No. 18-__

In the Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner here, Appellee below, is the Financial Oversight and Management Board for Puerto Rico.

Respondents here, also Appellees below, are the United States, the Commonwealth of Puerto Rico, the American Federation of State County and Municipal Employees; the Official Committee of Retired Employees of the Commonwealth of Puerto Rico; the Official Committee of Unsecured Creditors; Puerto Rico Electric Power Authority (PREPA); the Puerto Rico Fiscal Agency and Financial Advisory Authority; Andrew G. Biggs; Jose B. Carrion, III; Carlos M. Garcia; Arthur J. Gonzalez; Jose R. Gonzalez; Ana J. Matosantos; David A. Skeel, Jr.; Cyrus Capital Partners, L.P.; Taconic Capital Advisors, L.P.; Whitebox Advisors LLC; Scoggin Management LP; Tilden Park Capital Management LP; Aristeia Capital, LLC; Canyon Capital Advisors, LLC; Decagon Holdings 1, LLC; Decagon Holdings 2, LLC; Decagon Holdings 3, LLC; Decagon Holdings 4, LLC; Decagon Holdings 5, LLC; Decagon Holdings 6, LLC; Decagon Holdings 7, LLC; Decagon Holdings 8, LLC; Decagon Holdings 9, LLC; Decagon Holdings 10, LLC; Fideicosmiso Plaza; Jose F. Rodriguez-Perez; Cyrus Opportunities Master Fund II, Ltd.; Cyrus Select Opportunities Master Fund, Ltd.; Cyrus Special Strategies Master Fund, L.P.; Taconic Master Fund 1.5 LP; Taconic Opportunity Master Fund LP; Whitebox Asymmetric Partners, L.P.; Whitebox Institutional Partners, L.P.; Whitebox Multi-Strategy Partners, L.P.; Whitebox Term Credit Fund I L.P.; Scoggin International Fund, Ltd.; Scoggin Worldwide Fund Ltd.; Tilden Park Investment Master Fund LP; Varde Credit Partners Master, LP; Varde Investment Partners, LP; Varde Investment Partners Offshore Master, LP; Varde

Skyway Master Fund, LP; Pandora Select Partners, L.P.; SB Special Situation Master Fund SPC; Segregated Portfolio D; CRS Master Fund, L.P.; Crescent 1, L.P.; Canery SC Master Fund, L.P.; Merced Partners Limited Partnership; Merced Partners IV, L.P.; Merced Partners V, L.P.; Merced Capital, LP; Aristeia Horizons, LP; Golden Tree Asset Management LP; Old Bellows Partners LLP; and River Canyon Fund Management, LLC.

Respondents here, Appellants below, are Assured Guaranty Corporation; Assured Guaranty Municipal Corporation; Aurelius Investment, LLC; Aurelius Opportunities Fund, LLC; Lex Claims LLC; and Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Financial Oversight and Management Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in consolidated appeals Nos. 18-1671, 18-1746, and 18-1787.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-45a) is reported at 915 F.3d 838. The opinion of the district court (App. 46a-82a) is reported at 318 F. Supp. 3d 537.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. A petition for rehearing en banc filed by respondent Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc. ("UTIER") was denied on March 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV of the Constitution provides, in relevant part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl.2.

Article II of the Constitution provides, in relevant part: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments

are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Relevant statutory provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq*., are reproduced at App. 85a-122a.

INTRODUCTION

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq*., to address a fiscal and humanitarian crisis in Puerto Rico. To meet Puerto Rico's immediate need for debt restructuring as well as its longer-term need for fiscal reform, Congress created a new, independent entity within the Puerto Rican government—the Financial Oversight and Management Board ("Board")—and conferred on it broad authority to oversee the restructuring of the Commonwealth's debt and to implement fiscal reforms. In the nearly three years since its inception, the Board has prosecuted debt restructuring proceedings representing over $100 billion dollars in claims and instituted significant fiscal and governance reforms designed to restore Puerto Rico to financial stability.

Now, however, the First Circuit has invalidated the appointments of the Board members as inconsistent with the Appointments Clause, thus throwing into doubt the legality of the Board's past and present actions and threatening the considerable progress that Puerto Rico has made to this point. The court of appeals' decision represents a radical departure from

two centuries of this Court's jurisprudence holding that the Constitution's separation-of-powers constraints do not restrict the forms of territorial government that Congress can choose to adopt when it exercises if Article IV power to make all needful rules for the territories. *McAllister* v. *United States*, 141 U.S. 174, 184-185 (1891); *Am. Ins. Co.* v. *356 Bales of Cotton ("Canter")*, 26 U.S. 511, 546 (1828). In enacting PROMESA, Congress left no doubt that the Board is a territorial entity and the Board members are territorial officers, not "officer[s] of the United States" who must be appointed in conformity with the Appointments Clause. Congress expressly invoked its Article IV authority to structure the territorial government; the Board is located in, and funded entirely by, the Puerto Rican government; and the Board exercises delegated local authority that is strictly territorial in scope. The Board members' appointments therefore need not have complied with the Appointments Clause; their method of appointment raises no separation-of-powers concern because they exercise purely territorial authority as part of the territorial government.

In view of the critical importance of the Board's responsibilities, certainty concerning the legality of the Board members' appointments is a matter of pressing necessity. In addition, the decision below has sweeping implications for Congress's authority to "develop innovative approaches to territorial governance." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016). The decision's reasoning threatens the constitutionality of Puerto Rico's long-established system of self-government, as well as that of other territories and the District of Columbia. This Court's review is warranted.

STATEMENT OF THE CASE

1. a. By 2016, Puerto Rico was "in the midst of a fiscal crisis." *Puerto Rico* v. *Franklin Cal. Tax–Free Tr.*, 136 S. Ct. 1938, 1942 (2016). The Commonwealth was "being crushed under the weight of a public debt that [was] larger" than its gross national product, "it ha[d] started to default on its debt obligations," and it had lost access to external financing. *Wal-Mart Puerto Rico, Inc.* v. *Zaragoza-Gómez*, 174 F. Supp. 3d 585, 602 (D.P.R. 2016); H.R. Rep. No. 114-602, at 40 (2016) (Commonwealth had over "$110 billion in combined debt and unfunded pension liabilities"). Even worse, these dire financial circumstances threatened a humanitarian crisis for the over 3 million U.S. citizens living in the Commonwealth. As the Secretary of the Treasury observed, the Commonwealth's ability to provide "basic healthcare, legal, and education services" was in serious doubt. Letter from Jacob L. Lew, Secretary of the Treasury, to Paul Ryan, Speaker, U.S. House of Representatives (Jan. 15, 2016).[1]

To address this "fiscal emergency," Congress enacted PROMESA. 48 U.S.C. § 2194(m). PROMESA establishes two primary mechanisms for restoring financial stability. First, Title III of the statute addresses Puerto Rico's immediate financial peril by providing for territory-specific debt restructuring cases, similar to bankruptcy cases, that enable Puerto Rico and its instrumentalities to restructure their debts. 48 U.S.C. § 2161. PROMESA provides for an automatic stay of other litigation during the penden-

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[1] https://www.treasury.gov/connect/blog/Pages/Secretary-Lew-Sends-Letter-to-Congress-on-Puerto-Rico.aspx.

cy of Title III cases, thus staving off creditor suits that otherwise could seek billions of dollars from the Commonwealth and inflict irreparable damage on the Puerto Rican economy. 11 U.S.C. § 362(a) (incorporated into the Title III case by 48 U.S.C. § 2161(a)). Second, Title II addresses longer-term fiscal-management issues by establishing annual budgetary controls and a process for developing fiscal plans designed to restore the Commonwealth to fiscal solvency. 48 U.S.C. §§ 2141-2145.

b. To oversee both efforts, PROMESA establishes a Financial Oversight and Management Board. 48 U.S.C. § 2121(a)(1). The Board is "an entity within the territorial government," rather than a "department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. § 2121(c)(2); see also 48 U.S.C. § 2194(i)(2) (defining the term "Government of Puerto Rico" to include the Oversight Board for purposes of that section); 48 U.S.C. § 2127(b) (providing that the Board is funded exclusively by the territorial government of Puerto Rico). Congress expressly rested its exercise of authority on "article IV, section 3 of the Constitution"—the Territories Clause—"which provides Congress the power to dispose of and make all needful rules and regulations for territories." 48 U.S.C. § 2121(b)(2).

The Board has seven members, and the Puerto Rican Governor or his designee serves as an eighth, *ex officio* member. 48 U.S.C. § 2121(e). The President appoints the seven voting members; one may be selected in his "sole discretion," and the other six "should be selected" from lists compiled by congres-

sional leadership. 48 U.S.C. § 2121(e)(2)(A).[2] If the President selects a member from a congressional list, no Senate confirmation is required. If the President instead selects someone not on a list, the person must be confirmed by the Senate under normal advice and consent procedures. 48 U.S.C. § 2121(e)(2)(E).

c. The Board administers PROMESA's two primary fiscal-relief measures. First, the Board institutes and prosecutes Title III restructuring cases on behalf of the Commonwealth and its instrumentalities. In these cases, the Board steps into the shoes of the Commonwealth and its instrumentalities, and may "take any action necessary on behalf of [a debtor-instrumentality] to prosecute the case of the debtor." 48 U.S.C. § 2175(a).

Second, the Board oversees the certification of annual "Fiscal Plans" and "Budgets" for the Commonwealth and covered instrumentalities. 48 U.S.C. §§ 2141–2152. The budget sets forth the expected revenues and permissible spending for the relevant fiscal year, 48 U.S.C. § 2142, while the fiscal plan delineates fiscal, legal, and governance reforms that must be undertaken to achieve fiscal responsibility and access to the capital markets, 48 U.S.C. § 2141(b) (setting forth required content of fiscal plan). PROMESA directs the Governor and Legislature to develop the budget and fiscal plan in the first instance, and submit them to the Board for approval. The statute provides for an iterative negotiation pro-

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[2] PROMESA's appointments structure was modeled on, and closely resembles, the structure Congress adopted for the D.C. Financial Control Board. *See* District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. 104-8, 109 Stat. 97, § 101(b).

cess among the Board, Governor, and Legislature, but confers on the Board ultimate authority to certify both the budget and fiscal plan. 48 U.S.C. §§ 2141-2142.

2. On August 31, 2016, the President announced the appointment of the seven Board members, six of whom he had selected from lists prepared by congressional leadership and one of whom he had selected himself.[3] As permitted by PROMESA, the President did not seek Senate confirmation of any of the appointees. 48 U.S.C. § 2121(e)(2)(E), (e)(2)(A)(vi).

The Board set to work immediately. At the time, the Commonwealth had $74 billion of debt, $49 billion of pension liabilities, and nowhere near the resources needed to meet those obligations. The crisis deepened in September 2017 after Hurricanes Maria and Irma destroyed much of the Island's infrastructure. Puerto Rico has estimated that recovery from Hurricane Maria will cost more than $139 billion.[4] Against that backdrop, the Board has engaged in two cycles of Budget development and certified twelve fiscal plans for the Commonwealth and its instrumentalities, working with the Governor and Legisla-

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[3] *President Obama Announces the Appointment of Seven Individuals to the Financial Oversight and Management Board for Puerto Rico*, The White House Office of the Press Sec'y (Aug. 31, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/08/31/president-obama-announces-appointment-seven-individuals-financial.

[4] Puerto Rico Central Office of Recovery, Reconstruction, and Resiliency, *Transformation and Innovation in the Wake of Devastation* 15 (Aug. 8, 2018), http://www.p3.pr.gov/assets/pr-transformation-innovation-plan-congressional-submission-080818.pdf.

ture to craft plans that lay the groundwork for the Commonwealth to regain financial stability. In connection with those processes, the Board pressed for and the Governor and Legislature have undertaken significant legal and governance reforms, including an operational and structural transformation of the island's electric grid, measures to increase the government's financial transparency, and budgetary controls. FOMB, Annual Report, Fiscal Year 2018, at 8-11.[5] These reforms will "enable the Commonwealth to reach fiscal balance, improve the Island's competitiveness, and increase the resources available for managing the Commonwealth's long-term liabilities and * * * reinvestment in the people of Puerto Rico."[6]

The Board also has filed five Title III cases on behalf of the Commonwealth and certain instrumentalities to restructure tens of billions of dollars in bond debt and over fifty billion dollars of unfunded pension obligations. Those cases have required a massive investment of resources by the parties and the judiciary. In connection with those cases, the Board has recently accomplished an $18 billion restructuring of sales-tax bonds issued by COFINA, a government instrumentality. The restructuring will save Puerto Rico $456 million in debt payments every year.[7] Creditors have filed 42 adversary proceedings in

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[5] https://caribbeanbusiness.com/wp-content/uploads/2018/07/FOMB-Annual-Report-FY-2018-and-Annex-A.pdf.

[6] Letter from José B. Carrión et al. to the Honorable Mark Pocan et al. (Dec. 27, 2018), https://drive.google.com/file/d/1A_zVq1VaPgNGANcGSst_B0i3FNmFeaa3/view.

[7] Andrew Scurria, Banking and Finance: Puerto Rico Wins Approval of $18 Billion Debt Restructuring, Wall Street J., Feb. 5, 2019, B10.

connection with the restructuring cases, reflecting the degree to which the financial stakes have motivated creditors to challenge the legality of the Board's actions.

3. Respondent Aurelius Capital Management ("Aurelius") is a hedge fund that invested heavily in distressed Puerto Rican bonds. On August 7, 2017, Aurelius moved to dismiss the Title III case the Board had initiated on behalf of the Commonwealth, arguing that the Board was appointed in a manner inconsistent with the Appointments Clause. Objection and Motion of Aurelius to Dismiss Title III Petition, Docket entry No. 913, No. 17-BK-3283-LTS (D.P.R.). Assured Guaranty Corporation, a municipal bond insurer, and UTIER, a labor organization that represents employees of the government-owned Puerto Rico Electric Power Authority, also filed adversary complaints challenging the Board members' appointments. App. 14a-16a.

The Board responded that this Court has long held that the territories are local political subdivisions of the United States, and that pursuant to the Territories Clause of Article IV, Congress may legislate for a territorial government in the same manner that a state legislates for its municipalities. Opposition to Motion to Dismiss Petition, Docket entry No. 1622, No. 17-BK-3283-LTS (D.P.R. Nov. 3, 2017) (citing, *e.g.*, *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 323 (1937); *First Nat'l Bank* v. *Yankton Cnty.*, 101 U.S. 129, 133 (1879); *Am. Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828)). Therefore, the Board explained, separation-of-powers provisions do not constrain Congress's choices about how to structure territorial governments. Because Board members were territorial rather than federal

officers, the Board argued, their appointments need not comply with the Appointments Clause.

The United States joined the Board in defending the constitutionality of the Board members' appointments, as did the Puerto Rico Fiscal Agency and Financial Advisory Authority (an independent entity within the government of Puerto Rico that serves as the government's fiscal agent and financial advisor) and several creditor groups and labor unions.

The district court denied Aurelius's motion to dismiss. App. 48a. The court held that the Board members were territorial officers who need not be appointed consistent with the Appointments Clause. *Id*. at 55a-81a. In separate decisions, the district court dismissed Assured's and UTIER's adversary complaints on the same grounds. *Id.* at 14a-16a.

4. The court of appeals reversed. *Id.* at 1a-45a.

The court framed the question as whether Congress's "Article IV powers" over the territories enable it "to ignore the structural limitations on the manner in which the federal government chooses federal officers." *Id.* at 20a. The court thus apparently assumed that officials of territorial governments were by definition "federal officers within the territories" if Congress created the office to which they were appointed. *Id.* at 25a; *see id.* at 21a. The court therefore considered "whether * * * the Territorial Clause displaces the Appointments Clause in an unincorporated territory such as Puerto Rico," such that Congress need not abide by the Appointments Clause in providing for the appointment of federal officers within the territories. *Id.* at 3a. Invoking the maxim that "the specific" must "govern[] the general," the court held that the Territories Clause did not displace the Appointments Clause. *Id.* at 21a. The court

acknowledged that this Court has previously held that other structural separation-of-powers requirements, such as Article III and the nondelegation doctrine, do not apply when Congress legislates for the territories, but it rejected those decisions as irrelevant. *Id.* at 22a-27a.

The court of appeals then held that Board members are "Officers of the United States" for purposes of the Appointments Clause because they exercise significant authority pursuant to the laws of the United States. *Id.* at 30a (citing *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018)). The court further held that Board members are "principal" officers who require Senate confirmation. *Id.* at 38-40a. The court distinguished Board members from other high-ranking territorial officials, such as the Puerto Rican Governor, asserting that such officials "are not federal officers" because their authority arises from the Puerto Rican constitution. *Id.* at 37a. The court recognized, however, that the Puerto Rico constitution itself represents "a federal grant" of authority from Congress. *Id.*

Turning to the appropriate remedy, the court invalidated the "provisions [of PROMESA] allowing the appointment of Board members in a manner other than by presidential nomination followed by the Senate's confirmation," and severed the remainder of the statute. *Id.* at 42a. The court declined to dismiss all of the Title III petitions, invoking the de facto officer doctrine to uphold the actions the Board had taken in good faith "under the color of official title." *Id.* (quoting *Ryder* v. *United States*, 515 U.S. 177, 179, 180 (1995)). The court emphasized that any other approach would have "negative consequences for the many, if not thousands, of innocent third parties who

have relied on the Board's actions until now," and would "likely introduce further delay into a historic debt restructuring process that was already turned upside down * * * by the ravage of the hurricanes." *Id.* at 43a.

REASONS FOR GRANTING THE PETITION

The court of appeals has declared unconstitutional an Act of Congress that provides for the appointment of members of the Financial Oversight and Management Board for Puerto Rico. That ruling is the first in the Nation's history holding that territorial officials must be appointed in conformity with the Appointments Clause. As such, it raises a separation-of-powers question of fundamental importance respecting Congress's exercise of its plenary Article IV power to structure territorial governments. The court of appeal's answer to that question is wrong, and its reasoning is entirely unsound. The court cast aside two centuries of precedent holding that the Constitution's separation-of-powers requirements do not constrain the forms of territorial governance Congress may adopt when exercising its Article IV authority. The ruling is causing, and will continue to cause, serious harms. It has cast a cloud of uncertainty over the Board's authority to address Puerto Rico's dire financial and humanitarian crises, as well as its efforts to restructure Puerto Rico's staggering debt burden. If left uncorrected, the decision will precipitate burdensome challenges to the validity of the Board's past and present actions. Respondent Aurelius has already vowed to pursue just such a challenge and others will surely follow. And by deeming Board members officers of the United States rather than territorial officials, the decision threatens to

trigger a host of harmful collateral consequences to the interests of Puerto Rico and the United States.

The decision also broadly calls into question the constitutionality of territorial self-governance that Congress has authorized over the past seven decades. The court's reasoning necessarily implies that all territorial officials elected and appointed pursuant to the territorial self-governance framework that Congress enacted for Puerto Rico have been unconstitutionally appointed because none of those officials is chosen by the methods the Appointments Clause prescribes for "officers of the United States." For similar reasons, it necessarily implies that the self-government framework Congress adopted for Guam and the Virgin Islands is unconstitutional. And it deems invalid the appointments of numerous territorial officials who served throughout the Nation's history. This Court's review is manifestly warranted.

I. The Court Of Appeals Erred In Holding That Board Members Are Federal Officers Subject To The Appointments Clause.

The decision below proceeds from a basic misunderstanding of the structural relationship between the national government and territorial governments. The court of appeals began its analysis by assuming that when Congress enacts a statute providing for the appointment of territorial officials, those officials are by definition "officers of the United States"—notwithstanding this Court's decisions holding that territorial governments created by Congress are local governments, not departments of the national government. App. 21a; *id*. at 22a-25a. From that incorrect premise, the court reasoned that the Appointments Clause applies to appointments of territorial officials because that Clause is more specific than,

and therefore controls over, the more general grant of plenary authority in the Territories Clause. The court then resolved the case by applying the traditional "significant authority" test used to determine whether an official within the national government is an "officer" subject to the Appointments Clause (as opposed to a mere employee)—again, assuming away the dispositive point that Board members' authority is entirely territorial, not national. Each step of that analysis is irreconcilable with this Court's precedents.

In an unbroken line of authority beginning with Chief Justice Marshall's decision in *American Insurance Co.* v. *356 Bales of Cotton* ("*Canter*"), 26 U.S. 511, 546 (1828), this Court has held that when Congress exercises its Article IV authority to structure a territorial government, the resulting government is local, not national, in character and authority. That local character has a critical consequence: separation-of-powers requirements that constrain Congress's choices about the structure of the federal government simply do not apply to the choices Congress makes about how to structure territorial offices or territorial governments. Congress therefore need not provide that territorial offices be filled in the manner prescribed by the Appointments Clause.

Considered under the framework that this Court has used to determine whether an entity is territorial or federal, the Board is unquestionably a territorial entity, and its members are territorial officers, not "officers of the United States" subject to the Appointments Clause. Congress established the Board in the exercise of its plenary Article IV authority over the territories; the Board is expressly made part of the territorial, rather than the federal, government;

and its authority extends only to administering a law, PROMESA, that pertains specifically to the territory. *Palmore* v. *United States*, 411 U.S. 389, 407-408 (1973); *Binns* v. *United States*, 194 U.S. 486, 494 (1904).

A. Territorial governments established under Article IV need not conform to the separation-of-powers principles that constrain the structure of the federal government.

The court of appeals' assumption that territorial offices created by federal statute are necessarily "federal office[s]," App. 20a-21a, cannot be reconciled with this Court's decisions defining the relationship between the national government and territorial governments.

1. The Territories Clause empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. In the exercise of that authority and its parallel authority under the District of Columbia Clause, U.S. Const. art. I, § 8, cl. 17, Congress may establish local governments and enact legislation prescribing substantive law for the territories and the District of Columbia. Since the Founding, Congress has enacted organic statutes that establish territorial governments with executive, legislative, and judicial branches, and that provide the framework and authority pursuant to which territorial governments exercise their governing authority. *Canter*, 26 U.S. at 546; *Binns*, 194 U.S. at 491-492; *First Nat'l Bank*, 101 U.S. at 130. And Congress has often enacted statutes prescribing the substantive law for a particular territory that the territorial government must administer. *Binns*, 194 U.S. at 487

(substantive tax and criminal statutes governing Alaska territory enacted by Congress); *Palmore*, 411 U.S. at 408 (local criminal code for D.C. enacted by Congress).

Territorial governments have thus long been created by, and have exercised authority conferred by, federal statutes. But they have never been understood to be organs of the national government as a result. Quite the contrary. Because the "territories are but political subdivisions * * * of the United States," their "relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations." *First Nat'l Bank*, 101 U.S. at 133. In other words, a territorial government created by Congress is a "local government," not a part of the national government. *Ibid.*; *Binns*, 194 U.S. at 491-492.

Consequently, a territorial government does not exercise the delegated nationwide authority *of the United States*; instead, it exercises only Congress's delegated "municipal authority" over the territory. *McAllister*, 141 U.S. at 184-185; *Canter*, 26 U.S. at 546; see *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 913 (1991) (Scalia, J., concurring) ("territorial governors are not Article I executives but Article IV executives."). As Members of this Court have explained, "Congress's power over the Territories allows it to create governments in miniature, and to vest those governments with the legislative, executive, and judicial powers, *not of the United States*, but of the Territory itself." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2197 (2018) (Alito, J., joined by Gorsuch, J., dissenting) (emphasis added).

2. It necessarily follows that when Congress creates territorial governments, it is "unrestricted" by the separation-of-powers constraints that the Constitution imposes on Congress's authority to structure the national government. *Binns*, 194 U.S. at 492; see *Sanchez Valle*, 136 S. Ct. at 1876 (Congress has "broad latitude to develop innovative approaches to territorial governance."). Instead, Congress exercises an authority comparable to that of "the legislature of a state" when it acts for its municipalities. *Binns*, 194 U.S. at 492.

