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

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

AURELIUS INVESTMENT, LLC, ET AL.,

Respondents.

[Caption Continued on Following Page]

BRIEF OF THE DRA ENTITIES AS *AMICI CURIAE* CHALLENGING THE APPOINTMENTS CLAUSE RULING AND SUPPORTING THE *DE FACTO* OFFICER DOCTRINE RULING

Peter J. Amend
Matthew R. Shahabian
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Arturo J. García-Solá
Nayuan Zouairabani
MCCONNELL VALDÉS LLC
270 Muñoz Rivera Ave.
Suite 7
Hato Rey, PR 00918

Robert Loeb
Counsel of Record
Douglas S. Mintz
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

Counsel for Amici Curiae

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

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

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

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. The Government Development Bank For Puerto Rico Falls Victim To The Puerto Rico Fiscal Crisis. 7

II. Congress Enacts PROMESA, Which Includes Title VI's Consensual Restructuring Process For Puerto Rico Instrumentalities And Their Bondholders. 9

III. The Puerto Rico Legislature Creates The Debt Recovery Authority To Restructure GDB Debts Under Title VI. 12

IV. The DRA Issues "New Bonds" That Resolve The GDB's $4.7 Billion In Debt. 16

V. Aurelius' Position Risks Harming Puerto Rico And Undermining Hard Negotiated Compromises. 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Andrade v. Lauder,
729 F.2d 1475 (D.C. Cir. 1984)............................20

Aurelius Inv., LLC v. Puerto Rico,
915 F.3d 838 (1st Cir. 2019)......................6, 18, 20

Buckley v. Valeo,
424 U.S. 1 (1976)..20

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993)..19

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982)..21

Nguyen v. United States,
539 U.S. 69 (2003)..20

Puerto Rico v. Franklin Cal. Tax-Free Tr.,
136 S. Ct. 1938 (2016)...9

Ryder v. United States,
515 U.S. 177 (1995).......................................20, 21

United States v. Leon,
468 U.S. 897 (1984)..21

Statutes

48 U.S.C. § 2104(2)..10

48 U.S.C. § 2121(a)..2

48 U.S.C. § 2124(i) 12

48 U.S.C. §§ 2161-77 9

48 U.S.C. § 2231 10

48 U.S.C. § 2231(a)(1) 11

48 U.S.C. § 2231(a)(2) 10

48 U.S.C. § 2231(a)(8) 10

48 U.S.C. § 2231(a)(9) 11

48 U.S.C. § 2231(a)(10) 10

48 U.S.C. § 2231(a)(15) 10

48 U.S.C. § 2231(b)..10

48 U.S.C. § 2231(d)..11

48 U.S.C. § 2231(e)...10, 11

48 U.S.C. § 2231(g)..11

48 U.S.C. § 2231(g)(1) 10

48 U.S.C. § 2231(g)(1)(C) 12

48 U.S.C. § 2231(g)(2) 12

48 U.S.C. § 2231(h) 12

48 U.S.C. § 2231(i) 11

48 U.S.C. § 2231(j) 10, 12

48 U.S.C. § 2231(m) 10

48 U.S.C. § 2231(m)(1)(B) 12

48 U.S.C. § 2231(m)(1)(D) 12

Emergency Moratorium & Financial Rehabilitation Act, 2016 P.R. Laws 160 13

GDB Debt Restructuring Act (Act No. 109-2017) 13, 14, 17

Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 et seq. 9

Other Authorities

Andrew Biggs et al., *Privatize Puerto Rico's Power*, Wall St. J. (June 29, 2017), https://tinyurl.com/yy3k5q4u 11

CUSIP: 36829QAA3, Electronic Municipal Market Access, https://tinyurl.com/ 17

DRA Parties' Motion and Memorandum of Law in Support of Their Motion for Relief from the Automatic Stay, or in the Alternative, Ordering Payment of Adequate Protection, *In re Puerto Rico*, No. 17 BK 3283 (D.P.R. Bankr. June 25, 2019) (ECF No. 7643) 8

Financial Oversight & Mgmt. Bd. for Puerto Rico, Unanimous Consent, May 8, 2018, https://tinyurl.com/y3t7mxbh 15

Financial Oversight & Mgmt. Bd. for Puerto Rico, Unanimous Written Consent Approving Authorization of Government Development Bank of Puerto Rico and Certification of Qualifying Modification Pursuant to Title VI of PROMESA, Nov. 2, 2018, https://tinyurl.com/y3yehvcb 15

Financial Oversight & Mgmt. Bd. for Puerto Rico, Unanimous Written Consent Approving Authorization of Government Development Bank of Puerto Rico and Certification of Restructuring Support Agreement Pursuant to Title VI of PROMESA, July 12, 2017, https://tinyurl.com/y5h7lt46 14

