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.

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

REPLY AND RESPONSE BRIEF FOR THE UNITED STATES

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AURELIUS INVESTMENT, LLC, ET AL., PETITIONERS
v.
COMMONWEALTH OF PUERTO RICO, ET AL.

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

UNITED STATES OF AMERICA, PETITIONER
v.
AURELIUS INVESTMENT, LLC, ET AL.

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

QUESTIONS PRESENTED

1. Whether the members of the Financial Oversight and Management Board (Board), an entity established by Congress as part of the territorial government of Puerto Rico, are "Officers of the United States" under the Appointments Clause of the Constitution of the United States.

2. Whether the Board's previous acts should be set aside in the event the Court determines that the manner of selecting its members violated the Appointments Clause.

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In the Supreme Court of the United States

No. 18-1334

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, PETITIONER

v.

AURELIUS INVESTMENT, LLC, ET AL.

No. 18-1475

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v.

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No. 18-1496

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

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

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY AND RESPONSE BRIEF
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SUMMARY OF ARGUMENT

I. Aurelius and the Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER) decline to defend the court of appeals' sweeping holding that the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, applies to officers in territorial governments in the same way that it applies to officers in the federal government. They now concede that the Territory Clause, Art. IV, § 3, Cl. 2, empowers Congress to create and fill territorial offices outside the Appointments Clause. See Aurelius Br. 14; UTIER Br. 14. Aurelius and UTIER instead rely on the narrower theory that the members of the Financial Oversight and Management Board for Puerto Rico (Board) are federal rather than territorial officers. See *ibid.* That is incorrect.

Under *Palmore* v. *United States*, 411 U.S. 389 (1973), an office's national or local status turns in part on congressional intent (as reflected in the power Congress

chose to invoke and the government in which Congress chose to place the office) and in part on the scope of the office's powers and duties. Congressional intent matters because Congress may govern the territories through national institutions as well as local ones; only by interpreting the statute can a court determine which choice Congress has made. And the scope of the office's powers and duties matters because constitutional text and precedent establish that an officer's status depends on the extent of his authority. Here, Congress invoked Article IV to create the Board, placed the Board in the territorial government of Puerto Rico, and limited the Board's work to territorial matters. The members of the Board therefore rank as territorial officers.

Aurelius and UTIER seek to evaluate the Board's status under *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), which asks whether an official exercises significant authority under the laws of the United States, and *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), which asks whether an official holds an office created by the federal government, under an appointment made by the federal government. But this Court has used the test in *Buckley* to distinguish officers from employees, and the test in *Lebron* to distinguish governmental bodies from private ones. It has never used either test to distinguish federal from territorial officers. The use of those tests in the present context has no sound basis in the Constitution's text or structure, contradicts *Palmore* and other precedents, fails to make sense of two centuries of unbroken historical practice, and would call into question the structures of the current governments of the territories and the District of Columbia.

II. The court of appeals awarded Aurelius and UTIER a declaratory judgment that the Board's method of appointment violates the Constitution. Dissatisfied with that remedy, Aurelius and UTIER insist that the court should also have dismissed Title III petitions previously filed by the Board. But under a venerable principle of remedies known as the *de facto* officer doctrine, a court need not redress an unlawful appointment by invalidating the appointee's past acts. And under the precedents of this Court going back to the 1840s, the decisions of courts in nearly every State, and the near-uniform practice of other common-law jurisdictions with written constitutions, the doctrine extends to appointments made under a statute that a court later determines violates the Constitution.

The court of appeals properly applied the *de facto* doctrine in refusing to dismiss Title III petitions previously filed by the Board. One of those petitions has already culminated in the confirmation of a debt-adjustment plan, under which private parties have already completed billions of dollars in transactions. And the Board, Puerto Rico, and Puerto Rico's creditors have made significant progress toward the resolution of the remaining Title III cases. Nullifying the Board's acts at this stage would set back Puerto Rico's economic recovery by years, and would cause grave harm to innocent third parties who have relied on the Board's past acts. The *de facto* doctrine exists precisely to avoid such consequences.

ARGUMENT

I. THE APPOINTMENTS CLAUSE DOES NOT GOVERN THE SELECTION OF THE BOARD'S MEMBERS

All parties to these cases now agree that Congress may invoke Article I to create offices in the national

government subject to the Appointments Clause—and that it may also invoke Article IV to create offices in a territorial government without complying with the Clause. The only remaining question here is which Congress did in the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. 2101 *et seq.*[1] The proper way to answer *that* question is, first, to discern Congress's intent regarding the status of the office and, second, to determine the constitutionality of Congress's choice by examining the scope of the officer's powers and duties. On that approach, the Board members are territorial officers: Congress treated them as territorial officers, and it limited their work to territorial matters. Aurelius and UTIER's alternative tests make little sense, defy history, and threaten disastrous practical consequences.

A. Aurelius And UTIER Fail To Defend Much Of The Court Of Appeals' Reasoning

1. The court of appeals' analysis in these cases, adopted at Aurelius's urging, consisted of two main steps. First, the court concluded that the Appointments Clause applies to territorial governments in the same way that it applies to the federal government. The court reasoned that the "specific governs the general" and that the Appointments Clause differs from other constitutional provisions that do not extend to the territories. 18-1334 Pet. App. 20a-21a (Pet. App.) (citation omitted); see *id.* at 20a-27a. Second, because the court believed that the Appointments Clause applies equally to territorial governments, it used the same framework to determine the Clause's applicability to a territorial official

[1] All references in this brief to Title 48 of the United States Code are to Supplement V (2017) of the 2012 edition.

that it would use to determine the Clause's applicability to a federal official—namely, asking whether the official exercises "significant authority pursuant to the laws of the United States," *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

Aurelius and UTIER defend the second step, but, for the most part, they decline to defend the first. Aurelius concedes (Br. 14) that "Congress may exercise its Article IV power to create purely local territorial offices" that "are not subject to the Appointments Clause," describing that proposition as a "truism" that "is not in dispute." And UTIER concedes (Br. 14) that "Congress can create offices or officers within the territorial government of Puerto Rico without any issue with the Appointments Clause." Neither Aurelius nor UTIER meaningfully addresses the United States' textual, structural, and historical arguments that the Appointments Clause itself distinguishes between the federal and territorial governments. See U.S. Br. 13-36. And neither meaningfully defends the court of appeals' theory that the specific governs the general or that the Appointments Clause differs from structural constitutional provisions that do not extend to the territories.

Aurelius and UTIER thus essentially abandon the foundation of the court of appeals' approach—*i.e.*, the premise that the Appointments Clause extends to territorial governments. Because all parties now agree that Congress may "create purely local territorial offices" that "are not subject to the Appointments Clause," Aurelius Br. 14, it becomes vital to address what the court of appeals did not: whether Congress exercised its Article I powers to place the Board within the federal government, or its Article IV powers to place the Board

within the Puerto Rico government. As explained below, *Buckley*'s significant-authority test has nothing to do with that question. But even more fundamentally, the court of appeals' basis for invoking *Buckley* was its mistaken belief that the separation-of-powers analysis should be the same for territorial governments as for the federal government. Aurelius and UTIER make little effort to defend that reasoning. They cling to *Buckley* as the test for determining whether an office is territorial rather than federal—but they neither defend how the court of appeals arrived at *Buckley* nor attempt to chart some other course.

2. Retreating from its concession, Aurelius elsewhere asserts (Br. 35) that the Appointments Clause "appl[ies] with full force" to officers in the territories. But its halfhearted defenses of that view lack merit. For instance, Aurelius contends (Br. 34) that Congress remains subject to "separation-of-powers constraints" when it determines the structure of territorial governments. That assertion contradicts this Court's cases holding that many other separation-of-powers principles do *not* restrict the structure of territorial governments: the nondelegation doctrine, Appropriations Clause, Executive Vesting Clause, Take Care Clause, removal power, Judicial Vesting Clause, Tenure Clause, Compensation Clause, and various doctrines under Article III. See U.S. Br. 21-23. Aurelius simply ignores most of those examples.

Aurelius does try to explain away the inapplicability of the nondelegation doctrine to the territories as a "limited," "'*sui generis*'" exception. Aurelius Br. 37 (citation omitted). When this Court held that the doctrine does not extend to the territories, however, it relied not on an ad hoc exception, but on the general principle

that, "[i]n dealing with the territories," Congress "is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 323 (1937). And as just discussed, the nondelegation doctrine does not constitute some unique exception; rather, the general rule is that territorial governments "are not organized under the Constitution, nor subject to its complex distribution of the powers of government." *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850).

