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

In The
Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,
v.
AURELIUS INVESTMENT, LLC, *et al*.

AURELIUS INVESTMENT, LLC, *et al*.,
v.
COMMONWEALTH OF PUERTO RICO, *et al*.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA,
v.
AURELIUS INVESTMENT, LLC, *et al*.

UNITED STATES OF AMERICA,
v.
AURELIUS INVESTMENT, LLC, *et al*.

UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.,
v.
FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *et al*.

On Writs Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF ALAN MYGATT-TAUBER AS AMICUS CURIAE CHALLENGING THE RULING ON THE APPOINTMENTS CLAUSE

ALAN MYGATT-TAUBER
Counsel of Record
LAW OFFICE OF ALAN MYGATT-TAUBER
10089 Ashley Circle NW
Silverdale, WA 98383
(253) 271-9585
alan@amtappeals.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE[1]

Alan Mygatt-Tauber has published multiple articles on the extraterritorial application of the Constitution and the application of the Constitution to the territories in particular, *see* Alan Tauber, "The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories," 57 Case W. Res. 147 (Fall, 2006). He also runs http://followtheflag.net, a website devoted to studying the extraterritorial application of the Constitution. The interest of amicus is in the sound development of law on the extraterritorial application of the Constitution. He submits this brief to address the implications of the First Circuit's decision that members of the Oversight Board are Officers of the United States.

SUMMARY OF ARGUMENT

Taken to its logical conclusion, the First Circuit's holding below would imperil self-rule in unincorporated territories. While the court tries to cabin its holding to members of the Financial Oversight and Management Board for Puerto Rico, the court's logic sweeps far more broadly and would encompass many territorial officials, including those currently subject to popular election.

---

[1] All the parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or his counsel funded its preparation or submission.

The First Circuit held that the members of the Oversight Board are "Officers of the United States" subject to the Appointments Clause of Article II, Section 2 of the U.S. Constitution. That status, the Court determined, stems from the fact that the members of the Oversight Board held continuing offices and exercised "significant authority" pursuant to the laws of the United States. *Aurelius Investment, LLC, et al. v. Commonwealth of Puerto Rico, et al.*, 915 F.3d 838, 856-57 (1st Cir. 2019). In making that determination, however, the Court failed to distinguish between members of the Oversight Board and many other territorial office-holders whose selection or appointment does not comport with the requirements of the Appointments Clause. This omission places territorial self-governance in doubt.

Even if one can distinguish between members of the Oversight Board and other members of the Puerto Rican government because of the island's Commonwealth status, the First Circuit's test also implicates the home rule of Guam and the United States Virgin Islands, which cannot claim the protection of that status for themselves. In light of these implications, the Court should carefully consider the results of the First Circuit's reasoning so as not to strip U.S. territories of their longstanding self-governance.

ARGUMENT

I. THE FIRST CIRCUIT'S DECISION IMPERILS HOME RULE IN UNINCORPORATED TERRITORIES

The First Circuit's decision has far-reaching implications for the local self-rule of millions of U.S. citizens living in three unincorporated territories. While purportedly focusing solely on the status of the members of the Oversight Board, the decision, if upheld, will affect the legitimacy of many elected and appointed territorial officers, who will suddenly find themselves subject to the Appointments Clause and their decisions open to challenge for failing to comply with its dictates.

A. The First Circuit's decision is far reaching

Simply put, the First Circuit provided no principled way to distinguish between the Board Members at issue here and the Governor and other officers of Puerto Rico and other unincorporated territories. Consequently, these officers would also be considered subject to the Appointments Clause.

To determine that members of the Financial Oversight and Management Board for Puerto Rico are "Officers of the United States" subject to the Appointments Clause of Article II, Section 2, the First Circuit employed a three-part test derived from *Lucia v. SEC*, 138 S. Ct. 2044 (2018), *Freytag v. Commissioner*, 501 U.S. 868 (1991), and *Buckley v. Valeo*, 424 U.S. 1 (1976). Under this test, an individual is an "Officer of the

United States" subject to the Appointments Clause if: "(1) the appointee occupies a 'continuing' position established by federal law; (2) the appointee 'exercises significant authority;' and (3) the significant authority is exercised pursuant to the laws of the United States." *Aurelius Investment, LLC, et al. v. Commonwealth of Puerto Rico, et al.*, 915 F.3d 838, 856 (1st Cir. 2019) (cleaned up).

The court held that Board Members occupy "continuing positions" because they were appointed to an initial term which was renewable and serve until replaced. *Id*. And the court held those Board Members "enjoy 'significant discretion' as they carry out 'important functions' under a federal law." *Id.* at 857 (citation omitted). Finally, it held that they exercise their authority "pursuant to the laws of the United States" and that they trace their authority "directly and exclusively" to a federal law. *Id*. Unfortunately, the same can also be said of the Governor of Puerto Rico, an elected official.

