No. 18-

IN THE

Supreme Court of the United States

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

Petitioner,

v.

AURELIUS INVESTMENT, LLC, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

LUC. A. DESPINS
PAUL HASTINGS LLP
200 Park Avenue
New York, New York 10166
(212) 318-6000

NEAL D. MOLLEN, ESQ.
Counsel of Record
STEPHEN B. KINNAIRD, ESQ.
PAUL HASTINGS LLP
875 15th Street N.W., Suite 1100
Washington, D.C. 20005
(202) 551-1700
nealmollen@paulhastings.com

Counsel for Petitioner Official Committee of Unsecured Creditors of All Title III Debtors other than COFINA

288654

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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 is the Official Committee of Unsecured Creditors of All Title III Debtors (other than COFINA) ("Committee"). The Committee was an Appellee below. The Financial Oversight and Management Board for Puerto Rico ("Oversight Board") was also an Appellee below and is a petitioner in this Court.

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 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; and David A. Skeel, Jr.

Respondents here, Appellants below, are Assured Guaranty Corporation; Assured Guaranty Municipal Corporation; Aurelius Investment, LLC; Aurelius Opportunities Fund, LLC; Lex Claims LLC; Ad Hoc Group of General Obligation Bondholders; 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; Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the court of appeals is reported at 915 F.3d 838 and is reprinted in the Appendix ("App.") accompanying the petition filed by the Financial Oversight and Management Board ("Oversight Board") on April 23, 2019 (No. 18-1334), at 1a–45a. The opinion of the district court is reported at 318 F. Supp. 3d 537 and is reproduced in the Oversight Board's petition at App. 46a-82a.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. A petition for rehearing *en banc* was then filed by respondent Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc. ("UTIER"). That petition was denied on March 7, 2019. The jurisdiction of this Court is invoked pursuant to 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 portions of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq.*, are reproduced in the Oversight Board's appendix in No. 18-1334 at 85a-122a.

INTRODUCTION

As explained in greater detail in the currently-pending petition filed by the Financial Oversight and Management Board for Puerto Rico (referred to here as the "Oversight Board," No. 18-1334, filed on April 23, 2019), the decision below not only declares unconstitutional an Act of Congress on novel and unsustainable grounds, but doing so has drawn into question the validity of the Oversight Board and efforts taken under PROMESA to secure a more stable financial future for the three million United States citizens living and working in Puerto Rico. Review by this Court is thus essential for two equally compelling reasons: *first*, to correct the First Circuit's view of Congress's Territorial Clause powers, which is at odds with two hundred years of settled precedent from this and every other court to examine those powers; and *second*, to head off the fiscal peril that would face the people of Puerto Rico if the First Circuit's decision is unreviewed.

STATEMENT OF THE CASE

The Oversight Board's petition comprehensively sets out the Statement of the Case, and the Committee hereby adopts and incorporates by reference that Statement as if set forth in full here.

REASONS FOR GRANTING THE PETITION

The petition filed by the Oversight Board in No. 18-1334 sets out in some detail both the harm facing the people of Puerto Rico as a result of the First Circuit's decision, and the numerous ways in which the court of appeals departed from settled law in reaching that decision. The Committee agrees with the Oversight Board's arguments in No. 18-1334 and adopts them by reference as if fully set forth below. Among other things, the Oversight Board's brief in support shows the following:

1. The court of appeals failed to apply this Court's Territorial Clause jurisprudence. *See* generally Oversight Board Pet. at 13-29. For nearly 200 years, this Court has held that when Congress acts for the territories, it acts not as Article I's federal legislature, creating structures for federal governance or authorizing "officers of the United States," but rather exercises the "plenary *municipal* authority that congress possesses [under Article IV] over the territories of the United States." *McAllister v. United States*, 141 U.S. 174, 184 (1891) (emphasis added); *see also Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828) (when acting for the territories, Congress's "jurisdiction . . . is conferred by . . . those general powers which that body possesses over the territories of the United States" under Article IV). The structural limitations of the Constitution

that ensure the balance of power between Congress and the Executive Branch under Article II "do[] not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." *Id.*

Thus, as the Court has held, when Congress acts for the territories under Article IV, as it did in enacting PROMESA and creating the Oversight Board, the separation of powers doctrine that marks out the division of responsibilities between the branches of the *federal* government is simply inapposite; in those circumstances, Congress "is not subject to the same restrictions which are imposed in respect of laws *for the United States* considered as a political body of states in union." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322-23 (1937) (emphasis added); *United States v. Heinszen*, 206 U.S. 370, 384-85 (1907) (notwithstanding non-delegation doctrine, Congress may delegate its legislative authority under Article IV to the President, enabling the President alone to make law for a territory); *cf. Binns v. United States*, 194 U.S. 486, 487, 492 (1904) (although Article I, Section 8, of the Constitution requires all "duties, imposts, and excises [to] be uniform throughout the United States," that uniformity requirement does not apply when Congress levies a tax in the territories; when doing so, Congress "act[s] as the local legislature . . . unrestricted by constitutional provisions" that apply when it acts for the national government.).[1] This Court has explicitly