Aurelius invokes (Br. 25-27) *Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (*MWAA*), but that decision does not advance its case. There, Congress sought to vest "operating control of two major airports" owned by the United States in a board consisting of "nine Members of Congress." *Id.* at 255. This Court held that the creation of such a board amounted to "an impermissible encroachment," because the Constitution did not allow Congress to delegate the United States' operational control over federal property to its own members. *Id.* at 277. The Court "express[ed] no opinion" on whether the board "contravene[d] the Appointments Clause." *Id.* at 277 n.23. *MWAA* suggests, at most, that Congress may not vest the United States' operational control over a territory in its own members. It does not suggest that, when Congress enacts a law that creates a separate territorial government, *that* government must comply with the same structural provisions that bind the federal government.[2]

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[2] Aurelius also asserts (Br. 33-34) that the United States' invocation of constitutional avoidance in the courts below "effectively conceded" the applicability of the Appointments Clause to territorial

B. The Board's Members Are Territorial Officers Because Congress Has Treated Them As Such And Has Limited Their Duties Primarily To Territorial Matters

1. *Palmore* v. *United States*, 411 U.S. 389 (1973), sets out the proper test for distinguishing local from federal officers. Under *Palmore*, at a minimum, an office is territorial where (1) Congress invokes Article IV when establishing the office, (2) Congress places the office in a territorial government, and (3) Congress limits the office's duties primarily to territorial matters. The first two factors help a court determine, as a matter of statutory interpretation, whether Congress chose to create a territorial office, while the third factor helps it determine, as a matter of constitutional law, whether Congress's choice was permissible. See U.S. Br. 37-40.

UTIER acknowledges (Br. 43) that, under *Palmore*, "if the territorial official has powers focused exclusively on the territory, they are not federal officials." That admission concedes almost the entire case, because, as discussed below, the Board's powers focus on the territory of Puerto Rico. Aurelius, by contrast, disagrees that *Palmore* sets forth the appropriate test. But its objections lack merit.

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governments. That is incorrect. There was a statutory question in the lower courts about whether PROMESA's requirements concerning the timing of appointments would govern future selections of Board members. The United States urged the courts below to interpret those requirements to avoid any concerns that those requirements "impermissibly aggrandize[d] Congress's power at the expense of the President"—not to avoid concerns under the Appointments Clause. 18-1671 Gov't C.A. Br. 45. Whether PROMESA impermissibly aggrandizes power is not before this Court; Aurelius and UTIER have not brought such a claim, the court of appeals did not pass on it, and it does not form part of the question presented.

Aurelius emphasizes (Br. 28) that *Palmore* involved Article III, not the Appointments Clause. But Aurelius fails to explain why a court should use one test for territorial status when interpreting the words "judicial Power of the United States," U.S. Const. Art. III, § 1, but an entirely different test when interpreting the words "Officers of the United States," U.S. Const. Art. II, § 2, Cl. 2. It also fails to address this Court's insistence on interpreting the Appointments Clause "in the context of [its] cognate provisions"—including the provisions of Article III. *Buckley*, 424 U.S. at 124. And it fails to address historical practice, which shows that, since the 1830s, the political branches have agreed that status as a territorial judge under Article III goes hand in hand with status as a territorial officer under Article II. See U.S. Br. 31-32.

Aurelius objects (Br. 29) to *Palmore*'s first two factors on the ground that they "call for courts simply to defer to Congress's 'Article IV' and 'territorial' labels." But any inquiry into an officer's status must begin by asking how Congress has classified that office. As the United States has observed and as Aurelius does not dispute, Congress "possesses a dual authority" in the territories. *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428, 442-443 (1923); see U.S. Br. 34-35. That is, Congress may act in the territories under its ordinary Article I powers, or instead under its plenary Article IV powers. For instance, Congress may choose to grant a territory a full-fledged federal district court with life-tenured judges, or only a territorial court without such judges. In light of that dual authority, the first step in classifying an office must be to discern "the intent of the

Congress" regarding "the status" of the office in question. *Palmore*, 411 U.S. at 399 (citation omitted). *Palmore*'s first two factors help a court do just that.

Aurelius persists that *Palmore*'s first two factors allow Congress to "switch the Constitution on or off at will." Aurelius Br. 29 (citation omitted). But when Congress chooses to create a territorial body, it has not "switched the Constitution off." It has, instead, exercised a plenary power over the territories that the Constitution itself grants—subject, of course, to *Palmore*'s critical third factor, which ensures that Congress's choice falls within its authority under the Territory Clause. Saying that Congress has "switched off" the Appointments Clause when it creates a territorial office is like saying that it has "switched off" the constitutional guarantee of life tenure, U.S. Const. Art. III, § 1, when it creates a territorial court.

Aurelius also objects (Br. 31) to *Palmore*'s third factor, suggesting that the "geographic scope" of an officer's powers is not even "relevant" to the officer's status. Under both the Appointments and Territory Clauses, however, the focus of the Board's powers is centrally relevant. The Appointments Clause governs the selection of "Officers of the United States," U.S. Const. Art. II, § 2, Cl. 2, and the law has long distinguished officers of the sovereign from officers of a political subdivision by considering whether the officer's work concerns that subdivision. See *In re Opinion of the Justices*, 46 N.E. 118, 119 (Mass. 1897); 1 William Blackstone, *Commentaries on the Laws of England* 337 (1871); U.S. Br. 14. In addition, the Territory Clause grants Congress plenary power over a particular geographic area: "the Territory * * * belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. It thus

makes sense that an officer's territorial status would depend on whether his powers concern the local affairs of that geographic area.

Aurelius argues (Br. 30) that a geographic focus would mean that "the judges, the U.S. Attorney, and the U.S. Marshal of the United States District Court for the District of Puerto Rico all do not qualify as Officers of the United States." That is incorrect. For one, an officer's status turns in the first instance on Congress's treatment of the officer. And Congress has chosen to establish the District Judges, U.S. Attorney, and U.S. Marshal in Puerto Rico as officers in the federal government. For another, when the Court in *Palmore* applied the geographic element of its test, it emphasized that the courts at issue there primarily administered "statutes that are applicable to the [local jurisdiction] alone," rather than statutes with "nationwide application." 411 U.S. at 406-407. The District Judges, U.S. Attorney, and U.S. Marshal primarily administer statutes that apply nationwide, not statutes dealing specifically with territories such as Puerto Rico.

2. Under *Palmore*, the members of the Board are territorial officers: Congress invoked Article IV, organized the Board as part of the territorial government of Puerto Rico, and limited the Board's powers and duties primarily to local matters. U.S. Br. 40-42. Aurelius and UTIER do not dispute that the Board meets the first two factors, but they incorrectly argue (Aurelius Br. 30-32; UTIER Br. 43-45) that it fails the third.

The Board satisfies *Palmore*'s third factor because the "focus of [the Board's] work is primarily upon" the local affairs of Puerto Rico. 411 U.S. at 407. The Board acts under a statute that applies only to territories such as Puerto Rico, not to the United States as a whole. And

it exists to enable "[the] territory to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. 2121(a). To that end, the Board serves as "the representative of the debtor" in specialized debt-adjustment proceedings that are available only to a "territory" or "territorial instrumentality." 48 U.S.C. 2162(1), 2175(b).

Aurelius and UTIER emphasize that the adjustment of Puerto Rico's debts has "national implications." Aurelius Br. 31; see UTIER Br. 44-45. By that, they mean that some investors who have invested money in Puerto Rico, and whose investments may be affected by the adjustment of Puerto Rico's debts, reside elsewhere. See Aurelius Br. 31. Aurelius and UTIER fail to explain why an adjustment of a debt owed by Puerto Rico and a resulting effect on an investment in Puerto Rico should be regarded as a "national" matter, simply because the person who holds the investment happens to reside outside Puerto Rico. In any event, an officer's status depends on whether "the focus of [his] work is primarily upon" the territory, not on whether that work has collateral effects elsewhere in the nation. *Palmore*, 411 U.S. at 407. Just about any act taken by any officer could be said to have "implications" for the rest of the nation. For example, the judgments of territorial courts are entitled to full faith and credit outside the territory, see 28 U.S.C. 1738, but that does not transform those bodies into federal courts for purposes of Article III. In the same way, the acts of the Board's members may have collateral effects outside the territory, but those effects do not transform the members into federal officers for purposes of Article II.

Aurelius also stresses (Br. 16) that the Board may sue in federal court to enforce federal law. But the law

that the Board may sue to enforce, PROMESA, extends only to the territories, not to the whole United States. In addition, a wide variety of litigants routinely sue in federal court to enforce federal law—for example, state officers, local officers, and even private plaintiffs. Their ability to bring such lawsuits does not transform them into officers of the United States. If Congress had vested the power to commence and prosecute these Title III cases in the Governor of Puerto Rico, that would not have rendered him a federal officer. It makes no difference that Congress instead reorganized Puerto Rico's government and vested the authority in a newly created Board.

