No. 18-1334

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

BRIEF FOR UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC. (UTIER) IN OPPOSITION

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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.;

PARTIES TO THE PROCEEDING – Continued

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, is Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. (UTIER); Assured Guaranty Corporation; Assured Guaranty Municipal Corporation; Aurelius Investment, LLC; Aurelius Opportunities Fund, LLC; and Lex Claims LLC.

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BRIEF FOR UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO (UTIER) IN OPPOSITION

Respondent Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER") respectfully submits its brief in opposition to the petitions for a writ of certiorari filed by the Financial Oversight and Management Board 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 (Pet. App. 1a-45a) is reported at 915 F.3d 838. The opinion of the district court (Pet. 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 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. Article 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. Article 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 Pet. App. 85a-122a.

INTRODUCTION

On February 15, 2019, the United States Court of Appeals for the First Circuit issued an *Opinion and Order* determining that the appointment of the

members of the Financial Oversight and Management Board for Puerto Rico ("Oversight Board" or "Board") are unconstitutional for lack of compliance with the procedure established in the Appointments Clause of the Constitution of the United States of America. As it will be further discussed, this determination is in accordance with the historical practice and the precedents of this Honorable Court.

However, the court of appeals permitted the Oversight Board to continue operating for an additional 90 days after the judgment in order "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause. (Citations omitted) During the 90-day stay period, "the Board may continue to operate as until now." On May 6th, 2019, the court of appeals issued an order further extending the stay of the mandate for an additional sixty (60) days, until July 15th, 2019.[1]

On April 29, 2019, before the term expired and in precise compliance with the court of appeals' mandate, President Donald J. Trump announced his intention to nominate all the current Oversight Board members.[2] This rendered the Oversight Board's petition for certiorari moot since the requested relief became

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[1] *See* First Circuit Court of Appeals document #00117435465.

[2] Press release: *President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts* (April 29, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-personnel-key-administration-posts-24/ (Accessed May 22, 2019).

impracticable in light of the President's determination.[3] Moot questions "require no answer."[4] Thus, this Supreme Court should not exercise its judicial power over the Petitioner's request since it does not comply with the "cases and controversies" limitation imposed by Article III of the United States Constitution.[5]

This Honorable Court must deny the petition for a writ of *certiorari* because the President's re-nomination of the current Oversight Board members is a strict compliance with the court of appeals mandate, thus, rendering this case moot. Any determination about this issue would thus be an advisory opinion, which is constitutionally prohibited.[6]

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

On June 30, 2016, President Obama signed the Puerto Rico Oversight, Management, and Economic Stability Act or "PROMESA". This Act created the Oversight Board that is composed of 7 members not elected by the United States Citizens residents of Puerto Rico. Moreover, President Obama did not submit the original appointments of the members to the

[3] However, UTIER contends that the validity of the actions of the Oversight Board members is still a question that requires review by this Honorable Supreme Court.

[4] *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

[5] U.S. Const. Article III, § 2.

[6] *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

advice and consent of the federal Senate. Although the court of appeals determined the unconstitutionality of the appointments, it also decided not to annul the determinations made by the Oversight Board and allowed it to continue operating until July 15, 2019.

This Court should deny the petition for certiorari not only because the case is moot, since President Trump complied with the order of the court below, but because the court's determination is well founded according to the relevant historical practice and precedents regarding the Appointments Clause. In addition, allowing the Board to continue operating indiscriminately and without undergoing the process of advice and consent of the Senate, is a historical error that would aggravate the political subordination of Puerto Rico, that is already unsustainable in the 21st century.

The People of Puerto Rico have never had the right to vote for the United States President or Congress because Puerto Rico is not a state. That violates fundamental principles of human rights protected under international law. But in addition to that, with the adoption of PROMESA, two more violations of the right to political freedom occurred: a) a Board, which Puerto Ricans did not elect, was named and given powers over the local government; b) this Board violated the power of self-government that Puerto Ricans were given under Law 600, making the Board an unelected supra-government and dramatically reducing the ability of the electorate to elect its political representatives. Thus, the People of Puerto Rico were deprived of their political prerogatives and disenfranchised, since

they can only elect representatives who have no real power over Puerto Rico.

The subordinate political position of the residents of Puerto Rico started with the interpretation of this Court in the *Insular Cases*[7] with respect to the power of Congress vested upon the Territories Clause. That interpretation incorporated criteria to make distinctions between citizens of the United States and those residents of Puerto Rico based on foreignness and race. Hence, Puerto Ricans belong to, but are not part of the United States. Because of this racist foundation, the XIII[8] and XV[9] Amendments to the United States Constitution were infringed.

At this moment, even when they were unconstitutionally appointed, the members of the Board exercise all the colonial powers of public policy through the certification of fiscal plans and budgets. Neither the Governor nor the Legislature of Puerto Rico can supervise the Oversight Board. All legislation and governmental regulatory actions must also be submitted to the Oversight Board to determine whether they comply with the corresponding certified fiscal plan and related budgets. Therefore, PROMESA disenfranchised the

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[7] Among others, *DeLima v. Bidwell*, 182 U.S. 1, 200 (1901); *Goetze v. United States*, 182 U.S. 221, 221-22 (1901); *Dooley v. United States*, 182 U.S. 222, 236 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392, 397 (1901); *Dorr v. United States*, 195 U.S. 138, 148 (1904).