The court brushed past this conundrum in a mere two sentences. First, it tried to distinguish the Governor and similar officers by noting that they are territorial officers, exercising power pursuant to local laws, such as the Commonwealth's Constitution. *Aurelius Investments*, 915 F.3d at 859. But it quickly acknowledged that those laws draw their authority from a grant from Congress. *Id.* The court also ignored the fact that the federal law creating the Oversight Board explicitly states that the Board is constituted pursuant to Congress's powers under Article IV, Section 3 of the

U.S. Constitution, and that the Board is to be an instrumentality of the territorial government. 48 U.S.C. § 2121.

Its only other argument was that if this reading of the court's holding were correct, "every claim brought under Puerto Rico's laws would pose a federal question." *Aurelius Investments*, 915 F.3d at 859. This argument is inadequate for two reasons. First, as pointed out by the Solicitor General, this is a non-sequitur, which conflates a statutory and constitutional question. Petition for Writ of Certiorari, *United States v. Aurelius Investment, LLC, et al.*, No. 18-1514, at 24. Second, even if the First Circuit had not conflated two questions, the anti-democratic result is the obvious implication of its holding. The court's failure to grapple with the full implications of that holding do not make those implications any less concrete or potentially disastrous.

B. Many territorial officers would meet the First Circuit's test

The anti-democratic result of the First Circuit's holding would clearly affect the office of the Governor of Puerto Rico. Article IV of the Constitution of Puerto Rico describes the office of the Governor. Per Section 2, the Governor "shall hold office for the term of four years from the second day of January of the year following his election and until his successor has been elected and qualifies." Const. of Puerto Rico, art. IV,

§ 2. The Constitution does not limit the number of times a Governor may be elected.

Section 4 lists the powers of the Governor, including, *inter alia*, executing the laws and causing them to be executed; appointing all officers whose appointment he is authorized to make; to serve as commander-in-chief of the militia; to proclaim martial law when the public safety requires it; to grant pardons and commutations; and to approve or disapprove the joint resolutions and bills passed by the Legislative Assembly. Const. of Puerto Rico, art. IV, § 4. The Constitution of Puerto Rico, which vests the Governor with these powers, was promulgated under the Puerto Rico Federal Relations Act of 1950. Pub. L. No. 81-600, 64 Stat. 319 (1950). Under the terms of that Act, the Constitution of Puerto Rico was not effective until ratified by Congress, which occurred on July 3, 1952. *See* Pub. L. No. 82-447, 66 Stat. 327 (1952).[2] *See*, *e.g.*, *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1868-69 (2016).

Thus, like the Board Members, the Governor of Puerto Rico serves in a continuing office; he exercises significant discretion in carrying out important functions; and his powers trace their authority directly and exclusively to federal law. *See*, *e.g.*, *Sanchez-Valle*, 136 S. Ct. at 1875 ("Put simply, Congress conferred the authority to create the Puerto Rico Constitution. . . .").

While the loss of the right to select their own governor would be bad enough for the people of Puerto

[2] This ratification was conditioned on several amendments to the Constitution of Puerto Rico required by Congress.

Rico, the Governor is not the only officer whose selection would be open to question. The Commonwealth Constitution creates at least 15 other officers who draw their power from a federal law. *See, e.g.*, Const. of Puerto Rico, art. III, § 22 (Controller); art. IV, § 5 (Creating a Council of Secretaries including State, Justice, Education, Health, Treasury, Labor, and Agriculture and Commerce Secretaries); art. IV, § 6 (Secretary of Public Works); and art. V, § 3 (Chief Justice and four Associate Justices of the Supreme Court of Puerto Rico). Under the logic of the First Circuit, not only would all of these officers be subject to the Appointments Clause, all the actions they have taken would potentially be open to question. *See*, *e.g.*, *Noel Canning v. National Labor Relations Board*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd by Nat'l Labor Relations Board v. Noel Canning*, 573 U.S. 513 (2014) (invalidating action by NLRB when the Board lacked a quorum because of improperly nominated Board Members).

Besides Puerto Rico, the First Circuit's reasoning also threatens the self-government of two other unincorporated territories—Guam and the U.S. Virgin Islands.[3] Unlike Puerto Rico, these two territories have never passed a local constitution to provide a basis for

[3] These concerns could also be raised about American Samoa. The Commonwealth of the Northern Mariana Islands specifically reserved the right of local self-government when it entered the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States. *See*, *e.g.*, *Commonwealth of the Northern Mariana Islands v. United States*, 399 F.3d 1057, 1058 (9th Cir. 2005).

territorial government[4]—instead, they draw their power exclusively from two Organic Acts passed by Congress. *See* 48 U.S.C. §§ 1421-1428e (Guam Organic Act); 48 U.S.C. §§ 1541-1645 (Revised Organic Act of the Virgin Islands).