Finally, Aurelius argues (Br. 31) that the Board's powers "extend well beyond Puerto Rico." That is mistaken. Aurelius asserts (Br. 32) that the Board "may establish an office" outside Puerto Rico, but the work of such an office must still concern the finances of Puerto Rico, see U.S. Br. 41-42. Aurelius asserts (Br. 32) that the Board may "investigate financial activities outside Puerto Rico," but the Board may do so only when those activities concern bonds "issued by [Puerto Rico]," 48 U.S.C. 2124(*o*). And Aurelius asserts (Br. 32) that the Board may "prosecute a Title III proceeding" in a venue outside Puerto Rico, but the substance of such a Title III proceeding must still concern the debts of Puerto Rico and its instrumentalities, see 48 U.S.C. 2162(1). In all events, trivialities such as the power to open an office outside Puerto Rico do not change "the focus" of the Board's work, which remains "primarily upon" Puerto Rico. *Palmore*, 411 U.S. at 407. The members of the Board are thus officers of Puerto Rico, not officers of the United States.

C. Aurelius's And UTIER's Alternative Tests Are Unsound

Eschewing the test that this Court has used to distinguish federal from local bodies, Aurelius and UTIER turn to tests that the Court has used to distinguish officers from employees and governmental from private bodies. Those alternative tests do not help a court distinguish federal from territorial officers.

1. An officer's exercise of authority under an Act of Congress does not make him a federal officer

Aurelius and UTIER argue that the members of the Board are officers of the United States because they "exercise significant authority pursuant to the laws of the United States." Aurelius Br. 15 (brackets omitted); see UTIER Br. 33. That is incorrect as a matter of precedent and logic, text, and history.

a. Aurelius derives (Br. 2) its significant-authority test from *Buckley*, *supra*, *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), and *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018). But those cases involved the distinction between officers and employees, not the distinction between federal and territorial officers. See U.S. Br. 43-44. Aurelius asserts (Br. 21) that this Court "has never limited the *Buckley* test that way," but, in fact, the Court has explained that the test provides the "basic framework for distinguishing between officers and employees." *Lucia*, 138 S. Ct. at 2051.

Moreover, the significant-authority test makes little sense as a criterion for distinguishing federal from territorial officers. The only sovereign in a territory is the United States itself, and, as a result, *all* officers in the territories exercise their authority pursuant to federal law. See U.S. Br. 44. In an effort to overcome that problem, Aurelius and UTIER assert that an officer's

status turns on "the most immediate source" of the officer's authority, not the "ultimate source." Aurelius Br. 47 (citation and emphasis omitted); see UTIER Br. 40. But Aurelius and UTIER do not explain *why* a court should focus on the "most immediate source." In other contexts—for instance, under the separate-sovereigns doctrine of the Double Jeopardy Clause, U.S. Const. Amend. V—the "ultimate source" is what counts. *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016).

Aurelius's and UTIER's approach would also contradict this Court's precedents treating entities as territorial for purposes of other constitutional provisions even where those entities exercise authority under an Act of Congress. For example, the Court has held that territorial and D.C. courts constitute local bodies for purposes of Article III, even though those courts derive their jurisdiction from and adjudicate disputes arising under statutes enacted by Congress. See *Palmore*, 411 U.S. at 397-404; *Clinton* v. *Englebrecht*, 80 U.S. (13 Wall.) 434, 442 (1872). Aurelius and UTIER identify no reason why the exercise of authority under an Act of Congress suffices to make a body federal for purposes of the Appointments Clause, when it does not for purposes of Article III.

b. Aurelius's and UTIER's test is also wrong as a matter of constitutional text. To start, the test fails to make sense of the key words of the Appointments Clause: "Officers of the United States." Aurelius and UTIER offer no persuasive evidence that, at the time of the founding, a person's status as an "officer of" a political subdivision turned on the source of the officer's authority, rather than the government to which the officer belongs and the scope of his authority.

Nor can Aurelius and UTIER reconcile their test with the Territory Clause. Under that Clause, Congress may not only create "territorial legislatures," but also "itself legislate directly for the local government" whenever it sees fit. *National Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880). The "power of Congress" to sit "as a local legislature" for the territories and the District of Columbia was "expressly admitted" in the earliest days of the Republic, and "has never since been doubted." *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407 (1886). Under Aurelius's and UTIER's test, however, Congress may rely on local officers to carry out territorial laws enacted by the territorial legislature, but not territorial laws enacted by Congress itself. Nothing in the Constitution justifies such a constraint.

c. In addition, Aurelius's and UTIER's test defies over two centuries of historical practice—practice that persists in the structure of territorial governments today. Most obviously, their approach contradicts the unbroken tradition, going back to the First Congress, of allowing the territories to elect their own legislators. See U.S. Br. 26. Aurelius asserts that "territorial legislators" do not qualify as officers of the United States under its test because they "enact territorial law." Aurelius Br. 41 (emphasis omitted). But Aurelius's test turns on the source from which the officer *derives his authority*, not the nature of the law that the officer *enacts*. Territorial legislators may enact territorial legislation, but they derive their authority from federal legislation. Aurelius's test thus treats them as federal officers.

Nor can Aurelius's and UTIER's approach explain why judges of territorial courts have long been considered territorial officers. For the most part, territorial

judges have had the power to hear cases arising under Acts of Congress, and thus have exercised significant authority under federal law. See *Hornbuckle* v. *Toombs*, 85 U.S. (18 Wall.) 648, 655 (1874). As Aurelius admits (C.A. Br. 59-60), therefore, territorial judges qualify as officers of the United States under its test. Yet in the 1830s, the Judiciary Committee of the House of Representatives and the Attorney General both concluded that territorial judges do *not* qualify as officers of the United States. See U.S. Br. 31. This Court too, must have understood that territorial judges are not officers of the United States when it stated that "[t]here is nothing in the constitution which would prevent Congress from conferring the jurisdiction which they exercise, if the judges were elected by the people of the Territory and commissioned by the governor." *McAllister* v. *United States*, 141 U.S. 174, 182 (1891).

Further, under Aurelius's and UTIER's approach, the governance of the District of Columbia for much of the past two hundred years—through officers chosen by election, by other local officers, and by the President using methods not authorized by the Appointments Clause—would have violated the Constitution. See U.S. Br. 28-31. Aurelius responds (Br. 41 n.9) that those officers "never wielded significant federal authority," but that assertion is incorrect. In the early 19th century, the mayor and council of the city of Washington, who were chosen using various methods not authorized by the Appointments Clause, exercised their powers pursuant to a municipal charter granted by Congress. See Act of May 3, 1802, ch. 53, 2 Stat. 195; U.S. Br. 28. In the mid-19th century, elected assessors, registers, collectors, and surveyors in the city of Washington exercised various powers pursuant to an Act of Congress.

See Act of May 17, 1848, ch. 42, §§ 3-4, 9 Stat. 224-226. More recently, the members of the D.C. Financial Responsibility and Management Assistance Authority (D.C. Control Board)—the body on which the Board was modeled—were appointed by the President alone, yet had primary responsibility for administering an Act of Congress. See U.S. Br. 30. Aurelius's and UTIER's test cannot make sense of any of those practices.

If taken seriously, Aurelius's and UTIER's test would mean that the present-day elected governors of Guam and the Virgin Islands and elected mayor of the District of Columbia all violate the Appointments Clause. Making matters worse, Aurelius's and UTIER's approach to remedies, see pp. 26-47, *infra*, would seemingly require the invalidation of those officials' past acts. In an effort to avoid those calamitous consequences, Aurelius asserts that those officials "do not exercise 'significant governmental authority under the laws of the United States.'" Aurelius Br. 45 (citation omitted). But that is simply not so. The elected governors of Guam and the Virgin Islands exercise all of their power pursuant to organic acts enacted by Congress. See U.S. Br. 47-48. The elected mayor of the District of Columbia likewise exercises her power pursuant to an Act of Congress, and also administers a variety of D.C.-specific statutes enacted by Congress. *Id.* at 48.

d. Aurelius advances a series of arguments for using the significant-authority test to distinguish a federal from a territorial officer. None is sound.

Aurelius argues (Br. 39) that "*every* civilian territorial governor appointed to a continuing office was nominated by the President and confirmed by the Senate." That argument suffers from a multitude of flaws. First,

Aurelius never disputes that Congress may fill a position using the methods listed in the Appointments Clause even if the position does not qualify as an office of the United States. See U.S. Br. 32-33. Aurelius considers (Br. 39) it unlikely that Congress's decision to use those procedures for territorial governors was "gratuitous." But because the requirement of Senate confirmation enhances Congress's own power, Congress has powerful incentives to follow those procedures even when it is not required to do so. (Those incentives explain why Congress often requires Senate confirmation for inferior officers, even though it does not have to. See U.S. Const. Art. II, § 2, Cl. 2.) Second, Aurelius concentrates on *appointed* territorial governors, but its test cannot make sense of *elected* territorial governors. The Acts of Congress that created elective governorships in Puerto Rico, Guam, and the Virgin Islands changed the method of selecting the governor, but did not change the nature of the governors' authority. See U.S. Br. 27-28. Aurelius does not explain why the same governors exercising the same authority were federal officers when appointed, but became territorial officers when elected. Nor does it explain how the Appointments Clause would allow Congress to remove an office from the Clause's domain simply by changing the method of selection. Third, Aurelius's argument addresses only governors, ignoring the wide range of other territorial officers who have been selected using methods not contemplated by the Appointments Clause. See *id.* at 26-28 (elected territorial officers); *id.* at 28-29 (territorial officers appointed by other territorial officers); *id.* at 30-31 (territorial officers appointed by the President using methods not authorized by the Appointments Clause).