Findings of Fact, Conclusions of Law, and Order Approving Qualifying Modification for the Government Development Bank for Puerto Rico Pursuant to Section 601(m)(1)(D) of the Puerto Rico Oversight, Management, and Economic Stability Act, *In re Gov't Dev. Bank for Puerto Rico*, No. 18 Civ. 1561 (D.P.R. Nov. 7, 2018) (ECF No. 270) 15, 16

First, Second, Third, and Fourth Amendments to RSA, https://tinyurl.com/y3t7mxbh 14

GDB Debt Recovery Authority, Offering Memorandum, Nov. 7, 2018, https://tinyurl.com/y5dzns7 16

Dawn Giel, *Puerto Rico's Oversight Board Strikes $35 Billion Restructuring Deal With Commonwealth's Bondholders*, CNBC, June 16, 2019, https://tinyurl.com/y44y5e49 18

Gurtin Mun. Bond Mgmt., Mun. Credit Research Report, July 2014, https://tinyurl.com/yxrefr9t 8

Kobre & Kim LLP, The Financial Oversight & Management Board for Puerto Rico, Independent Investigator, Final Investigative Report (Aug. 20, 2018) 7, 8

Letter from AAFAF to Financial Oversight & Mgmt. Bd. for Puerto Rico, Oct. 31, 2018, https://tinyurl.com/y3yehvcb 15

Moody's Revises Outlook for Govt. Dev. Bank for Puerto Rico Senior Notes To Stable; C Rating Affirmed, Moody's, Nov. 16, 2018, https://tinyurl.com/yx96pkk9 17

Luis Valentin Ortiz, *Puerto Rico Wins Court Approval For Sales Tax-Backed Debt Restructuring*, Reuters, Feb. 4, 2019, https://tinyurl.com/y2nzttjy 18

Press Release, Governor of Puerto Rico, *AAFAF and GDB Announce the Settlement of Litigation Brought By the Official Committee of Unsecured Creditors Appointed in the Title III Cases*, Oct. 10, 2018, https://tinyurl.com/yxws2bvh 16

Press Release, Governor of Puerto Rico, *Government of Puerto Rico Announces Consummation of the GDB Qualifying Modification*, Nov. 29, 2018, https://tinyurl.com/y4498db8 17

Restructuring Support Agreement, May 15, 2017, https://tinyurl.com/y5h7lt46 (Ex. A to Letter from AAFAF to Financial Oversight & Mgmt. Bd. for Puerto Rico, June 30, 2017)...13

David A. Skeel Jr., *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 Rev. Jur. UPR 862 (2018)..10, 11

Title VI Application of the Government Development Bank for Puerto Rico and the Puerto Rico Fiscal Agency and Financial Advisory Authority ¶ 8, *In re Gov't Dev. Bank for Puerto Rico*, No. 18-01561 (LTS) (D.P.R. Aug. 10, 2018) (ECF No. 1)...7, 8, 9, 13, 14

Mary Williams Walsh, *Hedge Funds Sue to Freeze Puerto Rico Bank's Assets*, N.Y. Times DealBook, Apr. 4, 2016, https://tinyurl.com/y35547kd 8

INTEREST OF *AMICI CURIAE*[1]

The GDB Debt Recovery Authority ("DRA") is a public trust and instrumentality of the Commonwealth of Puerto Rico. It is charged with carrying out the restructuring of $4.7 billion in debt issued by the Government Development Bank for Puerto Rico ("GDB"). The GDB served as the primary fiscal agent for the Government of Puerto Rico until 2016, when it was declared insolvent. The Commonwealth and its agencies and instrumentalities borrowed billions of dollars from the GDB to fund and provide public infrastructure and services to the people of Puerto Rico.

In restructuring GDB's unserviceable debt, the DRA issued new bonds that GDB creditors agreed to accept in exchange for 55 cents on the dollar of their original claims. The DRA also manages certain assets of the GDB that the DRA received to secure these new bonds. With respect to the DRA, the *amici curiae*—the Servicer, AmeriNational Community Services, LLC, and the Collateral Monitor, Cantor-Katz Collateral Monitor LLC (collectively, the "DRA Entities")—play the following roles: The Servicer is contractually responsible to manage the GDB assets transferred to the DRA, including all day-today operations in respect thereof such as collection of revenues used to

---

[1] The parties to these consolidated cases have filed blanket letters of consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amici* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

pay the new bonds, administer defaults, delinquencies, and adjustments; the Collateral Monitor is contractually responsible for monitoring the performance of the Servicer and protecting the GDB assets transferred to the DRA.