Both of these Acts define a number of territorial officials who would be considered "Officers of the United States" under the First Circuit's test. And unlike Puerto Rico, with no mediating constitution, these officers all draw their power directly from a federal statute. In the U.S. Virgin Islands, the Governor (48 U.S.C. § 1591), Lieutenant Governor (same), Commissioner of Law (48 U.S.C. § 1597), Commissioner of Finance (same), and even members of school boards (same) are provided for directly in the Revised Organic Act. Similarly in Guam the Governor (48 U.S.C. § 1422), Lieutenant Governor (same), Office of the Public Prosecutor (48 U.S.C. § 1421g(c)), Office of Public Auditor (same), Attorney General (48 U.S.C. § 1421g(d)), the judges of the Supreme and Superior Courts of Guam (48 U.S.C. § 1424(a)(1)), and the Board of Directors of the Guam Power Authority (48 U.S.C.

[4] The U.S. Virgin Islands has tried many times to create a local constitution, but has consistently failed to craft a document acceptable to both the people and Congress. *See*, *e.g.*, Pub. L. No, 111-194, 124 Stat. 1309 (2010). Guam has twice tried to pass a Constitution, most recently in 1979. In the last attempt, although the federal government approved the document, the people of Guam rejected it in a referendum. *See also* GAO/OGC-98-5, U.S. Insular Areas—Application of the U.S. Constitution, November 1997, at 8. ("Guam and the Virgin Islands have not adopted local constitutions and remain under organic acts approved by the Congress."), available at <https://www.gao.gov/archive/1998/og98005.pdf>.

§ 1423a) all derive their existence and power from federal statutes.[5]

C. There is no "election exception" to the Appointments Clause

In trying to distinguish the members of the Oversight Board from the Governor of Puerto Rico, the First Circuit noted that "the Governor is elected by the citizens of Puerto Rico" under the Puerto Rican Constitution. 915 F.3d at 859. But there is no election exception to the Appointments Clause. As this Court has made clear, the Appointments Clause is the exclusive means for appointing "all Officers of the United States." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, if the First Circuit's test would otherwise encompass the Governor of Puerto Rico (and other territorial officials) the fact that the Governor is currently elected would not save that office from the implications of the First Circuit's decision.

II. GUAM AND THE UNITED STATES VIRGIN ISLANDS CANNOT SHIELD THEMSELVES WITH COMMONWEALTH STATUS

Even if the First Circuit were correct in its conclusion that the existence of the Constitution of Puerto

---

[5] In addition, a host of Boards, Commissions, and other territorial officials, such as the Guam Chief of Police and the Adjutant General of the Guam National Guard, derive their power from acts of the Guam Legislature, whose power emanates from federal law. 48 U.S.C. § 1423a.

Rico limits the reach of its test to avoid encompassing officers elected and appointed pursuant to that document, neither Guam nor the U.S. Virgin Islands can make the same claim. Lacking local constitutions, there can be no doubt that the Governors and other officers all exercise their significant powers pursuant to federal law.

A. As a Commonwealth, Puerto Rico may have aspects of sovereignty that shield its officers from the First Circuit's rationale

In *Sanchez-Valle*, this Court held that Puerto Rico was not a separate sovereign from the United States for purposes of the Double Jeopardy Clause of the Fifth Amendment. 136 S. Ct. 1863. Even so, the majority recognized that in the Double Jeopardy context, the term "sovereignty" is a term of art. *Id.* at 1870 ("Truth be told, however, 'sovereignty' in this context does not bear its ordinary meaning."). As far as Puerto Rico itself, the Court recognized that "Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing Commonwealth[,]" *id.* at 1874, going so far as to recognize that the creation of the Commonwealth "w[as] of great significance—and, indeed, made Puerto Rico 'sovereign' in one commonly understood sense of that term." *Id. See also Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976) ("[A]fter 1952, when Congress relinquished its control over the organization of the local affairs of the island [it] granted Puerto Rico a measure

of autonomy comparable to that possessed by the States. . . .").

In his dissent, Justice Breyer identified several aspects of Puerto Rico's Commonwealth status that afforded it a great measure of autonomy. *Sanchez-Valle*, 136 S. Ct. at 1880-84 (Breyer, J., dissenting). It is possible that the unique action taken by Congress to grant Puerto Rico Commonwealth status is the key to untangling the First Circuit's Gordian knot and distinguish between the members of the Oversight Board and the locally elected officers of Puerto Rico's government. This Court could certainly find that the creation of the Commonwealth allows for the popular election of what were once considered "Officers of the United States" subject to the Appointments Clause. But this is not the end of the discussion.

