible for administering an Act of Congress.

By focusing on these cases, however,Aurelius elides the "of the United States" requirement —an inquiry on which these three cases provide no guidance. In *Lucia*, the Court considered whether Securities and Exchange Commission administrative law judges who were given "statutory authority to enforce the nation's securities laws" were '"Officers of the United States' or simply

employees *of the Federal Government*." *Lucia*, 138 S. Ct. at 2049, 2051 (emphasis added). The Court had no reason to question whether the judges acted for "the Federal Government" because the issue was never raised.

The same was true in *Freytag*. There, the Court considered whether special trial judges employed by the United States Tax Court, which hears claims of "tax deficiencies" brought by U.S. taxpayers, were Officers subject to the Appointments Clause. 501 U.S. at 871. The Court observed that the Appointments "Clause bespeaks a principle of limitation [regarding] the power to appoint . . . principal *federal* officers," and no one suggested that the judges in that case were not "federal." *Id.* at 884 (emphasis added). The court performed tasks that are indisputably *national* in scope, exclusively construing laws of *national* application, and thus there was no doubting that those judges were *federal* officials and thus employees "of the United States." The Court examined the "role [the judges play] in the *federal* judicial scheme," and based on those duties, proceeded to answer the question whether the judges were "inferior Officers," subject to the Appointments Clause. *Id.* at 880, 891.

Finally, *Buckley* answered the question whether members of the FEC were constitutional "Officers," not whether they were officers "of the United States." The FEC, after all, had been created by Congress to "regulate *federal* elections," as its name suggests. *Buckley*, 424 U.S. at 13 (emphasis added). No one in the case doubted that the Commissioners acted for "the United States" — the entire Nation — and any claim that they did not would have been frivolous.

The factors considered in these three cases — whether the position at issue is "continuing and permanent," and whether the incumbent "exercise[s] significant authority pursuant to the laws of the United States" — set out the "Court's basic framework for distinguishing between officers and employees." *Lucia*, 138 S. Ct. at 2051 (citations omitted). They are not useful questions to ask here, however, where the task is to determine whether the Oversight Board members are "Officers *of the United States*," or territorial officials. Here, Congress enacted PROMESA for the benefit of Puerto Rico pursuant to its Territorial Clause power, with authority to act exclusively within the Commonwealth, and did not act for the Nation as "a political body of states in union." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323 (1937).

2. Although the cases featured by Aurelius are not useful in deciding when Congress acts for the United States as "a political body of states in union," *id.*, or, conversely, for a territory, the Court has provided guidance on that subject. In *Palmore*, 411 U.S. at 389, the Court was asked to determine whether courts sitting in the District of Columbia, established by an Act of Congress, exercised the "judicial power of the United States" (and thus were subject to the life tenure requirement of Article III), or conversely were local District of Columbia officials not subject to Article III's requirements. The petitioner argued there, as Aurelius argues here, that because the courts were created by a federal law and the judges were asked to apply "statutes of Congress of otherwise nationwide application," the judges of the court exercised the Article III judicial power "of the United States." *Id.* at 397. The case provides useful guidance here because the Court has repeatedly said that the scope of Congress'

Art. I, sec. 8 power to legislate for the District of Columbia and its Article IV power to legislate for the territories are parallel.[17]

To determine whether Congress created the District of Columbia courts to exercise local authority or, conversely, to wield the "judicial Power of the United States," *Palmore*, 411 U.S. at 389, the Court gave weight to the fact that Congress had "expressly created" the local courts pursuant to the "plenary" power it possessed under Article I to "exercise exclusive Legislation . . . over [the] District," rather than its power to pass "national legislation . . . under other powers delegated to it under Art. I, sec. 8." *Id.* at 397-98, 407.

Here, Congress expressly invoked its Article IV powers in enacting PROMESA and creating the Oversight Board. Aurelius disparages Congress' invocation of its Article IV powers as mere *ipse dixit*, but where "Congress . . . invoke[s] [a specific constitutional] power [in enacting legislation] [i]ts judgment on that score is entitled to . . . respect . . . ." *Woods v. Cloyd W. Miller Co.*, 333 U.S.

17. In *United States v. Sharpnack*, 355 U.S. 286, 296 (1958), for example, the Court cited its opinion in *D.C. v. John R. Thompson Co.*, 346 U.S. 100, 106-07 (1953) — a case involving Congress' authority over the District of Columbia — in describing Congress' authority to "delegate to local legislative bodies broad jurisdiction over Territories and . . . to revise, alter and revoke the local legislation." *See also John R. Thompson*, 346 U.S. at 106-07 ("power of Congress to grant self-government to the District of Columbia under Art. I, s 8, cl. 17 of the Constitution would seem to be as great as its authority to do so in the case of territories" under Article IV).