Aurelius also argues (Br. 43-44) that Presidents have long made recess appointments to territorial offices for which Congress had, by statute, required the Senate's advice and consent. But the most natural explanation for that practice is the understanding that, where a territorial organic act borrows the Constitution's advice-and-consent procedure, it also implicitly borrows the Constitution's recess-appointments exception to that procedure. See U.S. Br. 33. Aurelius never addresses that point. See Aurelius Br. 43-44.

Aurelius next observes (Br. 39-40) that, after ratification, the First Congress amended the Northwest Ordinance to transfer the power to appoint the territorial governor from Congress to the President with the advice and consent of the Senate. Yet Aurelius fails to identify any convincing evidence that Congress did so because it believed that the territorial governor was an officer of the United States—rather than because it considered the President the natural successor to the power of appointment previously lodged in the unicameral Confederation Congress. Aurelius relies (Br. 40) on Professor David Currie's observation that Congress may have amended the ordinance as a result of Article II, but Professor Currie himself acknowledged that Congress's decision may have reflected "policy considerations rather than constitutional compulsion." David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829*, at 114 (2001).

Aurelius further asserts that the First Congress "classified the judges of the Northwestern Territory as 'Executive Officers of Government' when establishing salaries for federal officers." Aurelius Br. 42 (citing Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67-68). By that,

Aurelius means that Congress enacted a statute entitled "An Act for establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks," *id.* 1 Stat. 67 (emphasis omitted), and that the statute in turn covered territorial judges. The title does not prove that Congress considered territorial judges to be "Executive Officers of Government"; titles often "do no more than indicate the provisions in a most general manner," without "attempt[ing] to refer to each specific provision." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947). It is especially clear that Congress did not consider the title here to be comprehensive, because territorial judges are not "Executive Officers" at all. In all events, even if Congress did consider territorial judges to be "Executive Officers of Government," that description would not establish that such judges are "Officers of the United States" for purposes of the Constitution.

Aurelius also points out (Br. 42) that Alexander Hamilton included territorial governors and secretaries in a list of civil officers that he prepared in 1793. See 14 *The Papers of Alexander Hamilton: Report on the Salaries, Fees, and Emoluments of Persons Holding Civil Office Under The United States* 157 (Harold C. Syrett et al. eds., 1969) (*Hamilton's Report*). Aurelius's reliance on that list is misplaced. First, Hamilton prepared the list in his capacity as Secretary of the Treasury, in response to a request from the Senate for "a statement of the salaries, fees, and emoluments" paid out of the Treasury. Journal of the First Session of the Senate 441 (Mar. 4, 1789). The purpose of the list was thus to identify recipients of money from the Treasury, not to identify officers of the United States under the Appoint-

ments Clause. Second, Hamilton's report began by explaining that the list included all "Persons holding civil offices or employments under the united States (except the Judges)," *Hamilton's Report* 157—a different category than "Officers of the United States." Third, Hamilton's original list included other officers who plainly do not qualify as officers of the United States—such as the Secretary of the Senate and the Clerk of the House of Representatives. See *id.* at 157-159.

Last, Aurelius relies (Br. 22-23) on various statements made by the Department of Justice. None of them supports Aurelius's theory. For example, Aurelius cites (Br. 22) a brief filed by the United States in the D.C. Circuit in *Hechinger* v. *Metropolitan Washington Airports Authority*, 36 F.3d 97 (1994) (No. 94-7036). But that brief and case concerned the status of a body created under an intergovernmental compact, not the status of a body in the territories. Aurelius also emphasizes (Br. 22-23) various statements made by Attorney General Richard Thornburgh, Acting Deputy Attorney General Edward Dennis, and Assistant Attorney General Harry Flickinger in 1989 and 1991. But those statements merely reflected the Department's view at that time that the Constitution precluded Congress from empowering territorial officers to administer the general and nationwide laws of the United States. That question has nothing to do with the statute at issue here, which applies only to the territories rather than to the United States as a whole.

2. The federal government's role in creating and filling an office does not make the officer federal

Aurelius, but not UTIER, argues in the alternative that, under *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the members of the Board

are federal officers because of Congress's role in creating the Board. Aurelius Br. 23-28. The United States has identified numerous reasons to reject that contention: The test in *Lebron* distinguishes governmental from private bodies, and the use of that test to distinguish federal from territorial officers contradicts historical practice, the precedents of this Court, and common sense. See U.S. Br. 50-53. Aurelius's own brief adds one more: Aurelius concedes that "Congress may exercise its Article IV power *to create* purely local territorial offices" that "are not subject to the Appointments Clause." Aurelius Br. 14 (emphasis added).

Relying on *Lebron* as well as other cases, Aurelius asserts (Br. 24) that the Board members are federal officers because of "the federal government's absolute control over the Board's appointments." That, too, is incorrect. The Appointments Clause, which regulates the method of appointing officers, would be circular if its applicability to an officer turned on that officer's method of appointment. Moreover, Aurelius does not dispute that, since the First Congress, the federal government has appointed officers in the territories using methods forbidden by the Appointments Clause—for instance, appointment of principal officers by the President alone, or appointment of territorial officers by the President from lists of candidates nominated by other bodies. See U.S. Br. 30-31. That longstanding practice would violate the Constitution if, as Aurelius maintains, federal involvement in the appointment makes an officer federal.

The sources on which Aurelius relies do not show otherwise. Aurelius cites (Br. 24) *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806), but that case involved the

classification of an officer for statutory rather than constitutional purposes. *Id.* at 336. Aurelius also cites (Br. 25) *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868), but that decision concerned the distinction between an officer and a "contract[or]," not the distinction between a federal officer and a territorial one. *Id.* at 393. Aurelius next relies (Br. 25) on an opinion of the Office of Legal Counsel discussing the meaning of the Appointments Clause, but that opinion states only that the method of appointment "may provide evidence of whether an office exists" (rather than evidence of whether the office is federal or territorial), and in any event warns that the Clause would be "tautological" if read to "require a certain means of appointment only for persons appointed by that means." 31 Op. O.L.C. 73, 115-116 (2007). Finally, Aurelius invokes (Br. 27) an opinion of the Office of Legal Counsel discussing the D.C. Control Board, an entity appointed by the President. That opinion, however, concluded only the Control Board represented "federal *interests*" for purposes of a conflict-of-interest statute—not that the Control Board's members were federal *officers* for purposes of the Appointments Clause. 22 Op. O.L.C. 109, 113 (1998) (emphasis added).

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In the end, *Palmore*, not *Buckley* or *Lebron*, sets out the appropriate framework for distinguishing federal from territorial officers. Under that framework, the Board's members qualify as territorial officers. The Appointments Clause accordingly does not govern their selection.

II. REGARDLESS OF ANY VIOLATION OF THE APPOINTMENTS CLAUSE, THE COURT SHOULD NOT SET ASIDE THE BOARD'S ACTS

If this Court were to conclude that the manner in which the Board's members were selected violates the Constitution, it would face the further question of what remedy to grant to redress the violation. The court of appeals awarded Aurelius and UTIER "a declaratory judgment" that the "protocol for the appointment of Board Members is unconstitutional." Pet. App. 45a. Dissatisfied with that relief, UTIER insists (Br. 20) that the court of appeals should have dismissed "all" the Title III proceedings, and Aurelius insists (Br. 4 & n.1) that it should have dismissed at least some of those proceedings. Those arguments are incorrect.

In general, the Constitution does not itself prescribe any particular remedy for a violation of its provisions. The Constitution instead operates against the backdrop of established rules that govern and limit the availability of relief—statutory restrictions such as the limits on habeas corpus set forth in 28 U.S.C. 2254; procedural rules such as the harmless-error rule and plain-error rule, Fed. R. Crim. P. 52; common-law doctrines such as absolute and qualified immunity; and equitable doctrines such as laches. Here, one such remedial rule—a centuries-old doctrine known as the *de facto* officer doctrine—provides that a court need not redress an improper appointment by invalidating the appointee's past acts. The court below properly applied that doctrine when it refused to set aside the Board's previous filing of Title III petitions. Dismissing those petitions, as Aurelius and UTIER urge, would undo years of progress toward Puerto Rico's economic recovery, causing devastating practical consequences for the people of the

island and for innocent third parties who have relied on the Board's acts.