This entire restructuring process depends on the voluntary restructuring framework created by Title VI of the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). To accomplish the restructuring, the GDB, the Puerto Rico Government, and a supermajority of its creditors used Title VI's simplified restructuring framework to negotiate a restructuring solution that was broadly acceptable to all interested parties. GDB's creditors were not just Wall Street investors; they included on-island credit unions or "cooperativas," as well as members of Bonistas del Patio, Inc., an organization that advocates for Puerto Rico residents who hold bonds of Commonwealth government issuers.

The Financial Oversight and Management Board for Puerto Rico played a key role in this process. As required by PROMESA, the Oversight Board must certify any restructuring under Title VI, as well establish the "pools" of creditors in any Title VI restructuring. The Board ultimately serves as Administrative Supervisor over a Title VI restructuring.

The resolution of this matter may potentially implicate the DRA Entities' interests. If the Court holds that the Oversight Board's current composition violates the Appointments Clause, and further holds that this calls into question actions previously taken by that Board, it could potentially spur challenges seeking to disrupt the results of three years of painstaking negotiations between the parties to resolve this $4.7 billion of GDB debt. Seeking to unwind the work of the Oversight Board, if permitted, would place a court in the impossible position of undoing a debt exchange where the new bonds are already trading on the open market. Attempts to unscramble the egg would be both unrealistic and, if attempted, would leave everyone worse off—both creditors who have exchanged uncertain claims for certain resolution, and the Commonwealth, which has resolved the GDB's debt in exchange for a sounder financial footing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past three years, Puerto Rico and its creditors have begun to make progress on restructuring the billions of dollars of debt that risks suffocating the Commonwealth. Aurelius' arguments, if accepted by this Court, risk undoing years of hard-fought progress on the path to fiscal stability for the island.

Before Puerto Rico's fiscal crisis, the GDB was a Puerto Rico instrumentality charged with financing the development of the island's infrastructure. The fiscal crisis left GDB insolvent—unable to raise financing in the capital markets, holding assets from other Puerto Rico instrumentalities that were insufficient to cover its obligations, and on the brink of defaulting on $4.7 billion of its obligations. GDB's insolvency, while just one piece of Puerto Rico's bleak fiscal picture, threatened to cut off Puerto Rico from ready financing to provide basic services like water, power, and transportation.

While the parties focus on the bankruptcy-like procedures in PROMESA's Title III and the Oversight Board's management role in approving fiscal plans for the island, another portion of PROMESA, Title VI, proved critical to restructuring GDB's unserviceable debt load. Title VI creates a voluntary restructuring process for Puerto Rico instrumentalities and their bondholders outside of the context of a formal bankruptcy-like proceeding. If a Puerto Rico entity and a supermajority of its bondholders can agree to a consensual restructuring of its bonds, that agreement—which must be certified by the Oversight Board and ultimately approved by the federal district court—can bind all bondholders into a restructuring of that debt.

Puerto Rico and its creditors turned to Title VI to restructure GDB's debts. After negotiations spanning years—interrupted by the devastation caused by Hurricanes Irma and Maria—a supermajority of GDB's creditors agreed to a compromise where they would accept a 45% haircut, i.e., 55 cents on the dollar, for their claims against GDB. To execute this transaction, the Puerto Rico Legislature created the DRA to issue new bonds to GDB creditors and hold GDB's assets as collateral for those bonds.

As required by PROMESA, the Oversight Board certified its approval of this voluntary restructuring, which the federal district court then approved—marking the first time that Puerto Rico and its creditors used PROMESA's Title VI to restructure Puerto Rico bonds. That exchange of $4.7 billion in debt for new bonds succeeded—the DRA issued the New Bonds in November 2018, and those bonds continue to trade in the market. By accomplishing this voluntary restructuring, Puerto Rico and the Oversight Board shaved 45% off GDB's multibillion-dollar debt load.

Aurelius Investment, LLC and its allied parties (collectively, "Aurelius") seek to upend Puerto Rico's path back to fiscal stability. While, as the Oversight Board and the Solicitor General cogently explain, Aurelius' legal arguments are dead wrong, the practical implications of its arguments would be disastrous. If the First Circuit's Appointments Clause ruling is allowed to stand and if this Court goes further and also adopts Aurelius' argument against the application of the *de facto* officer doctrine, that ruling could potentially draw into question the Oversight Board's authorization of the GDB to use Title VI and its certification of the voluntary exchange of billions of dollars' worth of GDB's debt. It would be near impossible to unwind the GDB's $4.7 billion debt exchange where the new bonds are actively traded in the market. More broadly, the progress that the Puerto Rico government has made in restructuring of its debt would be disrupted.