B. Neither Guam nor the United States Virgin Islands can claim Commonwealth status

As noted above, Puerto Rico's status as a Commonwealth is unique among the territories. *Sanchez-Valle*, 136 S. Ct. at 1868.[6] Thus, even if the Court were to determine that the First Circuit's test does not reach officers of the Commonwealth, it would still have to grapple with the implications for the territorial governments of Guam and the U.S. Virgin Islands.

---

[6] The Commonwealth of the Northern Mariana Islands, despite sharing the name, enjoys a separate and distinct political relationship with the United States, drawn from its Covenant.

As unincorporated territories, with no local constitutions, these territorial governments draw all of their power from the Organic Acts which created them. Thus, to the extent that territorial officials meet the standards set out by the First Circuit, they would have to be considered "Officers of the United States" to the same extent as the Board Members here.

Unlike the Governor of Puerto Rico, the Governors of the U.S. Virgin Islands and Guam owe their offices solely to federal statutes. Those offices are "continuing" as defined by the First Circuit. *See* 48 U.S.C. § 1591 ("[T]he Governor and Lieutenant Governor [of the U.S. Virgin Islands] shall hold office for a term of four years and until their successors are elected and qualified.");[7] 48 U.S.C. § 1422 ("The Governor and Lieutenant Governor [of Guam] shall hold office for a term of four years and until their successors are elected and qualified.").[8]

Both governors exercise significant authority. They are granted "general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of government" of their respective territories. 48 U.S.C. §§ 1422, 1591. And of course, as noted above, they exercise this

---

[7] The only limitation on the terms of these offices is that no one may serve as Governor for more than two consecutive terms. However, once an intervening term has elapsed, a candidate may again run for the position. 48 U.S.C. § 1591.

[8] Guam has an identical limitation on holding the office of Governor. 48 U.S.C. § 1422.

significant authority pursuant to a law of the United States.[9] The same is true of all other officers whose positions are created by the Organic Acts.

III. OVERRULING THE FIRST CIRCUIT HAS THE LEAST FAR-REACHING IMPLICATIONS

The questions posed by this case offer no clear or easy solutions. Indeed, it seems the more one delves into the morass of doctrine surrounding territorial government, the messier things become. But this Court has a responsibility to issue a decision. When it appears that any solution will cause doctrinal or practical harm, it is incumbent upon this Court to pick the one which harms the least. In this case, that mediates in favor of reversing the First Circuit.

Specifically, the Court should find that the members of the Oversight Board are territorial officials, appointed pursuant to Congress's powers under Art. IV, § 3. Thus, they are not "Officers of the United States" subject to the Appointments Clause. Such a finding is supported by the text of the statute, *see* 48 U.S.C. §§ 2121(b)(2), (c)(1), and (c)(2), and does the least damage to territorial self-rule.

---

[9] While this analysis is limited to the Governors of Guam and the U.S. Virgin Islands, it applies equally to all territorial officers named in the respective Organic Acts identified above. It remains an open question how far down into offices created by the territorial government the Appointments Clause, as interpreted by the First Circuit, would reach.

Amicus is cognizant of the concerns raised by the Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. about the power the Oversight Board wields over the democratically-elected government of Puerto Rico. *See* Brief for Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. in Opposition, *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, et al.*, No. 18-1334, at 16-17. Nevertheless, a ruling upholding the First Circuit's decision would have broader and more long-lasting implications for territorial self-rule, as outlined above. However broad the powers of the Oversight Board, they are of limited duration. *See* 48 U.S.C. § 2149. The requirement that territorial officers be appointed by the President, with the advice and consent of the Senate, would require a constitutional amendment to correct.

Likewise, a finding that the Appointments Clause does not apply to U.S. territories would extend the reach and reasoning of the *Insular Cases*, which UTIER rightfully decries. *See* Brief for Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. in Opposition, *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, et al.*, No. 18-1334, at 12-21.

CONCLUSION

This Court should not hastily consider the question of whether the members of the Oversight Board

created by Congress are subject to the Appointments Clause, nor take lightly the arguments advanced by the parties regarding the historical practice of subjecting territorial officers to the requirements of that Clause. The implications of this Court's ruling will have far-reaching impacts on the local self-government of U.S. citizens in our territories. The least far-reaching can be achieved by reversing the court below and finding that members of the Oversight Board are territorial officers and not "Officers of the United States."

Respectfully submitted,

ALAN MYGATT-TAUBER
Counsel of Record
LAW OFFICE OF ALAN MYGATT-TAUBER
10089 Ashley Circle NW
Silverdale, WA 98383
(253) 271-9585
alan@amtappeals.com

July 30, 2019