From the time the Constitution was first adopted, and continuing to the present, Congress has repeatedly exercised its plenary Article IV power to structure territorial governments in ways that do not comply with the separation-of-powers constraints that apply to the structure of the federal government, and this Court has uniformly upheld Congress's actions. For example, Congress need not abide by Article III in establishing territorial courts that have general jurisdiction to hear cases under both local and federal law. *McAllister*, 141 U.S. at 184-185. As a textual matter, territorial courts do not exercise the "judicial power *of the United States*" within the meaning of Article III. U.S. Const., art. III, § 1; *Clinton* v. *Englebrecht*, 80 U.S. 434, 447 (1871) (territorial courts are not "courts of the United States"). Congress can therefore create territorial judgeships that lack Article III's salary and tenure protections—even though territorial judges hold offices created by "act[s] of Congress" and exercise jurisdiction over "all cases arising under the Constitution and laws of the United States." *Clinton*, 80 U.S. at 447; *McAllister*, 141 U.S. at 184; *Benner*, 50 U.S. at 244.

Similarly, the non-delegation doctrine, which prohibits Congress from delegating its legislative power to a coequal branch, imposes no constraint on how Congress may structure territorial governments. *Cincinnati Soap*, 301 U.S. at 322-323. As the Court explained, when Congress legislates for the territorial government, it "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*." *Ibid*. (emphasis added). That is why Congress's choices to vest territorial lawmaking authority in territorial legislatures—from the time of the Northwest Ordinance to the present—have never been thought to raise a separation-of-powers issue. This Court has even held that Congress may delegate its legislative authority under Article IV to the President, to enable the President alone to make law for a territory. *United States* v. *Heinszen*, 206 U.S. 370, 385 (1907).

For similar reasons, the uniformity requirement pertaining to taxes that Congress levies "to provide for * * * the general welfare *of the United States*," U.S. Const. art. I, § 8, cl. 1 (emphasis added), does not apply when Congress levies a tax for the benefit of a particular territory. *Binns*, 194 U.S. at 492. Congress "act[s] as the local legislature" in enacting a territorial tax, and it is therefore "unrestricted by constitutional provisions" that apply when it acts in its capacity as the national government. *Ibid*.

B. Territorial offices created by Congress need not be filled in the manner prescribed by the Appointments Clause for federal government offices.

1. The Appointments Clause is indistinguishable from the other separation-of-powers requirements

that this Court has already held do not constrain Congress's power to structure territorial governments. The Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * all other Officers *of the United States*." U.S. Const. art. II, § 2, cl. 2 (emphasis added). By its plain text, the Clause applies only when Congress creates an office *of the United States—i.e.*, an office *in* the federal government that exercises the national authority *of* the federal government. Territorial officials are local officers, not officers "of the United States"—just as territorial courts are local courts, not "courts of the United States" for Article III purposes; federal statutes delegating authority to prescribe substantive territorial law are local laws, not "laws of the United States" for purposes of the nondelegation doctrine; and taxes imposed for the benefit of a territory are not for the "general welfare of the United States" for purposes of the Uniformity Clause. *Binns*, 194 U.S. at 490-492; *The City of Panama*, 101 U.S. 453, 460 (1879); *see Freytag*, 501 U.S. at 913 (Scalia, J., concurring) ("[Territorial courts] are neither Article III courts nor Article I courts, but Article IV courts—just as territorial governors are not Article I executives but Article IV executives.").

The separation-of-powers considerations that animate the Appointments Clause simply do not come into play when Congress exercises its Article IV power to decide how a territorial government should be structured. As Article III does for the Judiciary, the Appointments Clause implements an anti-aggrandizement principle: it "prevents congressional encroachment upon the Executive" by ensuring that the President can choose and control those who assist him in executing federal law. *Edmond* v. *United*

*State*s, 520 U.S. 651, 659 (1997); see generally *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010). And just as the nondelegation doctrine preserves the power of the Legislative Branch, the Appointments Clause "preserves * * * the Constitution's structural integrity" by "prevent[ing] Congress from dispensing power too freely" to other Branches. *Freytag*, 501 U.S. at 878, 880. These concerns do not arise when Congress creates a territorial office, as it is not structuring a coequal Branch within a framework of checks and balances, but is instead legislating for a "political subdivision[]" over which it has plenary authority, unconstrained by the Vesting Clauses that divide power among the three Branches of the national government. *First Nat'l Bank*, 101 U.S. at 133.

Centuries of historical practice confirm that territorial officers need not be appointed in conformity with the Appointments Clause. *See NLRB* v. *Noel Canning*, 573 U.S. 513, 524-526 (2014) ("[T]he long-standing 'practice of the government' can inform [a] determination of 'what the law is.'" (citations omitted)). Since the eighteenth century—in the exercise of its "broad latitude to develop innovative approaches to territorial governance" under Article IV, *Sanchez Valle*, 136 S. Ct. at 1876—Congress has employed a variety of procedures for appointing territorial officers that do not conform to the Appointments Clause. It has, for example, provided for the appointment of legislative officers and high-ranking executive officers (such as attorneys general) by election or appointment by other territorial officials. *E.g.*, *Snow* v. *United States*, 85 U.S. 317, 321-322 (1873) (territorial legislature elected attorney general); An Act temporarily to provide revenues and a civil government for Porto Rico, ch. 191, 31 Stat. 77,

81, 84, §§ 17, 18, 34 (1900) (territorial governor appointed territorial judges with advice and consent of executive council); An Act to provide a civil government for Porto Rico, ch. 145, 39 Stat. 951, 955-956, § 13 (1917) ("Jones Act"). In the Jones Act, Congress provided that four heads of executive departments for Puerto Rico were to be appointed by the governor with the advice and consent of the Puerto Rican senate. Jones Act § 13, 39 Stat. 955-956.[8]

Even more to the point, for the past seventy years, Congress has permitted the citizens of territories a considerable measure of self-government, including the right to select their own executive officers. In 1947, Congress provided that the Governor of Puerto Rico would be elected by the people of Puerto Rico (rather than appointed by the President), and that the Governor would in turn have the authority to appoint all the heads of the Puerto Rican executive departments with the advice and consent of the Senate of Puerto Rico. See An Act to amend the organic act of Puerto Rico, ch. 490, 61 Stat. 770, 771 (1947). In 1952, Congress went further and authorized the people of Puerto Rico to adopt their own constitution, which also provided for popular election of the Governor and appointment of executive officers by the

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[8] Other examples abound. See, *e.g.*, An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, ch. 182, 26 Stat. 81, 85, 88, §§ 7, 14 (1890); An Act Proposing to the State of Texas the Establishment of her Northern and Western Boundaries, etc., ch. 49, 9 Stat. 446, 449, § 8 (1850); Max Farrand, *The Legislation of Congress for the Government of the Organized Territories of the United States*, 1789-1895, at 35-36 (1896), https://archive.org/details/legislationofcon00farrrich.

Governor with advice and consent of the Senate of Puerto Rico. See *Sanchez-Valle*, 136 S. Ct. at 1868-1869. Congress has enacted similar self-government provisions for other territories. *E.g.*, Organic Act of Guam, ch. 512, 64 Stat. 384 (1950); An Act to provide for the popular election of the Governor of Guam, 82 Stat. 842 (1968). If territorial officers must be appointed in conformity with the Appointments Clause, all of these measures would have been unconstitutional because they all resulted in territorial officers being chosen by citizens of the territories (or their elected territorial representatives) rather than by means prescribed in the Clause. It is precisely because territorial officials are local officials, not federal officials, that territorial self-government poses no separation-of-powers problem.

2. In reaching a contrary result, the court of appeals never grappled with the foundational distinction between federal government offices and territorial offices. It simply assumed that officers of territorial governments are by definition "Officers of the United States" if Congress created the office. It then framed the question as whether the plenary power conferred on Congress by Article IV "trumps" the requirements of the Appointments Clause. App. 20a. Invoking the maxim that the specific controls over the general (but citing no authority), the court concluded that the Territories Clause is more general than the Appointments Clause, such that the latter must be "strict[ly] enforce[d]" in the territories. *Id.* 21a.

In asking whether the Appointments Clause takes precedence over the Territories Clause, the court of appeals fundamentally misunderstood the structural relationship between the national government and

the local territorial governments. It is simply incorrect that territorial offices should be considered part of the federal government because Congress enacted the legislation creating the office, or because the law the officials administer is federally enacted. That approach is irreconcilable with this Court's precedents holding that territories are local political subdivisions and that Congress legislates for them as though it were a state providing for its municipalities. See pp. 15-18, *supra*. It follows that structural provisions such as Article III and the Appointments Clause *by their own terms* do not apply to Congress's establishment of a territorial government; instead, they apply only when Congress acts in its capacity as the national legislature to legislate for the national government—when, in the words of the Constitution's text, it establishes judicial or executive offices "of the United States."

Unsurprisingly, the court of appeals' halfhearted attempts to distinguish this Court's decisions rejecting separation-of-powers challenges to territorial government structures are unpersuasive. The court recognized that this Court has held that Article III does not apply to local territorial courts, App. 26a-27a, but it did not even attempt to explain why the reasoning of those decisions is inapplicable to the Appointments Clause. Nor did the court acknowledge the textual parallels between the two provisions, both of which are limited to Congress's creation of entities "of the United States." See *Clinton*, 80 U.S. at 447 (Article III does not apply to territorial courts because they are not "courts of the United States"); *Territorial Judges Not Liable to Impeachment*, 3 Op. Att'y Gen. 409, 411 (1839) (territorial judges are not "officers of the United States" for purposes of the Impeachment Clause). And the court's assertion that

the nondelegation doctrine does not apply when Congress legislates for the territories because Congress may delegate authority in anticipation of statehood is pure *ipse dixit*. It also fails on its own terms. If, as the court repeatedly asserted, pre-statehood territorial officials were *federal* officers, App. 24a, then a delegation of legislative power to a territorial governor would be just as unconstitutional as a delegation to any other Executive Branch officer, and *Cincinnati Soap* was wrongly decided. And the court of appeals had no answer at all for this Court's decision in *Heinszen*, suggesting only that the decision might not be an "apt analogy." App. 25a.

The court of appeals purported to draw support from the fact that Congress must conform to the constitutional requirement of bicameralism and presentment when it exercises its Article IV power to legislate for the territories. *Id.* at 21a-22a. That inference is unwarranted. Unlike the Appointments Clause, which applies only to officers "of the United States," Article I, Section 7 provides that "*[e]very* bill" must pass both the House and Senate and be presented to the President before it becomes a law. U.S. Const. art. I, § 7 (emphasis added). As the Constitution's text makes clear, bicameralism and presentment is the only mechanism by which Congress can enact legislation on any subject matter. That Congress must observe bicameralism and presentment when it exercises its Article IV powers therefore does not suggest anything about whether the Appointments Clause governs the *substance* of the resulting legislation.

The court of appeals also cited cherry-picked historical examples of instances in which Congress provided that territorial offices be filled through advice

and consent procedures, principally the Foraker Act of 1900 (which established the initial territorial government for Puerto Rico). App. 34a-36a. But it is undeniable that throughout our history many other territorial officials were appointed in ways that did not conform to the Appointments Clause, including Puerto Rican territorial officers appointed under the governance structure established in the Jones Act in 1917. See pp. 20-22, *supra*. The court of appeals dismissed those many counter-examples as mere inconsistencies. App. 36a. That is precisely the wrong inference. Historical practice is evidence of constitutional meaning because this Court presumes that the political Branches act in conformance with their understanding of what the Constitution requires. *Noel Canning*, 573 U.S. at 525. What Congress's repeated decisions not to fill territorial offices using Appointments Clause procedures make clear is that Congress did not believe that the Appointments Clause restricted its choices about how those offices could be filled. By the same token, when Congress did employ advice and consent procedures for territorial offices, it did so because those procedures provided advantages even though they were not required—just as Congress often does for offices in the federal government. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116 (2007) (Congress often chooses to use Appointments Clause procedures for officials who are not "officers of the United States"). That understanding of our history is consistent with what Congress has actually done since the founding. The court of appeals' contrary understanding cannot be reconciled with actual historic practice.

C. The Board members are territorial officers, not officers "of the United States."

Because the Appointments Clause does not apply when Congress specifies the procedures for appointing territorial officers, the critical question is whether the Board members are territorial, rather than federal, officers. They are unquestionably territorial. In determining whether Congress has acted for the territories rather than the national government, this Court has placed great weight on (1) whether Congress invoked its Article IV power (or its similar plenary power over the District of Columbia), rather than its Article I powers; (2) whether Congress placed the entity in the territorial rather than the national government; and (3) whether the powers of the office and the law it enforces are strictly territorial, rather than national, in scope. See *Palmore*, 411 U.S. at 407; *Binns*, 194 U.S. at 494. Those considerations demonstrate that the Board is territorial.

1. Congress expressly stated that it established the Board "pursuant to Article IV, section 3," the Territories Clause, 48 U.S.C. § 2121(b)(2), and that that the Board is an "entity within the territorial government" that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. § 2121(c). That is strong evidence that the Board is a territorial entity. *Palmore*, 411 U.S. at 407 (emphasizing that D.C. courts were "expressly created pursuant to the plenary Art. I power to legislate for the District of Columbia"); *Binns*, 194 U.S. at 494-495.

The court of appeals failed even to acknowledge Congress's express textual directive that the Board members are territorial and not federal officers. But Congress's determinations are not mere labels that

the court was free to disregard. This Court has given great weight to Congress's statement that it is acting pursuant to its territorial or D.C. powers, rejecting attempts to characterize the resulting entity as federal unless the entity's responsibility over "purely local affairs [is] obviously subordinate and incidental." *Palmore*, 411 U.S. at 407 (quoting and limiting *O'Donoghue* v. *United States*, 289 U.S. 516, 539 (1933)); *Binns*, 194 U.S. at 494-495. And Congress's decision to place the Board in the territorial government, rather than the Executive Branch, has a host of concrete legal consequences: for instance, the Board is not subject to federal statutes that govern the Executive Branch, such as FOIA, the APA, and civil service protections. 5 U.S.C. §§ 551(1)(c), 552(f); 5 U.S.C. § 701(b)(1)(c); 5 U.S.C. § 2301(a).

Congress made clear in numerous other ways that the Board is in both form and substance a part of the territorial government, not the Executive Branch. For instance, the Board's funding comes entirely from Puerto Rico, not the federal government. 48 U.S.C. § 2127. If the Board were a federal agency, funding the agency from local rather than federal sources would be a stark and dubious departure from normal practice. Office of the General Counsel, U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, at 2-24 to 2-26 (4th rev. ed. 2016).

2. The Board's authority, and the law it administers, are purely territorial in nature and application. The Board is tasked with "provid[ing] a method for a covered territory to achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121. Its authority extends only to territorial instrumentalities, 48 U.S.C. § 2121(d), and its responsibilities—approving fiscal plans and budgets for the Common-

wealth and its instrumentalities, and petitioning on behalf of Puerto Rican government instrumentalities to restructure their debt—are exclusively focused on Puerto Rico. 48 U.S.C. §§ 2141, 2164. The Board "shall terminate," moreover, when the "territorial government" has achieved access to credit markets and fiscal stability. 48 U.S.C. § 2149. The Board applies the substantive provisions set forth in PROMESA, which governs the affairs of only Puerto Rico and has no application outside the territories. 48 U.S.C. § 2121(a); *see Palmore*, 411 U.S. at 407.

Rather than focus on the nature and scope of the Board's responsibilities, the court of appeals gave dispositive weight to the fact that Congress prescribed those responsibilities. App. 33a. Precedent and history refute that approach. In *Palmore*, this Court held that D.C. courts did not exercise the judicial power "of the United States" because they were "focus[ed]" on "matters of strictly local concern," even though their primary responsibility was to administer federal statutes that Congress enacted for the District of Columbia, including the D.C. criminal code. 411 U.S. at 407. The Court emphasized that although the criminal code was enacted by Congress, it was "applicable to the District of Columbia alone," and was therefore was a "local law" rather than a "law of national applicability." *Id*. at 408. As *Palmore* illustrates, it is the subject matter on which a statute focuses, not who enacted it, that determines its local or national character.

Indeed, if the court of appeals were correct that administering PROMESA necessarily constitutes exercising federal authority, then all officials who have responsibility for administering PROMESA would be exercising federal authority. In addition to

the Board, the Governor and the Legislature of Puerto Rico *also* have significant substantive duties under PROMESA, including submitting budgets and reports to the Board. App. 7a-8a; 48 U.S.C. §§ 2141, 2142. Under the court of appeals' reasoning, these aspects of PROMESA would be unconstitutional as well because the Governor and the Legislature would be exercising federal authority without being appointed in accordance with the Appointments Clause. The court of appeals failed to grapple with that clear implication of its holding.

In sum, the court of appeals' unprecedented holding that territorial offices created by Congress must be filled using Appointments Clause procedures cannot be reconciled with the Constitution's text, historical practice, bedrock separation-of-powers principles, and the decisions of this Court implementing those principles. The decision is profoundly wrong and deeply destabilizing.

II. This Case Presents An Issue Of Exceptional Importance That Merits Review.

This Court's review is manifestly warranted. The court of appeals has invalidated an Act of Congress and thereby rendered unlawful the appointments of the Board's members, who are responsible for managing Puerto Rico's financial and humanitarian crisis. The decision thus has sweeping implications, not only for Puerto Rico and the over 3 million United States citizens who live there, but also for Congress's authority to structure territorial governments and in particular to permit popular sovereignty in the territories.

A. The Board is the linchpin of the plan that Congress enacted to address a financial and humanitarian crisis of immediate and unprecedented propor-

tions. Since 2016, the Board has overseen the restructuring of billions of dollars of the Commonwealth's debt. The Board has filed five Title III restructuring cases on behalf of the Commonwealth, which together involve over $100 billion in claims, and most of which remain ongoing. In connection with that process, the Board recently completed an $18 billion restructuring of COFINA's bond debt, reaching a settlement that was supported by the principal bondholders and that will save Puerto Rico $456 million in debt payments annually. See p. 8, *supra*. In addition, through the fiscal-plan and budget approval process, the Board has negotiated intensively with the Governor and the Legislature to identify a range of structural reforms and strategic investments.

Given the gravity and breadth of the Board's responsibilities, the cloud of uncertainty that now hangs over the Board's actions is intolerable. This Court has routinely granted certiorari to determine whether particular officials were constitutionally appointed in circumstances where far less was at stake. See, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018); *Ortiz*, 138 S. Ct. at 2170; *Noel Canning*, 573 U.S. at 521-522; *Edmond*, 520 U.S. at 655; *Freytag*, 501 U.S. at 873. This Court's attention to appointments issues reflects the fundamental need for certainty concerning the legality of official appointments. Questions about the constitutionality of an official's appointment cast into doubt the validity of the official's actions, and the existence of mitigating or remedial measures such as the de facto officer doctrine or ratification do not lessen the need to provide Congress, the President, and the affected officials with certainty concerning permissible appointment methods. See

Ryder, 515 U.S. at 182-183. The need for certainty is all the more pressing here.

B. This Court's review is also warranted because the decision undermines ongoing efforts to alleviate Puerto Rico's financial crisis. Notwithstanding the progress the Board and other Puerto Rican government entities have already made, much work remains: tens of billions of dollars in debt still must be restructured through Title III proceedings, and additional reforms are necessary for Puerto Rico to achieve sustainable solvency.

The Board must continue to pursue these efforts, lest creditors seek to dismiss the Title III proceedings and subject Puerto Rico to lawsuits that would seek immediate payment of billions of dollars and threaten irreparable damage to the Puerto Rican economy. And an interruption in the fiscal plan and budgetary process could disrupt progress towards fiscal solvency. While the Board has continued to operate pursuant to a stay of the mandate, App. 44a, the decision below has injected considerable uncertainty that has affected the Board's ongoing negotiations, both with bondholders in the restructuring process and with the Puerto Rican Governor and legislative leaders in the fiscal process. Jayden Sangha, *Current Status of Puerto Rico Debt Restructuring*, MunicipalBonds.com (Mar. 20, 2019) (although "progress was being made to achieve the objective of debt restructuring for Puerto Rico, this new ruling" threatens to "knock[] any progress off its rails").[9]

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[9] https://www.municipalbonds.com/risk-management/current-status-of-puerto-rico-debt-restructuring/; *see also* Robert Slavin, *Puerto Rico Board struggles with uncooperative local, federal*

(footnote continued)

That uncertainty is exacerbated by the fact that the validity of the Board's actions, both past and present, will doubtless be subject to legal challenge. Notwithstanding the court of appeals' invocation of the de facto officer doctrine, Aurelius has informed the district court that it intends to challenge the validity of the Board's actions, and other bondholders are sure to follow suit.[10] Those challenges will engender significant and burdensome collateral litigation—litigation whose costs are borne by Puerto Rico itself. Matt Wirz, *Puerto Rico Creditor Group Starts Talks*, Wall Street J., Aug 30, 2018, B10 (litigation with creditors has already cost Puerto Rico hundreds of millions of dollars). That litigation will further drain Puerto Rico's scarce resources and burden its economy. And even if the President nominates and the Senate confirms Board members—a process whose duration and outcome are uncertain—and a Senate-confirmed Board eventually ratifies all of the Board's innumerable previous actions, the validity of those ratifications is sure to be challenged by every affected creditor. Cf. *Lucia* v. *SEC*, 138 S. Ct. at 2055. Unless the court of appeals' decision is re-

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governments, The Bond Buyer (Mar. 25, 2019, 3:46 PM), https://www.bondbuyer.com/news/board-struggles-with-uncooperative-local-federal-governments.

[10] Informative Motion & Reservation of Rights by Aurelius Capital Management, LP, on Behalf of the Funds & Entities It Manages or Advises, and Not in Its Individual Capacity at 3-4, *In re Fin. Oversight & Mgmt. Bd.*, No. 17 BK 3283-LTS (D.P.R. Mar. 21, 2019), ECF No. 5977.

versed, uncertainty and litigation will continue to hobble the restructuring process for years to come.[11]

C. More broadly, the decision calls into question Congress's longstanding, "broad latitude to develop innovative approaches to territorial governance," and in particular, its authority to permit territories a greater measure of self-government. *Sanchez Valle*, 136 S. Ct. at 1876. The First Circuit's reasoning necessarily implies that all sitting territorial governors and all other high-ranking officials were unconstitutionally selected because they are federal officers but were not appointed in accordance with the Appointments Clause. It is therefore only a matter of time before litigants rely on the decision below to challenge actions of the government of Puerto Rico, or some other territory, on Appointments Clause grounds.

The court of appeals resisted that conclusion, asserting that its ruling posed no risk to Puerto Rico's constitution because officials elected and appointed under it are not federal officers subject to the Appointments Clause. App. 37a. But that reasoning fails for two reasons. First, Puerto Rico was able to promulgate a constitution only because Congress delegated the authority to do so to the people of Puerto Rico. This Court has accordingly held that the source of territorial officials' sovereignty remains the United States. *Sanchez Valle*, 136 S. Ct. at 1875-

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[11] The First Circuit's holding that Board members are federal officers has other significant implications as well. For instance, some creditors have asserted that the decision renders the United States liable for takings claims based on the Board's actions. See *Altair Glob. Credit Opportunities Fund (A), LLC* v. *United States*, 138 Fed. Cl. 742 (Fed. Cl. 2018).

1876 ("no matter how much authority [Congress] opts to hand over" by permitting local elections pursuant to a local Constitution, "the 'ultimate' source of prosecutorial power remains the U.S. Congress"); *Grafton* v. *United States*, 206 U.S. 333, 354 (1907). If, as the court of appeals believed, Board members are "officers of the United States" for Appointments Clause purposes because their authority flows from Congress, the same would necessarily be true of officials elected and appointed under Puerto Rico's constitution.[12]

Second, under the court of appeals' reasoning, if PROMESA is unconstitutional then *a fortiori* Congress's decision seven decades ago to provide for territorial self-government would have been unconstitutional. Congress's decision to allow the people of Puerto Rico to choose their own governor fully divests the President of any authority over the office. If the Appointments Clause requires that territorial officials who exercise significant authority be chosen by Appointments Clause procedures in order to protect the President's Article II authority, then Congress could not have been free simply to remove them from the President's control by providing that they would

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[12] Even if the court of appeals were correct that the Puerto Rican constitution shields its officials from the Appointments Clause, that reasoning would not be available to preserve the constitutionality of officers of Guam and the Virgin Islands. Those territories lack constitutions, and their governments are established by federal organic statutes. 48 U.S.C. §§ 1421a, 1541(b). Their governors are elected pursuant to federal statutes and exercise their authority by virtue of federal law. 48 U.S.C. §§ 1422, 1591. The court's reasoning therefore necessarily implies that officials of Guam and the Virgin Islands were unconstitutionally appointed.

no longer be selected under the Appointments Clause. *Edmond*, 520 U.S. at 659-660.