[8] U.S. Const. amend. XIII, § 1.

[9] U.S. Const. amend. XV, § 1.

People of Puerto Rico intensifying the colonialism control of the United States over Puerto Rico. This unsustainable control is unconstitutional and a gross violation of international law.

On the other hand, PROMESA is unfeasible. The complexity of the implementation of PROMESA responds to a hybrid of provisions from Chapter 9 and 11 of the Bankruptcy Code with other territorial provisions that connect them, enacted by Congress under the Territories Clause. PROMESA, contrary to Chapter 9, allows the central government to initiate a debt adjustment procedure based on fiscal plans and budgets approved at the sole discretion of the Oversight Board. This type of legislation had not been previously implemented in the United States. On paper, PROMESA seems to have all the elements necessary to achieve the adjustment of Puerto Rico's debts. However, the colonial situation in Puerto Rico in which there is no solid basis for predicting economic growth, an outlook dramatically impaired by the passage of two hurricanes in September 2017, augurs that it is not possible to obtain the objectives of the Act.

The objective in PROMESA's text is that the Board shall continue controlling Puerto Rico until achieving four consecutive balanced budgets and access to bond markets at reasonable costs.[10] However, for these four consecutive budgets to be balanced, it is essential that the projections of expenditures and income of the fiscal plans be reliable. This is the main problem that the

[10] 48 U.S.C. § 2149.

Board currently faces. The fiscal plans have undergone numerous amendments and will continue to suffer changes because the economy of Puerto Rico has not yet recovered to the levels before September 2017. If there is no recovery, it will aggravate the situation forcing many people to leave the country in alarming numbers to relocate to the United States. This constant outflow of population undermines the government's tax base and affects the projections of income and expenditure. If the projections of income and expenses are not met, any agreement carried out with the bondholders will be destined to fail.

On the other hand, the Board is imposing arbitrary austerity measures, including pension cuts, that will increase the harm to the economy and the People of Puerto Rico. If the economy does not grow, there is no way to achieve the four balanced budgets required and access the bond markets at reasonable costs.

Additionally, although the wellbeing of workers plays a vital role in the Commonwealth's economy, the government has enacted legislation, that was adopted in the Board's Fiscal Plan, directed at undermining and impairing collective bargaining agreements and the private sector minimal labor statutory rights. Those measures are an arbitrary and unnecessary attempt against the minimum living conditions required to sustain a vigorous middle class that can serve as a brake to reduce the speed of the amplitude of the inequality gap that continues to expand in Puerto Rico.

In conclusion, as a result of its mistakes, the Board could be operating indefinitely intensifying this undemocratic tyranny. This also would dramatically affect investors' confidence in Puerto Rico, thus compromising the future of the island due to a permanent economic downturn. PROMESA is not the Act that Puerto Rico needs to tackle its problems. PROMESA, under the current political and economic circumstances, is not feasible and is doomed for failure.

Congress must assume its historic responsibility and end the colonial relationship that has bound Puerto Rico since 1898. The only way for Puerto Rico to achieve its economic development, properly adjust its debts and pursue its happiness as a People is with the return of their sovereign powers through a free process of self-determination in accordance with international law.

The Oversight Board has impaired UTIER's labor rights notwithstanding the unconstitutional appointment of its members. The delegation of powers to the Oversight Board is so broad and unchecked, that it affects the daily life of an entire Caribbean nation. Thus, allowing the Oversight Board to act unfettered over Puerto Rico is unprecedented as to the powers vested in them and the damages that they could infringe upon the People of Puerto Rico. Therefore, the petition for certiorari should be denied immediately to prevent widespread and irreparable damages to UTIER and the People of Puerto Rico.

Denying the writ of certiorari would allow the confirmation process to continue in the Senate. This will open the opportunity for the groups and entities opposing PROMESA, to raise the need to repeal the law or to claim that the current members should not be confirmed because they are unfit or have conflicts of interest. This conjuncture also offers the opportunity to discuss the need to correct the colonial situation of Puerto Rico.

In order to raise a separation-of-power question respecting Congress's exercise of its plenary Article IV power to structure territorial governments, the Petitioner misconstrues the court of appeals ruling by stating that it "is the first in the Nation's history holding that territorial officials must be appointed in conformity with the Appointments Clause." Pet. 12. However, the court of appeals did not rule that the appointment of *territorial* officials had to be in conformity with the Appointments Clause. The court applied the appropriate test to determine whether the Oversight Board members exercise "significant authority" in order for them to be considered "Officers of the United States" for purposes of the Appointments Clause. The court's reasoning is supported by this Honorable Supreme Court precedent.[11] Therefore, the court below disregarded the Petitioner's contention that the Oversight Board members are territorial officers, despite the

[11] *Lucia v. SEC*, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018); *Freytag v. Commissioner*, 501 U.S. 868, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991); and *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

"made-for-litigation label" of PROMESA. Where "constitutional limits are invoked," courts ignore "mere matters of form" and look instead "to the substance of what is required."[12]

Petitioner claims a catastrophic scenario in which supposedly "[t]he ruling is causing, and will continue to cause, serious harms". Pet. 12. It worries that "the decision will precipitate burdensome challenges to the validity of the Board's past and present actions". *Id.* The reality of the matter is that the court of appeals did nothing of the sort. In fact, even though the court of appeals correctly determined that the Oversight Board members are "Officers of the United States" and therefore had to be appointed in conformity with the Appointments Clause, it validated their previous actions by applying the *de facto* officer doctrine. Pet. App. 40a-45a. The court went further and allowed the Board members to continue operating for 90 days until the President complied with appointing them in accordance with the Appointments Clause. *Id.* at 44a.