The Court of Appeals below recognized that this is a situation that calls for invoking the *de facto* officer doctrine's equitable remedies. In fashioning a constitutional remedy for the purported Appointments Clause violation, the court explained that application of the doctrine "protect[s] citizens' reliance on past government actions and the government's ability to take effective and final action." *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 862 (1st Cir. 2019) (quotation marks omitted). To hold otherwise, the court acknowledged, would have "negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now," introduce further delays, and cancel the progress the Board has made towards fiscal stability for Puerto Rico. *Id.* This Court should not hold differently. Sending Puerto Rico back to square one would do immeasurable and incalculable harm to the Commonwealth that has already endured so much hardship.

ARGUMENT

I. The Government Development Bank For Puerto Rico Falls Victim To The Puerto Rico Fiscal Crisis.

Prior to the Puerto Rico fiscal crisis, the GDB was the principal financial agent for the Commonwealth. As the issuer of government bonds, intragovernmental bank, fiscal agent, and financial advisor of the government of Puerto Rico, the GDB spurred investment and development in the island's infrastructure, issuing bonds on behalf of multiple Puerto Rico agencies and instrumentalities. *See* Title VI Application of the Government Development Bank for Puerto Rico and the Puerto Rico Fiscal Agency and Financial Advisory Authority ¶¶ 8-9, *In re Gov't Dev. Bank for Puerto Rico*, No. 18-01561 (LTS) (D.P.R. Aug. 10, 2018) (ECF No. 1) (hereinafter "Application").

The GDB had strong access to capital markets. *See id.*; Kobre & Kim LLP, The Financial Oversight & Management Board for Puerto Rico, Independent Investigator, Final Investigative Report 73-75 (Aug. 20, 2018) (hereinafter "Kobre & Kim Report"). Puerto Rico leveraged that access by calling upon the GDB to issue long-term and interim financing to the Commonwealth and its instrumentalities, public corporations, and municipalities.

Over time, this practice linked the GDB's financial position to those entities' ability to repay their loans from the GDB. For example, the Puerto Rico Highways and Transpiration Authority obtained over $1.7 billion in financing from the GDB through 23 separate promissory notes, secured by, *inter alia*, motor vehicle license fees and excise taxes on cigarettes, gas, and diesel. *See* DRA Parties' Motion and Memorandum of Law in Support of Their Motion for Relief from the Automatic Stay, or in the Alternative, Ordering Payment of Adequate Protection ¶¶ 5-6, *In re Puerto Rico*, No. 17 BK 3283 (D.P.R. Bankr. June 25, 2019) (ECF No. 7643). By 2013, GDB bonds issued to the capital markets were, in effect, backed by the revenues generated by those instrumentalities, as the instrumentalities used their revenues to service their debts to the GDB. *See* Kobre & Kim Report, *supra*, at 101 (concluding that the GDB had "essentially … sacrificed its own liquidity in order to sustain the Public Utilities and other Puerto Rico-Related Entities").

Market participants recognized that the "GDB's solvency is dependent on continued capital market access, which is highly precarious and reliant upon market confidence in the Commonwealth." Gurtin Mun. Bond Mgmt., Municipal Credit Research Report, July 2014, at 2, https://tinyurl.com/yxrefr9t. In 2014, the GDB lost its investment grade credit rating, resulting in it losing continued access to capital markets. This meant the GDB could no longer borrow funds to service its existing debts, while its illiquid assets—primarily loans to Puerto Rico and its instrumentalities—were seen as mostly worthless as those entities could not pay the GDB back. Application ¶ 10.

By the time the Puerto Rico fiscal crisis peaked in 2016, the market expected that the GDB would default on its obligations. *See, e.g.*, Mary Williams Walsh, *Hedge Funds Sue to Freeze Puerto Rico Bank's*

Assets, N.Y. Times DealBook, Apr. 4, 2016, https://tinyurl.com/y35547kd. Puerto Rico's Governor declared the GDB insolvent and prohibited most withdrawals and loan disbursements. *See* Application ¶ 11 (citing Governor of Puerto Rico, Executive Order 2016-10). As a result, the GDB essentially froze its bank functions and government entities stopped depositing their funds at the GDB and began depositing funds at other private banking institutions. *Id.*

II. Congress Enacts PROMESA, Which Includes Title VI's Consensual Restructuring Process For Puerto Rico Instrumentalities And Their Bondholders.