D. Review is needed now. Because Puerto Rico is currently the only territory for which a financial oversight and management board has been appointed, a circuit conflict is highly unlikely to develop in the foreseeable future. Puerto Rico, moreover, is the largest territory in the United States by a considerable margin. The opinion below thus sets forth the controlling test for evaluating the constitutionality of the vast majority of territorial appointments. And in view of the immediacy of Puerto Rico's financial crisis and the Board's critical role in resolving it, waiting for a circuit conflict to develop is a luxury that Puerto Rico cannot afford. This Court should grant certiorari to remove the constitutional cloud over the Board's past and present actions and to restore Congress's broad discretion to structure territorial governments.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 23, 2019

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1671, 18-1746, 18-1787
AURELIUS INVESTMENT, LLC, ET AL.,

Appellants,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Appellees.

ASSURED GUARANTY CORPORATION, ET AL.,

Appellants,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD, ET AL.

Appellees.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA
ELÉCTRICA Y RIEGO (UTIER)

Appellant,

v.

PUERTO RICO ELECTRIC POWER AUTHORITY,
ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Laura Taylor Swain,* *U.S. District Judge*]

Before: Torruella, Thompson, and Kayatta, *Circuit Judges*.

February 15, 2019

TORRUELLA, ***Circuit Judge***. The matter before us arises from the restructuring of Puerto Rico's public debt under the 2016 Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). This time, however, we are not tasked with delving into the intricacies of bankruptcy proceedings. Instead, we are required to square off with a single question of constitutional magnitude: whether members of the Financial Oversight and Management Board created by PROMESA ("Board Members") are "Officers of the United States" subject to the U.S. Constitution's Appointments Clause. Title III of PROMESA authorizes the Board to initiate debt adjustment proceedings on behalf of the Puerto Rico government, and the Board exercised this authority in May 2017. Appellants seek to dismiss the Title III proceedings, claiming the Board lacked authority to initiate them given that the Board Members were allegedly appointed in contravention of the Appointments Clause.

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*Of the Southern District of New York, sitting by designation.

Before we can determine whether the Board Members are subject to the Appointments Clause, we must first consider two antecedent questions that need be answered in sequence, with the answer to each deciding whether we proceed to the next item of inquiry. The first question is whether, as decided by the district court and claimed by appellees, the Territorial Clause displaces the Appointments Clause in an unincorporated territory such as Puerto Rico. If the answer to this first question is "no," our second area of discussion turns to determining whether the Board Members are "Officers of the United States," as only officers of the federal government fall under the purview of the Appointments Clause. If the answer to this second question is "yes," we must then determine whether the Board Members are "principal" or "inferior" United States officers, as that classification will dictate how they must be appointed pursuant to the Appointments Clause. But before we enter fully into these matters, it is appropriate that we take notice of the developments that led to the present appeal.

BACKGROUND

The centerpieces of the present appeals are two provisions of the Constitution of the United States. The first is Article II, Section 2, Clause 2, commonly referred to as the "Appointments Clause," which establishes that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of

> such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., art. II, § 2, cl. 2.

The second is Article IV, Section 3, Clause 2, or the "Territorial Clause," providing Congress with the "power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const., art. IV, § 3, cl. 2.

A. Puerto Rico's Financial Crisis

The interaction between these two clauses comes into focus because of events resulting from the serious economic downfall that has ailed the Commonwealth of Puerto Rico since the turn of the 21st Century, *see* Center for Puerto Rican Studies, *Puerto Rico in Crisis Timeline*, Hunter College (2017), https://centropr.hunter.cuny.edu/sites/default/files/PDF_Publications/Puerto-Rico-Crisis-Timeline-2017.pdf; *see generally* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 Harv. L. Rev. F. 65 (2018), and its Governor's declaration in the summer of 2015 that the Commonwealth was unable to meet its estimated $72 billion public debt obligation, *see* Michael Corkery & Mary Williams Walsh, *Puerto Rico's Governor Says Island's Debts Are "Not Payable"*, N.Y. Times (June 28, 2015), https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html. This obligation developed, in substantial part, from the triple tax-exempt bonds issued and sold to a large variety of individual and institutional investors, not only in

Puerto Rico but also throughout the United States.[1] Given the unprecedented expansiveness of the default in terms of total debt, the number of creditors affected, and the creditors' geographic diversity, it became self-evident that the Commonwealth's insolvency necessitated a national response from Congress. Puerto Rico's default was of particular detriment to the municipal bond market where Commonwealth bonds are traded and upon which state and local governments across the United States rely to finance many of their capital projects. *See* Nat'l Assoc., of Bond Lawyers, *Tax-Exempt Bonds: Their Importance to the National Economy and to State and Local Governments* 5 (Sept. 2012), https://www.nabl.org/portals/0/documents/NABL_White_Paper.pdf.

From 1938 until 1984, Puerto Rico was able, like all other U.S. jurisdictions, to seek the protection of Chapter 9 of the U.S. Bankruptcy Code when its municipal instrumentalities ran into financial difficulties. *See Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 345-50 (1st Cir. 2015) (Torruella, J., concurring). But without any known or documented explanation, in 1984, Congress extirpated from the Bankruptcy Code the availability of this relief for the Island. *Id.* at 350. In an attempt to seek self-help, and amidst the Commonwealth's deepening financial crisis, the Puerto Rico Legislature passed its own municipal bankruptcy legislation in 2014. *See* Puerto Rico Public Corporation Debt Enforcement and Recovery Act of 2014, 2014 P.R. Laws Act No. 71; *see generally* Lorraine S. McGowen,

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[1] Since 1917 Congress has authorized exemption of Puerto Rico bonds from taxation by the federal, state, and municipal governments. *See* An Act to provide a civil government for Porto Rico, and for other purposes, ch. 145, § 3, 39 Stat. 953 (1917).

Puerto Rico Adopts a Debt Recovery Act for Its Public Corporations, 10 Pratt's J. Bankr. L. 453 (2014) . The Commonwealth's self-help journey, however, was cut short by the Supreme Court in *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016), which invalidated the Puerto Rico bankruptcy statute. Coincidentally, the Supreme Court decided *Franklin Cal.* on June 13, 2016—seven days before the following congressional intervention into this sequence of luckless events.

B. Congress Enacts PROMESA

On June 30, 2016, Congress's next incursion into Puerto Rico's economic fortunes took place in the form of Public Law 114-187, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA),[2] 48 U.S.C. § 2101 *et seq.*, which Congress found necessary to deal with Puerto Rico's "fiscal emergency" and to help mitigate the Island's "severe economic decline." *See id.* § 2194(m)(1). Congress identified the Territorial Clause as the source of its authority to enact this law. *See id.* § 2121(b)(2).

To implement PROMESA, Congress created the Financial Oversight and Management Board of Puerto Rico (the "Board"). Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island "achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a). In so proceeding, Congress stipulated that the Board was "an entity [created] within the territorial government" of Puerto Rico, *id.* §

[2] Since its proposed enactment this legislation has been labeled by the acronym "PROMESA," which in the Spanish language stands for "promise."

2121(c)(1), which "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government," *id.* § 2121(c)(2), and that it was to be funded entirely from Commonwealth resources, *id.* § 2127.[3]

Although PROMESA places the Board "within" the Puerto Rico territorial government, Section 108 of PROMESA, which is labeled "Autonomy of Oversight Board," *id.* § 2128, precludes the Puerto Rico Governor and Legislature from exercising any power or authority over the so-called "territorial entity" that PROMESA creates. Instead, it subordinates the Puerto Rico territorial government to the Board, as it unambiguously pronounces that:

> (a). . . Neither the Governor nor the Legislature may—
>
> (1) exercise any control, supervision, oversight, or review over the . . . Board or its activities; or
>
> (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the . . . Board.

Id. § 2128(a).

PROMESA also provides additional authority and powers to the Board with similarly unfettered discretion. For example, Section 101(d)(1)(A) grants the Board, "in its sole discretion at such time as the . . . Board determines to be appropriate, " the designation

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[3] A new account—under the Board's exclusive control—was required to be established by the Puerto Rico government within its Treasury Department to fund Board operations.

of "any territorial instrumentality as a covered territorial instrumentality that is subject to the requirements of [PROMESA]." *Id.* § 2121(d)(1)(A). Under Section 101(d)(1)(B), the Board, "in its sole discretion, " may require the Governor of Puerto Rico to submit "such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the . . . Board determines to be necessary . . ." *Id.* § 2121(d)(1)(B). Pursuant to Section 101(d)(1)(C), the Board is allowed, "in its sole discretion," to require separate budgets and reports for covered territorial instrumentalities apart from the Commonwealth's budget, and to require the Governor to develop said separate documents. *Id.* § 2121(d)(1)(C). Per Section 101(d)(1)(D), the "Board may require, in its sole discretion," that the Governor "include a covered territorial instrumentality in the applicable Territory Fiscal Plan." *Id.* § 2121(d)(1)(D). Further, as provided in Section 101(d)(1)(E), the Board may, "in its sole discretion," designate "a covered territorial instrumentality to be the subject of [a separate] Instrumentality Fiscal Plan." *Id.* § 2121(d)(1)(E). Finally, Section 101(d)(2)(A) bestows upon the Board, again "in its sole discretion, at such time as the . . . Board determines to be appropriate," the authority to "exclude any territorial instrumentality from the requirements of [PROMESA]." *Id.* § 2121(d)(2)(A).

PROMESA also requires the Board to have an office in Puerto Rico and elsewhere as it deems necessary, and that at any time the United States may provide the Board with use of federal facilities and equipment on a reimbursable or non-reimbursable basis. *Id.* § 2122. Additionally, Section 103(c) waives the application of Puerto Rico procurement laws to the Board, *id.* § 2123(c), while Section 104 (c) authorizes the

Board to acquire information directly from both the federal and Puerto Rico governments without the usual bureaucratic hurdles, *id.* § 2124(c). Moreover, the Board's power to issue and enforce compliance with subpoenas is to be carried out in accordance with Puerto Rico law. *Id.* § 2124(f).[4] Finally, PROMESA directs the Board to ensure that any laws prohibiting public employees from striking or engaging in lockouts be strictly enforced. *Id.* § 2124(h).

We thus come to PROMESA's Title III, the central provision of this statute, which creates a special bankruptcy regime allowing the territories and their instrumentalities to adjust their debt. *Id.* §§ 2161-77. This new bankruptcy safe haven applies to territories more broadly than Chapter 9 applies to states because it covers not just the subordinate instrumentalities of the territory, but also the territory itself. *Id.* § 2162.

An important provision of PROMESA's bankruptcy regime is that the Board serves as the sole representative of Puerto Rico's government in Title III debtor-related proceedings, *id.* § 2175(b), and that the Board is empowered to "take any action necessary on behalf of the debtor"—whether the Commonwealth government or any of its instrumentalities—"to prosecute the case of the debtor," *id.* § 2175(a).

C. Appointment of Members to PROMESA's Board

PROMESA establishes that the "Board shall consist of seven members appointed by the President,"

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[4] We note that 48 U.S.C. § 2124(f)(1) makes reference to the Puerto Rico Rules of Civil Procedure of 1979, 32 L.P.R.A. App. Ill, even though those rules were repealed and replaced by the Puerto Rico Rules of Civil Procedure of 2009, 32 L.P.R.A. App. V.

who must comply with federal conflict of interest statutes. *Id.* § 2121(e)(1)(A).[5] The Board's membership is divided into six categories, labelled A through F, with one member for Categories A, B, D, E, and F, and two members for Category C. *Id.* § 2121(e)(1)(B).[6] The Governor of Puerto Rico, or his designee, also serves on the Board, but in an *ex officio*, non-voting capacity. *Id.* § 2121(e)(3). The Board's duration is for an indefinite period, at a minimum four years and likely more, given the certifications that Section 209 of PROMESA requires.[7]

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[5] Section 2121(e)(1)(A) of PROMESA cross-references section 2129(a), which, for its part, incorporates 18 U.S.C. § 208's dispositions governing conflicts of interest.

[6] As will be discussed in detail below, the assigned category affects a prospective Board member's eligibility requirements and appointment procedure.

[7] Section 209 of PROMESA states that the Board shall terminate when it certifies that:

> (1) the applicable territorial government has adequate access to short-term and long-term credit markets at reasonable interest rates to meet the borrowing needs of the territorial government; and
>
> (2) for at least 4 consecutive fiscal years —
>
> (A) the territorial government has developed its Budgets in accordance with modified accrual accounting standards; and
>
> (B) the expenditures made by the territorial government during each fiscal year did not exceed the revenues of the territorial government during that year, as determined in accordance with modified accrual accounting standards.

48 U.S.C. § 2149.

Pursuant to Section 101(f) of PROMESA, individuals are eligible for appointment to the Board only if they:

> (1) ha[ve] knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and
>
> (2) prior to appointment, [they are] not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.

Id. § 2121(f). In addition, there are certain primary residency or primary business place requirements that must be met by some of the Board Members. *Id.* § 2121(e)(2)(B)(i), (D) (requiring that the Category A Board Member "maintain a primary residence in the territory or have a primary place of business in the territory").

Of particular importance to our task at hand is Section 101(e) (2) (A), which outlines the procedure for the appointment of the Board Members:

> (A) The President shall appoint the individual members of the . . . Board of which—
>
> (i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives;
>
> (ii) the Category B member should be selected from a separate, non-overlapping list

> of individuals submitted by the Speaker of the House of Representatives;
>
> (iii) the Category C member should be selected from a list submitted by the Majority Leader of the Senate;
>
> (iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives;
>
> (v) the Category E member should be selected from a list submitted by the Minority leader of the Senate; and
>
> (vi) the category F member may be selected in the President's sole discretion.

Id. § 2121(e)(2)(A).

In synthesis, pursuant to this scheme, six of the seven Board Members shall be selected by the President from the lists provided by House and Senate leadership, with PROMESA allowing the President to select the seventh member at his or her sole discretion. Senatorial advice and consent is not required if the President makes the appointment from one of the aforementioned lists. *Id.* § 2121(e)(2)(E). In theory, the statute allows the President to appoint a member to the Board who is not on the lists, in which case, "such an appointment shall be by and with the advice and consent of the Senate." *Id.* Consent by the Senate had to be obtained by September 1, 2016 so as to allow an off-list appointment, else the President was required to appoint directly from the lists. And because the Senate was in recess for all but eight business days between enactment of the statute and September 1, one might conclude that, in practical effect, the statute forced the selection of persons on the list.

As was arguably inevitable, on August 31, 2016, the President chose all Category A through E members from the lists submitted by congressional leadership and appointed the Category F member at his sole discretion.[8]

It is undisputed that the President did not submit any of the Board member appointments to the Senate

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[8] *President Obama Announces the Appointment of Seven Individuals to the Financial Oversight and Management Board for Puerto Rico*, The White House Off. of the Press Sec'y (Aug. 31, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/08/31/president-obama-announces-appointment-seven-individualsfinancial. The appointees included **Andrew G. Biggs**, a resident scholar at the American Enterprise Institute, and former holder of multiple high ranking positions in the Social Security Administration; **José B. Carrión III**, an experienced insurance industry executive from Puerto Rico and the President and Principal Partner of HUB International CLC, LLC, which operates therein; **Carlos M. García**, a resident of Puerto Rico, the Chief Executive Officer of BayBoston Managers LLC, Managing Partner of BayBoston Capital LP, who formerly served as Senior Executive Vice President and board member at Santander Holdings USA, Inc. (2011-2013), among other executive posts at Santander entities (1997-2008), and as Chairman of the Board, President, and CEO of the Government Development Bank for Puerto Rico (2009-2011); **Arthur J. González**, a Senior Fellow at the New York University School of Law and former U.S. Bankruptcy Judge in the Southern District of New York (1995-2002); **José R. González**, CEO and President of the Federal Home Loan Bank of New York, which he joined in 2013, former Chief Executive Officer and President of Santander Bancorp (2002-2008), and President of Santander Securities Corporation (1996-2001) and the Government Development Bank of Puerto Rico (1986-1989); **Ana J. Matosantos**, President of Matosantos Consulting, former Director of the State of California's Department of Finance (2009-2013) and Chief Deputy Director for Budgets (2008-2009); and, **David A. Skeel Jr.**, professor of Corporate Law at the University of Pennsylvania Law School, which he joined in 1999.

for its advice and consent prior to the Board Members assuming the duties of their office, or, for that matter, at any other time.

D. Litigation Before the District Court

In May 2017, the Board initiated Title III debt adjustment proceedings on behalf of the Commonwealth in the U.S. District Court for the District of Puerto Rico. *See* Title III Petition, *In re Commonwealth of P.R.*, Bankruptcy Case No. 17-BK- 3283 (LTS) (D.P.R. May 3, 2017). This was followed by the filing of several other Title III proceedings on behalf of various Commonwealth government instrumentalities. *See* Title III Petitions in: *In re P.R. Sales Tax Fin. Corp. (COFINA)*, Bankruptcy Case No. 17-BK-3284 (LTS) (D.P.R. May 5, 2017); *In re Emps. Ret. Sys, of the Gov't of the Commonwealth of P.R. (ERS)*, 17-BK-3566 (LTS) (D.P.R. May 21, 2017); *In re P.R. Highways and Transp. Aut. (HTA)*; Bankruptcy Case No. 17-BK-3567 (LTS) (D.P.R. May 21, 2017); *In re P.R. Elec. Power Auth. (PREPA) [hereinafter In re PREPA]*, Bankruptcy Case No. 17-BK-4780 (LTS) (D.P.R. Jul. 7, 2017). Thereafter, some entities—now the appellants before us—arose in opposition to the Board's initiation of debt adjustment proceedings on behalf of the Commonwealth.

Among the challengers are *Aurelius Investment, LLC, et al*. and *Assured Guaranty Corporation, et al*. ("*Aurelius*"). Before the district court, Aurelius argued that the Board lacked authority to initiate the Title III proceeding because its members were appointed in violation of the Appointments Clause and the principle of separation of powers. The Board rejected this argument, positing that its members were not "Officers of

the United States" within the meaning of the Appointments Clause, and that the Board's powers were purely local in nature, not federal as would be needed to qualify for Appointments Clause coverage. The Board further argued that, in any event, the Appointments Clause did not apply even if the individual members were federal officers, because they exercised authority in Puerto Rico, an unincorporated territory where the Territorial Clause endows Congress with plenary powers. This, according to the Board, exempted Congress from complying with the Appointments Clause when legislating in relation to Puerto Rico. In the alternative, the Board argued that the Board Members' appointment did not require Senate advice and consent because they were "inferior officers." The United States intervened on behalf of the Board, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of PROMESA and the validity of the appointments and was generally in agreement with the Board's contentions.

The other challenger to the Board's appointments process, and an appellant here, is the Union de Trabajadores de la Industria Electrica y Riego ("UTIER"), a Puerto Rican labor organization that represents employees of the government-owned electric power company, the Puerto Rico Electric Power Authority ("PREPA") . The Board had also filed a Title III petition on behalf of PREPA, *see In re PREPA*, *supra*, which led the UTIER to file an adversary proceeding as a party of interest before the District Court in which it raised substantially the same arguments as Aurelius regarding the Board Members' defective appointment, *see Union de Trabajadores de la Industria Electrica y Riego v. P. R. Elec. Power Auth.*, No. 17-228

(LTS) (D.P.R. Aug. 15, 2018); *see also* Adversary Complaint, *Union de Trabajadores de la Industria Electrica y Riego v. P.R. Elec. Power Auth.*, No. 17-229 (LTS) (D.P.R. Aug. 7, 2017) (describing the terms of the UTIER-PREPA collective bargaining agreement).

E. The District Court's Opinion

The district court, in separate decisions, ruled against Aurelius and UTIER and rejected their motions to dismiss the Board's Title III petitions. *In re Commonwealth of P.R.*, Bankruptcy Case No. 17-BK-3283 (LTS) (D.P.R. July 3, 2018); *Assured Guar. Mun. Corp. v. Fin. Oversight and Mgmt. Bd. for P.R.*, No. 18-87 (LTS) (D.P.R. Aug. 3, 2018); *UTIER v. PREPA*, No. 17-228 (LTS). In brief, the district court determined that the Board is an instrumentality of the Commonwealth government established pursuant to Congress's plenary powers under the Territorial Clause, that Board Members are not "Officers of the United States," and that therefore there was no constitutional defect in the method of their appointment. The court arrived at this conclusion after considering the jurisprudence and practice surrounding the relationship between Congress and the territories, including Puerto Rico, along with Congress's intent with regards to PROMESA.

The district court based its ruling on the premise that "the Supreme Court has long held that Congress's power under [the Territorial Clause] is both 'general and plenary.'" Such a plenary authority is what, according to the district court, allows Congress to "establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the

governance of the United States." The district court further pronounced that Congress "has exercised [its plenary] power with respect to Puerto Rico over the course of nearly 120 years, including the delegation to the people of Puerto Rico elements of its . . . authorizing a significant degree of local self-governance."

The district court also relied on judicial precedents holding that Congress may create territorial courts that do not "incorporate the structural assurances of judicial independence" provided for in Article III of the Constitution—namely, life tenure and protection against reduction in pay—as decisive authority. From the perdurance of these non-Article III courts across the territories (excepting, of course, Puerto Rico which although still an unincorporated territory has had, since 1966, an Article III court),[9] the district court rea-

[9] Act of Sept. 12, 1966, Public Law 89-571, 80 Stat. 764 (granting judges appointed to the District of Puerto Rico the same life tenure and retirement rights granted to judges of all other United States district courts); *see also Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 n.26 1976) ("The reason given [by Congress] for [Public Law 89-571] was that the Federal District Court in Puerto Rico 'is in its jurisdiction, powers, and responsibilities the same as the U. S. district courts in the (several) States.'" (quoting S. Rep. No. 89-1504 at 2 (1966))); *Igartua-De La Rosa v. United States*, 417 3d 145, 169 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) ("An Article III District Court sits [in Puerto Rico], providing nearly one-third of the appeals filed before [the Court of Appeals for the First Circuit], which sits in Puerto Rico at least twice a year, also in the exercise of Article III power."); *United States v. Santiago*, 23 F. Supp. 3d 68, 69 (D.P.R. Feb. 12, 2014) (collecting cases and scholarly articles).

soned that "Congress can thus create territorial entities that are distinct in structure, jurisdiction, and powers from the federal government."

Turning to the relationship between Congress and Puerto Rico, the district court noted that "Congress has long exercised its Article IV plenary power to structure and define governmental entities for the island," in reference to the litany of congressional acts that have shaped Puerto Rico's local government since 1898, including the Treaty of Paris of 1898, the Foraker Act of 1900, the Jones-Shafroth Act of 1917, and Public Law 600 of 1950.

Furthermore, with regards to PROMESA and its Board, the district court afforded "substantial deference" to "Congress's determination that it was acting pursuant to its Article IV territorial powers in creating the . . . Board as an entity of the government of Puerto Rico." The district court then proceeded to consider whether Congress can create an entity that is not inherently federal. It concluded in the affirmative, because finding otherwise would "ignore [] both the plenary nature of congressional power under Article IV and the well-rooted jurisprudence . . . establish[ing] that any powers of self-governance exercised by territorial governments are exercised by virtue of congressional delegation rather than inherent local sovereignty." Accordingly, the district court found that the "creation of an entity such as the . . . Board through popular election would not change the . . . Board's ultimate source of authority from a constitutional perspective." The court deemed this so because "neither the case law nor the historical practice . . . compels a finding that federal appointment necessarily renders

an appointee a federal officer." The district court therefore concluded that the Board is a territorial entity notwithstanding

> [t]he fact that the . . . Board's members hold office by virtue of a federally enacted statutory regime and are appointed by the President [,] [because this] does not vitiate Congress's express provisions for creation of the . . . Board as a territorial government entity that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government."

After ruling that the Board is a "territorial entity and its members are territorial officers," the district court finally determined that "Congress had broad discretion to determine the manner of selection for members of the . . . Board," which Congress "exercised . . . in empowering the President with the ability to both appoint and remove members from the . . . Board." On this final point, the district court observed that "[a]lthough historical practice . . . indicates that Congress has required Senate confirmation for certain territorial offices, nothing in the Constitution precludes the use of that mechanism for positions created under Article IV, and its use does not establish that Congress was obligated to invoke it."

The district court was certainly correct that Article IV conveys to Congress greater power to rule and regulate within a territory than it can bring to bear within the fifty states. In brief, within a territory, Congress has not only its customary power, but also the power to make rules and regulations such as a state government may make within its state. *See* U.S. Const. art. IV, § 3, cl. 2; *D.C. v. John R. Thompson Co.*, 346 U.S.