138, 144 (1948) (exercise of police power).[18] If there were any evidence that Congress' invocation of Article IV were mere subterfuge — if Congress had declared the legislation "territorial" but given the Oversight Board national authority — the Court might reasonably look behind Congress' invocation of its territorial powers. No evidence of subterfuge exists here, and the Court accordingly should accord great "deference . . . to [the] deliberate judgment by constitutional majorities of the two Houses of Congress that [the] Act is within their delegated power" under Article IV. *United States v. Five Gambling Devices Labeled in Part "Mills" & Bearing Serial Nos. 593-221*, 346 U.S. 441, 449 (1953) (deference to congressional choices "is not a mere polite gesture" but a fundamental feature of separation of powers).

Beyond Congress' invocation of its power of legislation over the District of Columbia, the *Palmore* Court relied on the content and structure of the Act of Congress that established the District of Columbia courts as "strictly local courts . . . designed primarily to concern [themselves] with local law and to serve as a local court system for a large metropolitan area." *Palmore*, 411 U.S. at 407-08. By design, these courts were local (and thus not courts "of the United States"), the Court held, despite the fact that in addition to their core "local" responsibilities, they were empowered to "enforce[] . . . the civil and criminal laws of Congress applicable throughout the United States" as well. *Id.* at 403.

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18. *Cf. City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) ("the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices" even where constitutional issues are involved).

This case is even clearer. Unlike the District of Columbia courts at issue in *Palmore*, where the local courts were obliged to hear cases arising under both local and federal law, both the problem Congress sought to address with PROMESA and the tool it created to address that problem are exclusively territorial. *See* 48 U.S.C. § 2121(c)(1). PROMESA gives the Oversight Board the authority to approve the *Commonwealth's* fiscal plans and budgets, and commence cases on behalf of the *Commonwealth* government and its instrumentalities to restructure their debt; it has no authority otherwise to act for the United States or for any other state or local government. *id.* §§ 2141, 2164. The Oversight Board's activities are funded *entirely* by Puerto Rico (and not the federal government), *id.* § 2127(b), its members are reimbursed by the government of Puerto Rico, *id.* § 2121(g), and it will cease to exist when certain *territorial* goals are achieved — a life span measured, not by any nationwide objective, but by Puerto Rico's ability to produce a balanced *territorial* budget for four consecutive years and obtain "adequate access to short-term and long-term credit markets at reasonable interest rates to meet [its] borrowing needs . . . ." *Id.* § 2149. Under *Palmore*, PROMESA and the Oversight Board it created are precisely what Congress declared them to be: measures "enacted by Congress in June 2016 to address *Puerto Rico*'s financial crisis," pursuant to Congress' Article IV territorial powers. *Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 509 (1st Cir. 2017) (emphasis added).

3. Although the Court has never considered whether the Appointments Clause limits Congress' choices in structuring territorial governments, its prior territorial decisions on other structure-of-government provisions of

the Constitution leave no doubt about the answer to that question. Aurelius all but ignores those decisions.

As the Committee explained in its opening brief, this Court has previously held that the structure-of-government provisions of the Constitution do not constrain Congress when it acts for the territories because when Congress does so, it acts, not as a *national* legislature, but as a surrogate for the territory, as a State would act for itself. Thus, as Justice Scalia explained in *Freytag*, when using its Article IV powers, Congress "may endow territorial governments with a plural executive; it may allow the executive to legislate; [or] it may dispense with the legislature or judiciary altogether," *Freytag*, 501 U.S. at 914, just as a state could do for itself.

In *United States v. Heinszen*, 206 U.S. 370 (1907), the Court held that Congress was free to delegate its legislative power for the territory to the Executive Branch — a cardinal sin if it were acting as the *national* legislature. The Court explained that any contrary argument would be "premise[d] upon [the supposition] that Congress, in dealing with [a territory] may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select," including the President. *Id.* at 384-85. The Court expressly rejected that supposition.

Again, in *Cincinnati Soap*, the Court held that it was permissible for Congress to enact a revenue measure the entire proceeds of which were to go to a territory (the Philippines) on the order of, and as specified by, the Executive Branch, without first having been appropriated by Congress. In concluding that the legislation was

constitutional, the Court explained that Congress "may do for one of [the territories] whatever a state might do for itself or one of its political subdivisions . . . ." 301 U.S. at 317. Because no provision in the Constitution would prohibit a *state* from delegating its legislative power to the state's executive (or, as Justice Scalia said, from dispensing with the legislature altogether), nothing in the Constitution prevented Congress from doing likewise in regulating the territories. The Constitution's separation of powers concerns — there, the non-delegation doctrine — simply did not apply.