On the other hand, the decision does not question the constitutionality of territorial self-governance. The focus of this case is to apply the test as to identify whether the officer in question exercises significant authority in order to be considered an "Officer of the United States" for purposes of the Appointments Clause. Puerto Rico's elected officials are not federal

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[12] *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586-87 (1985) (Emphasis omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932)).

officers. As the court clearly stated, "they exercise authority pursuant to the laws of the territory". *Id.* at 37a. Of course, Commonwealth laws are themselves the product of authority Congress has delegated by statute, as the court recognized. But that doesn't make the Commonwealth's Constitution or any Puerto Rico law a federal law or "else[,] every claim brought under Puerto Rico's laws would pose a federal question". Pet. App. 37a. On the other hand, the validity of the territories self-governance framework is not the question to address in these proceedings. Therefore, any discussion on that matter would be pure *ipse dixit.*

In order to justify the grant of the writ of *certiorari*, the Oversight Board tries to make it worse than it really is and states an apocalyptic scenario that is just not real. Therefore, as opposed to the Petitioner's contention, the question presented does not require this Court's review and it is not warranted.

A. The *Insular Cases* Are Unconstitutional And Should Not Be The Foundation To Reverse The Court Of Appeals' Ruling.

In 1898, the United States illegally invaded Puerto Rico when it already had a national history of 405 years of political and economic development, violently taking away our country of the Autonomic Charter and with it, the right to vote and elect political representatives with international treaty powers, granted by the Spanish regime, after a long and bloody anti-colonial struggle.

To make matters worse, this Court imposed the ignominious colonial judicial doctrine of the *Insular Cases*.[13] In these cases, the colonial system of the United States was strengthened, and the unequal and immoral treatment of Puerto Rico was legitimized until this very day. Such cases determined that Puerto Rico is not a foreign country in relation to the United States, but an unincorporated territory, which belongs to, but is not part of, the United States, and to which only a few fundamental constitutional rights of the Federal Constitution apply. That imposed the abhorrent condition of the deprivation of fundamental human rights upon the Puerto Rican People that is contrary to binding international law.

Contradicting 122 years of a history of proclamations to the world regarding the values of equality and freedom,[14] the *Insular Cases* turned the United States into an empire as cruel as the kingdom from which they vigorously sought liberation with their war for independence.[15] These cases "stand at par with *Plessy v.*

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[13] Among others, *DeLima v. Bidwell*, 182 U.S. 1, 200 (1901); *Goetze v. United States*, 182 U.S. 221, 221-22 (1901); *Dooley v. United States*, 182 U.S. 222, 236 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392, 397 (1901); *Dorr v. United States*, 195 U.S. 138, 148 (1904).

[14] "The happy union of these states is a wonder: their Constitution a miracle: their example the hope of liberty throughout the world." James Madison (1829).

[15] *See* Nelson A. Denis, *War Against All Puerto Ricans: Revolution and Terror in America's Colony*, Nation Books (2015).

Ferguson[16] in permitting disparate treatment by the government of a discrete group of citizens."[17] This is a clear violation of the international regime of human rights.[18]

The *Insular Cases* reflect outdated theories of imperialism and racial inferiority that have outlived their usefulness.[19] The fact that race and alienage was a deciding factor in the rationale of the *Insular Cases* is evident when Justice Brown – the same Justice that decided *Plessy* – observed that because the **"alien races"** that inhabited the new territories that the United States had acquired differed from other Americans in "religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles,

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[16] 163 U.S. 537 (1896).

[17] Juan R. Torruella, *The Supreme Court and Puerto Rico, The Doctrine of Separate and Unequal*, Editorial de la Universidad de Puerto Rico (1985), p. 3. *"The 'redeeming' difference is that Plessy is no longer the law of the land, while the Supreme Court remains aloof about the repercussions of its actions in deciding the Insular Cases as it did, including the fact that these cases are responsible for the establishment of a regime of de facto political apartheid, which continues in full vigor."* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29:2 U. Pa. J. Int'l L. 283 (2007), p. 286.

[18] U.S. Const. Article VI: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; **and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land**; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Emphasis added).

[19] Juan R. Torruella, *supra*, p. 286-87.

may for a time be impossible." *Downes v. Bidwell*, 182 U.S. 244 (1901) at 287. (Emphasis added.) **The *Insular Cases* were fundamentally based on the badges and incidents of slavery in the United States that were supposedly forbidden by the XIII, XIV and XV Amendments of the U.S. Constitution.**[20]

Under the Territories Clause and the *Insular Cases* doctrine of discriminatory incorporation of fundamental constitutional rights, Puerto Rico continues to be a colony inhabited by 3.2 million second class American citizens who do not have political or economic rights as do the resident citizens of the other States. Puerto Rico has more resident citizens than 23 States including the District of Columbia. Also, it is the largest and most populated of the eight current colonies. Nevertheless, we cannot vote in federal elections, we do not have the right to elect fully empowered political representatives, to receive federal funds on equal terms, nor do we have the power to exercise our sovereign powers to free ourselves from the limitations of the federal Commerce Clause, the preemption doctrine, the control of the currency, telecommunications, transportation and diplomatic and commercial relations with other countries. Therefore, as Puerto Ricans we are unable to manage our political and economic destiny to get out of this swamp in which we have stumbled because we don't have the most basic right

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[20] *See Civil Rights Cases*, 109 U.S. 3, 4, 3 S. Ct. 18, 27 L. Ed. 835 (1883) and *Hodges v. United States*, 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65 (1906).

to elect the representatives that control all the fundamental aspects of our life.