100, 106 (1953); *Simms v. Simms*, 175 U.S. 162, 168 (1899). As we will explain, however, we do not view these expanded Article IV powers as enabling Congress to ignore the structural limitations on the manner in which the federal government chooses federal officers, and we deem the Board Members—save its *ex officio* member[10]—to be federal officers.

DISCUSSION

A. The Territorial Clause Does Not Trump the Appointments Clause

However much Article IV may broaden the reach of Congress's powers over a territory as compared to its power within a state, this case presents no claim that the substance of PROMESA's numerous rules and regulations exceed that reach. Instead, appellants challenge the way the federal government has chosen the individuals who will implement those rules and regulations. This challenge trains our focus on the power of Congress vis-a-vis the other branches of the federal government. Specifically, the Board claims that Article IV effectively allows Congress to assume what is otherwise a power of the President, and to share within the two bodies of Congress a power only assigned to the Senate.

We reject this notion that Article IV enhances Congress's capabilities in the intramural competitions established by our divided system of government. First,

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[10] No Appointments Clause challenge has been brought concerning the Governor of Puerto Rico, or the Governor's designee, who serves as an *ex officio* Board member without voting rights. *See* 48 U.S.C. § 2121(e)(3). Our holding is therefore limited to the seven Board Members appointed pursuant to 48 U.S.C. § 2121(e)(1)-(2).

the Board seems to forget—and the district court failed to recognize and honor—the ancient canon of interpretation that we believe is a helpful guide to disentangle the interface between the Appointments Clause and the Territorial Clause: *generalia specialibus non derogant* (the "specific governs the general"). *See*, *e.g.*, *Turner v. Rogers*, 564 U.S. 431, 452-53 (2011) (Thomas, J., dissenting) (applying this canon in the context of constitutional interpretation in a conflict between the Due Process Clause and the Sixth Amendment); *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (plurality opinion).

The Territorial Clause is one of general application authorizing Congress to engage in rulemaking for the temporary governance of territories. *See Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion). But such a general empowerment does not extend to areas where the Constitution explicitly contemplates a particular subject, such as the appointment of federal officers. Nowhere does the Territorial Clause reference the subject matter of federal appointments or the process to effectuate them. On the other hand, federal officer appointment is, of course, the *raison d'etre* of the Appointments Clause. It cannot be clearer or more unequivocal that the Appointments Clause mandates that it be applied to "*all* . . . Officers of the United States." U.S. Const., art II, § 2, cl. 2 (emphasis added). Thus, we find in answering the first question before us a prime candidate for application of the *specialibus* canon and for the strict enforcement of the constitutional mandate contained in the Appointments Clause.

Consider next the Presentment Clause of Article I, Section 7. Under that clause, a bill passed by both chambers of Congress cannot become law until it is

presented to, and signed by, the President (or the President's veto is overridden). U.S. Const., art. I, § 7, cl. 2. Surely no one argues that Article IV should be construed so as to have allowed Congress to enact PROMESA without presentment, or to have overridden a veto without the requisite super-majority vote in both houses. Nor does anyone seriously argue that Congress could have relied on its plenary powers under Article IV to alter the constitutional roles of its two respective houses in enacting PROMESA.

Like the Presentment Clause, the Appointments Clause constitutionally regulates how Congress brings its power to bear, whatever the reach of that power might be. The Appointments Clause serves as one of the Constitution's important structural pillars, one that was intended to prevent the "manipulation of official appointments"—an "insidious . . . weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (citations omitted); *see also Edmond v. United States*, 520 U.S. 651, 659 (1997) . The Appointments Clause was designed "to prevent[] congressional encroachment" on the President's appointment power, while "curb[ing] Executive abuses" by requiring Senate confirmation of all principal officers. *Edmond*, 520 U.S. at 659. It is thus universally considered "among the significant structural safeguards of the constitutional scheme." *Id.*

It is true that another restriction that is arguably a structural limitation on Congress's exercise of its powers—the nondelegation doctrine—does bend to the peculiar demands of providing for governance within the territories. In normal application, the doctrine requires that "when Congress confers decisionmaking authority upon agencies," it must "lay down by legislative act an intelligible principle to which the person or

body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Otherwise, Congress has violated Article I, Section 1 of the Constitution, which vests "[a]11 legislative Powers herein granted . . . in a Congress of the United States." *Id.*; *see also* U.S. Const., art. I, § 1. In connection with the territories, though, Congress can delegate to territorial governments the power to enact rules and regulations governing territorial affairs. *See John R. Thompson Co.*, 346 U.S. at 106 ("The power of Congress to delegate legislative power to a territory is well settled."); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321-23 (1937); *see also Simms*, 175 U.S. at 168 ("In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory."). The Supreme Court has analogized the powers of Congress over the District of Columbia and the territories to that of states over their municipalities. *See John R. Thompson Co.*, 346 U.S. at 109. In the state-municipality context, " [a] municipal corporation ... is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality." *Barnes v. D. C.* , 91 U.S. 540, 544 (1875); *see also John R. Thompson Co.*, 346 U.S. at 109 ("It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of

full legislative power subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted."). The Supreme Court has also made clear that, in delegating power to the territories, Congress can only act insofar as "other provisions of the Constitution are not infringed." *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932).

The territorial variations on the traditional restrictions of the nondelegation doctrine pose no challenge by Congress to the power of the other branches. Any delegation must take the form of a duly enacted statute subject to the President's veto. Furthermore, the territorial exception to the nondelegation doctrine strikes us as strongly implicit in the notion of a territory as envisioned by the drafters of the Constitution. The expectation was that territories would become states. *See Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting). Hence, Congress had a duty—at least a moral duty—to manage a transition from federal to home rule. While the final delegation takes place in the act of formally creating a state, it makes evident sense that partial delegations of home-rule powers would incrementally precede full statehood. Accordingly, from the very beginning, Congress created territorial legislatures to which it delegated rulemaking authority. *See*, *e.g.*, An Ordinance for the Government of the Territory of the United States northwest of the river Ohio (1787), ch. 8, 1 Stat. 50, 51 n.(a) (1789).

None of these justifications for limiting the nondelegation doctrine to accommodate one of Congress's most salient purposes in exercising its powers under Article IV applies to the Appointments Clause. Nor

does the teaching of founding era history. To the contrary, the evidence suggests strongly that Congress in 1789 viewed the process of presidential appointment and Senate confirmation as applicable to the appointment by the federal government of federal officers within the territories. That first Congress passed several amendments to the Northwest Ordinance of 1787 "so as to adopt the same to the present Constitution of the United States." *Id.* at 51. One such conforming amendment eliminated the pre-constitutional procedure for congressional appointment of officers within the territory and replaced it with presidential nomination and appointment "by and with the advice and consent of the Senate." *Id.* at 53.

More difficult to explain is *United States v. Heinszen*, 206 U.S. 370, 384-85 (1907). The actual holding in *Heinszen* sustained tariffs on goods to the Philippines where the tariffs were imposed first by the President and then thereafter expressly ratified by Congress. In sustaining those tariffs, the Court stated that Congress could have delegated the power to impose the tariffs to the President beforehand, citing *United States v. Dorr*, 195 U.S. 138 (1904), a case that simply held that Congress could provide for criminal tribunals in the territories without also providing for trial by jury. *Id.* at 149. *Heinszen* cannot be explained as an instance of Congress enabling home rule in a territory. Rather, it seems to allow Congress to delegate legislative power to the President, citing the territorial context as a justification. *Heinszen*, though, has no progeny that might shed light on how reliable it might serve as an apt analogy in the case before us. Moreover, *Heinszen* concerned a grant of power by Congress, not a grab for power at the expense of the executive.

For the foregoing reasons, we find in the nondelegation doctrine no apt example to justify an exception to the application of the Appointments Clause within the territories. An exception from the Appointments Clause would alter the balance of power within the federal government itself and would serve no necessary purpose in the transitioning of territories to states.

Further, the Board points us to *Palmore v. United States*, 411 U.S. 389 (1973) . That case arose out of Congress's exercise of its plenary powers over the District of Columbia under Article I, Section 8, Clause 17, powers which are fairly analogous to those under Article IV. *See John R. Thompson Co.*, 346 U.S. at 105-09. The Court held that Congress could create local courts—like state courts—that did not satisfy the requirements of Article III. *Palmore*, 411 U.S. at 410. The Board would have us read *Palmore* as an instance of Congress's plenary powers over a territory trumping the requirements of another structural pillar of the Constitution. We disagree. The Court explained at length how Article III itself did not require that all courts created by Congress satisfy the selection and tenure requirements of Article III. *Id.* at 407 ("It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. Ill court before a judge enjoying lifetime tenure and protection against salary reduction."). Rather, the requirements of Article III are applicable to courts "devoted to matters of national concern," *id.* at 408, and that local courts "primarily with local law and to serve as a local court system" created by Congress pursuant to its plenary powers are simply another exam-

ple of those courts that did not fit the Article III template (like state courts empowered to hear federal cases, military tribunals, the Court of Private Land Claims, and consular courts), *id.* at 404, 407, 408. In short, Article III was not trumped by Congress's creation of local courts pursuant to its Article I power. Rather, Article III itself accommodates exceptions, and the local D.C. court system fits within the range of those exceptions. That there are courts in other territories of the same ilk does not alter this analysis. *Palmore* therefore offers no firm ground upon which to erect a general Article IV exception to separation-of-powers stalwarts such as the Appointments Clause.

Finally, nothing about the "Insular Cases"[11] casts doubt over our foregoing analysis. This discredited[12]

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[11] *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes*, 182 U.S. 244; *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

[12] *See*, *e.g.*, Christina Duffy Burnett, *A Convenient Constitution?: Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973, 982 (2009) (noting the Insular Cases have "long been reviled" for concluding that "the Constitution does not 'follow the flag' outside the United States"); Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 437 (2011) (criticizing that "the Insular Cases relied on *Dred Scott* as authority for the constitutional relationship between Congress and acquired territories"); Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 Iowa L. Rev. 101 (2011); Charles E. Littlefield, *The Insular Cases*, 15 Harv. L. Rev. 169, 170 (1901) ("The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history."); Gerald L. Neuman, *Anomalous Zones*, 48 Stan. L. Rev. 1197, 1221 (1996) (observing that "the colonialism authorized in the Insular Cases . . . was not

lineage of cases, which ushered the unincorporated territories doctrine, hovers like a dark cloud over this case. To our knowledge there is no case even intimating that if Congress acts pursuant to its authority under the Territorial Clause it is excused from conforming with the Appointments Clause, whether this be by virtue of the "Insular Cases" or otherwise. Nor could there be, for it would amount to the emasculation from the Constitution of one of its most important structural pillars. We thus have no trouble in concluding that the Constitution's structural provisions are not limited by geography and follow the United States into its unincorporated territories. *See Downes*, 182 U.S. at 277 (Brown, J.) (noting that "prohibitions [going] to the very root of the power of Congress to act at all, irrespective of time or place" are operative in the unincorporated territories).

Notwithstanding this doctrine, appellant UTIER asks us to go one step further and reverse the "Insular Cases." Although there is a lack of enthusiasm for the perdurance of these cases,[13] which have been regarded

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justified by either peculiar necessity or consent"); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 Rev. Jur. U.P.R. 225 (1996); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283 (2007); Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 Colum. L. Rev. 797 (2010); Lisa María Pérez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 Va. L. Rev. 1029 (2008); see also José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 Harv. L. Rev. 450 (1986) (reviewing Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1985)).

[13] *See supra* note 12.

as a "relic from a different era," *Reid*, 354 U.S. at 12, and which Justice Frankfurter described as "historically and juridically, an episode of the dead past about as unrelated to the world of today as the one-hoss shay is to the latest jet airplane," *Reid v. Covert* 351 U.S. 487, 492 (1956) (Frankfurter, J., reserving judgment), we cannot be induced to engage in an ultra vires act merely by siren songs. Not only do we lack the authority to meet UTIER's request, but even if we were writing on a clean slate, we would be required to stay our hand when dealing with constitutional litigation if other avenues of decision were available, and we believe there are in this case.

In this respect, we are aided again by the Supreme Court's decision in *Reid*, which although refusing to reverse the "Insular Cases" outright, provides in its plurality opinion instructive language that outlines the appropriate course we ought to pursue in the instant appeal:

> The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. . . . *[I]t is our judgment that neither the cases nor their reasoning should be given any further expansion.*

Reid, 354 U.S. at 14 (plurality opinion) (*emphasis added*); *see also Boumediene v. Bush*, 553 U.S. 723, 765 (2008) ("Our basic charter cannot be contracted away . . . . The Constitution grants Congress and the Presi-

dent the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.").

The only course, therefore, which we are allowed in light of Reid is to not further expand the reach of the "Insular Cases." Accordingly, we conclude that the Territorial Clause and the "Insular Cases" do not impede the application of the Appointments Clause in an unincorporated territory, assuming all other requirements of that provision are duly met.

B. Board Members Are "Officers of the United States" Subject to the Appointments Clause

We must now determine whether the Board Members qualify within the rubric of "Officers of the United States," the Appointments Clause's job description that marks the entry point for its coverage. The district court determined that the Board Members do not fall under such a rubric. We disagree.

We begin our analysis by turning to a triad of Supreme Court decisions: *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Freytag*, 501 U.S. 868; and *Buckley v. Valeo*, 424 U.S. 1 (1976). From these cases, we gather that the following "test" must be met for an appointee to qualify as an "Officer of the United States" subject to the Appointments Clause: (1) the appointee occupies a "continuing" position established by federal law; (2) the appointee "exercis[es] significant authority"; and (3) the significant authority is exercised "pursuant to the laws of the United States." *See Lucia*, 138 S. Ct. at 2050-51; *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126. In our view, the Board Members readily meet these requirements.

First, Board Members occupy "continuing positions" under a federal law since PROMESA provides for their appointment to an initial term of three years and they can thereafter be reappointed and serve until a successor takes office. 48 U.S.C. § 2121(e)(5)(A), (C)-(D). The continuity of the Board Members' position is fortified by the provision that only the President can remove them from office and then only for cause. *Id.* § 2121(e)(5)(B). In fact, the Board Members' term in office could well extend beyond three years, as PROMESA stipulates that the Board will continue in operation until it certifies that the Commonwealth government has met various fiscal objectives "for at least 4 consecutive fiscal years." *Id.* § 2149(2).

Second, the Board Members plainly exercise "significant authority." For example, PROMESA empowers the Board Members to initiate and prosecute the largest bankruptcy in the history of the United States municipal bond market, *see Yasmeen Serhan*, *Puerto Rico Files for Bankruptcy*, The Atlantic (May 3, 2017), https://www.theatlantic.com/news/archive/2017/05/puerto-rico-files-for-bankruptcy/525258/, with the bankruptcy power being a quintessential federal subject matter, *see* U.S. Const., art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish uniform Laws on the subject of Bankruptcies throughout the United States."). The Supreme Court recently reminded the Commonwealth government of the bankruptcy power's exclusive federal nature in *Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1938.

The Board Members' federal authority includes the power to veto, rescind, or revise Commonwealth laws and regulations that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed

pursuant to it. *See* 48 U.S.C. § 2144 ("Review of activities to ensure compliance with fiscal plan."). Likewise, the Board showcases what can be construed as nothing but its significant authority when it rejects the budget of the Commonwealth or one of its instrumentalities, *see id.* § 2143 ("Effect of finding of noncompliance with budget"); when it rules on the validity of a fiscal plan proposed by the Commonwealth, *id.* § 2141(c)(3); when it issues its own fiscal plan if it rejects the Commonwealth's proposed plan, *id.* § 2141(d) (2) (authorizing the Board to develop a "Revised Fiscal Plan"); and when it exercises its sole discretion to file a plan of adjustment for Commonwealth debt, *id.* § 2172(a) ("Only the Oversight Board . . . may file a plan of adjustment of the debts of the debtor."). The Board can only employ these significant powers because a federal law so provides.

Moreover, Board Members' investigatory and enforcement powers, as carried out collectively by way of the Board, exceed or are at least equal to those of the judicial officers the Supreme Court found to be "Officers of the United States" in *Lucia*. *See* 138 S. Ct. at 2053. There, the Supreme Court held that administrative law judges are "Officers of the United States," in part, because they can receive evidence at hearings and administer oaths. *Id.* PROMESA grants the Board Members the same right and more. *See* 48 U.S.C. § 2124(a); *id.* § 2124(b) ("Any member . . . of the Oversight Board may, if authorized by the Oversight Board, take any action that the Oversight Board is authorized to take by this section."); *id.* § 2124(c) ("Obtaining official data"); *id.* § 2124(f) ("Subpoena power"). In short, the Board Members enjoy "significant discretion" as they carry out "important functions," *Freytag*, 501 U.S.

at 881, under a federal law—qualities that the Supreme Court has considered for decades as the birthmark of federal officers who are subject to the Appointments Clause.

Third, the Board Members' authority is exercised "pursuant to the laws of the United States." The Board Members trace their authority directly and exclusively to a federal law, PROMESA. That federal law provides both their authority and their duties. Essentially everything they do is pursuant to federal law under which the adequacy of their performance is judged by their federal master. And this federal master serves in the seat of federal power, not San Juan. The Board Members are, in short, more like Roman proconsuls picked in Rome to enforce Roman law and oversee territorial leaders than they are like the locally selected leaders that Rome allowed to continue exercising some authority. *See*, *e.g.*, Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 Miss. L.J. 431, 484 (2006); *Davila Asks House for Reily Inquiry*, N.Y. Times (Apr. 5, 1922), https://times-machine.nytimes.com/timesmachine/1922/04/05/112681107.pdf (comparing the then-appointed Governor of Puerto Rico to a Roman proconsul).

The United States makes two arguments in support of the district court's opinion and PROMESA's current appointments protocol that warrant our direct response at this point. First, the United States argues that historical precedent suggests the inapplicability of the Appointments Clause to the territories. Second, the United States contends that if we find for appellants, territories because the officers of such office without the Senate's advice and consent. We reject each argument in turn.

The relevant historical precedents of which we are aware lead us to a different conclusion than that claimed by the United States. Excepting the short period during which Puerto Rico was under military administration following the Spanish-American War, the major federal appointments to Puerto Rico's civil government throughout the first half of the 20th century all complied with the Appointments Clause.

Beginning in 1900 with the Foraker Act, the Governor of Puerto Rico was to be nominated by the President and confirmed by the Senate to a term of four years "unless sooner removed by the President." An Act temporarily to provide revenues and a civil government for Porto Rico, ch. 191, 31 Stat. 77, 81 (1900). The Foraker Act also mandated presidential nomination and Senate confirmation of the members of Puerto Rico's "Executive Council" (which assumed the dual role of executive cabinet and upper chamber of the territorial legislature). *Id.* The Executive Council consisted of a secretary, an attorney general, a treasurer, an auditor, a commissioner of the interior, a commissioner of education, and five other persons "of good repute." *Id.* In addition, the Foraker Act also subjected the justices of the Puerto Rico Supreme Court, along with the marshal and judge of the territorial U.S. District Court for the District of "Porto" Rico, to the strictures of the Appointments Clause. *Id.* Even the three members of a commission established to compile and revise the laws of "Porto" Rico were made subject to the Appointments Clause. *Id.*

The Foraker Act regime lasted until 1917, when Congress passed the Jones-Shafroth Act. *See* An Act to provide a civil government for Porto Rico, ch. 145, 39 Stat. 951 (1917). Here again, Congress provided for all

key appointments by Washington to Puerto Rico's territorial government to meet the Appointments Clause: the governor, attorney general, commissioner of education, supreme court justices, district attorney, U.S. marshal, and U.S. territorial district judge were to be appointed by the President with the advice and consent of the Senate. *Id.* In sum, between 1900 and 1947—the last time the Island had a federally-selected Governor—each of the presidentially appointed Governors of Puerto Rico acquired their office after receiving the Senate's blessing.[14]

As the United States would have it, Congress's requirement of Senate confirmation for presidential nominees in all of the aforementioned contexts was mere voluntary legislative surplusage. This position, however, directly contravenes the published opinions of the United States' own Office of Legal Counsel issued as recently as 2007. *See "Officers of the United States Within the Meaning of the Appointments Clause,"* 31 Op. O.L.C. 73, 122 (2007) ("[A]n individual who will occupy a position to which has been delegated by legal authority a portion of the sovereign powers of the federal government, which is 'continuing,' must be

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[14] The early appointments to high-level office in the territorial governments of the Philippines, Guam, and the Virgin Islands also conformed with the Appointments Clause. *See* Organic Act of Guam of 1950, § 6, 64 Stat. 512 (1950) (providing that the Governor of Guam "shall be appointed by the President, by and with the advice and consent of the Senate of the United States"); Organic Act of Virgin Islands, § 20, 49 Stat. 1807 (1936) (providing for the presidential nomination and Senate confirmation of the Governor, who will then be under supervision of the Secretary of the Interior). Even the Panama Canal Zone, during its period under United States control, had a Governor appointed by the President "by and with the advice of the Senate." *See* Panama Canal Act, 37 Stat. 560 (1912).

appointed pursuant to the Appointments Clause."); *see also* Jennifer L. Mascott, *Who Are "Officers of the United States",* 70 Stan. L. Rev. 443, 564 (2018) ("Extensive evidence suggests that the original public meaning of 'officer' in Article II includes all federal officials with responsibility for an ongoing statutory duty."). At a minimum, the United States' posture runs head against the sound principle of legislative interpretation bordering on dogma that "'[l]ong settled and established practice is a consideration of great weight in proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (citing *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). Furthermore, the United States fails to support its assertion with legislative history or other evidence establishing that Congress's largely consistent adherence to Appointments Clause procedures in appointing territorial officials was gratuitous. Lacking such an explanation, we believe it is more probable that Congress was simply complying with what the Constitution requires. Furthermore, that largely consistent compliance with Appointment Clause procedures in hundreds if not thousands of instances over two centuries belies any claim that adherence to those procedures impedes Congress's exercise of its plenary powers within the territories.

The United States, as well as the Board, also point to the manner in which Congress has for centuries allowed territories to elect territorial officials, including for example the governor of Puerto Rico since 1947. *See An Act to amend the Organic Act of Puerto Rico*, ch. 490, 61 Stat. 770 (1947). Congress created many of these territorial positions and they were filled not

through presidential nomination and Senate confirmation, but rather by elections within the territory. The Board's basic point (and the United States' basic point as well) is this: If we find that the Board Members must be selected by presidential nomination and Senate confirmation, then that would mean that, for example, all elected territorial governors and legislators have been selected in an unconstitutional manner.

We disagree. The elected officials to which the Board and the United States point—even at the highest levels—are not federal officers. They do not "exercise significant authority pursuant to the laws of the United States." *See Lucia*, 138 S. Ct. at 2051; *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126; *see also United States v. Germaine*, 99 U.S. 508, 511-12 (1878). Rather, they exercise authority pursuant to the laws of the territory. Thus, in Puerto Rico for example, the Governor is elected by the citizens of Puerto Rico, his position and power are products of the Commonwealth's Constitution, *see* Puerto Rico Const., art. IV, and he takes an oath similar to that taken by the governor of a state, *id.* § 16; *see also*, *e.g.*, N.Y. Const. art. XIII, § 1; Ala. Const., art. XVI, § 279; N.H. Const., pt. II, art. 84.

It is true that the Commonwealth laws are themselves the product of authority Congress has delegated by statute. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875 (2016). So the elected Governor's power ultimately depends on the continuation of a federal grant. But that fact alone does not make the laws of Puerto Rico the laws of the United States, else every claim brought under Puerto Rico's laws would pose a federal question. *See Viqueira v. First Bank*, 140 F.3d 12, 19 (1st Cir. 1998) ("[T]he plaintiffs' complaint alleges manifold claims under Puerto Rico law, but it

fails to assert any claim arising under federal law. Accordingly, no jurisdiction lies under 28 U.S.C. § 1331."); *Everlasting Dev. Corp. v. Sol Luis Descartes*, 192 F.2d 1, 6 (1st Cir. 1951) ("Of course, in so far as the controversy relates to the construction of an insular [Puerto Rico] tax exemption statute, that is not a federal question.").