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 et seq., to address the fiscal crisis in Puerto Rico. Locked out of the Bankruptcy Code, *see Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016), PROMESA created two pathways for Puerto Rico and its entities to restructure their debts. First, the more well-known provision, Title III, creates a bankruptcy analog that allows Puerto Rico and its instrumentalities, under the approval of and represented by the Oversight Board, to restructure their debts pursuant to a comprehensive restructuring plan, even over the objections of creditors, under the protection of the Bankruptcy Code's automatic stay provision. *See* 48 U.S.C. §§ 2161-77.

Second, Title VI of PROMESA creates a path for Puerto Rico and certain of its agencies—including the GDB—to restructure obligations voluntarily, so long as a supermajority of creditors agree to restructure those claims. *See* 48 U.S.C. § 2231. As one member of the Oversight Board has explained, Title VI is the "simpler option" compared to Title III and is "similar to the collective action provisions that are used to restructure sovereign debt." David A. Skeel Jr., *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 Rev. Jur. UPR 862, 872 (2018).

Title VI's scope is substantially more limited than Title III. Only "Issuers" of defined "Bonds" are eligible to utilize Title VI of PROMSEA. *See* 48 U.S.C. § 2231(g)(1). An entity may be an Issuer if it is a "Territory Government Issuer" under PROMESA itself, § 2231(a)(8), (15), or if it is specifically authorized as an "Authorized Territorial Instrumentality" by the Oversight Board to use Title VI's procedures, § 2231(a)(2), (8), (e), and it has issued or guaranteed at least one "Bond," § 2104(2) that is "Outstanding," § 2231(a)(10), (b).

Moreover, Title VI is a purely consensual process. While its collective action provisions prevent holdout creditors from scuttling a mutually beneficial deal, 48 U.S.C. § 2231(m), a supermajority of creditors of a given Bond must vote in favor of a negotiated deal for it to go into effect under Title III, § 2231(j) (requiring two-third majority for approval of a modification to a bond).

Of course, even this "simpler" restructuring process requires significant investments of time by the relevant stakeholders. PROMESA requires that a Title VI restructuring be certified and approved by the Oversight Board, which acts as the "Administrative

Supervisor" under Title VI, § 2231(a)(1), as well as approved by the federal district court. Generally, the Oversight Board must first vote to designate a potential issuer an "Authorized Territorial Instrumentality," thereby allowing an instrumentality to use Title VI. *See* 48 U.S.C. § 2231(e).[2]

After authorizing an Issuer to proceed under Title VI, the Oversight Board establishes "Pools"—i.e., creditors with different rights. 48 U.S.C. § 2231(d). For example, junior bondholders and senior bondholders may have different rights to payment and priorities on collateral, and therefore may have different interests. The Board must establish Pools to protect those groups such that one group cannot force a "voluntary" compromise on the other.

The Issuer or its creditors can then propose a "modification" to the bonds—such as an exchange or repurchase of the bonds. § 2231(a)(9), (i). The Issuer must then consult and negotiate with these Pools of bondholders to try to reach a mutually agreeable—and fair—compromise. § 2231(g). The Oversight Board certifies that the proposed modification is in the best interests of creditors and is feasible, that it followed PROMESA's consultation process, and that any compromise is consistent with the broader fiscal

[2] For example, a majority of Oversight Board members declined to certify a request from the Puerto Rico Electric Power Authority ("PREPA") to initiate a Title VI proceeding in favor of the Board initiating a Title III proceeding on PREPA's behalf. *See* Skeel, *supra*, at 876; Andrew Biggs et al., *Privatize Puerto Rico's Power*, Wall St. J. (June 29, 2017), https://tinyurl.com/yy3k5q4u.

goals for the Puerto Rico instrumentality. §§ 2124(i), 2231(g)(1)(C), (2).

After the Oversight Board certifies the proposed modification, a supermajority of each of the established Pools must then vote in favor of the proposed modification. § 2231(h), (j). Even if the Issuer and its bondholders reach an agreement that is approved by the requisite majority of voting bondholders, that modification becomes a binding "Qualifying Modification" only after the Board certifies the Modification as following PROMESA's procedural and substantive requirements, which then must also be approved by the federal district court. § 2231(m)(1)(B), (D).

III. The Puerto Rico Legislature Creates The Debt Recovery Authority To Restructure GDB's Debt Under Title VI.

To restructure approximately $4.7 billion of debt, the Oversight Board, the GDB, and its creditors and stakeholders engaged in extensive negotiations to find an acceptable workout. After nearly two years, the parties settled on a voluntary restructuring that made use of Title VI's collective action procedures. In short, they agreed to restructure GDB's debts by paying creditors 55 cents on the dollar.