Nowadays, to solve a major financial crisis in the United States municipal bond market, Congress called again upon the extraordinary and violent powers of the *Insular Cases*, and added insult to injury, taking away our charters by enacting PROMESA, that imposes a supra-governmental and non-voted federal Oversight Board, not only striping away the rights of the already limited self-government of Public Law 600 of 1950[21] and the 1952 Constitution of the Commonwealth of Puerto Rico, but also, in violation of the Appointments Clause of the United States Constitution,[22] the Bill of Rights[23] and binding international law.

The Oversight Board, as imposed on Puerto Rico by PROMESA, has exercised many of the federal powers vested upon them by this federal statute. For example, they certified and imposed several Fiscal Plans as that constitute the mandate that the Commonwealth's Government and other governmental instrumentalities shall follow in the next five fiscal years; certified and imposed the Commonwealth's FY-19 budget against the political will of the Legislature of Puerto Rico; and has invalidated laws of the Commonwealth.[24]

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[21] The Puerto Rico Federal Relations Act of 1950 (Pub. L. 81-600).

[22] U.S. Const. Art. II, § 2, cl. 2.

[23] Particularly the I, V, XIII, XIV and XV Amendments.

[24] *Rosselló Nevares v. The Financial Oversight and Management Board for Puerto Rico*, 330 F. Supp. 3d 685 (2018); *Rivera-Schatz et al.*

These actions nullified the power of the People of Puerto Rico to elect representatives with all the powers conferred by the Constitution of the Commonwealth of Puerto Rico. Wherefore, the Oversight Board is the actual power that is deciding over public policy in Puerto Rico, circumventing the elected Government in practically all fundamental issues.

Through PROMESA, Congress created a unique mechanism to impose to the President the manner in which not only the selection process should take place, but also on how the lists of possible candidates to conform the Board should be assembled. It is at this point that this case has its roots. Evidently, such an imposition collides directly with the Appointments Clause of the Constitution of the United States, which provides that it is the President who should nominate and appoint with the advice and consent of the Senate. Nowhere the Appointments Clause mentions or implies that an alternate process would be valid regarding nominating or appointing Officers of the United States. As it will be discussed, UTIER contends that due to the nature of the Oversight Board federal powers, its appointees are clearly Officers of the United States and therefore, their nomination and appointment process failed under the Appointments Clause. Not only such provisions are unconstitutional, but the nominations, appointments and executions of PROMESA's Oversight Board are also unconstitutional and null.

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v. The Financial Oversight and Management Board for Puerto Rico et al., 327 F. Supp. 3d 365 (2018).

Unfortunately, the Petitioner is relying on the expansive powers grounded on the *Insular Cases* doctrine to sustain that PROMESA is constitutional. In an attempt to sustain the position that the Appointments Clause is not applicable to the Board members because the Territories Clause makes other structural constitutional provisions vanish, the Petitioner desperately and imprudently turned to the condemned doctrine rooted in the *Insular Cases* pretending to extend the double standard of constitutional applicability of the *Insular Cases* to expand their scope and include the structural provisions of the United States Constitution. This overextension of such infamous doctrine is another insult to the human rights and the dignity of the People of Puerto Rico that this Court should not allow.

Despite the anachronistic and race-based pronouncements of the *Insular Cases*, none of these cases held that structural provisions of the Constitution are inapplicable when Congress legislates with respect to a territory. None of the *Insular Cases* involved the Appointments Clause. And even if the *Insular Cases* had comprehended certain structural provisions of the colonial regime, these cases also recognized "restrictions of so fundamental a nature that they cannot be transgressed". *Dorr v. United States*, 195 U.S. at 147. Certainly, the Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond v. U.S.*, 520 U.S. 651, 659 (1997). The separation of powers in general is also unquestionably essential. "[T]here is no liberty" without the separation

of powers. *Stern v. Marshall*, 564 U.S. 462, 483 (2011). "[T]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 501 (2010).[25] Therefore, structural provisions like the Appointments Clause, necessarily apply to the territories.

The Petitioner's argument is based on the extension of the constitutional defects of the *Insular Cases* to make inapplicable the Appointments Clause to Puerto Rico. Therefore, in order to sustain the constitutionality of PROMESA, if this Court were to grant review it should address first, the validity of the *Insular Cases*.

Fortunately, the judicial tool to affirmatively address the problem of the *Insular Cases* is provided by *Mark Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*, 585 U.S. ___ (2018) No. 16-1466, June 27, 2018 585 U.S. ___; 138 S. Ct. 2448; 201 L. Ed. 2d 924 ("*Janus*"). Stare decisis does not require retention of the *Insular Cases*. The *Insular Cases* were fundamentally based on the badges and incidents of slavery in the United States that are forbidden by the XIII, XIV and XV Amendments of the U.S. Constitution, therefore are unconstitutional and should be overruled according to *Janus*.