4. Although *Heinszen* and *Cincinnati Soap* deal with the question presented here — whether the separation of powers doctrine has any role to play when Congress legislates for the territories — they earn but a single paragraph each in Aurelius' merits brief, and neither case is discussed in UTIER's brief at all. Aurelius says *Heinszen* can be distinguished because the separation of powers intrusion there was "*temporary*." Aurelius br. at 37 (emphasis supplied by Aurelius). But a "temporary" constitutional violation is still a violation, *see San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (unconstitutional taking "may be temporary [but that] does not make it any less of a constitutional 'taking'"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (even during time of war, temporary seizure of coal mines by President, pending resolution of strike, without congressional authorization violates separation of powers), and the Court did not suggest in *Heinszen* that the temporal element saved what would otherwise have been an unconstitutional delegation. Quite the opposite: the Court focused on the breadth of Congress' Article IV powers and not the peculiar way they had been exercised in that case.

Aurelius' basis for distinguishing *Cincinnati Soap* is even less apt. As Aurelius reads it, *Cincinnati Soap* means that Congress can delegate to a territory its power to legislate, but only on those matters "that, in a state, would be 'regulated by the laws of the state . . . —that is, municipal matters.'" *Id.* at 36-37 (quoting *John R. Thompson Co.*, 346 U.S. at 106). Thus, to Aurelius, the case "stands only for the proposition that Congress can allow a territorial legislature to enact territorial law." *Id.* at 37.

Aurelius seems confused about the extent of Congress' power of delegation. The question here is whether PROMESA is a "territorial law" enacted by Congress, as it expressly declared it to be, or is something else. The power of legislation for the territories belongs to Congress, not to the territory, and Congress' power of legislation is plenary, as this Court has repeated for centuries and reaffirmed as recently as *Boumediene v. Bush*, 553 U.S. 723, 757-59 (2008). All of that power, as *Cincinnati Soap* expressly holds, can be delegated to the territories as Congress sees fit: "The congressional power of delegation to such a local government is and must be as comprehensive as the needs," *id.*, and as *Heinszen* held, that means that Congress can "delegate legislative authority to such agencies as it may select." *Heinszen*, 206 U.S. at 384-85.

Moreover, even if Congress were limited in the way Aurelius suggests, PROMESA is *precisely* the sort of legislation one might expect a state to enact in similar financial circumstances. Indeed, states have repeatedly created financial control boards to assist when they or their localities are facing similar crises. Michigan created a nine-member Financial Review Commission to assist

Detroit with its financial crisis, and it did so in a fashion that would not comply with the Appointments Clause if it were relevant to state action. Its board was composed of several elected officials and a number of gubernatorial appointees, none of whom had to be confirmed legislatively. *See* Michigan Financial Review Commission Act, Act 181 of 2014, Section 141.1635(5).

Similarly, the Pennsylvania Intergovernmental Cooperation Authority, created by the Commonwealth in 1991 to assist Philadelphia through its own financial crisis. The body consisted of five individuals, each designated by one of five elected officials in the state government, without legislative confirmation. *See* PICA Act of June 5, 1991, P.L. 9, 53 P.S. § 12720.101 *et seq*. States act in this way, and Congress is entitled to do so as well when it acts for the territories.

Congress has been here before too, and the legislation it enacted survived separation-of-powers attack. In the mid-1990s, the District of Columbia was, as Puerto Rico is now, experiencing a financial crisis. Congress did then as it has done here: it created a new agency — a financial control board — as an entity within the District's government to assist the District in taking control of its financial future. The members of the board were appointed by the President, but there was no provision for senatorial confirmation. Instead, the President was statutorily required to "consult with" certain specific Congressional leaders designated in the statute about his intended appointees.[19]

19. District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. 104–8, 109 Stat. 97 (1995).

The constitutionality of that board was also challenged on separation of powers grounds, just as Aurelius challenges the Oversight Board here. *Brewer v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 953 F. Supp. 406, 410 (D.D.C.), *aff'd*, 132 F.3d 1480 (D.C. Cir. 1997). The court, however, found that, as here, "Congress [had lawfully] reserved its constitutional authority to alter the institutions of the District of Columbia government at any time and for nearly any reason." *Id.*

The district court held (and the D.C. Circuit affirmed) that when it created the control board within the District government and assigned it some of the existing government's responsibilities, Congress "exercise[d] its constitutional authority as legislature for the District," *id.* (citation omitted). Rejecting a separation of powers challenge, the court in *Brewer* held that the "Executive Branch has no constitutional role with respect to the District that corresponds or competes with that of Congress." *Brewer*, 953 F. Supp. at 410. That is, because Congress was exercising its plenary authority to govern the District — a zone where the Constitution gives the Executive branch no corresponding responsibilities — the court held that there was no "dange[r] of congressional usurpation of Executive Branch functions." *Id.* (citation omitted).