C. The Board Members are Principal Officers of the United States

Having concluded that the Board Members are indeed United States officers, we now turn to the specific means by which they must be appointed pursuant to the Appointments Clause. If the officer is a "principal" officer, the only constitutional method of appointment is by the President, by and with the advice and consent of the Senate. U.S. Const. Art. II, § 2, cl. 2; *Edmond*, 520 U.S. at 659. But when an officer is "inferior," Congress may choose to vest the appointment in the President alone, the courts, or a department head. *Edmond*, 520 U.S. at 660; U.S. Const. Art. II, § 2, cl. 2. And the Board argues (but we do not decide) that the President appointed the Board Members notwithstanding the restricted choice from congressional lists.

In *Morrison v. Olson*, the Supreme Court held that an independent counsel was an "inferior" officer because she was subject to removal by the attorney general and because she had limited duties, jurisdiction, and tenure, among other factors. 487 U.S. 654, 671-672 (1988). More than a decade later, the Court held that an "inferior" officer was one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S.

at 663. Our circuit later squared the two cases by holding that *Edmond*'s supervision test was sufficient, but not necessary.[15] *See United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000). Therefore, inferior officers are those who are directed and supervised by a presidential appointee; otherwise, they "might still be considered inferior officers if the nature of their work suggests sufficient limitations of responsibility and authority." *Id.*

The Board Members clearly satisfy the *Edmond* test. They are answerable to and removable only by the President and are not directed or supervised by others who were appointed by the President with Senate confirmation. 48 U.S.C. § 2121(e)(5)(B); *Edmond*, 520 U.S. at 663. Considering the additional *Morrison*

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[15] There has been long-lasting confusion as to whether *Morrison* is still good law. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring) ("Although we did not explicitly overrule *Morrison* in *Edmond*, it is difficult to see how *Morrison*'s nebulous approach survived our opinion in *Edmond*."); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 810, 811 (1999) (arguing that *Morrison* provided "a doctrinal test good for one day only" and that in *Edmond* the Supreme Court "apparently abandoned *Morrison*'s *ad hoc* test"); *but see In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 640 (D.D.C. 2018) (considering the *Morrison* factors in determining that special counsel is an inferior officer of the United States). More recently, in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, the Supreme Court held that members of the Public Company Accounting Oversight Board, who were supervised by the SEC, were inferior officers. 561 U.S. 477, 510 (2010). In so doing, the Court cited *Edmond* for the proposition that "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Id.* However, the *Edmond* language has already been analyzed by this court and reconciled with *Morrison*. Because *Free Enterprise* does not explicitly overrule *Morrison,* it does not affect our precedent.

factors does not change the calculus. Though the Board Members' tenure "is 'temporary' in the sense that [they are] appointed essentially to accomplish a single task, and when that task is over the [Board] is terminated," *Morrison*, 487 U.S. at 672, the Board's vast duties and jurisdiction are insufficiently limited. Significantly, while the independent counsel in *Morrison* was unable to "formulate policy for the Government or the Executive Branch," PROMESA explicitly grants such authority. *See* 48 U.S.C. § 2144(b)(2). And whereas the jurisdiction of the independent counsel was limited, *Morrison*, 487 U.S. at 672, the Board's authority spans across the economy of Puerto Rico — a territory with a population of nearly 3.5 million — overpowering that of the Commonwealth's own elected officials. Under *Edmond* and *Morrison*, the Board Members are "principal" United States officers. *See Hilario*, 218 F.3d at 25. They therefore should have been appointed by the President, by and with the advice and consent of the Senate. Art. II, § 2, cl.2.

THE REMEDY

Having concluded that the process PROMESA provides for the appointment of Board Members is unconstitutional, we are left to determine the relief to which appellants are entitled. Both Aurelius and the UTIER ask that we order dismissal of the Title III petitions that the Board filed to commence the restructuring of Commonwealth debt. In doing so, appellants suggest that we ought to deem invalid all of the Board's actions until today and that this case does not warrant application of the *de facto* officer doctrine. It would then be on a constitutionally reconstituted Board, they say, to ratify or not ratify the unconstitutional Board's actions. Appellants also request that we sever from 48 U.S.C. § 2121(e) the language that authorizes the

Board Members' appointment without Senate confirmation.

There is no question but that in fashioning a remedy to correct the constitutional violation we have found it is unlikely that a perfect solution is available. In choosing among potential options, we ought to reduce the disruption that our decision may cause. But we are readily aided by several factors in this respect.

First, PROMESA itself contains an express severability clause, stating as follows:

> Except as provided in subsection (b) [regarding uniformity of similarly situated territories], if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby, provided that subchapter III is not severable from subchapters I and II, and subchapters I and II are not severable from subchapter III.

48 U.S.C. § 2102.

Such a clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of [a] constitutionally offensive provision." *Alaska Airlines*, *Inc. v. Brock*, 480 U.S. 678, 686 (1987).

Severability in this instance is especially appropriate because Congress, within PROMESA, has already provided an alternative appointments mechanism, at least as to six of the Board Members. PROMESA directs that if the mechanism we found unconstitutional

is not employed, "[w]ith respect to the appointment of a Board member . . . such an appointment *shall be by and with the advice and consent of the Senate*, unless the President appoints an individual from a list, . . . in which case no Senate confirmation is required." 48 U.S.C. § 2121(e)(2)(E) (emphasis added).

Accordingly, we hold that the present provisions allowing the appointment of Board Members in a manner other than by presidential nomination followed by the Senate's confirmation are invalid and severable. We do not hold invalid the remainder of the Board membership provisions, including those providing the qualifications for office and for appointment by the President with the advice and consent of the Senate.

Second, we reject appellants' invitation to dismiss the Title III petitions and cast a specter of invalidity over all of the Board's actions until the present day. To the contrary, we find that application of the *de facto* officer doctrine is especially appropriate in this case.

An ancient tool of equity, the *de facto* officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment . . . to office is deficient." *Ryder v. United States*, 515 U.S. 179, 180 (1995) (citing *Norton v. Shelby Cnty.*, 118 U.S. 425, 440 (1886)); *see also* Note, *The De Facto Officer Doctrine*, 63 Colum. L. Rev. 909, 909 n.1 (1963) ("The first reported case to discuss the concept of *de facto* authority was The Abbe of Fountaine, 9 Hen. VI, at 32(3) (1431)."). A *de facto* officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such

manner and under such circumstances as not to present the appearance of being an intruder or usurper." *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902). Our sister court for the D.C. Circuit has described the doctrine as "protect[ing] citizens' reliance on past government actions and the government's ability to take effective and final action." *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984).

Here, the Board Members were acting with the color of authority—namely, PROMESA—when, as an entity, they decided to file the Title III petitions on the Commonwealth's behalf, a power squarely within their lawful toolkit. And there is no indication but that the Board Members acted in good faith in moving to initiate such proceedings. *See Leary v. United States*, 268 F.2d 623, 627 (9th Cir. 1959). Moreover, the Board Members' titles to office were never in question until our resolution of this appeal.

Other considerations further counsel for our application of the *de facto* officer doctrine. We fear that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now. In addition, a summary invalidation of everything the Board has done since 2016 will likely introduce further delay into a historic debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017. *See* Stephanie Gleason, *Puerto Rico's Bankruptcy Delayed, Moved to New York Following Hurricane Maria*, The Street (Sept. 26, 2017), https://www.thestreet.com/story/14320965/1/puerto-rico-s-bankruptcy-delayed-moved-to-new-york-following-hurricane-maria.html. At a minimum, dismissing

the Title III petitions and nullifying the Board's years of work will cancel out any progress made towards PROMESA's aim of helping Puerto Rico "achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a).

We therefore decline to order dismissal of the Board's Title III petitions. Our ruling, as such, does not eliminate any otherwise valid actions of the Board prior to the issuance of our mandate in this case. In so doing, we follow 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. Although the Court held that the Commission was in fact constituted in violation of the Appointments Clause, *id.* at 140, it nonetheless found that such a constitutional infirmity did "not affect the validity of the Commission's . . . past acts," *id.* at 142. We conclude the same here and find that severance is the appropriate relief to which appellants are entitled after they successfully and "timely challenge[d] the constitutional validity of" the Board Members' appointment. *Ryder*, 515 U.S. at 182-83.

Finally, our mandate in these appeals shall not issue for 90 days, so as to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause. *Cf. Weinberger v. Romero-Barceló*, 456 U.S. 305, 312-313 (1982). During the 90-day stay period, the Board may continue to operate as until now.

CONCLUSION

In sum, we hold that the Board Members (other than the ex officio Member) must be, and were not, appointed in compliance with the Appointments Clause.

Accordingly, the district court's conclusion to the contrary is reversed. We direct the district court to enter a declaratory judgment to the effect that PROMESA's protocol for the appointment of Board Members is unconstitutional and must be severed. We affirm, however, the district court's denial of appellants' motions to dismiss the Title III proceedings. Each party shall bear its own costs.

So ordered.

Reversed in part and Affirmed in part.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PROMESA
Title III

No. 17 BK 3283-LTS
(Jointly Administered)

In re:
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,
as representative of
COMMONWEALTH OF PUERTO RICO, *et al.*,
Debtors.[1]

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[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are (i) the Commonwealth of Puerto Rico (the "*Commonwealth*") (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("*COFINA*") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("*PRHTA*") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("*ERS*") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("*PREPA*") (Bankruptcy Case No. 17 BK 04780-LTS) (Last Four Digits of Federal Tax ID: 3747).

OPINION AND ORDER DENYING THE AURELIUS MOTIONS TO DISMISS THE TITLE III PETITION AND FOR RELIEF FROM THE AUTOMATIC STAY

LAURA TAYLOR SWAIN, United States District Judge

Before the Court are (I) the *Objection and Motion of Aurelius to Dismiss Title III Petition* (Docket Entry No.[2] 913, the "Motion to Dismiss"), and (II) the *Motion of Aurelius for Relief from the Automatic Stay* (Docket Entry No. 914, the "Lift Stay Motion" and, together with the Motion to Dismiss, the "Motions"). The movants are Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC (collectively, "Aurelius"). Aurelius argues principally that the debt adjustment case filed for the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico") under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq*. ("PROMESA"), must be dismissed as unauthorized. Aurelius also argues that further PROMESA-related activity must be enjoined because the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), which filed the Title III proceeding on behalf of the Commonwealth, was appointed in a manner inconsistent with the requirements of the Appointments Clause of Article II, Section 2, Clause 2 of the Constitution of the United States (the "Constitution"). A submission supporting the position advanced by Aurelius was filed by the Ad Hoc Group

[2] All docket entry references are to entries in Case No. 17-BK-3283-LTS, unless otherwise specified.

of General Obligation Bondholders. (Docket Entry No. 1627.) Opposition submissions have been filed by the United States of America (the "United States"), the Oversight Board, the American Federation of State, County and Municipal Employees, the Official Committee of Retired Employees of the Commonwealth of Puerto Rico, the Official Committee of Unsecured Creditors (the "Committee"), the COFINA Senior Bondholders' Coalition (the "COFINA Seniors"), and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"). (Docket Entry Nos. 1610, 1622, 1623, 1629, 1631, 1634, 1638, 1640, 1929.) The Court heard argument on the instant Motions on January 10, 2018 (the "Hearing"), and has considered carefully all of the arguments and submissions made in connection with the Motions.[3] For the reasons that follow, the Motion to Dismiss is denied in its entirety and the Lift Stay Motion is denied in light of the determinations set forth below, for failure to show cause.

I.
BACKGROUND

The following summary reflects matters that are undisputed in the parties' submissions, or of which the Court may take judicial notice.

As discussed in more detail below, Puerto Rico became a territory of the United States under the

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[3] The Court also heard oral argument at the Hearing in connection with a motion to dismiss the complaint in *Union De Trabai adores De La Industria Electrica Y Riego (UTIER) v. PREPA, et al.*, 17-AP-228-LTS (D.P.R.), an adversary proceeding filed in PREPA's Title III case that raises issues substantially similar to those argued in this current motion practice. The Court will address that motion in a separate decision.

Treaty of Paris, following the Spanish American War of 1898. Treaty of Paris art. 9, Dec. 10, 1898, 30 Stat. 1759. In accordance with the Territories Clause of the Constitution, U.S. Const., art. IV, §3, cl. 2, which provides that Congress "shall have Power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," Congress has provided for military, and then civilian, local governance of Puerto Rico. Pursuant to a constitution developed by the people of Puerto Rico and approved by Congress, Puerto Rico's status has been that of a Commonwealth since 1952, led by a popularly elected Governor and Legislature. *See* Act of July 3, 1952, 66 Stat. 327; P.R. Const., art. I, §§ 1, 2.

In 2016, in response to the longstanding and dire fiscal emergency of the Commonwealth, Congress enacted PROMESA "pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories." 48 U.S.C.A. § 2121(b)(2) (West 2017).

PROMESA established, among other things, federal statutory authority pursuant to which federal territories, including the Commonwealth, may restructure their debts.[4] *See id.* § 2194(n).

PROMESA created the Oversight Board as "an entity within the territorial government" of Puerto

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[4] PROMESA is codified at 48 U.S.C. § 2101 *et seq.* References to "PROMESA" provisions in the remainder of this Opinion are to the uncodified version of the legislation unless otherwise indicated. Puerto Rico and its public instrumentalities are not authorized to seek debt relief under the United States Bankruptcy Code.

Rico. *Id.* § 2121(c)(1).[5] Funding for the Oversight Board is derived entirely from the Commonwealth's resources. *Id.* § 2127. The Oversight Board is tasked with developing "a method [for Puerto Rico] to achieve fiscal responsibility and access to the capital markets." *Id.* § 2121(a). In aid of that purpose, PROMESA empowers the Oversight Board to, among other things, approve the fiscal plans and budgets of the Commonwealth and its instrumentalities, override Commonwealth executive and legislative actions that are inconsistent with approved fiscal plans and budgets, and commence a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities. *Id.* §§ 2141-2152; 2175(a). In a Title III proceeding, the Oversight Board acts as the sole representative of the debtor and may "take any action necessary on behalf of the debtor to prosecute the case of the debtor." *Id.* § 2175(a). The Oversight Board is the only entity empowered to propose a plan of debt adjustment on behalf of the Commonwealth or a debtor instrumentality. *Id.* § 2172(a). In carrying out its duties under PROMESA, the Oversight Board may hold hearings, take testimony, and receive evidence; obtain data from the federal and territorial governments; obtain creditor information; issue subpoenas; enter into contracts; enforce certain laws of the Commonwealth; and seek judicial enforcement of its authority. *Id.* § 2124(a), (c)-(d),(f)-(h), (k). While it is created as an entity within the government of Puerto Rico, it is not subject to supervision or control by the Governor of Puerto Rico (the "Governor") or the

[5] PROMESA further provides that the Oversight Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C.A. § 2121(c)(2) (West 2017).

Legislature of Puerto Rico (the "Legislature"). *Id.* § 2128(a). It is, however, required to submit an annual report to the President of the United States (the "President") and Congress of the United States ("Congress") and the Governor and Legislature. *Id.* § 2148.

The Oversight Board is composed of seven voting members, with the Governor or his designee serving *ex officio* as an additional non-voting member. *Id.* § 2121(e)(1), (3).[6] PROMESA provides that the President "shall appoint" the seven voting members as follows: one "may be selected in the President's sole discretion" and six "*should* be selected" from specific lists of candidates provided by congressional leaders.[7] *Id.* § 2121(e)(2)(A)-(B) (emphasis added). PROMESA does not require Presidential nomination and Senate confirmation for the President's discretionary appointees and members chosen from the congressional lists. *Id.* § 2121(e)(2)(E). However, in the event that the President appoints members that are

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[6] Congress modeled the Oversight Board's structure after an entity created by Congress in 1995 to address a fiscal crisis in the District of Columbia. *See* 162 Cong. Rec. H3604 (daily ed. June 9, 2016) (statement of Rep. Lucas) (stating that, in 1995, Congress "passed a bill very similar to [PROMESA]. We set up a supervisory board that took control of [D.C.'s] finances to help right the ship."); *see also* District of Columbia Financial Responsibility Management and Assistance Act of 1995 ("DCFRMAA"), Pub. L. No. 104-8, 109 Stat. 97 (1995). The Financial Responsibility and Management Assistance Authority ("D.C. Control Board") was established within the District of Columbia government, *see* DCFRMAA, § 101(a), and its members were appointed by the President without Senate confirmation, *id.* § 101(b).

[7] Under PROMESA, the lists may be supplemented upon the President's request. 48 U.S.C.A. § 2121(e)(2)(C).

not named on the congressional lists, Senate confirmation is required under PROMESA.[8] *Id.* On August 31, 2016, President Obama appointed the seven voting members, six members from the congressional lists and one member in his sole discretion. (Docket Entry No. 1929, the "U.S. Mem. of Law," at 6.) Board members are appointed to serve for a term of three years and until the appointment of their successors. 48 U.S.C.A. § 2121(e)(5) (West 2017). As of the date hereof, all of the original appointees continue to serve on the Oversight Board. Thus, to date, no appointment to the Oversight Board has been subject to Senate confirmation. Oversight Board members can be removed only by the President, and only for cause prior to the end of the member's term. *Id.* § 2121(e)(5)(B).

On May 3, 2017, the Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth by filing a petition in this Court under Title III of PROMESA.[9] (*See* Docket Entry No. 1, the "Title III Petition"). Shortly thereafter, the Oversight Board commenced Title III proceedings on behalf of certain Puerto Rican government instrumentalities, including PREPA.

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[8] PROMESA also provides that if any of the seven voting members had not been appointed by September 1, 2016, the President was required to appoint an individual from the list associated with the vacant position by September 15, 2016. 48 U.S.C.A. § 2121(e)(2)(G). Under PROMESA, any vacancies must be filled "in the same manner in which the original member was appointed." *Id.* § 2121(e)(6).

[9] *See id*. §§ 2164, 2172-2174.

II.
DISCUSSION

A. Motion to Dismiss

1. Questions Presented

As noted above, Aurelius moves to dismiss the Commonwealth's Title III Petition on the basis that the Oversight Board's membership was not properly appointed and therefore lacked the power to properly invoke Title III of PROMESA by filing the Title III Petition on behalf of the Commonwealth. Section 304(b) of PROMESA provides that the Court, after notice and a hearing, may dismiss a petition that "does not meet the requirements of Title III of PROMESA.[10] 48 U.S.C.A. § 2164(b) (West 2017). Section 302 enumerates the statutory prerequisites that a debtor must satisfy to avail itself of relief pursuant to Title III of PROMESA.

Id. § 2162. Specifically, it provides that "[a]n entity may be a debtor" under Title III of PROMESA if:

> (1) the entity is—
>
> (A) a territory that has requested the establishment of an Oversight Board or has had an Oversight Board established for it by the United States Congress in accordance with section 2121 of [PROMESA]; or

[10] Section 304(b) of PROMESA provides that a Title III petition may not be dismissed during the first 120 days after the commencement of the case. 48 U.S.C.A. § 2164(b) (West 2017). The 120 day waiting period has expired.

> (B) a covered territorial instrumentality of a territory described in paragraph (1)(A);
>
> (2) The Oversight Board has issued a certification under section 2146(b) of [PROMESA] for such entity; and
>
> (3) the entity desires to effect a plan to adjust its debts.

Id. § 2162. Aurelius argues that the requirements of Title III are not satisfied in this case because the Oversight Board, as currently constituted, is itself an unlawful entity. Aurelius contends that the selection mechanism established under PROMESA for members of the Oversight Board is unconstitutional under the Appointments Clause, such that the existing Oversight Board could not lawfully make the requisite certifications and file the petition commencing the Commonwealth's Title III proceeding.

The Appointments Clause of Article II of the Constitution prescribes the method of appointment for "Officers of the United States" whose appointments are not otherwise provided for in the Constitution. U.S. Const., art. II, § 2, cl. 2; *see Buckley v. Valeo*, 424 U.S. 1, 125-26, 132 (1976). In *Buckley*, the Supreme Court held that the term "Officers of the United States," as used in Article II of the U.S. Constitution, is "intended to have substantive meaning" and must include "any appointee exercising significant authority pursuant to the laws of the United States." 424 U.S. 1, 125-26. The Appointments Clause distinguishes between "principal officers," who must be nominated by President with advice and consent of the Senate, and "inferior officers," who may be appointed by the "President alone, Courts of Law, or Heads of Departments." U.S. Const., art. II, § 2, cl. 2.

Aurelius argues principally that the Appointments Clause procedures were mandatory notwithstanding PROMESA's statutory appointment provisions because the members of the Oversight Board are either (i) principal "Officers of the United States" who could only be validly appointed through presidential nomination and Senate confirmation or, in the alternative, (ii) inferior officers of the United States whose appointment was improperly delegated to the President. (Mot. to Dismiss at 13.) Aurelius requests that the Court dismiss the Title III Petition and terminate this proceeding.

The United States, which has exercised its statutory authority to intervene in these proceedings to defend PROMESA's constitutionality (*see* 28 U.S.C. § 2403(a)), argues that PROMESA's appointment mechanism is not subject to the Appointments Clause because (i) the Oversight Board members are territorial officers rather than' ' Officers of the United States," and (ii) the Appointments Clause does not govern the appointment of such territorial officers. (*See generally* U.S. Mem. of Law.) In support of its position, the United States cites historical practice and argues that Congress's plenary power over the territories is not subject to the distribution of powers provisions that regulate the federal government. (*Id.* at 8-15.) The Oversight Board primarily raises the same argument. (Docket Entry No. 1622, the "FOMB Opposition," at 7-21.) In addition, the Oversight Board contends that (i) the Appointments Clause does not constitute a "fundamental" constitutional provision and, as such, it does not apply to Puerto Rico, and (ii) even if the Appointments Clause is applicable, the Oversight Board members were properly appointed. (*Id.* at 23-31.) The other opponents raise substantially

similar arguments to those advanced by the United States and the Oversight Board. (*See generally*, Docket Entry Nos. 1610, 1629, 1631, 1634, 1638, 1640.) The Oversight Board, the Committee and AAFAF further argue that the Court should hold the Oversight Board's past actions *de facto* valid in the event that the Court finds the Oversight Board's appointment unconstitutional. (FOMB Opp. at 32; Docket Entry No. 1631 at 27; Docket Entry No. 1640 at 31.)

The principal question thus presented for the Court on this motion practice is whether the Constitution required compliance with the Appointments Clause in the appointment of the Oversight Board members. If such compliance was required, the Court must examine whether the process that was undertaken pursuant to PROMESA was sufficient to meet the constitutional requirement and, if the process was not compliant, whether the Petition must be dismissed as noncompliant with PROMESA. The Court turns now to the principal question. Because Puerto Rico is a territory of the United States, rather than a state, or part of the federal government, and because Congress identified the Constitution's Territories Clause as the source of its authority in enacting PROMESA, the Court looks first to the text and historical interpretation and application of the Territories Clause.

2. Congress's Power Under the Territories Clause

The Territories Clause of Article IV of the Constitution vests Congress with the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, § 3, cl. 2. The

Supreme Court has long held that Congress's power under this clause is both "general and plenary." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) (reasoning that the people of the United States became the "sovereign owners" of the territory of Utah upon its acquisition, that the United States as their government exercises power over the territory subject only to the provisions of the Constitution, and that Congress therefore could supersede pre-acquisition legislative acts). Acting under the Territories Clause, Congress may, for example, create local governments for the territories of the United States. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 321-22 (1978) (stating that "a territorial government is entirely the creation of Congress," while noting the unique status of Native American tribes, whose prior sovereignty is preserved in certain respects). The constitutional division between state to the Constitution is not applicable to territories, whose governments are "the creations, exclusively, of [Congress], and subject to its supervision and control." *Benner v. Porter*, 50 U.S. 235, 242 (1850); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323 (1937) (explaining that "[i]n dealing with the territories . . . Congress in legislating 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").