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[25] *See also Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

In *Janus*, the Supreme Court identified factors that should be considered in deciding whether to overrule a past decision. Five of those are relevant here: the quality of reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.

The colonial status of Puerto Rico and the racist determinations of the *Insular Cases* do not reflect the contemporary political standards of civil and human rights under international law. Undoubtedly, those civil and human rights constitute the Universal Freedom that is protected particularly by the I, V, XIII, XIV and XV Amendments of the United States Constitution.

To sustain the allegations that colonialism imposed through the Territories Clause as interpreted in the *Insular Cases* no longer represents the principles of freedom, UTIER urge to look upon the following sources of international obligations for the United States that are the Supreme Law of the Land: the *American Declaration of the Rights and Duties of Man*,[26] the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Organization of American States Charter*,[27] the *American*

[26] Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

[27] Adopted in Bogotá, Colombia, in 1948.

Convention on Human Rights,[28] the *Inter-American Democratic Charter*,[29] and the United Nations.

The development of this body of international law on civil and human rights establishes the scope and specific content of the concept of Universal Freedom encompassed in the Bill of Rights of the United States Constitution that is applicable to UTIER and all Puerto Rico residents.

B. The Court Of Appeals Did Not Err In Holding That Board Members Are Federal Officers Subject To The Appointments Clause.

Petitioner misrepresents the decision below by stating that the court of appeals' analysis is based on "assuming that when Congress enacts a statute providing for the appointment of territorial officials, those officials are by definition 'Officers of the United States' ". Pet. 12. The court of appeals clearly stated what is a matter of separation of powers. Pet. App. 20a. ("This challenge trains our focus on the power of Congress vis-à-vis the other branches of the federal government."). The focus of the instant case is not necessarily the relationship between the national government and territorial government. It is the nature of the authority that the Oversight Board members have pursuant to PROMESA and whether that makes them

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[28] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

[29] Adopted in a special session of the General Assembly, Lima Perú, Lima, September 11, 2001.

"Officers of the United States" for the purposes of the Appointments Clause. Certainly, Congress's plenary power pursuant to Article IV of the United States Constitution cannot surpass the basic principles of separation-of-powers as embedded, for example, in the Appointments Clause.

Based on that premise, the court of appeals applied the ancient canon of interpretation: *generalia specialibus non derogant* (the "specific governs the general"). With such guidance, the court of appeals applied the "significant authority" test that is used to determine whether an official within the national government is an "officer" subject to the Appointments Clause in accordance with this Honorable Court precedent. *Id.* at 20a-40a. Therefore, notwithstanding the Petitioner's understanding of the decision below, the court did not rule that the Appointments Clause applies to the appointment of territorial officials. Petitioner points out to the "traditional" "significant authority" test as if there was another test applicable. But, the court of appeals correctly reasoned, first, the applicability of the Appointments Clause even though Congress has plenary power when acting pursuant to Article IV of the United States Constitution. After determining that Congress is bound by the Appointments Clause even when acting upon the Territories Clause, the court then turned to determine if the Oversight Board members were "Officers of the United States" as opposed to mere territorial officers. Such analysis requires the applicability of the *only* test available, which is the "significant authority" test. As such, the court analyzed the

issue to determine, based on the authority and powers vested on the Oversight Board by PROMESA, the real nature of their appointments.

C. Congress Must Comply With Separation-Of-Powers Principles Even When Acting Pursuant To Article IV Of The U.S. Constitution.

According to the Petitioner, Congress has repeatedly acted under Article IV to vest executive power in territorial officers selected by other means, and not by following the procedures set forth in the Appointments Clause, confirming that the clause simply does not apply to officers of a territorial government, as opposed to Officers of the United States. That statement contradicts the historical record of Puerto Rico that is very clear with respect to the Appointments Clause. Since 1900 until 1947, the President appointed 19 governors and in each case, the Senate advised and consented the appointments.[30] But, if Congress is not bound by the principles of separation of powers when it legislates under the Territories Clause, what other provisions of the Constitution can be set aside? The court of appeals correctly reasoned that even when acting under the Territories Clause, Congress is bound by separation of powers provisions such as the Presentment Clause.[31] Petitioner tries to dismiss this as an "unwarranted inference" by stating that while the Appointments

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[30] List of Governors of Puerto Rico, World Heritage Encyclopedia (2017) Available at: http://worldheritage.org/article/WHEBN0000252515/List%20of%20Governors%20of%20Puerto%20Rico.

[31] U.S. Const. Article I, § 7, cl. 2.

Clause applies only to Officers of the United States, the Presentment Clause applies to *every bill*. Pet. 24. And while Petitioner implicitly attempts to make it seem as a general clause *vis-à-vis* a specific one, the Presentment Clause is undeniably a provision of separation of powers as it includes the President's authority to veto an act. "Like the Presentment Clause, the Appointments Clause constitutionality regulates how Congress brings its power to bear, whatever the reach of that power might be." Pet. App. 22a.

In *Metropolitan Washington Airport Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), this Court categorically rejected the contention that Congress' acts are "immune from scrutiny for constitutional defects" just because they were taken "in the course of Congress' exercise of its power" under "Art. IV, § 3, cl. 2."[32]

Petitioner cannot deny that even the *Insular Cases* recognized "restrictions of so fundamental a nature that they cannot be transgressed". *Dorr v. United States*, 195 U.S. 138, 147 (1904); *Binns v. United States*, 194 U.S. 486, 491 (1904).[33] Certainly, the Appointments

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[32] *Metr. Wash. Airport Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. at 270.