The extensiveness of the negotiations is plain from the painstaking process the parties used to execute this restructuring. First, in the spring of 2017, nearly a year after Congress enacted PROMESA, the

GDB, major GDB creditors, and the Puerto Rico Fiscal Agency and Financial Advisory Authority[3] entered into the Restructuring Support Agreement ("RSA"), where they agreed in principle to restructure the GDB's debt by exchanging their existing claims against GDB for new bonds at haircuts to the value of the original claims. *See* Restructuring Support Agreement, May 15, 2017, https://tinyurl.com/y5h7lt46 (Ex. A to Letter from AAFAF to Financial Oversight & Mgmt. Bd. for Puerto Rico, June 30, 2017). This agreement was reached through negotiations between GDB, AAFAF, and major creditor constituencies, including the ad hoc group of GDB bondholders, a number of on-island credit unions or "cooperativas," and members of Bonistas del Patio, Inc., an organization that advocates for Puerto Rico residents who hold bonds of Commonwealth government issuers, which together held nearly $1 billion in GDB bonds. Application ¶¶ 19-20. The RSA expressly contemplated that the parties would use PROMESA's Title VI procedures to effectuate this bond exchange.

To execute this voluntary restructuring of GDB's debt, in summer 2017 the Puerto Rico Legislature enacted the GDB Debt Restructuring Act (Act No. 109-2017). As part of that Act, the Legislature created the DRA. *Id.* art. 201-209. The DRA facilitates the re-

[3] In April 2016 the Puerto Rico Legislature transferred the GDB's fiscal agency and financial advisory functions to the Puerto Rico Fiscal Agency and Financial Advisory Authority, also known by its Spanish acronym "AAFAF." *See* Emergency Moratorium & Financial Rehabilitation Act, 2016 P.R. Laws 160 §§ 601-602.

structuring of the GDB's debt under the RSA and Title VI by issuing new bonds in exchange for the existing claims against GDB at the agreed-upon haircut. *Id.* art. 401. The Act expressly incorporates the RSA and Oversight Board-approved use of Title VI into its terms. *Id.* art. 103(ii).

Hurricanes Irma and Maria, unfortunately, inflicted such severe damage on Puerto Rico that the parties needed to negotiate further modifications to the RSA and push back its timeframe. In light of those unexpected and tragic natural disasters, the parties amended the RSA a total of four times. *See* Application ¶ 22; First, Second, Third, and Fourth Amendments to RSA, https://tinyurl.com/y3t7mxbh (Exs. A-D to Letter from AAFAF to Financial Oversight & Mgmt. Bd. for Puerto Rico, Apr. 25, 2018). Ultimately, the parties settled on a simple final agreement: In exchange for their existing claims, GDB creditors would receive new bonds from the DRA worth 55 cents on the dollar. In other words, GDB's creditors, after hard-fought negotiations, voluntarily agreed to a 45% haircut.

Under PROMESA, the Oversight Board needed to approve this negotiated agreement in multiple stages. First, on July 12, 2017, the Board issued a resolution authorizing GDB to use Title VI of PROMESA and approving the initial version of the RSA as a "Qualifying Modification" under Title VI. *See* Financial Oversight & Mgmt. Bd. for Puerto Rico, Unanimous Written Consent Approving Authorization of Government Development Bank of Puerto Rico and Certification of Restructuring Support Agreement Pursuant to Title

VI of PROMESA, July 12, 2017, https://tinyurl.com/y5h7lt46. The Board then recertified the amended RSA on May 8, 2018. *See* Financial Oversight & Mgmt. Bd. for Puerto Rico, Unanimous Consent, May 8, 2018, https://tinyurl.com/y3t7mxbh.

The GDB and AAFAF submitted the amended RSA to GDB creditors for a vote. Creditors approved a 45% haircut by overwhelming majorities: nearly 75% of voting creditors in a pool comprising over $3 billion of GDB debt, and 100% of creditors in a separate pool of over $1 billion of GDB debt. *See* Letter from AAFAF to Financial Oversight & Mgmt. Bd. for Puerto Rico, Oct. 31, 2018, at 2, https://tinyurl.com/y3yehvcb. The Oversight Board certified this vote count and approved the amended RSA as a "Qualifying Modification" complying with PROMESA's requirements. *See* Financial Oversight & Mgmt. Bd. for Puerto Rico, Unanimous Written Consent Approving Authorization of Government Development Bank of Puerto Rico and Certification of Qualifying Modification Pursuant to Title VI of PROMESA, Nov. 2, 2018, https://tinyurl.com/y3yehvcb.