A federal territory's "relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations." *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879). Congress can thus amend the acts of a territorial legislature, abrogate laws of

territorial legislatures, and exercise "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." *Id.* With respect to territorial governance, Congress exercises the governance powers reserved under the Constitution to the people in respect of state matters. *Id.* In this sense, Congress occupies a dual role with respect to the territories of the United States: as the national Congress of the United States, and as the local legislature of the territory. *See Cincinnati Soap Co.*, 301 U.S. at 317 ("A [territory] has no government but that of the United States, except in so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible."); *see also Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442-43 (1923) (recognizing that, in exercising Congress's substantially identical power over the District of Columbia, Congress had power to create courts "of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts"); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (recognizing the power of Congress to create a territorial court with jurisdiction that could not otherwise have been constitutionally granted to a state court); *United States v. McMillan*, 165 U.S. 504, 510-11 (1897) (explaining that territorial courts are not "courts of the United States, and do not come within the purview of acts of Congress which speak of courts of the United States' only," although

Congress exercises the combined powers of the general government, and of a state government with respect to territories and could directly legislate for any territory or "extend the laws of the United States over it, in any particular that congress may think fit.").[11]

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[11] On July 6, 2018, the Court received and reviewed a supplemental informative motion filed by Aurelius. (Docket Entry No. 3451, the "Aurelius Supplement.") The Court subsequently received and reviewed informative motions filed by the Oversight Board, the United States, and the COFINA Seniors in response to the Aurelius Supplement. (Docket Entry Nos. 3494, 3495, 3500.) In its submission, Aurelius cites the Supreme Court's June 22, 2018 decision in *Ortiz v. United States*, 138 S. Ct. 2165 (2018), for the propositions that military and territorial courts are created pursuant to similar powers, and if separation of powers concerns pertain to one they must necessarily pertain to the other. (Docket Entry No. 3451 at 5.) The *Ortiz* Court's focus has no such implications, however. The Court was examining the question of whether the military court rulings before it were within its appellate jurisdiction. It cited past examples of judicial proceedings in state, military and territorial courts from which it had entertained appeals, emphasizing the judicial review, as opposed to executive action or original determination, aspects of the matter that was before it in *Ortiz*. *Ortiz* does not speak to the question of whether Congress can create a territorial court or any other entity that is not a court of the United States and is not subject to the Appointments Clause. The *Ortiz* Court's treatment of the Appointments Clause is similarly inapposite, as the Court held that Congress was empowered to permit the challenged military officer to perform in the job in question and the appellant's Appointments Clause argument (which the Court rejected) concerned whether a single person could be both a principal and an inferior officer of the United States, an issue that is not raised here. *See Ortiz,* 138 S. Ct. at 2183-84. The supplemental informative brief also cites the *Lucia* case, which is similarly inapposite as it involved a distinction between an officer of the United States and an employee. *Lucia v. S E C.*, 138 S. Ct. 2044 (2018).

Due to its unique role with respect to federal territories, Congress may act "in a manner that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it. . . ." *Palmore v. United States*, 411 U.S. 389, 398 (1973) (upholding creation of criminal courts for District of Columbia whose judges are not life-tenured). For example, as discussed in more detail below, the Supreme Court has held that the non-delegation doctrine, which prohibits Congress from delegating its legislative authority to another branch of the Government, does not preclude Congress from delegating its legislative authority to a territorial government. *See, e.g.*, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953) (upholding delegation by Congress of legislative authority to District of Columbia in the context of a challenge to a District law prohibiting racial discrimination); *Cincinnati Soap Co.*, 301 U.S. at 323 (rejecting argument that a revenue measure constituted an unlawful delegation and explaining that the "congressional power of delegation to a [territorial] government is and must be as comprehensive as the needs").

The Supreme Court's jurisprudence regarding territorial courts is instructive with respect to the distinction between territorial and federal entities. In *American Insurance Co.*, the Supreme Court considered a challenge to the admiralty jurisdiction conferred on territorial courts of Florida by a territorial legislature established by congressional legislation. 26 U.S. 511. Chief Justice Marshall, writing for a unanimous Court, drew a distinction between "Constitutional" courts established pursuant to Article III of the Constitution, which, *inter alia*,

commits admiralty jurisdiction to the life-tenured federal judiciary, and courts established pursuant to congressional legislation for the territory of Florida. The judges of the Florida territorial courts established by Congress were appointed only for terms of years. Because Congress had acted under "those general powers which that body possesses over the territories of the United States," the constitutional constraint on admiralty jurisdiction was inapplicable to the "legislative courts" created for the territory and the territorial court, unlike a non-"Constitutional" court situated within a state, could validly rule on admiralty matters. *Id.* at 546. Legislative Courts in territories derive their power from Congress's ability to create courts under the Territories Clause of the U.S. Constitution and are vested with jurisdiction by Congress. *Id.* Their structure and jurisdiction need not comport with those prescribed by the Constitution for courts exercising the "judicial power of the United States" pursuant to Article III. "The jurisdiction with which they are invested, is not a part of that judicial power, which is defined in the [third] article of the Constitution, but is conferred by Congress in the execution of those general powers . . . over the territories of the United States." *Id.* at 546. Chief Justice Marshall explained that:

> Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the [third] article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.

Id.

Subsequent Supreme Court decisions likewise recognized Congress's power to create judicial structures within territories that have characteristics peculiar to those territories and could not necessarily have been established as courts exercising power on behalf of the United States. *See, e.g.*, *Benner*, 50 U.S. at 244-45 (holding that, upon admission of Florida as a state, the prior legislative courts created by Congress "in the exercise of its powers in the organization and government of the Territories" could not exercise jurisdiction of matters invoking the judicial power of the United States under Article III of the Constitution and "[n]o place was left unoccupied for the Territorial organization"); *Clinton v. Englebrecht*, 80 U.S. 434 (1871) (stating that "[t]he judges of the Supreme Court of the Territory [of Utah] are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold 'courts of the United States'"). Just as territorial courts can, if permitted by Congress, exercise powers that Congress could not have granted to similar courts within the states of the United States, the Constitution does not require Congress to incorporate the structural assurances of judicial independence in Article III of the Constitution *(e.g.*, life tenure and protection against reduction in pay) in establishing such courts. The Supreme Court so held in *Palmore*, a decision concerning the Superior Court for the District of Columbia. 411 U.S. 389 (1973). Upholding the Superior Court's exercise of jurisdiction of federal criminal felony proceedings, the Court reasoned that its approach was "consistent" with the "view of [the] Court" concerning territorial courts. *Id.* at 403. Congress can thus create territorial entities that are

distinct in structure, jurisdiction, and powers from the federal government.

Turning to Puerto Rico, Congress has long exercised its Article IV plenary power to structure and define governmental entities for the island. Puerto Rico became a territory of the United States, under the Treaty of Paris, following the Spanish American War of 1898. Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. The Treaty of Paris expressly committed to Congress the task of determining "[t]he civil rights and political status" of the inhabitants of Puerto Rico. *Id.* Shortly thereafter Congress, acting pursuant to its power under the Territories Clause, enacted the Foraker Act and established a civilian government for Puerto Rico. Organic Act of 1900, ch. 191, 31 Stat. 77; *see also Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

In 1917, Congress again addressed the governance of Puerto Rico by enacting the Jones Act. That federal statute granted United States citizenship to the people of Puerto Rico and allowed the residents of Puerto Rico to elect a bicameral legislature by popular vote. *See* Organic Act of Puerto Rico, ch. 145, §§ 5, 26, 39 Stat. 951, 953, 958 (1017). Then, in 1947, Congress further shaped Puerto Rico's government by enacting the Elective Governor Act and allowing the residents of Puerto Rico to elect their own governor. *See* Act of Aug. 5, 1947, ch. 490, §1,61 Stat. 770, 771 (1947). In 1950, Congress passed Public Law 600 and gave the Puerto Rican people the right to form an elected self-government and adopt a constitution. Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319 (1950). Pursuant to Public Law 600, the people of Puerto Rico approved a draft constitution and submitted it to Congress for its approval. *See id.* Congress revised and, on July 3,

1952, approved the Puerto Rico Constitution. *See* Act of July 3, 1952, ch. 567, 66 Stat. 327 (1952). On July 25, 1952, the Governor proclaimed the effectiveness of the Puerto Rico Constitution and a new political entity was born, the Commonwealth of Puerto Rico. P.R. Const., art. I, §§ 1, 2. In creating these governance structures for Puerto Rico, Congress delegated its direct territorial governance authority to institutions it established for Puerto Rico in a manner that would not have been permissible in the context of the exercise of its powers within the federal government.

As the Supreme Court observed in *John R. Thompson Co.*, "[t]he power of Congress to delegate legislative power to a territory is well settled." 346 U.S. at 106. The Court went on to note that:

> [i]t would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter or revoke the authority granted.

Id. at 109. In *Cincinnati Soap Co.*, the Supreme Court held that the non-delegation doctrine did not preclude Congress from delegating its legislative authority to the territorial government of the Philippines. 301 U.S. 308. The Court explained that Congress's plenary power over the territories "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." *Id.* at 323. Similarly, in *United States*

v. Heinszen, the Supreme Court rejected the argument that Congress was unable to delegate its legislative authority, under the Territories Clause, to the President. 206 U.S. 370, 384-85 (1907).

In summary, Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States. It has exercised this power with respect to Puerto Rico over the course of nearly 120 years, including the delegation to the people of Puerto Rico elements of its plenary Article IV authority by authorizing a significant degree of local self-governance. Such territorial delegations and structures may, however, be modified by Congress. *John R. Thompson*, 346 U.S. at 109. Congress purported to do so in creating the Oversight Board as an entity of the territorial government of Puerto Rico. The Court now turns to the question of whether the Oversight Board is a territorial entity and its members officers of the territorial government, or whether its members are officers of the United States who must be appointed pursuant to procedures consistent with the requirements of the Appointments Clause.

3. The Oversight Board

Congress explicitly invoked the Territories Clause, and only the Territories Clause, as its source of authority in enacting PROMESA:

> Constitutional Basis – The Congress enacts [PROMESA] pursuant to article IV, section 3 of the Constitution of the United States,

> which provides Congress the power to dispose of and make all needful rules and regulations for territories.

48 U.S.C.A. § 2121(b)(2) (West 2017). Aurelius argues, nonetheless, that the appointment of Oversight Board members is governed by Article II of the Constitution which, according to Aurelius, requires unfettered nomination by the President and confirmation by the Senate of Oversight Board members as principal officers of the United States. Aurelius urges this proposition on the basis of (i) the federal (as opposed to territorial) authority of the appointing institution, (ii) what Aurelius characterizes as federal control and supervision of the Oversight Board's operations, and (iii) Oversight Board authority that Aurelius contends extends beyond local territorial matters. (Mot. to Dismiss at 18.) The United States, the Oversight Board, and other opponents point to similar factors in arguing that the Oversight Board is territorial and its members lawfully appointed.[12] While neither the parties nor the Court's own research has identified a definitive set of factors relevant to the determination of whether an entity is territorial or federal, many of the factors argued by the parties have been considered in connection with controversies over whether

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[12] The United States argues that the Court should consider the "Oversight Board's creation , statutory objectives, authority, characteristics, and relationship with the Federal Government." (U.S. Mem. of Law at 21.) The Oversight Board argues that the Court should consider whether (i) Congress invoked its Article IV power in creating the entity and (ii) the entity's objectives and authority are local rather than national, or whether its responsibilities over local affairs are subordinate and incidental. (FOMB Opp. at 13.) Other parties-in-interest advance similar or alternative standards.

congressionally created entities are private or governmental.[13]

Having examined the factors argued by the parties, the Court finds that Congress's invocation of the Territories Clause is consistent with the entity it purported to create, that the method of selection that Congress fashioned for the membership of the Oversight Board is consistent with the exercise of plenary congressional power under that Clause, and that neither

Presidential nomination nor Senate confirmation of the appointees to the Oversight Board is necessary as a constitutional matter to legitimize the exercise of the Oversight Board's powers under PROMESA because the members of the Oversight Board are not "Officers of the United States" subject to the Appointments Clause.

a. Authority for Creation of Board

As noted above, Congress explicitly stated that it was acting pursuant to the Territories Clause when it enacted PROMESA, creating the Oversight Board as a new entity within the Government of Puerto Rico. Congress is entitled to substantial deference when it

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[13] In the context of determining whether an entity is a federal instrumentality for constitutional purposes, the Supreme Court has looked at factors similar to those advanced by the parties. Specifically, in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 383-400 (1995), and *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1231-33 (2015), the Supreme Court considered the creation, objectives, and practical operation of an entity in determining whether the nominally private entity should be treated as a federal government instrumentality for purposes of individual rights and separation of powers.

acts pursuant to its plenary Article IV power. *See, e.g.*, *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001) (upholding, "[g]iven the deference owed to Congress [under the Territories Clause]" and in light of other constitutional provisions relating to voting rights, a statute providing that Puerto Rican citizens who moved from mainland States to Puerto Rico could not vote in federal presidential elections); *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) (stating that "[t]o require the government . . . to meet the most exacting standard of review . . . would be inconsistent with Congress's '[l]arge powers' to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States'" and thus applying a rational basis test in evaluating the constitutionality of exclusion of veterans of Philippine armed forces from certain federal benefits) (citations omitted).

Congress's determination that it was acting pursuant to its Article IV territorial powers in creating the Oversight Board as an entity of the government of Puerto Rico is entitled to substantial deference. Indeed, Supreme Court jurisprudence regarding Congress' s governance of the territories consistently looks to Congress's express declaration regarding whether it is acting pursuant to its power under the Territory Clause of Article IV of the Constitution. *See, e.g.*, *Cincinnati Soap Co.*, 301 U.S. at 323; *Binns v. United States*, 194 U.S. 486, 494 (1904). As shown above, those powers are plenary and include the power to create and shape the contours of territorial governments. *Cf. Palmore*, 411 U.S. at 407 (holding that courts in the District of Columbia are local rather than federal because Congress "expressly created" the courts pursuant to its plenary authority and created a

body with authority over matters of "strictly local concern").

This factor thus weighs in favor of the legitimacy of the Oversight Board as currently constituted.

b. Can Congress Create an Entity that Is Not Inherently Federal?

Aurelius argues that a fundamental distinction exists between officials appointed by the federal government and those who take their office by virtue of local, territorial authority. (Mot. to Dismiss at 18.) Specifically, Aurelius contends that individuals appointed to their office by the federal government are federal officers, regardless of whether or not the office has federal or national responsibilities. (*Id.* at 19.) Under the premise advanced by Aurelius, Congress is incapable of both creating and filling a territorial office or entity. Rather, the only officers who may be considered "territorial" are those who are popularly elected by the residents of a federal territory. (*Id.* at 21.)

Aurelius' argument that only Puerto Rico itself could have created an entity that was not effectively part of the federal government is unavailing because it ignores both the plenary nature of congressional power under Article IV and the well-rooted jurisprudence, discussed above, that establishes that any powers of self-governance exercised by territorial governments are exercised by virtue of congressional delegation rather than inherent local sovereignty. Thus, creation of an entity such as the Oversight Board through popular election would not change the Oversight Board's ultimate source of authority from a constitutional perspective. Aurelius' argument is

therefore meritless. Popular elective authority in territories of the United States derives from Congress, which explicitly states in PROMESA that it has exercised its own power to create a territorial entity.

Aurelius relies principally on two decisions and historical practice in support of its argument. (*Id.* at 18-19.) It cites *Wise v. Withers*, in which the Supreme Court concluded that a justice of the peace in the District of Columbia was an "Officer of the United States" for purposes of a statute exempting such officers from military service. 7 U.S. (3 Cranch) 331, 335-37 (1806). The Court did not, however, analyze whether the justice of the peace was an "Officer of United States" for constitutional purposes.[14] Moreover, to the extent *Wise* can be read as establishing that presidential appointment or congressional creation of an office renders the appointee or the institution to which the person is appointed federal, the Supreme Court has deviated from this view in subsequent decisions. *See, e.g.*, *Englebrecht*, 80 U.S. at 447 (presidential appointment of territorial judges does not render their courts "courts of the United States" within the meaning of the Constitution). Aurelius also relies on *United States v.*

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[14] The *Wise* Court appears to have relied on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), as settling the proposition that a justice of the peace for the District of Columbia is an officer of the United States. *Wise*, 7 U.S. (3 Cranch) at 336 (stating that "[i]t has been decided in this court, that a justice of the peace is an officer"). However, the proposition that Marbury was an officer of the United States was not contested in that 1803 case and the *Marbury* Court's decision did not expressly address the significance of the identity of the appointing authority or the significance of the method of appointment for the determination of the officer status of the appointee.

Hartwell, where the Supreme Court considered whether a clerk employed in the federal Treasury Department was an "officer" of the federal government for purposes of federal bank fidelity and embezzlement statutes. 73 U.S. 385, 397 (1867). Although the *Hartwell* Court noted that the defendant had been appointed by "the head of a department within the meaning of the constitutional provision upon the subject of the appointing power," the Court's focus was on the language of the statute and on the general nature of government office, rather than on the Constitutional status of the office held by the defendant. *See id.* at 393-95. No issue was presented as to whether the defendant could have been an officer of any government other than that of the United States.

Turning to historical practice, Aurelius points to territorial offices that were established during the early years of the country's history, including positions with authority over the Northwest Territory. (Mot. to Dismiss at 19.) In the instances Aurelius cites, Congress provided for the government positions and required that the appointees be appointed by the President and confirmed by the Senate. Aurelius argues that these historical examples evidence an "established" practice and general understanding that federally appointed positions are inherently federal offices. (*Id.*) Aurelius further argues that historical practice also indicates that officials who are elected by the people of a territory (or who are appointed by popularly elected representatives) are not officers of the federal government. *(Id.* at 21-22.)

The Oversight Board, and various parties in interest, fundamentally disagree with Aurelius' position and, instead, argue that the source of an

official's appointment is irrelevant in determining whether the office is territorial or federal. (*See, e.g.*, FOMB Opp. at 18.) Noting that "there is no evidence . . . that Congress believed advice and consent was constitutionally required" in the past instances where Congress decided to require that certain territorial offices be filled through advice and consent (*id.* at 11), the Oversight Board contends that Aurelius putative distinction between a federally appointed and a popularly elected official is baseless because a territorial "official's authority *always* derives from Congress." (*Id.* at 19 (emphasis in original) (citing *Sanchez Valle*, 136 S. Ct. at 1875 ("[Behind] the Puerto Rican people and their Constitution, the 'ultimate' source of prosecutorial power remains the U.S. Congress.")).) The Oversight Board argues that "any time Congress exercises its Article IV power to confer authority on a territorial government, it does so by means of a federal statute." (*Id.* at 20); *cf. Barnes v. District of Columbia*, 91 U.S. 540 (1875) (holding that the board of public works for the District of Columbia was a part of the municipal government. Although its members were "nominated by the President" with the "advice and consent of the Senate," the Court held that "it is quite immaterial, on the question whether [the] board is a municipal agency, from what source the power comes to these officers,—whether by appointment of the President, or by the legislative assembly, or by election."); *Metro. R. Co. v. District of Columbia*, 132 U.S. 1, 8 (1889) ("The mode of appointing [] officers does not abrogate [an entity's] character as a municipal body politic. We do not suppose that it is necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people.").

The Court agrees with the Oversight Board that neither the case law nor the historical practice cited by Aurelius compels a finding that federal appointment necessarily renders an appointee a federal officer. Any time Congress exercises its Article IV power it does so by means of a federal statute, and all local governance in Puerto Rico traces back to Congress. *See United States v. Sanchez*, 992 F.2d 1143, 1152 (11th Cir. 1993) (stating that although "Congress has [] delegated more authority to Puerto Rico over local matters . . . this has not changed in any way Puerto Rico's *constitutional* status as a territory, or the source of power over Puerto Rico. Congress continues to be the *ultimate source of power* pursuant to the Territory Clause of the Constitution") (citing *United States v. Lopez Andino*, 831 F.2d 1164, 1176 (1st Cir. 1987) (Torruella, J, concurring)) (emphasis in original). The fact that the Oversight Board's members hold office by virtue of a federally enacted statutory regime and are appointed by the President does not vitiate Congress's express provisions for creation of the Oversight Board as a territorial government entity that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C.A. § 2121(c) (West 2017). The jurisprudence, historical practice, and Congress's express intention establish that Congress can and has created a territorial entity in this case.

c. Control and Supervision of the Oversight Board

Aurelius argues that a defining characteristic of an entity's territorial or federal status is whether the federal government controls the ongoing operations of the entity. (Mot. To Dismiss at 22.) Aurelius argues

that the federal government continues to control and supervise the Oversight Board because of the following:

> (i) The Oversight Board reports to the President and Congress under Section 208 of PROMESA. 48 U.S.C.A. § 2148(a) (West 2017).
>
> (ii) The Oversight Board's ongoing ethics obligations are governed by federal conflicts of interest and financial disclosure statutes. *Id.* § 2129.
>
> (iii) The Oversight Board members may be removed by the President. *Id.* § 2121(e)(5)(B).
>
> (iv) The Commonwealth's Governor may not remove Board members and "[n]either the Governor nor the Legislature may . . . exercise any control, supervision, oversight, or review over the Oversight Board or its activities." *Id.* § 2128(a).
>
> (v) The Oversight Board wields its authority pursuant to the provisions of a federal statute, PROMESA.

(Mot. to Dismiss at 22-23.)

The Oversight Board argues, *inter alia*, that these qualities are not determinative of whether the office is territorial or federal, because federal appointment and removal have historically been common attributes of territorial offices due to Congress's unique role in structuring local governance for federal territories. (FOMB Opp. at 20.) In fact, the United States contends that "the nature of degree of the Federal Government's

supervision of the Oversight Board is consistent with the Oversight's Board territorial character." (U.S. Mem. of Law at 23.) These points are well taken.

Furthermore, Aurelius reads excessive significance into the provisions of PROMESA upon which it relies. Although Section 208 of PROMESA does require the "[Oversight] Board [to make] reports to the President and Congress" (Mot. to Dismiss at 22), such reports must simultaneously go to the Governor and Legislature. 48 U.S.C.A. § 2148 (West 2017). They are no more indicative of supervision by federal authorities than of supervision by the territorial authorities. Indeed, PROMESA's express prohibition of the exercise of control over the Oversight Board by the Governor and Legislature (*see id.* § 2128(a)) suggests that the reporting requirement is not an instrument of control or supervision at all. Notably, the statute provides that the Oversight Board may use the reporting mechanism as an opportunity to provide "recommendations to the President and Congress on changes to [PROMESA] or other Federal laws . . . that would assist [Puerto Rico] in complying with any certified Fiscal Plan." *Id.* § 2148(a)(3). The fact that the President and Congress are included in the list of parties entitled to receive the Oversight Board's annual report does not mean that the Oversight Board is subject to the federal government's control.[15] Nor is

[15] In *Association of American Railroads*, the Supreme Court considered whether Amtrak constituted a federal entity rather than a private one for constitutional purposes. 135 S. Ct. 1225 (2015). Specifically, the Association of American Railroads sued the Department of Transportation and others, claiming that the section of Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") requiring Amtrak to jointly develop standards to evaluate performance of Amtrak's intercity passenger trains was

it unprecedented for Congress to require a territorial officer to report to the federal government. For example, under the Jones Act, the Governor was required to report annually to Congress and the executive branch, despite the fact that the Governor was elected by the people of Puerto Rico. Jones Act § 12.

The fact that members of the Oversight Board may not be removed by the Governor or the Legislature and are, instead, only removable by the President "for cause" is indicative of the autonomy and independence that Congress intended for the Oversight Board rather than of control by the federal government. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (upholding a for cause removal provision in the context of the Federal Trade Commission); *Mistretta v. United States*, 488 U.S. 361, 411 (1989) (Congress "insulated" Sentencing Commission members from Presidential removal except for good cause "precisely to ensure that they would not be subject to coercion."). Some mechanism for removal was obviously necessary as a practical matter. Provision for removal by the territorial Governor or Legislature would have undermined the express statutory preclusion of the exercise of control by those authorities over the Oversight Board. Removal by act of Congress would have raised practical impediments to swift action

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unconstitutional. In determining that Amtrak constituted a federal instrumentality for constitutional purposes, the Court cited the fact that Amtrak was required to submit various annual reports to Congress and the President, among many other factors. *Id.* at 1232. The Court also considered Amtrak's creation, objectives, and practical operation. Although the Oversight Board in this case provides annual reports to the President and Congress, that factor is not alone dispositive.

when necessary. Delegating removal authority to the President, the most powerful executive officer in the nation, and limiting such removal to circumstances where there is cause, appears to ensure that the power will not be used lightly and is thus consistent with the intended independence of the Oversight Board. The Court finds no basis for interpretation of the removal provision as an indicator of federal control that would render the board members officers of the United States rather than territorial officials.