[33] *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879) ("Congress is supreme" and has all powers, "except such as have been expressly or by implication reserved in the prohibitions of the Constitution."); *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) ("[T]he government of the United States" has full authority over the territories, except for **"such restrictions as are expressed in the constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself."**).

Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond v. U.S.*, 520 U.S. at 659. The separation of powers in general is also unquestionably essential. "[T]here is no liberty" without the separation of powers. *Stern v. Marshall*, 564 U.S. at 483. "[T]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. at 501.[34]

Therefore, structural provisions like the Appointments Clause, apply to the territories because they preserve fundamental freedom. Thus, even if this Court chooses not to overrule the *Insular Cases*, it must conclude that the separation of powers is a fundamental right for the American citizens of Puerto Rico.

Puerto Rico is subject to a double set of constitutional rules that sustain legal discrimination upon the citizen residents of Puerto Rico. The only way for the Petitioner to make sense on this constitutional conundrum is by recurring to an interpretation premised in the authoritarian and overreaching application of anachronist principles of an unfair double standard governance for the territories. This was formulated upon a racist interpretation of the reality of Puerto Rico at the beginning of the twentieth century that has not been fully examined in the context of modern constitutional law and international covenants on human

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[34] *See also Bowsher v. Synar*, 478 U.S. at 730.

rights. The history of the colonial domination of Puerto Rico through the Territories Clause is untenable and unconstitutional, therefore as long as the *Insular Cases* doctrine is the foundation of the Petitioner's contention, it is imperative for this Court to assess the validity of this case law. The constitutional defects of the *Insular Cases* are the core of this controversy and are interposed to the remedy sought by UTIER, therefore warrants them to be overruled.

D. The Oversight Board Members Are Officers Of The United States.

Petitioner barely discusses the significant authority that the Oversight Board has in order to make this Court turn its attention to other issues that do not address the question presented: Whether the Appointments Clause applies to the Oversight Board members. And how could the Appointments Clause apply? Only by determining, as the court of appeals did, that the Oversight Board members are "Officers of the United States". It is required then, to analyze the significant authority exercised by the Oversight Board to reach such conclusion; but the Petitioner tries to avoid this central issue in its argument.

Petitioner interpreted the court of appeals' analysis as if the court ruled that "territorial offices should be considered part of the federal government because Congress enacted legislation creating the office, or because the law the officials administer is federally enacted." Pet. 23. Such reasoning, as misunderstood by

the Petitioner, is certainly irreconcilable with this Court's precedents regarding territorial officers. Of course, the court of appeals did consider that PROMESA is a federal law, but it did so in the context of the Oversight Board "exercising *significant authority* pursuant to the laws of the United States", Pet. App. 30a (Emphasis added), which is part of the test to determine if they are "Officers of the United States".[35] Petitioner fails to argue as to the fact that the Oversight Board has such a significant authority over the government of Puerto Rico and the People of Puerto Rico that they are empowered by PROMESA (a federal law) to initiate and prosecute, at its sole discretion, the largest bankruptcy in the history of the United States municipal bond market,[36] which is in itself an exclusive federal power,[37] and that they can even formulate public policy binding for the government of Puerto Rico.[38]

Petitioner argues that "[t]he 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." Pet. 19. As Petitioner would have it, such assertion makes Congress immune

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[35] *Lucia v. SEC*, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018); *Freytag*, 501 U.S. 868, 111 S. Ct. 2631, 115 L. Ed. 2d 764; and *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

[36] *See* Pet. App. 31a.

[37] *See Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016).

[38] *See* 48 U.S.C. § 2144(b)(2).

of the structural provisions of the Constitution when it comes to Congress's power under the Territorial Clause. However, this Court has ruled that "Congress, in the government of the territories as well as of the District of Columbia, has plenary power, *save as controlled by the provisions of the Constitution.*" *Binns v. United States*, 194 U.S. at 491 (Emphasis added.); *see also*, *e.g.*, *First Nat'l Bank v. Yankton Cty.*, 101 U.S. at 133 ("Congress is supreme" and has all powers, "*except such as have been expressly or by implication reserved in the prohibitions of the Constitution.*") (Emphasis added); *Murphy v. Ramsey*, 114 U.S. at 44 ("[T]he government of the United States" has full authority over the territories, except for "*such restrictions as are expressed in the constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself.*") (Emphasis added).

Petitioner focuses also on PROMESA's mandate that the Oversight Board be entirely funded by the Commonwealth of Puerto Rico. Also, in support of its argument in favor of the Board members being territorial officers, Petitioner states that federal statutes that apply to federal agencies are not applicable to the Oversight Board. Pet. 27. However, the source of funding does not alter the Oversight Board's duties while exercising significant authority.

Moreover, Congress has the power to enact the creation of a federal agency and exempt it of certain federal statutes without altering its nature as federal agency or converting it into a state or territorial agency. The U.S. Courts and military courts, for

example, are all exempt from the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA), 5 U.S.C. § 551(B), (F), *id.* § 701(b)(1)(B), (F). Still, it cannot be argued that these are not plainly federal.