A. Under The *De Facto* Doctrine, A Court Need Not Redress An Unconstitutional Appointment By Invalidating The Appointee's Past Acts

1. A court may, of course, redress an unlawful appointment through forward-looking relief that prohibits the appointee from continuing to exercise the office—in traditional practice, through a "judgment of ouster" in proceedings on a writ of quo warranto, 3 Blackstone 263 (emphasis omitted), and in modern practice, also through a declaration that the appointment violates the law or an injunction prohibiting further exercise of the office. Under the *de facto* doctrine, however, a court need not redress an unlawful appointment through backward-looking relief that sets aside the appointee's past acts. A court may instead treat the "acts of an officer *de facto*" as "valid and binding," even if he was not "an officer *de jure*." *Phillips* v. *Payne*, 92 U.S. 130, 132 (1876).

The *de facto* doctrine has a long legal pedigree. The earliest English case to discuss the rule dates to 1431 and explains that "if a man be made abbot or parson erroneously" by one who "had no right" to make the appointment, the wrongful appointee may be "ousted by legal process," but "a deed made by him" in the meantime need not be set aside. *State* v. *Carroll*, 38 Conn. 449, 458 (1871) (translating *The Abbé de Fontaine*, 1431 Y.B. 9 Hen. 6, fol. 32, pl. 3 (Eng.)). Early American state courts considered the doctrine "too well settled to be discussed." *People ex rel. Bush* v. *Collins*, 7 Johns. 549, 552 (N.Y. Sup. Ct. 1811) (Kent, C.J.). This Court

recognized the doctrine as early as 1842, and it has applied the doctrine in over a dozen cases since then.[3]

The *de facto* doctrine rests on "considerations of policy and necessity." *Norton* v. *Shelby Cnty.*, 118 U.S. 425, 441 (1886). First, the doctrine safeguards "the foundations of law and order and the stability of government" by preventing the chaos that could result if a defect in an officer's appointment required the mass invalidation of the officer's past acts. *Briggs* v. *Voss*, 85 P. 571, 572 (Kan. 1906). Second, the doctrine ensures that members of the public who transact business with an officer need not "investigate his title, but may safely act upon the assumption that he is a rightful officer." *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 323 (1902). Third, the doctrine protects "innocent men, who have dealt with officers upon the faith of a public appointment," from "difficulty and losses." *State of Ohio ex rel. Newman* v. *Jacobs*, 17 Ohio 143, 152 (1848) (in bank). To cite an example from one of this Court's cases, the doctrine ensures that a court need not annul a marriage because of a defect in the appointment of the clerk who signed

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[3] See, *e.g.*, *Buckley*, 424 U.S. at 142 (members of administrative agency); *United States* v. *Royer*, 268 U.S. 394, 396-398 (1925) (army major); *Tulare Irrigation Dist.* v. *Shepard*, 185 U.S. 1, 13-14 (1902) (irrigation district); *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 322-324 (1902) (mayor); *Nofire* v. *United States*, 164 U.S. 657, 661 (1897) (clerk); *Starr* v. *United States*, 164 U.S. 627, 631 (1897) (circuit-court commissioners); *Wright* v. *United States*, 158 U.S. 232, 238 (1895) (deputy marshal); *Lyons* v. *Woods*, 153 U.S. 649, 669 (1894) (territorial legislators); *In re Delgado*, 140 U.S. 586, 590 (1891) (county commissioners); *Gonzales* v. *Ross*, 120 U.S. 605, 619 (1887) (land commissioner); *Hussey* v. *Smith*, 99 U.S. 20, 24 (1879) (marshal); *United States* v. *Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-103 (1875) (state legislators); *Cocke ex rel. Commercial Bank of Columbus* v. *Halsey*, 41 U.S. (16 Pet.) 71, 87 (1842) (clerk of court).

the marriage license. *Nofire* v. *United States*, 164 U.S. 657, 661 (1897).

2. In general, the Constitution does not itself require any particular remedy for violations of its provisions. See *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). The applicability of the *de facto* doctrine to violations of the Appointments Clause thus presents a common-law question about the scope of the doctrine rather than a constitutional question about the meaning of the Clause. The jurisprudence of this Court, the decisions of state courts and courts in other common-law jurisdictions, and the writings of legal commentators all make it plain that a court may apply the *de facto* doctrine to an officer who has been appointed under a statute that a court later declares unconstitutional. Contrary to the theory advanced by Aurelius and UTIER, the doctrine is not limited to "minor" or "'technical'" defects in appointments. Aurelius Br. 51-52 (citation omitted); see UTIER Br. 71.

a. The jurisprudence of this Court establishes that the *de facto* doctrine extends to constitutional claims. The Court explicitly recognized the applicability of the doctrine to such claims in *Norton*, where it cited "[n]umerous cases" that apply the doctrine "to the invalidity, irregularity, *or unconstitutionality* of the mode by which the party was appointed or elected." 118 U.S. at 444 (emphasis added). The Court also defined an "officer *de facto*" to include one who exercises an office "[u]nder color of an election or an appointment by or pursuant to *a public, unconstitutional law*, before the same is adjudged to be such." *Id.* at 446 (emphasis added). It explained that the doctrine remains applicable despite "the unconstitutionality of the act by which the officer is appointed to an office." *Ibid.* And it stated

that "[t]he law authorizing the appointment [may be] declared unconstitutional, [yet] the acts of [an officer appointed under the law] deemed valid as those of an officer *de facto*." *Id.* at 447. Aurelius never addresses *Norton*, which squarely refutes the notion that the doctrine extends only to "a minor statutory irregularity in the manner of appointment" and that applying the doctrine to "constitutional" defects "would expand the doctrine far beyond its traditional scope." Aurelius Br. 51.

Moreover, this Court applied the *de facto* doctrine in *Buckley* after determining that the protocol for appointing the Federal Election Commission violated the Appointments Clause. See 424 U.S. at 124-143. Although the challengers received a declaration and an injunction, the Court refused to award them retrospective relief that would "affect the validity" of the Commission's previous "administrative actions." *Id.* at 142; see *id.* at 8-9, 124-137. The Court instead accorded "*de facto* validity" to those "past acts." *Id.* at 142. Aurelius and UTIER suggest that *Buckley* did not rely on the *de facto* doctrine, see Aurelius Br. 54; UTIER Br. 70, but they offer no other explanation for the reference to "*de facto* validity," 424 U.S. at 142.

In addition, this Court and individual Justices have applied the *de facto* doctrine to violations of numerous other constitutional provisions. For example:

- *Recess Appointments Clause.* The Court has refused to set aside a conviction entered by a judge allegedly appointed in violation of the Recess Appointments Clause, U.S. Const. Art. II, § 2, Cl. 3, reasoning that "a conviction is lawful although the judge holding the court may be only an officer *de facto*." *Ex parte Ward*, 173 U.S. 452, 454 (1899).

- *Oaths Clause*. The Court has refused to set aside legislation enacted by state legislators who refused to take the oath to support the Constitution, see U.S. Const. Art. VI, Cl. 3, reasoning that unsworn legislators still constitute "a legislature *de facto*." *United States* v. *Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101 (1875).
- *Equal Protection Clause*. The Court has held that a violation of the Equal Protection Clause's one-person-one-vote rule, see U.S. Const. Amend. XIV, § 1, does not require the invalidation of past elections or past legislative acts. See *Georgia* v. *United States*, 411 U.S. 526, 541 (1973); *Connor* v. *Williams*, 404 U.S. 549, 550-551 (1972) (per curiam); *Fortson* v. *Morris*, 385 U.S. 231, 235-236 (1966); *Maryland Comm. for Fair Representation* v. *Tawes*, 377 U.S. 656, 676 (1964).
- *Prohibition on secession*. After the Civil War, the Court accorded "*de facto*" validity to the acts of secessionist state governments, notwithstanding the unconstitutionality of secession, explaining that acts "which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government." *Texas* v. *White*, 74 U.S. (7 Wall.) 700, 733 (1869); see *Baldy* v. *Hunter*, 171 U.S. 388, 392-400 (1898).
- *State sovereignty*. During Reconstruction, the Court sustained a state court's application of the *de facto* doctrine to a claim that a federal military governor had violated state sovereignty by appointing a state judge. *Bolling* v. *Lersner*, 91 U.S. 594, 594-596 (1876).

- *Section 3 of the Fourteenth Amendment.* Section 3 of the Fourteenth Amendment disqualifies a person from holding office if he takes an oath to defend the Constitution, but then engages in rebellion or insurrection against the United States. Chief Justice Chase, riding circuit, explained that a judge appointed in violation of Section 3 remains a "judge de facto," and that a conviction entered by such a judge remains valid. *Griffin's Case*, 11 F. Cas. 7, 27 (C.C.D. Va. 1869) (No. 5815).