1. Significantly, the court of appeals admitted that it found it "difficult to explain" the result it reached in light of *Heinszen*. Pet. App. in No. 18-1334 at 25a. It purported to solve the puzzle by limiting the decision's holding to its facts, *id.* at 25a-26a, but in doing so, it misunderstood the breadth of that holding.

recognized that the Appointments Clause is a specific application of the Constitution's separation of powers principles,[2] and if the latter do not apply when Congress legislates for the territories, the former does not either.

2. The court of appeals also confused the standard used to determine whether a congressional action is "territorial" or "federal" in nature. As the Oversight Board shows, Pet. in No. 18-1334 at 26-29, the applicable standard for making that distinction was articulated in *Palmore v. United States*, 411 U.S. 389, 407-08 (1973). It asks (1) whether Congress invoked its Article IV power (or, there, 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 territorial, rather than national, in scope. Under this test, the Oversight Board is indisputably territorial: Congress expressly invoked its Article IV territorial powers when it created the Oversight Board; it explicitly placed the Board "within the territorial government" and not "within" the federal government; and the Oversight Board has no powers other than those specifically addressing the economy of Puerto Rico.[3]

---

2. *See Weiss v. United States*, 510 U.S. 163, 188-89 (1994); *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991) ("separation of powers [doctrine] is embedded in the Appointments Clause").

3. 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). It also established the Board as "an entity within the territorial government," rather than within any "department, agency,

The court of appeals, however, mistakenly looked to *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proper dividing line between territorial and federal officers. But that case did not deal with a territory at all, and thus did not — and could not — mark out the boundaries between Congress's federal and territorial responsibilities. Instead, that decision articulated a test for determining whether individuals who are *indisputably federal employees* and who exercise national responsibilities across all of the States (there, the members of the Federal Election Commission), are *also* within the more limited constitutional classification of "officers of the United States," and thus subject to the Appointments Clause. That is a fundamentally different inquiry. A test for sorting between various *federal employees* for Appointments Clause purposes is not implicated when the pertinent question is whether an entity created by Congress is "within a territorial government" or, conversely, a federal entity with national responsibilities.

3. As the Oversight Board compellingly shows, Pet. in No. 18-1334 at 29-35, the importance of review in this case can hardly be overstated. The court below invalidated an Act of Congress on novel grounds incompatible with settled law from this Court. But even if that were not so clearly the case, review would be warranted for more practical reasons. If the decision below is not reviewed, it could jeopardize all of the work done in the last three years to address Puerto Rico's financial distress. Without

---

establishment, or instrumentality of the Federal Government." *Id.* § 2121(c)(1)-(2); *see also id.* § 2194(i)(2) (defining the term "Government of Puerto Rico" to include the Oversight Board for purposes of that section); *id.* § 2127(b) (providing that the Board is funded exclusively by the territorial government of Puerto Rico).

a functioning Oversight Board — and there would be none as a result of the First Circuit's decision — there will be no one to prosecute the title III cases. If those cases are dismissed as a result, it would almost certainly terminate the automatic stay currently shielding the Commonwealth and the other title III debtors from suit by their thousands of creditors. In the absence of the automatic stay, Puerto Rico would thus be without a refuge from a "massive wave of litigation." *Brigade Leveraged Capital Structures Fund Ltd. v. Garcia-Padilla*, 217 F. Supp. 3d 508, 528 (D.P.R. 2016) (internal quotation marks omitted).

As a consequence, Puerto Rico could effectively be rendered "unable to pay for things like fuel to generate electricity . . . to provide safe drinking water, maintain roads, and operate public transportation . . . ." *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1949–50 (2016) (Sotomayor, J., dissenting). Given the ongoing humanitarian crisis Puerto Rico faces as a result of Hurricanes Irma and Maria, impeding the efforts to meet these enormous challenges would be inequitable.

Respectfully submitted,

Luc. A. Despins
Paul Hastings LLP
200 Park Avenue
New York, New York 10166
(212) 318-6000

Neal D. Mollen, Esq.
Counsel of Record
Stephen B. Kinnaird, Esq.
Paul Hastings LLP
875 15th Street N.W., Suite 1100
Washington, D.C. 20005
(202) 551-1700
nealmollen@paulhastings.com

Counsel for Petitioner Official Committee of Unsecured Creditors of All Title III Debtors other than COFINA