Petitioner points to this Court that the court of appeals focused on the fact that Congress prescribed the responsibilities of the Oversight Board as opposed to the nature and scope of its responsibilities and refers to Pet. App. 33a. *See* Pet. 28. However, Petitioner's argument is totally misleading. The court of appeals *did* focus on the nature and scope of the Oversight Board's authority. In fact, it is the essence of the significant authority test. *See* Pet. App. 31a-33a where the court of appeals discusses in depth the most significant powers of the Oversight Board, *i.e.*, (1) initiate and prosecute the largest bankruptcy in the history of the Unites States municipal bond market; (2) the power to veto, rescind or revise Commonwealth laws and regulations; (3) rejecting budgets for the Commonwealth or the instrumentalities; (4) issuing its own fiscal plan if it rejects the Commonwealth's proposed fiscal plan; (5) exercising its sole discretion to file a plan of adjustment of debt; (6) investigatory and enforcement powers; and (7) receive evidence at hearings and administer oaths, among other functions at its sole discretion. Therefore, Petitioner is misrepresenting the true reasoning of the court of appeals that led to its correct and assertive ruling.

On the other hand, it is apparent that the only example that the Petitioner could construe as to the

power or responsibilities of the Governor and the Legislature of Puerto Rico have left after PROMESA is that they "*also* have significant substantive duties under PROMESA, including submitting budgets and reports to the Board." Pet. 29. (Emphasis in the original) True, PROMESA states that the Governor and the Legislature can submit fiscal plans and budgets. But, section 201(c) *also* states that the Governor shall submit to the Oversight Board any proposed Fiscal Plan *as required* by it, but it is the Oversight Board that will determine *in its sole discretion* if the proposed Fiscal Plan complies or not with the requirements of PROMESA.[39] And if the Board determines *in its sole discretion* that it does not comply, it shall submit *its own* fiscal plan which, according to PROMESA "shall be deemed approved by the Governor".[40] The exact same happens when submitting budgets to the Oversight Board.[41] In the end, the sole discretion and full authority remains in the Oversight Board, above the elected officials of the Government of Puerto Rico, which is what the court of appeals reasoned when it determined that the Board members are "Officers of the United States".

The Appointments Clause does not expressly define who is an officer of the United States, but there are numerous reasonable and founded efforts of its interpretation that have been outlining it. This Court has

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[39] *See* 48 U.S.C. § 2141(c)(2) and (3).

[40] *See* 48 U.S.C. § 2141(e)(2).

[41] *See* 48 U.S.C. § 2142(e)(3) and (4).

described the hallmarks of "office" around the elements of degree of authority, tenure, duration, emolument and continuing duties, among others.[42] Generally, courts have agreed that "officers of the United States" as used in the Appointments Clause infers "any appointee exercising significant authority pursuant to the laws of the United States."[43] The test for determining whether officials are "Officers of the United States" within the meaning of the Appointments Clause, as it was applied by the court of appeals, is: do they (1) occupy a "continuing" position established by law, and (2) "exercise significant authority pursuant to the laws of the United States." *Lucia v. SEC*, *supra*; *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126. In the Oversight Board's own words, its job is "to enforce compliance" with federal law "though broad-based powers" given to it by Congress.[44]

Just a simple analysis of the Oversight Board's powers, pursuant to PROMESA, lead to the conclusion that they in fact exercise significant authority. However, Petitioner ignores such a fact by turning the attention into an incorrect appreciation of the court of

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[42] Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 3:5 (2017).

[43] *Id. See also Buckley v. Valeo*, 424 U.S. at 126.

[44] *FOMB Basic Financial Statements and Required Supplementary Information as of June 30th, 2017 and for the Period from August 31, 2016 (Commencement of Operations) to June 30, 2017*, p. 17 n. 1. Available at: https://drive.google.com/file/d/1wUWFa0xd3VTSKs7dgOT5h7liX7wzqM_U/view.

appeals' ruling by stating that the Appointments Clause does not apply to *territorial* officers.

On the other hand, the Oversight Board's authority is not strictly local as it can bind those outside the government.[45] PROMESA responds to a large-scale financial crisis that could only be solved with the exercise of broad federal powers. This is not a strictly local or limited territorial issue. It is about the total restructuring of a "sovereign" debt because, contrary to the Bankruptcy Code, PROMESA allows the central government of a territory to file for the protection of Title III, and to be able to submit a plan of adjustment of debt that would impair creditors outside the boundaries of Puerto Rico and that do business globally. Such power is an exclusive federal power according to Article I, Section 8, Clause 4 of the Constitution. *See Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016). Therefore, the powers vested to the Oversight Board by PROMESA are significant and federal and could not be considered exclusively as territorial.

Not only is the Oversight Board exercising exclusive federal powers like the one that emanates from the Bankruptcy Clause, but it also exercises significant federal authority upon PROMESA's establishment of a supra-governmental authority composed of officers appointed by the President, which by its vested discretion and powers to establish public policy and budgetary regulations, resulted in the demolition of the

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[45] *See Officers of the United States within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 87 (2007).

Commonwealth's Constitution and the powers of a local democratically elected government. As such, the Board has the authority to rescind certain laws enacted by the Commonwealth that "alter[ed] pre-existing priorities of creditors." 48 U.S.C. § 2144(c)(3)(B)(ii). It can enter into contracts of its own, *id*. § 2124(g), and its authorization is required to allow the Commonwealth to issue or guarantee new debt, or to exchange, modify, repurchase, redeem, or enter into any similar transactions with respect to its debt. *Id*. § 2147.