In November 2018, the federal district court ratified this approval. *See* Findings of Fact, Conclusions of Law, and Order Approving Qualifying Modification for the Government Development Bank for Puerto Rico Pursuant to Section 601(m)(1)(D) of the Puerto Rico Oversight, Management, and Economic Stability Act, *In re Gov't Dev. Bank for Puerto Rico*, No. 18 Civ. 1561 (D.P.R. Nov. 7, 2018) (ECF No. 270). As the district court put it: "The Qualifying Modification is the result of extensive arms' length negotiations among

GDB, AAFAF, the Oversight Board and significant creditor constituencies of GDB holding Participating Bonds … and the Exchange Terms and Conditions reflect compromises and settlements among GDB, AAFAF, the Oversight Board and the various holders of Participating Bonds form the very foundation of the Qualifying Modification." *Id.* ¶ 24; *see also* Press Release, Governor of Puerto Rico, *AAFAF and GDB Announce the Settlement of Litigation Brought By the Official Committee of Unsecured Creditors Appointed in the Title III Cases*, Oct. 10, 2018 (noting that AAFAF and GDB reached settlement where, *inter alia*, unsecured creditors dropped objection to the Qualifying Modification), https://tinyurl.com/yxws2bvh. In sum, under the structure provided by Title VI, the GDB and its stakeholders were able, through painstaking negotiations, to work out a voluntary restructuring that removed billions in bad debt hanging over the Commonwealth and its instrumentalities.

IV. The DRA Issues "New Bonds" That Resolve $4.7 Billion In GDB Debt.

The same day the district court approved the modification, the DRA issued its offering memorandum for the "New Bonds" that GDB creditors could exchange their claims for. *See* GDB Debt Recovery Authority, Offering Memorandum, Nov. 7, 2018, https://tinyurl.com/y5dzns7r. The Memorandum explains that for every $1000 in claims against GDB, a GDB creditor would receive New Bonds having a face value of $550. *Id.* at 6. The New Bonds are payable solely from and secured solely by the GDB assets that were transferred to the DRA for purposes of issuing these bonds. *Id.* The New Bonds, since issuance, not only finally resolved the GDB's debts, they continue to trade in public municipal bond markets—shortly after their issuance they traded at between 68% and 73% of their face value; they now trade at between 73% and 75% of their face value. *See, e.g.*, CUSIP: 36829QAA3, Electronic Municipal Market Access, https://tinyurl.com/y3j6xv5p (last accessed July 31, 2019) (trade dates: July 31, 2019, and December 6, 2018); *see also Moody's Revises Outlook for Government Development Bank for Puerto Rico Senior Notes To Stable; C Rating Affirmed*, Moody's, Nov. 16, 2018, https://tinyurl.com/yx96pkk9 (revising outlook for GDB bonds "to stable from negative" in light of district court approval of the Qualifying Modification).

The Qualifying Modification's benefits speak for themselves. Puerto Rico resolved $4.7 billion in significant debt that directly impacted its key instrumentalities by negotiating an exchange where creditors agreed to accept only 55% of what they were owed from the GDB. In addition, the deal saved Puerto Rico municipalities nearly $55 million in short-term debt servicing payments. *See* Press Release, Governor of Puerto Rico, *Government of Puerto Rico Announces Consummation of the GDB Qualifying Modification*, Nov. 29, 2018, https://tinyurl.com/y4498db8. The DRA has also engaged the Servicer and the Collateral Monitor to protect the value of the GDB assets that have been transferred to the DRA. Any residual value that remains after the New Bonds are paid off belongs to the Commonwealth and its people. *See* GDB Debt Restructuring Act, art. 201.

While restructuring the GDB's $4.7 billion in obligations was only one step in restructuring Puerto Rico's overall fiscal burden, the successful closing of this exchange in November 2018 marked the *first* consensual debt restructuring under Title VI. *See* Press Release, Nov. 29, 2018, *supra*. Following the GDB Title VI restructuring, the district court approved a Title III restructuring for over $17 billion of sales tax-backed bonds, known as COFINA bonds. *See* Luis Valentin Ortiz, *Puerto Rico Wins Court Approval For Sales Tax-Backed Debt Restructuring*, Reuters, Feb. 4, 2019, https://tinyurl.com/y2nzttjy. Similar restructuring negotiations are underway for restructuring $35 billion in general obligation bonds, $8 billion in PREPA bonds, and over $50 billion in unfunded pension liabilities. *See* Dawn Giel, *Puerto Rico's Oversight Board Strikes $35 Billion Restructuring Deal With Commonwealth's Bondholders*, CNBC, June 16, 2019, https://tinyurl.com/y44y5e49.