- *Ineligibility Clause.* The Ineligibility Clause prohibits the appointment of Members of Congress to offices that have been created or whose salaries have been increased during their terms. U.S. Const. Art. I, § 6, Cl. 2. Although some appointments have violated that prohibition, Chief Justice Chase further explained that "no instance is believed to exist" where the past acts of an officer "have been held invalid" because of such a violation. *Griffin's Case*, 11 F. Cas. at 27.

- *State constitutions.* This Court has stated that, "although [an] officer did not comply with the requisites of [a state] constitution, yet, having been appointed, and thus having colour of title, his acts are valid in respect to third persons." *Cocke ex rel. Commercial Bank of Columbus* v. *Halsey*, 41 U.S. (16 Pet.) 71, 86 (1842). Justice Story, riding circuit, likewise stated that the law may allow "the acts of * * * officers de facto to be good," even where their appointments violate "the constitution of the state." *Allen* v. *McKean*, 1 F. Cas. 489, 501-502 (C.C.D. Me. 1833) (No. 229).

Aurelius attempts to distinguish this Court's past cases applying the *de facto* doctrine to constitutional defects on the ground that those cases involved "collateral attack[s]" on final judgments. Aurelius Br. 52 (citation omitted). That is mistaken. None of the cases just cited, apart from *Ward* and *Griffin's Case*, involved a petition for a writ of habeas corpus or other collateral attack on a final judgment. And even in *Ward* and *Griffin's Case*, neither the Court nor Chief Justice Chase suggested that the *de facto* doctrine becomes applicable to constitutional defects only after the entry of a final judgment.

b. Decisions from other jurisdictions confirm that a court may apply the *de facto* doctrine to an unconstitutional appointment. Most importantly, the state courts agree that a court may apply the *de facto* doctrine where a person holds office "under color of an election or appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such." *Carroll*, 38 Conn. at 472. That rule is longstanding; as far back as 1815, a state court called the applicability of the *de facto* doctrine to unconstitutional appointments "too well established to admit of a doubt." *Taylor* v. *Skrine*, 3 S.C.L. 568, 569, 2 Tread. 696, 697. The rule is also close to universal. The courts of 48 states (all but Iowa and Montana) have concluded that a court may apply the *de facto* doctrine to unconstitutional appointments.[4]

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[4] See *Heath* v. *State*, 36 Ala. 273, 276 (1860); *Jordan* v. *Reed*, 544 P.2d 75, 79-80 (Alaska 1975); *State ex rel. Nelson* v. *Jordan*, 450 P.2d 383, 387 (Ariz.) (en banc), cert. dismissed, 396 U.S. 5 (1969) (per curiam); *Eureka Fire Hose Co.* v. *Furry*, 190 S.W. 427, 427-428 (Ark. 1916); *Marine Forests Soc'y* v. *California Coastal Comm'n*, 113 P.3d 1062, 1093 (Cal.), cert. denied, 546 U.S. 979 (2005); *Glavino* v. *People*, 224 P. 225, 226 (Colo. 1924); *Carroll*, 38 Conn. at 472; *State*

ex rel. James v. *Schorr*, 65 A.2d 810, 817 (Del. 1948); *State* v. *Gleason*, 12 Fla. 190, 230-235 (1868), error dismissed, 76 U.S. (9 Wall.) 779 (1870); *Godbee* v. *State*, 81 S.E. 876, 877-878 (Ga. 1914); *Sierra Club* v. *Castle & Cooke Homes Hawai'i, Inc.*, 320 P.3d 849, 868 (Haw. 2013); *Lyons* v. *Bottolfsen*, 101 P.2d 1, 8 (Idaho 1940); *Leach* v. *People ex rel. Patterson*, 12 N.E. 726, 728-730 (Ill. 1887); *Platte* v. *Dortch*, 263 N.E.2d 266, 268-269 (Ind. 1970); *State ex rel. Anderson* v. *State Office Bldg. Comm'n*, 345 P.2d 674, 682-683 (Kan. 1959); *Wendt* v. *Berry*, 157 S.W. 1115, 1116-1119 (Ky. 1913); *In re Office of Chief Justice*, 101 So. 3d 9, 21 n.21 (La. 2012) (per curiam); *Bucknam* v. *Ruggles*, 15 Mass. 180, 182 (1818) (per curiam); *State* v. *Poulin*, 74 A. 119, 122-124 (Me. 1909); *Hetrich* v. *County Comm'rs*, 159 A.2d 642, 644-646 (Md. 1960); *Carleton* v. *People*, 10 Mich. 250, 255-258 (1862); *Bowman* v. *City of Moorhead*, 36 N.W.2d 7, 10-11 (Minn. 1949); *Coker* v. *Wilkinson*, 106 So. 886, 889 (Miss. 1926); *State* v. *Dierberger*, 2 S.W. 286, 287-288 (Mo. 1886); *State Bank* v. *Frey*, 91 N.W. 239, 241-242 (Neb. 1902); *Sawyer* v. *Dooley*, 32 P. 437, 439 (Nev. 1893); *Town of Lisbon* v. *Town of Bow*, 10 N.H. 167, 169-171 (1839); *State* v. *Corrigan*, 60 A. 515, 516 (N.J. 1905); *City of Albuquerque* v. *Water Supply Co.*, 174 P. 217, 228-229 (N.M. 1918); *People* v. *Petrea*, 64 How. Pr. 139, 172-175 (N.Y. Gen. Term 1883); *Smith* v. *Town of Carolina Beach*, 175 S.E. 313, 315 (N.C. 1934); *State ex rel. Sathre* v. *Moodie*, 258 N.W. 558, 568 (N.D. 1935); *State* v. *Gardner*, 42 N.E. 999, 999-1000 (Ohio 1896); *Wixson* v. *Green*, 521 P.2d 817, 818-819 (Okla. 1974); *Carey* v. *Lincoln Loan Co.*, 125 P.3d 814, 818-819 (Or. Ct. App. 2005); *Riddle* v. *County of Bedford*, 1821 WL 1904, at *4 (Pa. Oct. 1821); *In re Request for Advisory Op. from House of Representatives*, 961 A.2d 930, 941 & n.18 (R.I. 2008); *Taylor*, 3 S.C.L. at 569, 2 Tread. at 697; *Potts* v. *Miller*, 39 N.W.2d 667, 672 (S.D. 1949); *Smith* v. *Landsden*, 370 S.W.2d 557, 560-561 (Tenn. 1963); *Anderson* v. *State*, 195 S.W.2d 368, 370 (Tex. Crim. App. 1946); *State ex rel. Jugler* v. *Grover*, 125 P.2d 807, 818 (Utah 1942); *Petition of Dusablon*, 230 A.2d 797, 800 (Vt. 1967); *Griffin's Ex'or* v. *Cunningham*, 61 Va. 31, 42-47 (1870); *State ex rel. McLeod* v. *Reeves*, 157 P.2d 718, 720 (Wash. 1945); *Roberts* v. *Steinbicker*, 176 S.E. 435, 435-436 (W. Va. 1934); *Burton* v. *State Appeal Bd.*, 156 N.W.2d 386, 392 (Wis. 1968); *May* v. *City of Laramie*, 131 P.2d 300, 313-314 (Wyo. 1942).

Similarly, under the common law of England, the *de facto* doctrine has always extended to violations of the unwritten English constitution. For example, since the 15th century, English law has treated as valid "all acts done" by "a king *de facto*" who has usurped the throne, even if he is not "a king *de jure*." 1 Blackstone 202. And after "the power of Cromwell was * * * overturned, and Charles the Second restored, the judicial decisions under the former remained unmolested on this account, and the judiciary went on as before, still looking only to the *de facto* government for the time being." *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 58 (1849).

Jurisdictions that inherited the common-law system from England and the United States have continued to follow that traditional understanding of the *de facto* doctrine. Courts in countries ranging from Canada to India to New Zealand have determined that the doctrine extends to those who hold office in violation of the constitutions of those countries.[5]

c. Other legal authorities confirm that the *de facto* doctrine extends to violations of the Constitution. In 1843, Attorney General Legare issued an opinion stating that he "d[id] not apprehend any great difficulty" as to the validity of the "acts" of customs inspectors who had arguably been appointed in violation of the Appointments Clause, 4 Op. Att'y Gen. 162, 165—"apparently

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[5] See *Whitfield* v *Attorney-General*, (1989) 44 WIR 1, 8 (Bah.); *In re Section 55 of the Supreme Court Act, R.S.C. 1970, c. S-19*, [1985] 1 S.C.R. 721, 725, 755-757 (Can.); *Rangaraju* v. *State of Andhra Pradesh*, (1981) 3 S.C.R. 474, 475-476 (India); *Funa* v. *Agra*, G.R. No. 191644, 704 Phil. Rep. 205 (Feb. 19, 2013) (en banc); *In re Sections 27(2), 48 and 49(1) of the Constitution*, [1989] S.I.L.R. 99 (Solom. Is.); *Sookar* v *Attorney Gen.*, No. CV 2010-04777 (Nov. 4, 2014), slip op. 31-34 (Trin. & Tobago); *R* v *Te Kahu*, [2006] 1 NZLR 459, at [57] (N.Z.).

assuming [the] applicability of [the] doctrine in [the] event of [a] constitutional challenge to [the] appointment," 31 Op. O.L.C. at 116. Treatise writers have reached similar conclusions. See Albert Constantineau, *A Treatise on the De Facto Doctrine*, § 424, at 580 (1910) ("[T]he authorities, without a single dissenting voice, have always held that an unconstitutional Act affords sufficient color of authority to an officer to constitute him an officer de facto."); Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 320, at 215 (1890) ("[A person] will be deemed to be an officer *de facto* * * * even though he was elected under an unconstitutional statute."); Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 751 n.1 (6th ed. 1890) (explaining that the doctrine applies "where the appointing body is acting under an unconstitutional law").

d. The application of the *de facto* doctrine to unconstitutional appointments makes sense in light of the doctrine's purposes. None of those purposes, see p. 28, *supra*, turns on the character of the defect in the appointment. Even where a court determines that an officer's appointment violates a constitutional provision, the wholesale nullification of everything the officer has ever done could threaten bedlam. And the invalidation of an officer's past acts could work an injustice to innocent third parties who have relied on those acts, even if that invalidation results from a constitutional defect.