Indeed, Congress had a broader objective that exceeds Puerto Rico's borders. Such fiscal solvency and the promotion of reforms shall lead to "a free flow of capital between possessions of the United States and the rest of the United States." *See* 48 U.S.C. §§ 2194(m); 2241. Therefore, PROMESA's objectives, executed by the Oversight Board, implicate the substantial rights of creditors throughout the United States, not just within the territory of Puerto Rico.

Moreover, Congress attempted to avoid a challenge of the appointment of federal officials by declaring that the Board is "an entity within the territorial government" and "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government."[46] The federal government's control over the Oversight Board members' appointments and the Board's ongoing operations, as well as the extent of its powers, confirm that, notwithstanding Congress's made-for-litigation label, the Oversight

[46] 48 U.S.C. §§ 2121(c)(1), (2).

Board members are actually "Officers of the United States" rather than territorial officers. Moreover, while "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory," it does not give the Government "the power to decide when and where its terms apply."[47] To the contrary, where "constitutional limits are invoked," courts ignore "mere matters of form" and look instead "to the substance of what is required."[48] It is a simple example of the maxim "Substance Over Form" that directs to ignore the legal form of an arrangement and to look to its actual substance in order to prevent artificial structures from being used to avoid the correct application of the Constitution or the Law.

Furthermore, the Oversight Board members are liable to supervision only by the President. They are not "'directed and supervised at some level' by other officers appointed by the President with the Senate's consent." *Free Enter. Fund*, 561 U.S. at 510, quoting *Edmond*, 520 U.S. at 664. In other words, a "principal officer is one who has no superior other than the President." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring). As such, they are only removable by the President for cause. 48 U.S.C. § 2121(e)(5)(B).

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[47] *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

[48] *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586-87 (1985) (Emphasis omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932)).

In sum, after considering the only test applicable to determine, in light of the official's authority the nature of their appointment and that such authority is pursuant to the laws of the United States, the only conclusion that rises is what the court of appeals correctly determined: the Oversight Board members are "Officers of the United States", thus, subject to the Appointments Clause of the United States Constitution. The most fit comparison to the Board members goes as follows:

> 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* Pet. App. 33a.

E. The Mootness Doctrine Precludes Judicial Review In This Case.

On February 15, 2019, the court of appeals issued the *Opinion and Order* subject to review in the instant case where the court rendered unconstitutional the appointment of the Board members for lack of compliance with the procedure established in the Appointments Clause of the United States Constitution.

However, the court of appeals permitted the Oversight Board to continue operating for an additional 90 days after the judgment in order "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause. (Citations omitted)

During the 90-day stay period, "the Board may continue to operate as until now." On May 6th, 2019, the court of appeals issued an order extending the stay of the mandate for an additional sixty (60) days, until July 15th, 2019.[49]

On April 29, 2019, before the term expired and in precise compliance with the court of appeals' mandate, President Donald J. Trump announced his intention to nominate all the current Oversight Board members.[50] This rendered the Oversight Board's petition for certiorari moot since the requested relief became impracticable in light of the President's determination.[51] When a controversy presented before a court "is no longer 'live' [. . .]" the case becomes moot.[52] This case does not present any actual,[53] real and substantial controversy[54] regarding the validity of the Oversight Board's appointments since the President already determined to nominate all the current Oversight Board members. A controversy must exist during "all stages" of the

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[49] *See* First Circuit Court of Appeals document #00117435465.

[50] Press release: *President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts* (April 29, 2019), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-personnel-key-administration-posts-24/_ (Accessed May 22, 2019).

[51] However, UTIER contends that the validity of the actions of the Oversight Board members is still a question that requires review by this Honorable Supreme Court.

[52] *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980).

[53] *Already, LLC v. Nike Inc.*, 568 U.S. 85, 91 (2013).

[54] *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

litigation.[55] Thus, this Supreme Court should not exercise its judicial power over the Petitioner's request since it does not comply with the "cases and controversies" limitation imposed by Article III of the United States Constitution.

On the other hand, there is no doubt that the exceptions to the mootness doctrine do not apply in this case. First, this is not a class action litigation.[56] Furthermore, this case is not about a voluntary cessation,[57] since the President of the United States simply complied with the order issued by the court of appeals. Moreover, with the President's compliance, there are no collateral consequences to the main controversy presented by the Oversight Board.[58] Finally, this case is not susceptible of repetition since once the appointments are made in accordance with the Appointments Clause of the United States Constitution, there would not be a future controversy as to this particular matter.[59]

Any determination about this issue would thus be an advisory opinion, which is constitutionally prohibited.[60] Moot questions "require no answer."[61] This

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[55] *Already*, 568 U.S. at 90-91.

[56] *Sosna v. Iowa*, 419 U.S. 393 (1975).

[57] *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

[58] *Sibron v. New York*, 392 U.S. 40, 57 (1968).

[59] *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

[60] *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

[61] *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

Honorable Court must deny the petition for a writ of certiorari because the President's re-nomination of the current Oversight Board members is a strict compliance with the court of appeals mandate, thus, rendering this case moot.

CONCLUSION

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

Respectfully submitted,

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