V. Aurelius' Position Risks Harming Puerto Rico And Undermining Hard Negotiated Compromises.

If the Court accepts Aurelius' argument that Board appointees must be Senate-confirmed under the Appointments Clause and agrees with Aurelius that the violation of the Clause vitiates any action previously taken by the Board, the negative impacts of that ruling will be tremendous. As the Court of Appeals below recognized, even to limit the holding to the Title III petitions initiated here on behalf of Puerto Rico would "cast a specter of invalidity over all of the Board's actions until the present day." 915 F.3d at 861-62. Such a ruling could instigate challenges to the Board's authorization of the GDB to use Title VI, as well as its approval of the Qualifying Modification's voluntary exchange of GDB's debt for the New Bonds. While such a challenge would be fundamentally flawed in other ways,[4] any attempt to draw into question or to unwind this Title VI approval would raise the impossible task of unwinding a multibillion-dollar bond transaction where the bonds have been issued and are actively trading on the market.

And, of course, as the Board's and the Solicitor General's petitions for certiorari explain, vitiating the Board's actions under PROMESA will have significant ramifications beyond the GRB and the DRA, potentially calling into question the efforts stakeholders have undertaken to resolve Puerto Rico's fiscal—and humanitarian—crisis. *See* Oversight Bd. Petition for Certiorari at 29-33; United States Petition for Certiorari at 30-32. To state the obvious: A ruling in favor of Aurelius risks upending parties' settled expectations.

In these circumstances, the First Circuit's invocation of the "ancient tool of equity, the *de facto* officer doctrine," was appropriate. *Aurelius*, 915 F.3d at 862. The doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that

---

[4] Including, because no timely appeal was taken from the district court's final judgment approving the GDB Title VI application, any collateral challenge would face substantial hurdles in overcoming that final judgment. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

person's appointment ... to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995).

For example, in *Buckley v. Valeo*, the Court declined to vitiate the validity of the past acts of the Federal Election Commission, even though the commission, as constituted, violated the Appointments Clause. 424 U.S. 1, 142 (1976) (according those acts "de facto validity"). In this case, an Appointments Clause challenge with arguably greater destructive potential than the FEC issue in *Buckley*, the First Circuit's application of the doctrine is justified because it "avoids the chaos that might ensue if all of the actions taken by an official improperly in office for years were subject to invalidation." *Andrade v. Lauder*, 729 F.2d 1475, 1499 (D.C. Cir. 1984).

This Court has declined to apply the doctrine, but typically where, for example, a constitutional challenge implicates the fundamental power and jurisdiction of the federal *judiciary*. *See Nguyen v. United States*, 539 U.S. 69, 77-83 (2003); *accord Ryder*, 515 U.S. at 182-83 (holding same for "Appointments Clause challenge[] with respect to questionable judicial appointments"). But even there, the Court has recognized that the propriety of the *de facto* officer doctrine remains a case-by-case determination, dependent on the circumstances of the purported violation. *Nguyen*, 539 U.S. at 77 ("Whatever the force of the *de facto* officer doctrine in other circumstances, an examination of our precedents concerning alleged irregularities in the assignment of judges does not compel us to apply it in these cases.").

It is ultimately this Court's role to fashion the appropriate remedy for a constitutional violation. But the Court has long recognized that not every constitutional violation justifies upending settled expectations. *Cf. United States v. Leon*, 468 U.S. 897, 922-25 (1984) (creating good faith exception to the application exclusionary rule for Fourth Amendment violations); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (declining to apply retrospectively Appointments Clause holding striking down bankruptcy court system, which "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts"). In cases where the Court declined to invoke the *de facto* officer doctrine, by contrast, there were few reliance interests. *See, e.g.*, *Ryder*, 515 U.S. at 185 (finding retrospective application of holding would affect only seven to 10 court-martial cases on direct review, and therefore would not work "the sort of grave disruption or inequity involved in awarding retrospective relief … that would bring th[e *de facto* officer] doctrine into play").

Aurelius asks this Court to wipe out three years of work (including potentially the successful restructuring of the GDB's obligations) and send the parties back to square one. That is precisely the kind of circumstance that calls, at the least, for the invocation of the *de facto* officer doctrine. The Court should not hold that the Board members are Officers under the Appointments Clause, nor should it hold that any such ruling to the effect vitiates the hard work the Oversight Board and other stakeholders have done to get Puerto Rico and its people back on their feet.

CONCLUSION

The Court should reverse the judgment below with respect to the Appointments Clause issue. If the Court affirms the judgment below with respect to the Appointments Clause issue, the Court should affirm the judgment below with respect to the *de facto* officer doctrine issue.

Respectfully submitted,

Robert Loeb
Counsel of Record
Douglas S. Mintz
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

Peter J. Amend
Matthew R. Shahabian
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Arturo J. García-Solá
Nayuan Zouairabani
MCCONNELL VALDÉS LLC
270 Muñoz Rivera Ave.
Suite 7
Hato Rey, PR 00918

August 1, 2019