The application of the *de facto* doctrine to unconstitutional appointments also makes sense in light of the "presumption of constitutionality" that attaches to statutes "until their invalidity is judicially declared." *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 153 (1944). A statute "cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but

must be received and obeyed, as to all intents and purposes law, until questioned in and set aside by the courts." *Carroll*, 38 Conn. at 472. It would be impractical to expect private citizens to inquire into the constitutionality of a statute before transacting business with officials appointed under that statute.

e. There is nothing novel about denying a particular remedy on a constitutional claim on account of such concerns. Under ordinary principles of equity, a court may refuse to enjoin a constitutional violation where such relief would be contrary to "the balance of equities" and "the public interest"; an injunction "does not follow from success on the merits as a matter of course." *Winter* v. *Natural Res. Def. Council*, 555 U.S. 7, 32 (2008). Under doctrines such as qualified immunity, courts often deny damages for constitutional violations in part to minimize the "social costs" of lawsuits against public officials. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). Under the exclusionary rule, courts may decline to exclude evidence obtained in violation of the Fourth Amendment where the "costs" of exclusion "outweigh" the "benefits." *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006) (citation omitted). Under doctrines that limit the scope of habeas corpus, "considerations of finality" may lead to a refusal to release prisoners who have been convicted in violation of the Constitution. *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality). And under similar doctrines that govern tax cases, courts have "a degree of leeway in designing a remedy" for "unconstitutional" tax laws, and may in some circumstances "deny" taxpayers "the refund that they sought." *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 755 (1995). Just as courts have the power to withhold some forms of relief on a constitutional claim in all of those settings, so too

courts have long had the authority to decline to invalidate the acts performed by an unconstitutionally appointed officer.

3. Aurelius and UTIER advance a series of arguments against the application of the *de facto* doctrine to violations of the Appointments Clause. Those arguments lack merit.

Aurelius and UTIER rely chiefly on *Ryder* v. *United States*, 515 U.S. 177 (1995), in which this Court declined to apply the *de facto* doctrine to the convictions entered by military judges chosen in violation of the Appointments Clause, so long as those convictions remained pending on direct review. Aurelius Br. 49; UTIER Br. 75. Aurelius and UTIER read *Ryder* to mean that the doctrine "never" applies to an officer whose appointment violates the Appointments Clause. Aurelius Br. 49; see UTIER Br. 75. That sweeping interpretation is mistaken. The Court in *Ryder* did not discuss, much less overrule, the vast body of case law beyond *Buckley* applying the doctrine to unconstitutional appointments. The Court also explicitly acknowledged the propriety of applying the *de facto* doctrine to constitutional violations in at least some circumstances, including: (1) "collateral" review of convictions, 515 U.S. at 181 (citation omitted); (2) "a challenge to the composition of an entire legislative body," *id.* at 183, and (3) the circumstances presented in *Buckley*, a case that the Court was "not inclined to extend," but also did not overrule, *id.* at 184.

Read properly, *Ryder* stands for the more modest proposition that a court ordinarily should not apply the *de facto* doctrine to an unconstitutional appointment of a judge or other adjudicator. The Court in *Ryder* repeatedly limited its holding to such officers, stating, for example, that "the *judges'* actions were not valid," that

"one who makes a timely challenge to the constitutional validity of the appointment of *an officer who adjudicates his case* is entitled to * * * relief" on "direct review," and that "[a]ny other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable *judicial* appointments." 515 U.S. at 179, 182-183 (emphases added). The Court also distinguished collateral review (when the *de facto* doctrine remains applicable) from direct review (when it does not). *Id.* at 185-186. That line makes sense only in the context of adjudications; non-adjudicators do not enter final judgments, and their acts do not have direct- and collateral-review stages.

There are sound reasons for treating adjudicators differently than other kinds of officers. On the one hand, the costs of invalidating past acts tend to be lower for adjudicators than for other officers. Adjudicators issue orders that bind the parties before them; regulators issue rules that bind the community at large. See *Bi-Metallic Inv. Co.* v. *State Bd. of Equalization*, 239 U.S. 441 (1915). And only a subset of an adjudicator's orders is likely to be pending on direct review with a timely and preserved objection at the time the challenge to the appointment is ultimately resolved. For example, the appointments in *Ryder* affected "only between 7 to 10 cases pending on direct review." 515 U.S. at 185. Challenges to adjudicators are thus less likely to involve the kind of "grave disruption" that the *de facto* doctrine seeks to prevent. *Ibid.* On the other hand, the costs of applying the *de facto* doctrine to adjudicators are uniquely high. A prospective remedy prohibiting an adjudicator from continuing to exercise his office would have little value to most litigants, who have little expectation of coming back before the same

adjudicator in a future case. The rigid application of the *de facto* doctrine in that context would thus systemically deprive challengers of the only meaningful remedy (namely, invalidation of the adjudicator's past acts), "creat[ing] a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Id.* at 183.

Aurelius and UTIER also invoke three other cases: *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), where a plurality of this Court declined to apply the *de facto* doctrine to judges who allegedly held office in violation of Article III, see *id.* at 535 (opinion of Harlan, J.); *Nguyen* v. *United States*, 539 U.S. 69 (2003), where the Court declined to apply the doctrine to a judge who heard a case in violation of a statute, see 539 U.S. at 77; and *Lucia*, where the Court explained that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official," 138 S. Ct. at 2055 (citation omitted). Aurelius Br. 51-52, 55; UTIER Br. 71-72. Those cases are inapposite for the same reason as *Ryder*: they involved challenges to the appointments of adjudicators.

In addition, Aurelius cites (Br. 60-61) this Court's decision in *Bowsher* v. *Synar*, 478 U.S. 714 (1986), and Justice Scalia's concurrence in the judgment in *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787 (1987). But the *de facto* doctrine was not at issue in either of those cases, and the Court and Justice Scalia accordingly did not discuss it. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

Aurelius and UTIER argue that the *de facto* doctrine does not extend to violations of the Appointments Clause because of the unique importance of redressing constitutional violations. See Aurelius Br. 60; UTIER Br. 72. But this Court has never held that constitutional claims enjoy an automatic exemption from the ordinary rules and restrictions governing the availability of remedies. Quite the contrary, the Court has held that constitutional claims remain subject to standard remedial rules such as the "principles and usages of law" limiting the availability of mandamus, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (internal quotation marks omitted); restrictions on the scope of habeas corpus, see *Munaf* v. *Geren*, 553 U.S. 674, 700-701 (2008); and requirements of administrative exhaustion, see *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008). The Court has, at most, adjusted the scope of some remedial doctrines to account for the nature of the claim at hand—for instance, by setting the threshold for harmless error higher for constitutional than for statutory violations. See *Chapman* v. *California*, 386 U.S. 18, 22-23 (1967). The constitutional stature of the claims here thus justifies, at most, requiring a stronger showing of harm before applying the *de facto* doctrine; it does not justify abandoning that deeply rooted doctrine in its entirety.

Aurelius and UTIER persist that the Appointments Clause differs from other constitutional provisions because it is "structural." Aurelius Br. 60; see UTIER Br. 72. Structural constitutional claims, however, are not wholly exempt from the remedial restrictions governing other kinds of claims. See *Armstrong*, 135 S. Ct. at 1383-1384. That is why, as noted earlier, courts have long applied the *de facto* doctrine to violations of a wide

range of structural guarantees, including the Appointments Clause itself, the Recess Appointments Clause, the Ineligibility Clause, and the Oaths Clause. See pp. 30-32, *supra*.