5. Based on *Lucia*, *Buckley*, and *Freytag*, Aurelius argues that Congress must follow the Appointments Clause when creating avowedly territorial positions whenever the position created will be "continuing," is created by an Act of Congress, and will exercise significant authority pursuant to the laws of the United States. Applying this standard (which, as noted, was conceived as a means for

sorting among employees who are indisputably *federal*, dividing that group between those who are and are not subject to the Appointments Clause) would undermine the legitimacy of every current territorial government and every one of their official acts.

For example, the Governor of Guam's position is "continuing," the office is entirely a creature of an Act of Congress, and federal law explicitly defines the powers available to the incumbent. 48 U.S.C. § 1422. The same is true for the Governor of the United States Virgin Islands. *Id.* § 1591. Every act taken by the incumbent in either position is an exercise of significant authority existing only because of an Act of Congress. By Aurelius' test, the Governors of Guam and the U.S. Virgin Islands would have to be appointed according to the Constitution's scheme. They are not; they are popularly elected by the people of those territories.

No matter, Aurelius and UTIER claim; the Court should create an atextual *vox populi* exception to the Appointments Clause to save them from unconstitutionality. That is, where the people of a territory have selected the individual filling an otherwise-Appointments-Clause-covered position, the Clause simply does not apply.

But if that were so — if popular election were an *alternative* to the Appointments Clause scheme — Congress could provide for the direct election of the Secretary of State, or the Justices of this Court, or of all federal judges. Aurelius cites no case to support the existence of such a startling addendum to the Appointments Clause, and the Committee has been unable to find one, except, of course, for the decision below in this case.

6. Aurelius places significant reliance on statements made by a number of Justice Department officials about the territories. For example, Aurelius cites a statement made by former Attorney General Richard Thornburgh to the effect that Congress could not give "a territorial Governor the authority to have a federal agency 'delay[]' and 'reconsider' proposed regulations." Aurelius br. at 22 (citation omitted). Whatever the accuracy of this statement, the Committee need not challenge it here, because no regulation is at issue and thus no "delay" or "reconsideration."

Similarly, Aurelius relies on a statement made to the General Accounting Office in 1991 by an Assistant Attorney General to the effect that the '"appointments power[] is a fundamental part of the Constitution, going like the Present[ment] Clause to the heart of the separation of powers,' and therefore 'applies necessarily . . . to the appointment of federal officers [even] in the insular areas.'" *Id.* at 22-23. The Committee does not quibble with the notion that the Appointments Clause is important, but in the present context, it does not apply. It is common ground that when *federal officers* are at issue, the Appointments Clause is in play. Thus, when Congress creates a *federal* office in the territories — for example a United States Attorney for the Virgin Islands or for Guam — the Appointments Clause applies. The Oversight Board, as just shown, is not a "federal office."

More to the point than these Department of Justice statements is the position taken by the Department of Justice, through the Solicitor General, before this Court in 2003:

> [The Supreme] Court has never held that the Appointments Clause applies to the governance of the United States Territories. The Court has never identified it as one of the fundamental rights enjoyed by residents of the Territories . . . . To the contrary, *the Appointments Clause, like the protections of Article III, regulates only the framework of the federal government and thus is no more applicable to the Territories than it is to State governments.* Accordingly, [individual citizens of the territories] are not within the class of persons protected by the Appointments Clause . . . .[20]

7. Beyond the *Lucia*, *Freytag*, and *Buckley* cases discussed *supra*, Aurelius places primary reliance on *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) ("*MWAA*"), but that case is easily distinguished. In *MWAA*, Congress tried to wrest from the Secretary of Transportation his operational authority to run two airports owned and administered by the federal government. It attempted to accomplish this feat by creating a local transportation authority to run the airports on a day-to-day basis, manned by state government officials. Superimposed over this authority, however, Congress created a "review board" populated entirely by members of Congress then serving on transportation-related committees, and gave the board the right to veto any operational decisions the authority's board of directors might make.

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20. Brief for the United States, *Nguyen v. United States*, Nos. 01-10873, 02-5034, 2003 WL 548057, at *33 (Feb. 21, 2003) (citations omitted) (emphasis added).