Aurelius is correct in asserting that the Oversight Board exercises authority that was "conferred by a federal statute" and that the nature of its work often requires the Oversight Board to turn to the requirements specified in a federal statute. That is not, however, remarkable, since the Oversight Board was created as an instrumentality of a territory that is under the sovereign control of the federal government. Congress is capable of operating only through the enactment of legislation. As detailed above, Congress has established the structure of Puerto Rico's local governance on numerous instances and, in each instance, it has done so through the enactment of legislation. Territorial governments are "the creations, exclusively, of the legislative department" and the local governance within a federal territory is necessarily derived from Congress. *Benner*, 50 U.S. at 242. For example, the Commonwealth's own constitution was subject to congressional approval prior to becoming effective. The facts that the Oversight Board's authority was conferred upon it by a federal statute and that the statute delineates its duties do not of themselves render the Oversight Board a federal entity.

d. Oversight Board's Statutory Objectives and Scope of Authority

The parties generally agree that the Court should examine the objectives and authority of the Oversight Board to determine whether they are targeted towards purely local matters. (*See, e.g.*, Mot. to Dismiss at 18; FOMB Opp. at 14.) The plain language of the statute indicates that the Oversight Board's objectives and authority are centered on Puerto Rico. PROMESA is specifically directed towards federal territories and the purpose of the Oversight Board is confined to an express territorial objective: "providing] a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." 48 U.S.C.A. § 2121(a) (West 2017). Pursuant to PROMESA, the Oversight Board is required to maintain an office in Puerto Rico. *Id.* § 2122. The Oversight Board's primary responsibilities are solely concentrated on Puerto Rico's economic recovery. *See, e.g.*, *id.* §§ 2141 (approval of fiscal plans), 2164 (commencement of restructuring court proceedings). The Oversight Board does not receive funding from the federal government and is instead funded entirely by Puerto Rico.[16] *Id.* § 2127. The Oversight Board acts as Puerto Rico's representative in invoking the debt adjustment authority of the federal government, just as a private debtor, trustee, or debtor in possession would do in settling an estate or pursuing a reorganization under the federal Bankruptcy Code. Puerto Rican law, as opposed to federal law, prescribes the Oversight Board's investigative authority. *Id.* § 2124(f). PROMESA's

[16] *Compare Ass'n of Am, R.Rs.*, 135 S. Ct. at 1232 (considering the fact that an entity was dependent on federal financial support in considering whether such entity was "federal").

express declaration that the Oversight Board is not a federal agency exempts the Board from numerous federal laws that apply to federal agencies *(e.g.*, the Freedom of Information Act ("FOIA") and the Administrative Procedure Act (the "APA")). *See* 5 U.S.C.A. §§ 55 l(l)(c), 552(f) (2017) (FOIA applies to "each authority of the Government of the United States," but not "the governments of the territories"); 5 U.S.C.A. § 701(b)(1)(c) (2017) (regarding the APA and providing the same exclusion). While it is true that Congress has chosen to apply federal ethics rules and requirements to the Oversight Board, the invocation of that body of law does not change the substantive focus or nature of the exercise of authority of the Oversight Board to purposes extraneous to Puerto Rico's economic health and future prospects, nor does it expand PROMESA's reach beyond the affairs of covered territories. The Oversight Board's statutory objectives and scope of authority thus mark its character as territorial rather than federal.

e. Selection Mechanism

Given that the Oversight Board is a territorial entity and its members are territorial officers, Congress had broad discretion to determine the manner of selection for members of the Oversight Board. Congress exercised that discretion in empowering the President with the ability to both appoint and remove members from the Oversight Board. The President's role in the selection process does not change the fundamental nature of the Oversight Board, which is a territorial entity. Nor does the manner of selection constitute an improper

delegation of power[17] or encroachment on the President's general appointment authority, because Congress used its Article IV powers and did not attempt to allow the President to appoint the Board as a federal entity within the Executive Branch. *Cf. Brewery, D.C. Fin, Responsibility & Mgmt. Assistance Auth.*, 953 F. Supp. 406, 410 (D.D.C. 1997) (rejecting a separation-of-powers challenge involving the D.C. Control Board because "[t]he Executive Branch has no constitutional role with respect to the District that corresponds or competes with that of Congress"). Although historical practice, as detailed above,

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[17] Aurelius cites *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) ("*MWAA*"), in support of the proposition that Congress's Property Clause authority is subject to separation of powers. In that case, an Act of Congress authorized the transfer of operating control of two airports from the Department of Transportation to the Metropolitan Washington Airports Authority (the "Authority"). The Authority was created pursuant to a compact between the state of Virginia and the District of Columbia. The Act of Congress also authorized the creation of a board of review (the "Review Board"), consisting solely of congressional members and vested with the authority to veto decisions made by the Authority's board of directors. The Supreme Court held that the Review Board was unconstitutional on separation of powers grounds, notwithstanding the fact that Congress was acting pursuant to the Property Clause. *MWAA*, 501 U.S. at 270-71. Specifically, through the Review Board, Congress either encroached on the Executive Branch by exercising executive power or failed to satisfy the bicameralism and presentment requirements by exercising legislative power. *Id.* at 276. Importantly, the Court's holding was premised on a finding that the Review Board was a federal entity wielding federal power. In this case, the Oversight Board does not include members of Congress and, as explained above, the Oversight Board is an entity within the territorial government of Puerto Rico that exercises power delegated to it by Congress.

indicates that Congress has required Senate confirmation for certain territorial offices, nothing in the Constitution precludes the use of that mechanism for positions created under Article IV, and its use does not establish that Congress was obligated to invoke it.

f. Conclusion—Motion to Dismiss the Petition

Affording substantial deference to Congress and for the foregoing reasons, the Court finds that the Oversight Board is an instrumentality of the territory of Puerto Rico, established pursuant to Congress's plenary powers under Article IV of the Constitution, that its members are not "Officers of the United States" who must be appointed pursuant to the mechanism established for such officers by Article II of the Constitution, and that there is accordingly no constitutional defect in the method of appointment provided by Congress for members of the Oversight Board. Since the alleged defect in the appointment method is the only ground upon which Aurelius argues that the Commonwealth's Title III Petition fails to comport with the requirements of PROMESA, Aurelius' motion to dismiss the Petition is denied. In light of the foregoing determinations, it is unnecessary to address the parties' remaining arguments.

B. Motion to Lift the Automatic Stay

In connection with its Motion to Dismiss, Aurelius filed a Lift Stay Motion seeking either (i) clarification that the automatic stay under 11 U.S.C. §§ 362 and 922 (made applicable to Title III proceedings generally by 48 U.S.C. § 2162(a)) does not apply to its effort to invalidate the actions of the current Oversight Board, or, in the alternative, (ii) relief from the stay so that

Aurelius may pursue an independent action for declaratory and injunctive relief outside the Title III case against the Oversight Board based on the same arguments that Aurelius has advanced in support of its Motion to Dismiss. At the Hearing, counsel for Aurelius stated that Aurelius filed the Lift Stay Motion as a precaution to ensure that it could obtain full scope injunctive relief if it were to prevail on its Appointments Clause challenge. (Tr. P. 36, 16-24.) For the reasons detailed above, Aurelius has failed to demonstrate any prospect of entitlement to injunctive relief. Accordingly, there is no cause for relief from the automatic stay to pursue an injunction and the Lift Stay Motion is denied in its entirety.

III.
CONCLUSION

For the foregoing reasons, the *Objection and Motion of Aurelius to Dismiss Title III Petition* (Docket Entry No. 913) is denied, and the *Motion of Aurelius for Relief from the Automatic Stay* (Docket Entry No. 914) is denied as well. This Opinion and Order resolves docket entry nos. 913 and 914.

SO ORDERED.

Dated: July 13, 2018

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1671, 18-1746, 18-1787

AURELIUS INVESTMENT, LLC, ET AL.,

Appellants,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Appellees.

ASSURED GUARANTY CORPORATION, ET AL.,
Appellants,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD, ET AL.
Appellees.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA
ELÉCTRICA Y RIEGO (UTIER)
Appellant,

v.

PUERTO RICO ELECTRIC POWER AUTHORITY,
ET AL.,
Appellees.

Before: Howard, *Chief Judge*, Torruella, Lynch, Thompson, Kayatta and Barron*, *Circuit Judges*.

ORDER OF COURT

Entered: March 7, 2019

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

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* Judge Barron is recused and did not participate in the consideration of this matter.

APPENDIX D

48 U.S.C. § 2104

DEFINITIONS.

In this Act—

(1) AGREED ACCOUNTING STANDARDS.—The term "agreed accounting standards" means modified accrual accounting standards or, for any period during which the Oversight Board determines in its sole discretion that a territorial government is not reasonably capable of comprehensive reporting that complies with modified accrual accounting standards, such other accounting standards as proposed by the Oversight Board.

(2) BOND.—The term "Bond" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law, in any case, related to such a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness in physical or dematerialized form of which the issuer, obligor, or guarantor is the territorial government.

(3) BOND CLAIM.—The term "Bond Claim" means, as it relates to a Bond—

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(4) BUDGET.—The term "Budget" means the Territory Budget or an Instrumentality Budget, as applicable.

(5) PUERTO RICO.—The term "Puerto Rico" means the Commonwealth of Puerto Rico.

(6) COMPLIANT BUDGET.—The term "compliant budget" means a budget that is prepared in accordance with—

(A) agreed accounting standards; and

(B) the applicable Fiscal Plan.

(7) COVERED TERRITORIAL INSTRUMENTALITY.—The term "covered territorial instrumentality" means a territorial instrumentality designated by the Oversight Board pursuant to section 101 to be subject to the requirements of this Act.

(8) COVERED TERRITORY.—The term "covered territory" means a territory for which an Oversight Board has been established under section 101.

(9) EXECUTIVE DIRECTOR.—The term "Executive Director" means an Executive Director appointed under section 103(a).

(10) FISCAL PLAN.—The term "Fiscal Plan" means a Territory Fiscal Plan or an Instrumentality Fiscal Plan, as applicable.

(11) GOVERNMENT OF PUERTO RICO.—The

term "Government of Puerto Rico" means the Commonwealth of Puerto Rico, including all its territorial instrumentalities.

(12) GOVERNOR.—The term "Governor" means the chief executive of a covered territory.

(13) INSTRUMENTALITY BUDGET.—The term "Instrumentality Budget" means a budget for a covered territorial instrumentality, designated by the Oversight Board in accordance with section 101, submitted, approved, and certified in accordance with section 202.

(14) INSTRUMENTALITY FISCAL PLAN.—The term "Instrumentality Fiscal Plan" means a fiscal plan for a covered territorial instrumentality, designated by the Oversight Board in accordance with section 101, submitted, approved, and certified in accordance with section 201.

(15) LEGISLATURE.—The term "Legislature" means the legislative body responsible for enacting the laws of a covered territory.

(16) MODIFIED ACCRUAL ACCOUNTING STANDARDS.—The term "modified accrual accounting standards" means recognizing revenues as they become available and measurable and recognizing expenditures when liabilities are incurred, in each case as defined by the Governmental Accounting Standards Board, in accordance with generally accepted accounting principles.

(17) OVERSIGHT BOARD.—The term "Oversight Board" means a Financial Oversight and Management Board established in accordance with section 101.

(18) TERRITORIAL GOVERNMENT.—The term "territorial government" means the government of a covered territory, including all covered territorial instrumentalities.

(19) TERRITORIAL INSTRUMENTALITY.—

(A) IN GENERAL.—The term "territorial instrumentality" means any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory, and this term should be broadly construed to effectuate the purposes of this Act.

(B) EXCLUSION.—The term "territorial instrumentality" does not include an Oversight Board.

(20) TERRITORY.—The term "territory" means—

(A) Puerto Rico;

(B) Guam;

(C) American Samoa;

(D) the Commonwealth of the Northern Mariana Islands; or

(E) the United States Virgin Islands.

(21) TERRITORY BUDGET.—The term "Territory Budget" means a budget for a territorial government submitted, approved, and certified in accordance with section 202.

(22) TERRITORY FISCAL PLAN.—The term "Territory Fiscal Plan" means a fiscal plan for a territorial government submitted, approved, and certified in accordance with section 201.

48 U.S.C. § 2121

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD.

(a) PURPOSE.—The purpose of the Oversight Board is to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.

(b) ESTABLISHMENT.—

(1) PUERTO RICO.—A Financial Oversight and Management Board is hereby established for Puerto Rico.

(2) CONSTITUTIONAL BASIS.—The Congress enacts this Act pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.

(c) TREATMENT.—An Oversight Board established under this section—

(1) shall be created as an entity within the territorial government for which it is established in accordance with this title; and

(2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.

(d) OVERSIGHT OF TERRITORIAL INSTRUMENTALITIES.—

(1) DESIGNATION.—

(A) IN GENERAL.—An Oversight Board, in its sole discretion at such time as the Oversight Board determines to be appropriate, may

designate any territorial instrumentality as a covered territorial instrumentality that is subject to the requirements of this Act.

(B) BUDGETS AND REPORTS.—The Oversight Board may require, in its sole discretion, the Governor to submit to the Oversight Board such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the Oversight Board determines to be necessary and may designate any covered territorial instrumentality to be included in the Territory Budget; except that the Oversight Board may not designate a covered territorial instrumentality to be included in the Territory Budget if applicable territory law does not require legislative approval of such covered territorial instrumentality's budget.

(C) SEPARATE INSTRUMENTALITY BUDGETS AND REPORTS.—The Oversight Board in its sole discretion may or, if it requires a budget from a covered territorial instrumentality whose budget does not require legislative approval under applicable territory law, shall designate a covered territorial instrumentality to be the subject of an Instrumentality Budget separate from the applicable Territory Budget and require that the Governor develop such an Instrumentality Budget.

(D) INCLUSION IN TERRITORY FISCAL PLAN.—The Oversight Board may require, in its sole discretion, the Governor to include a covered territorial instrumentality in the applicable Territory Fiscal Plan. Any covered territorial instrumentality submitting a separate

Instrumentality Fiscal Plan must also submit a separate Instrumentality Budget.

(E) SEPARATE INSTRUMENTALITY FISCAL PLANS.—The Oversight Board may designate, in its sole discretion, a covered territorial instrumentality to be the subject of an Instrumentality Fiscal Plan separate from the applicable Territory Fiscal Plan and require that the Governor develop such an Instrumentality Fiscal Plan. Any covered territorial instrumentality submitting a separate Instrumentality Fiscal Plan shall also submit a separate Instrumentality Budget.

(2) EXCLUSION.—

(A) IN GENERAL.—An Oversight Board, in its sole discretion, at such time as the Oversight Board determines to be appropriate, may exclude any territorial instrumentality from the requirements of this Act.

(B) TREATMENT.—A territorial instrumentality excluded pursuant to this paragraph shall not be considered to be a covered territorial instrumentality.

(e) MEMBERSHIP.—

(1) IN GENERAL.—

(A) The Oversight Board shall consist of seven members appointed by the President who meet the qualifications described in subsection (f) and section 109(a).

(B) The Board shall be comprised of one Category A member, one Category B member, two Category C members, one Category D

member, one Category E member, and one Category F member.

(2) APPOINTED MEMBERS.—

(A) The President shall appoint the individual members of the Oversight Board, of which—

(i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives;

(ii) the Category B member should be selected from a separate, non-overlapping list of individuals submitted by the Speaker of the House of Representatives;

(iii) the Category C members should be selected from a list submitted by the Majority Leader of the Senate;

(iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives;

(v) the Category E member should be selected from a list submitted by the Minority Leader of the Senate; and

(vi) the Category F member may be selected in the President's sole discretion.

(B) After the President's selection of the Category F Board member, for purposes of subparagraph (A) and within a timely manner—

(i) the Speaker of the House of Representatives shall submit two non-

overlapping lists of at least three individuals to the President; one list shall include three individuals who maintain a primary residence in the territory or have a primary place of business in the territory;

(ii) the Senate Majority Leader shall submit a list of at least four individuals to the President;

(iii) the Minority Leader of the House of Representatives shall submit a list of at least three individuals to the President; and

(iv) the Minority Leader of the Senate shall submit a list of at least three individuals to the President.

(C) If the President does not select any of the names submitted under subparagraphs (A) and (B), then whoever submitted such list may supplement the lists provided in this subsection with additional names.

(D) The Category A member shall maintain a primary residence in the territory or have a primary place of business in the territory.

(E) With respect to the appointment of a Board member in Category A, B, C, D, or E, such an appointment shall be by and with the advice and consent of the Senate, unless the President appoints an individual from a list, as provided in this subsection, in which case no Senate confirmation is required.

(F) In the event of a vacancy of a Category A, B, C, D, or E Board seat, the corresponding congressional leader referenced in subpara-

graph (A) shall submit a list pursuant to this subsection within a timely manner of the Board member's resignation or removal becoming effective.

(G) With respect to an Oversight Board for Puerto Rico, in the event any of the 7 members have not been appointed by September 1, 2016, then the President shall appoint an individual from the list for the current vacant category by September 15, 2016, provided that such list includes at least 2 individuals per vacancy who meet the requirements set forth in subsection (f) and section 109, and are willing to serve.

(3) EX OFFICIO MEMBER.—The Governor, or the Governor's designee, shall be an ex officio member of the Oversight Board without voting rights.

(4) CHAIR.—The voting members of the Oversight Board shall designate one of the voting members of the Oversight Board as the Chair of the Oversight Board (referred to hereafter in this Act as the "Chair") within 30 days of the full appointment of the Oversight Board.

(5) TERM OF SERVICE.—

(A) IN GENERAL.—Each appointed member of the Oversight Board shall be appointed for a term of 3 years.

(B) REMOVAL.—The President may remove any member of the Oversight Board only for cause.

(C) CONTINUATION OF SERVICE UNTIL SUCCESSOR APPOINTED.—Upon the expi-

ration of a term of office, a member of the Oversight Board may continue to serve until a successor has been appointed.

(D) REAPPOINTMENT.—An individual may serve consecutive terms as an appointed member, provided that such reappointment occurs in compliance with paragraph (6).

(6) VACANCIES.—A vacancy on the Oversight Board shall be filled in the same manner in which the original member was appointed.

(f) ELIGIBILITY FOR APPOINTMENTS.—An individual is eligible for appointment as a member of the Oversight Board only if the individual—

(1) has knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and

(2) prior to appointment, an individual is not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.

(g) NO COMPENSATION FOR SERVICE.—Members of the Oversight Board shall serve without pay, but may receive reimbursement from the Oversight Board for any reasonable and necessary expenses incurred by reason of service on the Oversight Board.

(h) ADOPTION OF BYLAWS FOR CONDUCTING BUSINESS OF OVERSIGHT BOARD.—

(1) IN GENERAL.—As soon as practicable after the appointment of all members and appoint-

ment of the Chair, the Oversight Board shall adopt bylaws, rules, and procedures governing its activities under this Act, including procedures for hiring experts and consultants. Such bylaws, rules, and procedures shall be public documents, and shall be submitted by the Oversight Board upon adoption to the Governor, the Legislature, the President, and Congress. The Oversight Board may hire professionals as it determines to be necessary to carry out this Act.

(2) ACTIVITIES REQUIRING APPROVAL OF MAJORITY OF MEMBERS.—Under the bylaws adopted pursuant to paragraph (1), the Oversight Board may conduct its operations under such procedures as it considers appropriate, except that an affirmative vote of a majority of the members of the Oversight Board's full appointed membership shall be required in order for the Oversight Board to approve a Fiscal Plan under section 201, to approve a Budget under section 202, to cause a legislative act not to be enforced under section 204, or to approve or disapprove an infrastructure project as a Critical Project under section 503.

(3) ADOPTION OF RULES AND REGULATIONS OF TERRITORIAL GOVERNMENT.—The Oversight Board may incorporate in its bylaws, rules, and procedures under this subsection such rules and regulations of the territorial government as it considers appropriate to enable it to carry out its activities under this Act with the greatest degree of independence practicable.

(4) EXECUTIVE SESSION.—Upon a majority vote of the Oversight Board's full voting membership, the Oversight Board may conduct its busi-

ness in an executive session that consists solely of the Oversight Board's voting members and any professionals the Oversight Board determines necessary and is closed to the public, but only for the business items set forth as part of the vote to convene an executive session.

48 U.S.C. § 2122

LOCATION OF OVERSIGHT BOARD.

The Oversight Board shall have an office in the covered territory and additional offices as it deems necessary. At any time, any department or agency of the United States may provide the Oversight Board use of Federal facilities and equipment on a reimbursable or non-reimbursable basis and subject to such terms and conditions as the head of that department or agency may establish.

48 U.S.C. § 2123

EXECUTIVE DIRECTOR AND STAFF OF OVERSIGHT BOARD.

(a) EXECUTIVE DIRECTOR.—The Oversight Board shall have an Executive Director who shall be appointed by the Chair with the consent of the Oversight Board. The Executive Director shall be paid at a rate determined by the Oversight Board.

(b) STAFF.—With the approval of the Chair, the Executive Director may appoint and fix the pay of additional personnel as the Executive Director considers appropriate, except that no individual appointed by the Executive Director may be paid at a rate greater than the rate of pay for the Executive Director unless the Oversight Board provides for otherwise. The staff shall include a Revitalization Coordi-

nator appointed pursuant to Title V of this Act. Any such personnel may include private citizens, employees of the Federal Government, or employees of the territorial government, provided, however, that the Executive Director may not fix the pay of employees of the Federal Government or the territorial government.

(c) INAPPLICABILITY OF CERTAIN EMPLOYMENT AND PROCUREMENT LAWS.—The Executive Director and staff of the Oversight Board may be appointed and paid without regard to any provision of the laws of the covered territory or the Federal Government governing appointments and salaries. Any provision of the laws of the covered territory governing procurement shall not apply to the Oversight Board.

(d) STAFF OF FEDERAL AGENCIES.—Upon request of the Chair, the head of any Federal department or agency may detail, on a reimbursable or nonreimbursable basis, and in accordance with the Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371–3375), any of the personnel of that department or agency to the Oversight Board to assist it in carrying out its duties under this Act.

(e) STAFF OF TERRITORIAL GOVERNMENT.—Upon request of the Chair, the head of any department or agency of the covered territory may detail, on a reimbursable or nonreimbursable basis, any of the personnel of that department or agency to the Oversight Board to assist it in carrying out its duties under this Act.

48 U.S.C. § 2124

POWERS OF OVERSIGHT BOARD.

(a) HEARINGS AND SESSIONS.—The Oversight Board may, for the purpose of carrying out this Act, hold hearings, sit and act at times and places, take testimony, and receive evidence as the Oversight Board considers appropriate. The Oversight Board may administer oaths or affirmations to witnesses appearing before it.

(b) POWERS OF MEMBERS AND AGENTS.—Any member or agent of the Oversight Board may, if authorized by the Oversight Board, take any action that the Oversight Board is authorized to take by this section.

(c) OBTAINING OFFICIAL DATA.—

(1) FROM FEDERAL GOVERNMENT.—Notwithstanding sections 552 (commonly known as the Freedom of Information Act), 552a (commonly known as the Privacy Act of 1974), and 552b (commonly known as the Government in the Sunshine Act) of title 5, United States Code, the Oversight Board may secure directly from any department or agency of the United States information necessary to enable it to carry out this Act, with the approval of the head of that department or agency.

(2) FROM TERRITORIAL GOVERNMENT.—Notwithstanding any other provision of law, the Oversight Board shall have the right to secure copies, whether written or electronic, of such records, documents, information, data, or metadata from the territorial government necessary to enable the Oversight Board to carry out its responsi-

bilities under this Act. At the request of the Oversight Board, the Oversight Board shall be granted direct access to such information systems, records, documents, information, or data as will enable the Oversight Board to carry out its responsibilities under this Act. The head of the entity of the territorial government responsible shall provide the Oversight Board with such information and assistance (including granting the Oversight Board direct access to automated or other information systems) as the Oversight Board requires under this paragraph.

(d) OBTAINING CREDITOR INFORMATION.—

(1) Upon request of the Oversight Board, each creditor or organized group of creditors of a covered territory or covered territorial instrumentality seeking to participate in voluntary negotiations shall provide to the Oversight Board, and the Oversight Board shall make publicly available to any other participant, a statement setting forth—

(A) the name and address of the creditor or of each member of an organized group of creditors; and

(B) the nature and aggregate amount of claims or other economic interests held in relation to the issuer as of the later of—

(i) the date the creditor acquired the claims or other economic interests or, in the case of an organized group of creditors, the date the group was formed; or

(ii) the date the Oversight Board was formed.

(2) For purposes of this subsection, an organized group shall mean multiple creditors that are—

(A) acting in concert to advance their common interests, including, but not limited to, retaining legal counsel to represent such multiple entities; and

(B) not composed entirely of affiliates or insiders of one another.