B. The Court Of Appeals Properly Applied The *De Facto* Doctrine In These Cases

1. The facts of these cases cry out for application of the *de facto* doctrine. Aurelius and UTIER seek the dismissal of Title III petitions previously filed by the Board, but, as the court of appeals recognized, that remedy "will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now." Pet. App. 43a.

In 2017, the Board filed a total of five Title III petitions: one each on behalf of the Commonwealth of Puerto Rico, the Puerto Rico Sales Tax Financing Corporation (COFINA), the Puerto Rico Highways and Transportation Authority, the Employees Retirement System of the Government of the Commonwealth of Puerto Rico, and the Puerto Rico Electric Power Authority. See Pet. App. 14a, 46a n.1. COFINA's Title III process culminated in February 2019 with the confirmation of a plan that adjusted approximately $18 billion in debt. See *In re Financial Oversight & Mgmt. Bd. for P.R.*, 361 F. Supp. 3d 203 (D.P.R. 2019). In accordance with the plan, COFINA has already collected hundreds of millions of dollars from some sources, and has already disbursed hundreds of millions of dollars to other recipients. See Rifkind Decl. ¶¶ 8, 10, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 19-1391 (1st Cir. June 28, 2019). The plan also resulted in the cancellation of COFINA's previous bonds, and insurers have already paid bondholders for those cancellations under applicable insurance policies. *Id.* ¶¶ 7, 9, 10. In addition,

COFINA has issued $12 billion in new bonds under the plan, and those bonds have traded on public markets thousands of times. *Id.* ¶ 7.

The other four Title III cases remain pending, but the parties to those cases have made substantial progress in the two years since those cases were filed. By the government's count, the creditors in those cases have already filed over 170,000 claims; the parties have filed and litigated over 75 adversary proceedings; and the Board has filed over 270 avoidance actions against recipients of pre-petition payments. The parties have also engaged in substantial negotiations regarding the restructuring of the Commonwealth's and its instrumentalities' debts. See 17-3283 D. Ct. Doc. 8244 (D.P.R. July 24, 2019). For instance, the Board recently announced an agreement with bondholders and bond insurers regarding the restructuring of the Puerto Rico Electric Power Authority. See Press Release, Financial Oversight & Management Board for Puerto Rico, *Oversight Board Reaches Agreement with Bond Insurers over PREPA Restructuring* (Sept. 9, 2019).[6] And the Board has stated that it is on the verge of proposing a debt-adjustment plan for the Commonwealth. 17-3283 D. Ct. Doc. 7640 (D.P.R. June 25, 2019).

UTIER argues (Br. 20) that "all the Title III proceedings should be dismissed." Aurelius, for its part, seeks (Br. 4 n.1) the dismissal of the Title III cases "initiated for the Commonwealth and the Puerto Rico Highways and Transportation Authority," but "do[es] not challenge Board actions in other Title III proceedings" (presumably because the Board's actions in those

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[6] https://drive.google.com/file/d/1kqZ4kXLNJrWSf9hUJc4z7ecXwMbgGEpS/view.

cases suit Aurelius's interests). Either way, the dismissal of some or all of the Title III cases at this stage would have dire practical consequences. First, as the court of appeals found, dismissal would "cancel out" "the Board's years of work," thereby "nullifying" significant "progress made towards [the statute's] aim of helping Puerto Rico 'achieve fiscal responsibility and access to the capital markets.'" Pet. App. 44a (quoting 48 U.S.C. 2121(a)). Second, dismissal could result in the termination of the automatic stay that now protects Puerto Rico from efforts to collect unpaid debts. See 11 U.S.C. 362; 48 U.S.C. 2161(a). That could leave creditors free to attach Puerto Rico's financial resources, crippling Puerto Rico's ability to continue to operate basic public services such as schools, police departments, and public hospitals. Third, dismissal would harm the "many, if not thousands, of innocent third parties who have relied on the Board's actions until now," Pet. App. 43a—most notably, the investors who have conducted billions of dollars in transactions in reliance on the plan in COFINA's Title III case. The *de facto* doctrine exists to allow a court to avoid just such consequences.

2. Aurelius and UTIER do not meaningfully dispute that the dismissal of the Title III petitions would cause the consequences just discussed. They instead contend that the *de facto* doctrine does not apply to these cases because the "violation of the Appointments Clause was open and notorious." Aurelius Br. 62; see UTIER Br. 78. That is incorrect. To be sure, some courts have suggested that the *de facto* doctrine may not apply to appointments under "manifestly" unconstitutional statutes. *Brown* v. *O'Connell*, 36 Conn. 432, 452 (1870).

But those decisions justify, at most, a "possible exception [for] a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979). Given the long history and established precedent concerning territorial officers who are materially indistinguishable from the Board, the challenged provision here is, at a minimum, not so flagrantly unconstitutional that any reasonable person would be bound to find it flawed.

Aurelius also argues (Br. 66) that the *de facto* doctrine cannot justify the court of appeals' decision to "withh[o]ld its mandate * * * until proceedings before this Court conclude." As an initial matter, Aurelius has waived that argument, because it conceded in the court of appeals that the court "can stay the effect of [its] decision and the board can continue to make decisions" until a "constitutionally appointed board" validates those actions. Oral Arg. at 1:27:24, *Aurelius Invs., LLC* v. *Commonwealth of Puerto Rico*, No. 18671 (1st Cir. Dec. 3, 2018).[7]

In any event, the court of appeals' withholding of its mandate did not rest on the *de facto* officer doctrine. It instead rested on Federal Rule of Appellate Procedure 41(b), which empowers a court of appeals to "stay" the issuance of its "mandate." This Court has, in previous cases, stayed its own mandate in order to allow a governmental body that it has declared unconstitutional to continue to operate for a brief period. For example, in *Buckley*, after the Court held that the protocol for appointing the members of the Federal Election Commission violated the Appointments Clause, the Court

[7] https://www.courtlistener.com/mp3/2018/12/03/aurelius_investments_llc_v._commonwealth_of_puerto_rico_cl.mp3.

granted a "limited stay" of "30 days" to the extent its judgment "affect[ed] the authority of the Commission to exercise [its] duties and powers," thereby allowing the Commission to continue to "function" "in the interim." 424 U.S. at 143. In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), after the Court held that the system of bankruptcy courts then in place violated Article III of the Constitution, it granted a six-month stay in order to "afford Congress an opportunity to reconstitute the bankruptcy courts * * * without impairing the interim administration of the bankruptcy laws." *Id.* at 88 (plurality); see *id.* at 92 (Rehnquist, J., concurring in the judgment). And in *Bowsher*, after holding that the assignment of executive functions to an agent of Congress violated the separation of powers, the Court "stayed" its judgment "for a period not to exceed 60 days to permit Congress to implement * * * fallback provisions." 478 U.S. at 736. (Indeed, the Court's stay of the mandate in those cases underscores the broader point that courts may in appropriate cases withhold remedies even with respect to structural constitutional violations.) The court below acted well within its discretion in staying its mandate in order to "allow the President and the Senate to validate the currently defective appointments or reconstitute the Board" without interrupting the Board's execution of its functions in the interim. Pet. App. 44a-45a.

3. If the Court concludes that the *de facto* doctrine does not extend in these circumstances to the asserted violation of the Appointments Clause, the Court should vacate the court of appeals' judgment with respect to remedy and remand these cases for further proceedings. The Court should not order the dismissal of the

Title III petitions outright. Even where the *de facto* doctrine does not apply, a challenger who succeeds on the merits is entitled only to "whatever relief may be appropriate." *Ryder*, 515 U.S. at 182-183. Quite apart from the *de facto* doctrine, other remedial principles may independently make it improper to dismiss the petition in COFINA's Title III case, after a restructuring plan has already been confirmed and consummated. See Aurelius Br. 68-69 (discussing the separate doctrine of equitable mootness). The courts below should address those issues in the first instance.

* * * * *

Congress enacted PROMESA in order to address a fiscal and humanitarian crisis that threatened Puerto Rico's "very ability to persist." *Wal-Mart P.R., Inc.* v. *Zaragoza-Gomez*, 174 F. Supp. 3d 585, 592 (D.P.R.), aff'd, 834 F.3d 110 (1st Cir. 2016). Invoking its "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments," *National Bank*, 101 U.S. at 133, Congress created a new Board within the Commonwealth's government to reform the Commonwealth's finances and secure its long-term financial stability. Aurelius's and UTIER's challenge to that Board lacks a sound basis in the constitutional text and structure, this Court's precedents, and historical practice. And their insistence on invalidating the Board's past official acts contradicts a remedial doctrine that has been settled law since before the Founding. This Court should reject their arguments, which would threaten to devastate Puerto Rico's ongoing economic recovery and to upend the current governmental structure of the District of Columbia and all U.S. territories.

CONCLUSION

The judgment of the court of appeals should be reversed on the merits, but, if not, affirmed on the remedy.

Respectfully submitted.

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SEPTEMBER 2019