If the separation of powers problem posed in *MWAA* were parallel to the one at issue here, one might have expected the Court to take issue with the appointment scheme Congress used for populating its "congressional agent" — the "board of review" — in which the President was allowed virtually no role.[21] It did not, strongly suggesting that no Appointments Clause problem existed.

Instead, the problem arising in *MWAA* stemmed from the fact that Congress had decided to take for itself the power to perform executive acts that, until the legislation was enacted, had been performed by the Secretary of Transportation. That attempt to usurp *executive* authority was defended in part by reference to Article IV's Property Clause, which authorizes Congress to dispose of and regulate property owned by the United States. The petitioners argued that separation of powers principles have no role to play when Congress disposes of property, but the Court disagreed.

The problematic element in *MWAA* is missing here. The veto power owned by the board of review, Congress' agent, allowed Congress "to exercis[e] *federal authority* for separation-of-powers purposes" over the "*federal* power to operate the airports," displacing the Executive Branch's authority to administer laws passed *for the national government*. *Id.* at 267, 271 (emphasis added); *see also id.* at 269 (Congress acted to "protect an acknowledged *federal* interest" by "exercis[ing] *federal* power") (emphasis added). The question, then,

21. Of the 11 members of the board, ten were appointed by local government officials and only one was appointed by the President. *Id.* at 257.

was "whether the maintenance of *federal* control over the airports by means of the Board of Review, which is allegedly a *federal* instrumentality, [was] invalid . . . ." *Id.* at 271 (emphasis added).

Nothing similar has happened here. The authority Congress exercised in creating the Oversight Board was territorial, not "federal." The Oversight Board is not a "federal instrumentality," and the financial well-being of the people of Puerto Rico is a territorial concern of Congress, not an "acknowledged federal interest." PROMESA was not enacted to displace previously-existing *Executive Branch* activity administering the finances of Puerto Rico; the Executive Branch had not been exercising authority to provide for territorial governance, and so PROMESA did not snatch any such power away from the Executive Branch. By enacting PROMESA, Congress merely exercised its own *exclusive* authority under Article IV to provide for territorial governance. As Chief Justice Marshall declared more than 200 years ago, "[C]ongress possess[es] and exercise[s] the absolute and undisputed power of governing and legislating for" territories such as Puerto Rico. *Sere v. Pitot*, 10 U.S. 332, 337 (1810) (Marshall, C.J.).

8. UTIER and its *amici* (for these purposes, collectively referred to here as "UTIER") claim that the citizens of Puerto Rico have been denied something akin to a "human right" by the alleged Appointments Clause violation in this case. *See*, *e.g.*, UTIER br. at 58. If presidential appointment and senatorial consent for Oversight Board members *were* a human right, of course, existing law would accommodate it, since the fundamental personal liberties embodied in the Constitution are precisely those

the current doctrine *does* apply in the territories. *See*, *e.g.*, *Boumediene*, 553 U.S. at 757-59 (endorsing current legal regime for Congress' Territorial Powers; residents of territories guaranteed "fundamental personal rights declared in the Constitution") (citation omitted).

But the Appointments Clause doesn't give rise to such a fundamental "human right." As the Committee noted in its opening brief, the appointment-and-confirmation scheme required by the Appointments Clause for certain *federal* officers is often absent in the States, and no citizen of these states could credibly claim to have been denied a fundamental "human right" as a result.

Thus, when the Governor of New Jersey appoints his or her Lieutenant Governor to serve simultaneously as Secretary of State, without legislative confirmation, the citizens of the state are not denied a "human right" as a result. *See* New Jersey Const. Art. V, § 4, ¶ 4. When the Governor of Arizona picks someone to be Director of Agriculture — a cabinet level position — and the candidate is screened by a five-member committee, also appointed by the Governor, but is not subject to state senate confirmation, or any other legislative approval, no liberty is lost. *See* Ariz. Rev. Stat. § 3-103. The "dignity" (UTIER br. at 15) of the citizens of New Hampshire is not offended when their Governor appoints the state Attorney General without any approval by the state senate or any legislative body. *See* NH Const. Pt. 2, Art. 46.1. Rhetoric insisting that *only* the scheme envisioned by the Appointments Clause is compatible with liberty generates heat, but it sheds no light. The Founders believed that the Clause was an important element in maintaining our tripartite *federal* government of limited powers; they did not make

it an essential ingredient of state governments, and there is no evidence that they believed it to be a necessary attribute of governments in the District of Columbia or the territories.

## CONCLUSION

The Court should reverse the court of appeals as to its Appointments Clause holding; if it does not, it should affirm the court of appeals' decision on *de facto* validity.

Respectfully submitted,

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