(3) The Oversight Board may request supplemental statements to be filed by each creditor or organized group of creditors quarterly, or if any fact in the most recently filed statement has changed materially.

(e) GIFTS, BEQUESTS, AND DEVISES.—The Oversight Board may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Oversight Board. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in such account as the Oversight Board may establish and shall be available for disbursement upon order of the Chair, consistent with the Oversight Board's bylaws, or rules and procedures. All gifts, bequests or devises and the identities of the donors shall be publicly disclosed by the Oversight Board within 30 days of receipt.

(f) SUBPOENA POWER.—

(1) IN GENERAL.—The Oversight Board may issue subpoenas requiring the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers,

documents, electronic files, metadata, tapes, and materials of any nature relating to any matter under investigation by the Oversight Board. Jurisdiction to compel the attendance of witnesses and the production of such materials shall be governed by the statute setting forth the scope of personal jurisdiction exercised by the covered territory, or in the case of Puerto Rico, 32 L.P.R.A. App. III. R. 4. 7., as amended.

(2) FAILURE TO OBEY A SUBPOENA.—If a person refuses to obey a subpoena issued under paragraph (1), the Oversight Board may apply to the court of first instance of the covered territory. Any failure to obey the order of the court may be punished by the court in accordance with civil contempt laws of the covered territory.

(3) SERVICE OF SUBPOENAS.—The subpoena of the Oversight Board shall be served in the manner provided by the rules of procedure for the courts of the covered territory, or in the case of Puerto Rico, the Rules of Civil Procedure of Puerto Rico, for subpoenas issued by the court of first instance of the covered territory.

(g) AUTHORITY TO ENTER INTO CONTRACTS.—The Executive Director may enter into such contracts as the Executive Director considers appropriate (subject to the approval of the Chair) consistent with the Oversight Board's bylaws, rules, and regulations to carry out the Oversight Board's responsibilities under this Act.

(h) AUTHORITY TO ENFORCE CERTAIN LAWS OF THE COVERED TERRITORY.—The Oversight Board shall ensure the purposes of this Act are met, including by ensuring the prompt enforcement of any

applicable laws of the covered territory prohibiting public sector employees from participating in a strike or lockout. In the application of this subsection, with respect to Puerto Rico, the term "applicable laws" refers to 3 L.P.R.A. 1451q and 3 L.P.R.A. 1451r, as amended.

(i) VOLUNTARY AGREEMENT CERTIFICATION.—

(1) IN GENERAL.—The Oversight Board shall issue a certification to a covered territory or covered territorial instrumentality if the Oversight Board determines, in its sole discretion, that such covered territory or covered territorial instrumentality, as applicable, has successfully reached a voluntary agreement with holders of its Bond Claims to restructure such Bond Claims—

(A) except as provided in subparagraph (C), if an applicable Fiscal Plan has been certified, in a manner that provides for a sustainable level of debt for such covered territory or covered territorial instrumentality, as applicable, and is in conformance with the applicable certified Fiscal Plan;

(B) except as provided in subparagraph (C), if an applicable Fiscal Plan has not yet been certified, in a manner that provides, in the Oversight Board's sole discretion, for a sustainable level of debt for such covered territory or covered territorial instrumentality; or

(C) notwithstanding subparagraphs (A) and (B), if an applicable Fiscal Plan has not yet been certified and the voluntary agreement is limited solely to an extension of applicable

principal maturities and interest on Bonds issued by such covered territory or covered territorial instrumentality, as applicable, for a period of up to one year during which time no interest will be paid on the Bond Claims affected by the voluntary agreement.

(2) EFFECTIVENESS.—The effectiveness of any voluntary agreement referred to in paragraph (1) shall be conditioned on—

(A) the Oversight Board delivering the certification described in paragraph (1); and

(B) the agreement of a majority in amount of the Bond Claims of a covered territory or a covered territorial instrumentality that are to be affected by such agreement, provided, however, that such agreement is solely for purposes of serving as a Qualifying Modification pursuant to subsection 601(g) of this Act and shall not alter existing legal rights of holders of Bond Claims against such covered territory or covered territorial instrumentality that have not assented to such agreement until an order approving the Qualifying Modification has been entered pursuant to section 601(m)(1)(D) of this Act.

(3) PREEXISTING VOLUNTARY AGREEMENTS.—Any voluntary agreement that the territorial government or any territorial instrumentality has executed before May 18, 2016, with holders of a majority in amount of Bond Claims that are to be affected by such agreement to restructure such Bond Claims shall be deemed to be in conformance with the requirements of this subsection.

(j) RESTRUCTURING FILINGS.—

(1) IN GENERAL.—Subject to paragraph (3), before taking an action described in paragraph (2) on behalf of a debtor or potential debtor in a case under title III, the Oversight Board must certify the action.

(2) ACTIONS DESCRIBED.—The actions referred to in paragraph (1) are—

(A) the filing of a petition; or

(B) the submission or modification of a plan of adjustment.

(3) CONDITION FOR PLANS OF ADJUSTMENT.—The Oversight Board may certify a plan of adjustment only if it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan.

(k) CIVIL ACTIONS TO ENFORCE POWERS.—The Oversight Board may seek judicial enforcement of its authority to carry out its responsibilities under this Act.

(l) PENALTIES.—

(1) ACTS PROHIBITED.—Any officer or employee of the territorial government who prepares, presents, or certifies any information or report for the Oversight Board or any of its agents that is intentionally false or misleading, or, upon learning that any such information is false or misleading, fails to immediately advise the Oversight Board or its agents thereof in writing, shall be subject to prosecution and penalties under any laws of the territory prohibiting the provision of false information to government officials, which in the case

of Puerto Rico shall include 33 L.P.R.A. 4889, as amended.

(2) ADMINISTRATIVE DISCIPLINE.—In addition to any other applicable penalty, any officer or employee of the territorial government who knowingly and willfully violates paragraph (1) or takes any such action in violation of any valid order of the Oversight Board or fails or refuses to take any action required by any such order, shall be subject to appropriate administrative discipline, including (when appropriate) suspension from duty without pay or removal from office, by order of the Governor.

(3) REPORT BY GOVERNOR ON DISCIPLINARY ACTIONS TAKEN.—In the case of a violation of paragraph (2) by an officer or employee of the territorial government, the Governor shall immediately report to the Oversight Board all pertinent facts together with a statement of the action taken thereon.

(m) ELECTRONIC REPORTING.—The Oversight Board may, in consultation with the Governor, ensure the prompt and efficient payment and administration of taxes through the adoption of electronic reporting, payment and auditing technologies.

(n) ADMINISTRATIVE SUPPORT SERVICES.—Upon the request of the Oversight Board, the Administrator of General Services or other appropriate Federal agencies shall promptly provide to the Oversight Board, on a reimbursable or non-reimbursable basis, the administrative support services necessary for the Oversight Board to carry out its responsibilities under this Act.

(o) INVESTIGATION OF DISCLOSURE AND SELLING PRACTICES.—The Oversight Board may investigate the disclosure and selling practices in connection with the purchase of bonds issued by a covered territory for or on behalf of any retail investors including any underrepresentation of risk for such investors and any relationships or conflicts of interest maintained by such broker, dealer, or investment adviser is as provided in applicable laws and regulations.

(p) FINDINGS OF ANY INVESTIGATION.—The Oversight Board shall make public the findings of any investigation referenced in subsection (o).

48 U.S.C. § 2127

BUDGET AND FUNDING FOR OPERATION OF OVERSIGHT BOARD.

(a) SUBMISSION OF BUDGET.—The Oversight Board shall submit a budget for each fiscal year during which the Oversight Board is in operation, to the President, the House of Representatives Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature.

(b) FUNDING.—The Oversight Board shall use its powers with respect to the Territory Budget of the covered territory to ensure that sufficient funds are available to cover all expenses of the Oversight Board.

(1) PERMANENT FUNDING.—Within 30 days after the date of enactment of this Act, the territorial government shall designate a dedicated funding source, not subject to subsequent legislative appropriations, sufficient to support the annual

expenses of the Oversight Board as determined in the Oversight Board's sole and exclusive discretion.

(2)(A) INITIAL FUNDING.—On the date of establishment of an Oversight Board in accordance with section 101(b) and on the 5th day of each month thereafter, the Governor of the covered territory shall transfer or cause to be transferred the greater of $2,000,000 or such amount as shall be determined by the Oversight Board pursuant to subsection (a) to a new account established by the territorial government, which shall be available to and subject to the exclusive control of the Oversight Board, without any legislative appropriations of the territorial government.

(B) TERMINATION.—The initial funding requirements under subparagraph (A) shall terminate upon the territorial government designating a dedicated funding source not subject to subsequent legislative appropriations under paragraph (1).

(3) REMISSION OF EXCESS FUNDS.—If the Oversight Board determines in its sole discretion that any funds transferred under this subsection exceed the amounts required for the Oversight Board's operations as established pursuant to subsection (a), any such excess funds shall be periodically remitted to the territorial government.

TITLE II—RESPONSIBILITIES OF OVERSIGHT BOARD

48 U.S.C. § 2141

APPROVAL OF FISCAL PLANS.

(a) IN GENERAL.—As soon as practicable after all of the members and the Chair have been appointed to the Oversight Board in accordance with section 101(e) in the fiscal year in which the Oversight Board is established, and in each fiscal year thereafter during which the Oversight Board is in operation, the Oversight Board shall deliver a notice to the Governor providing a schedule for the process of development, submission, approval, and certification of Fiscal Plans. The notice may also set forth a schedule for revisions to any Fiscal Plan that has already been certified, which revisions must be subject to subsequent approval and certification by the Oversight Board. The Oversight Board shall consult with the Governor in establishing a schedule, but the Oversight Board shall retain sole discretion to set or, by delivery of a subsequent notice to the Governor, change the dates of such schedule as it deems appropriate and reasonably feasible.

(b) REQUIREMENTS.—

(1) IN GENERAL.—A Fiscal Plan developed under this section shall, with respect to the territorial government or covered territorial instrumentality, provide a method to achieve fiscal responsibility and access to the capital markets, and—

(A) provide for estimates of revenues and expenditures in conformance with agreed accounting standards and be based on—

(i) applicable laws; or

(ii) specific bills that require enactment in order to reasonably achieve the projections of the Fiscal Plan;

(B) ensure the funding of essential public services;

(C) provide adequate funding for public pension systems;

(D) provide for the elimination of structural deficits;

(E) for fiscal years covered by a Fiscal Plan in which a stay under titles III or IV is not effective, provide for a debt burden that is sustainable;

(F) improve fiscal governance, accountability, and internal controls;

(G) enable the achievement of fiscal targets;

(H) create independent forecasts of revenue for the period covered by the Fiscal Plan;

(I) include a debt sustainability analysis;

(J) provide for capital expenditures and investments necessary to promote economic growth;

(K) adopt appropriate recommendations submitted by the Oversight Board under section 205(a);

(L) include such additional information as the Oversight Board deems necessary;

(M) ensure that assets, funds, or resources of a territorial instrumentality are not loaned

to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory, unless permitted by the constitution of the territory, an approved plan of adjustment under title III, or a Qualifying Modification approved under title VI; and

(N) respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to the date of enactment of this Act.

(2) TERM.—A Fiscal Plan developed under this section shall cover a period of fiscal years as determined by the Oversight Board in its sole discretion but in any case a period of not less than 5 fiscal years from the fiscal year in which it is certified by the Oversight Board.

(c) DEVELOPMENT, REVIEW, APPROVAL, AND CERTIFICATION OF FISCAL PLANS.—

(1) TIMING REQUIREMENT.—The Governor may not submit to the Legislature a Territory Budget under section 202 for a fiscal year unless the Oversight Board has certified the Territory Fiscal Plan for that fiscal year in accordance with this subsection, unless the Oversight Board in its sole discretion waives this requirement.

(2) FISCAL PLAN DEVELOPED BY GOVERNOR.—The Governor shall submit to the Oversight Board any proposed Fiscal Plan required by the Oversight Board by the time specified in the notice delivered under subsection (a).

(3) REVIEW BY THE OVERSIGHT BOARD.—The Oversight Board shall review any proposed Fiscal Plan to determine whether it satisfies the requirements set forth in subsection (b) and, if the Oversight Board determines in its sole discretion that the proposed Fiscal Plan—

(A) satisfies such requirements, the Oversight Board shall approve the proposed Fiscal Plan; or

(B) does not satisfy such requirements, the Oversight Board shall provide to the Governor—

(i) a notice of violation that includes recommendations for revisions to the applicable Fiscal Plan; and

(ii) an opportunity to correct the violation in accordance with subsection (d)(1).

(d) REVISED FISCAL PLAN.—

(1) IN GENERAL.—If the Governor receives a notice of violation under subsection (c)(3), the Governor shall submit to the Oversight Board a revised proposed Fiscal Plan in accordance with subsection (b) by the time specified in the notice delivered under subsection (a). The Governor may submit as many revised Fiscal Plans to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits.

(2) DEVELOPMENT BY OVERSIGHT BOARD.—If the Governor fails to submit to the Oversight Board a Fiscal Plan that the Oversight Board determines in its sole discretion satisfies the requirements set forth in subsection (b) by the

time specified in the notice delivered under subsection (a), the Oversight Board shall develop and submit to the Governor and the Legislature a Fiscal Plan that satisfies the requirements set forth in subsection (b).

(e) APPROVAL AND CERTIFICATION.—

(1) APPROVAL OF FISCAL PLAN DEVELOPED BY GOVERNOR.—If the Oversight Board approves a Fiscal Plan under subsection (c)(3), it shall deliver a compliance certification for such Fiscal Plan to the Governor and the Legislature.

(2) DEEMED APPROVAL OF FISCAL PLAN DEVELOPED BY OVERSIGHT BOARD.—If the Oversight Board develops a Fiscal Plan under subsection (d)(2), such Fiscal Plan shall be deemed approved by the Governor, and the Oversight Board shall issue a compliance certification for such Fiscal Plan to the Governor and the Legislature.

(f) JOINT DEVELOPMENT OF FISCAL PLAN.—Notwithstanding any other provision of this section, if the Governor and the Oversight Board jointly develop a Fiscal Plan for the fiscal year that meets the requirements under this section, and that the Governor and the Oversight Board certify that the fiscal plan reflects a consensus between the Governor and the Oversight Board, then such Fiscal Plan shall serve as the Fiscal Plan for the territory or territorial instrumentality for that fiscal year.

48 U.S.C. § 2142

APPROVAL OF BUDGETS.

(a) REASONABLE SCHEDULE FOR DEVELOPMENT OF BUDGETS.—As soon as practicable after all of the members and the Chair have been appointed to the Oversight Board in the fiscal year in which the Oversight Board is established, and in each fiscal year thereafter during which the Oversight Board is in operation, the Oversight Board shall deliver a notice to the Governor and the Legislature providing a schedule for developing, submitting, approving, and certifying Budgets for a period of fiscal years as determined by the Oversight Board in its sole discretion but in any case a period of not less than one fiscal year following the fiscal year in which the notice is delivered. The notice may also set forth a schedule for revisions to Budgets that have already been certified, which revisions must be subject to subsequent approval and certification by the Oversight Board. The Oversight Board shall consult with the Governor and the Legislature in establishing a schedule, but the Oversight Board shall retain sole discretion to set or, by delivery of a subsequent notice to the Governor and the Legislature, change the dates of such schedule as it deems appropriate and reasonably feasible.

(b) REVENUE FORECAST.—The Oversight Board shall submit to the Governor and Legislature a forecast of revenues for the period covered by the Budgets by the time specified in the notice delivered under subsection (a), for use by the Governor in developing the Budget under subsection (c).

(c) BUDGETS DEVELOPED BY GOVERNOR.—

(1) GOVERNOR'S PROPOSED BUDGETS.—The Governor shall submit to the Oversight Board proposed Budgets by the time specified in the notice delivered under subsection (a). In consultation with the Governor in accordance with the process specified in the notice delivered under subsection (a), the Oversight Board shall determine in its sole discretion whether each proposed Budget is compliant with the applicable Fiscal Plan and—

(A) if a proposed Budget is a compliant budget, the Oversight Board shall—

(i) approve the Budget; and

(ii) if the Budget is a Territory Budget, submit the Territory Budget to the Legislature; or

(B) if the Oversight Board determines that the Budget is not a compliant budget, the Oversight Board shall provide to the Governor—

(i) a notice of violation that includes a description of any necessary corrective action; and

(ii) an opportunity to correct the violation in accordance with paragraph (2).

(2) GOVERNOR'S REVISIONS.—The Governor may correct any violations identified by the Oversight Board and submit a revised proposed Budget to the Oversight Board in accordance with paragraph (1). The Governor may submit as many revised Budgets to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits. If the Governor fails to de-

velop a Budget that the Oversight Board determines is a compliant budget by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop and submit to the Governor, in the case of an Instrumentality Budget, and to the Governor and the Legislature, in the case of a Territory Budget, a revised compliant budget.

(d) BUDGET APPROVAL BY LEGISLATURE.—

(1) LEGISLATURE ADOPTED BUDGET.—The Legislature shall submit to the Oversight Board the Territory Budget adopted by the Legislature by the time specified in the notice delivered under subsection (a). The Oversight Board shall determine whether the adopted Territory Budget is a compliant budget and—

(A) if the adopted Territory Budget is a compliant budget, the Oversight Board shall issue a compliance certification for such compliant budget pursuant to subsection (e); and

(B) if the adopted Territory Budget is not a compliant budget, the Oversight Board shall provide to the Legislature—

(i) a notice of violation that includes a description of any necessary corrective action; and

(ii) an opportunity to correct the violation in accordance with paragraph (2).

(2) LEGISLATURE'S REVISIONS.—The Legislature may correct any violations identified by the Oversight Board and submit a revised Territory Budget to the Oversight Board in accordance

with the process established under paragraph (1) and by the time specified in the notice delivered under subsection (a). The Legislature may submit as many revised adopted Territory Budgets to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits. If the Legislature fails to adopt a Territory Budget that the Oversight Board determines is a compliant budget by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop a revised Territory Budget that is a compliant budget and submit it to the Governor and the Legislature.

(e) CERTIFICATION OF BUDGETS.—

(1) CERTIFICATION OF DEVELOPED AND APPROVED TERRITORY BUDGETS.—If the Governor and the Legislature develop and approve a Territory Budget that is a compliant budget by the day before the first day of the fiscal year for which the Territory Budget is being developed and in accordance with the process established under subsections (c) and (d), the Oversight Board shall issue a compliance certification to the Governor and the Legislature for such Territory Budget.

(2) CERTIFICATION OF DEVELOPED INSTRUMENTALITY BUDGETS.—If the Governor develops an Instrumentality Budget that is a compliant budget by the day before the first day of the fiscal year for which the Instrumentality Budget is being developed and in accordance with the process established under subsection (c), the Oversight Board shall issue a compliance certification to the Governor for such Instrumentality Budget.

(3) DEEMED CERTIFICATION OF TERRITORY BUDGETS.—If the Governor and the Legislature fail to develop and approve a Territory Budget that is a compliant budget by the day before the first day of the fiscal year for which the Territory Budget is being developed, the Oversight Board shall submit a Budget to the Governor and the Legislature (including any revision to the Territory Budget made by the Oversight Board pursuant to subsection (d)(2)) and such Budget shall be—

(A) deemed to be approved by the Governor and the Legislature;

(B) the subject of a compliance certification issued by the Oversight Board to the Governor and the Legislature; and

(C) in full force and effect beginning on the first day of the applicable fiscal year.

(4) DEEMED CERTIFICATION OF INSTRUMENTALITY BUDGETS.—If the Governor fails to develop an Instrumentality Budget that is a compliant budget by the day before the first day of the fiscal year for which the Instrumentality Budget is being developed, the Oversight Board shall submit an Instrumentality Budget to the Governor (including any revision to the Instrumentality Budget made by the Oversight Board pursuant to subsection (c)(2)) and such Budget shall be—

(A) deemed to be approved by the Governor;

(B) the subject of a compliance certification issued by the Oversight Board to the Governor; and

(C) in full force and effect beginning on the first day of the applicable fiscal year.

(f) JOINT DEVELOPMENT OF BUDGETS.—Notwithstanding any other provision of this section, if, in the case of a Territory Budget, the Governor, the Legislature, and the Oversight Board, or in the case of an Instrumentality Budget, the Governor and the Oversight Board, jointly develop such Budget for the fiscal year that meets the requirements under this section, and that the relevant parties certify that such budget reflects a consensus among them, then such Budget shall serve as the Budget for the territory or territorial instrumentality for that fiscal year.

48 U.S.C. § 2149

TERMINATION OF OVERSIGHT BOARD.

An Oversight Board shall terminate upon certification by the Oversight Board that—

(1) the applicable territorial government has adequate access to short-term and long-term credit markets at reasonable interest rates to meet the borrowing needs of the territorial government; and

(2) for at least 4 consecutive fiscal years—

(A) the territorial government has developed its Budgets in accordance with modified accrual accounting standards; and

(B) the expenditures made by the territorial government during each fiscal year did not exceed the revenues of the territorial government during that year, as determined in accordance with modified accrual accounting standards.

TITLE III—ADJUSTMENTS OF DEBTS

48 U.S.C. § 2162

WHO MAY BE A DEBTOR.

An entity may be a debtor under this title if—

(1) the entity is—

(A) a territory that has requested the establishment of an Oversight Board or has had an Oversight Board established for it by the United States Congress in accordance with section 101 of this Act; or

(B) a covered territorial instrumentality of a territory described in paragraph (1)(A);

(2) the Oversight Board has issued a certification under section 206(b) of this Act for such entity; and

(3) the entity desires to effect a plan to adjust its debts.

48 U.S.C. § 2164

PETITION AND PROCEEDINGS RELATING TO PETITION.

(a) COMMENCEMENT OF CASE.—A voluntary case under this title is commenced by the filing with the district court of a petition by the Oversight Board pursuant to the determination under section 206 of this Act.

(b) OBJECTION TO PETITION.—After any objection to the petition, the court, after notice and a hearing, may dismiss the petition if the petition does not meet the requirements of this title; however, this subsection shall not apply in any case during the first 120 days after the date on which such case is com-

menced under this title.

(c) ORDER FOR RELIEF.—The commencement of a case under this title constitutes an order for relief.

(d) APPEAL.—The court may not, on account of an appeal from an order for relief, delay any proceeding under this title in the case in which the appeal is being taken, nor shall any court order a stay of such proceeding pending such appeal.

(e) VALIDITY OF DEBT.—The reversal on appeal of a finding of jurisdiction shall not affect the validity of any debt incurred that is authorized by the court under section 364(c) or 364(d) of title 11, United States Code.

(f) JOINT FILING OF PETITIONS AND PLANS PERMITTED.—The Oversight Board, on behalf of debtors under this title, may file petitions or submit or modify plans of adjustment jointly if the debtors are affiliates; provided, however, that nothing in this title shall be construed as authorizing substantive consolidation of the cases of affiliated debtors.

(g) JOINT ADMINISTRATION OF AFFILIATED CASES.—If the Oversight Board, on behalf of a debtor and one or more affiliates, has filed separate cases and the Oversight Board, on behalf of the debtor or one of the affiliates, files a motion to administer the cases jointly, the court may order a joint administration of the cases.

(h) PUBLIC SAFETY.—This Act may not be construed to permit the discharge of obligations arising under Federal police or regulatory laws, including laws relating to the environment, public health or safety, or territorial laws implementing such Federal legal provisions. This includes compliance obliga-

tions, requirements under consent decrees or judicial orders, and obligations to pay associated administrative, civil, or other penalties.

(i) VOTING ON DEBT ADJUSTMENT PLANS NOT STAYED.—Notwithstanding any provision in this title to the contrary, including sections of title 11, United States Code, incorporated by reference, nothing in this section shall prevent the holder of a claim from voting on or consenting to a proposed modification of such claim under title VI of this Act.

48 U.S.C. § 2175

ROLE AND CAPACITY OF OVERSIGHT BOARD.

(a) ACTIONS OF OVERSIGHT BOARD.—For the purposes of this title, the Oversight Board may take any action necessary on behalf of the debtor to prosecute the case of the debtor, including—

(1) filing a petition under section 304 of this Act;

(2) submitting or modifying a plan of adjustment under sections 312 and 313; or

(3) otherwise generally submitting filings in relation to the case with the court.

(b) REPRESENTATIVE OF DEBTOR.—The Oversight Board in a case under this title is the representative of the debtor.