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,

v.

AURELIUS INVESTMENT, LLC, et al.,

AURELIUS INVESTMENT, LLC, et al.,

v.

COMMONWEALTH OF PUERTO RICO, et al.,

OFFICIAL COMM. 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.,

UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA 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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION CHALLENGING THE RULING ON THE *DE FACTO* OFFICER DOCTRINE

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Questions Presented

1. Whether the *de facto* officer doctrine can excuse a violation of the Appointments Clause as to the creation of the Financial Oversight and Management Board for Puerto Rico.

2. Whether the First Circuit erred when it allowed the Board to continue to prospectively exercise authority after it rule that the Board was unlawfully constituted.

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Interest of Amicus Curiae[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit legal foundation organized for the purpose of engaging in litigation and advocacy in matters affecting the public interest. PLF defends the principles of liberty and limited government, including constitutionally mandated separation of powers.

In pursuing its mission, PLF and its attorneys have frequently represented litigants or participated as amicus in cases before this Court, including cases involving the separation of powers. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116 (2019), *pet. for reh'g filed* July 11, 2019; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); *Rapanos v. United States*, 547 U.S. 715 (2006).

PLF has a particular interest in the outcome of this case because it represents clients in a variety of settings who are challenging administrative action under the Appointments Clause. *See, e.g.*, *Moose Jooce, et al. v. FDA*, No. 1:18-cv-00203-CRC (D.D.C.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have filed blanket consent to the filing of amicus briefs. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

Jan. 30, 2018). If the First Circuit's application of the *de facto* officer doctrine and allowance of continued unlawful agency action were upheld, that could affect the ability of PLF's clients to obtain meaningful relief should they prevail on their Appointments Clause challenges. Because the decision below threatens to undermine separation of powers principles, PLF supports reversal of the First Circuit's decision as to the appropriate remedy.

Introduction and Summary of Argument

The First Circuit concluded that in enacting the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA), Congress created a system that violated the Appointments Clause. *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 863 (1st Cir. 2019). Specifically, it held that members of the Financial Oversight and Management Board are "officers of the United States" and therefore must be appointed consistent with the Clause. *Id.* at 856. The First Circuit further held that the Board members are "principal officers," which means that they had to be appointed by the President, with the advice and consent of the Senate. *Id.* at 860–61; *see also* U.S. Const. art. II, § 2, cl. 2. Even though there remains a dispute over whether they are "officers of the United States," no one disputes that the appointment process for the Board members did not comply with the procedures specified in the Clause. None of the Board members were confirmed by the Senate; nor were they appointed following the prescribed steps to be appointed as an inferior officer in conformity with the Clause. 915 F.3d at 846–48.

Yet rather than provide a meaningful remedy for what it found to be a constitutional violation, the First Circuit applied the "*de facto* officer" doctrine to sanitize all past actions of the Board. *Id.* at 861–63. Even worse, it held that the unconstitutionally constituted Board could continue to act for a period of 90 days (later extended to 150 days) after the issuance of the First Circuit's judgment and opinion. *Id.* at 863; *see also* Joint Appendix (JA) at 183-84.

Amicus takes no position on the underlying issue of whether Congress' chosen method of selecting the Board members violates the Appointments Clause. Nor does it take a position on whether there may be other grounds or doctrines—apart from the *de facto* officer doctrine—under which the courts on remand could uphold some or all of the Board actions that are challenged here. But because the First Circuit erred in applying the *de facto* officer doctrine to uphold all prior acts of an unconstitutional Board, and because it improperly preapproved five months of future acts, this Court should reverse the remedy portion of the decision below. [2]

Argument

I. The First Circuit Improperly Applied the *De Facto* Officer Doctrine to Excuse a Violation of the Structural Protections in the Appointments Clause.

In upholding the actions of a Board that it found to be unconstitutionally created, the First Circuit extended the *de facto* officer doctrine far beyond its

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[2] Alternatively, if the Court reverses on the Appointments Clause issue, it should vacate the decision below rather than leave its *de facto* officer ruling in place.

historical roots in English law. Those historical roots create no necessary conflict with our written Constitution and its structural protections of liberty, but the First Circuit's broad extension raises serious constitutional problems.

Those problems are threefold. First, as this Court has held, the *de facto* officer doctrine does not apply where the alleged constitutional problem is with the creation of the *office* itself, not merely the invalid appointment of a particular *officer*. The First Circuit ignored that limitation in crafting its remedy. Second, the First Circuit erroneously relied on a portion of *Buckley v. Valeo*, 424 U.S. 1 (1976), that has been limited to its facts and is readily distinguishable. This Court should reaffirm that limitation. Third, the First Circuit's remedy decision both undermines important structural provisions of the Constitution and disincentivizes private parties and lawmakers from protecting the constitutional separation of powers.

A. The *de facto* officer doctrine does not apply where the issue is the validity of an *office* rather than the appointment of a particular *officer*.

"The de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). The doctrine originated in medieval England, *see State v. Gardner*, 42 N.E. 999, 1000 (Ohio 1896), and is based on public policy considerations such as "insuring the orderly functioning of the government" and avoiding "chaos that would result from multiple and repetitious suits challenging

[official] action," *Ryder*, 515 U.S. at 180 (citation omitted).

But determining whether to apply the *de facto* officer doctrine is not simply a matter of looking at whether innocent parties would be harmed by the invalidation of apparently official action. Rather, application of the *de facto* officer doctrine has historically been limited to two circumstances: (1) where there are "merely technical" defects in a particular officer's appointment, *Nguyen v. United States*, 539 U.S. 69, 77 (2003), or (2) to forestall collateral attack on an officer's judgments or decisions, *Ex parte Ward*, 173 U.S. 452, 456 (1899). In contrast to those two circumstances, the *de facto* officer doctrine does not apply when the creation of an office itself is challenged, on direct review, as invalid or unconstitutional.[3]

That distinction was made clear in one of this Court's first cases discussing the doctrine. In *Norton v. Shelby County*, 118 U.S. 425 (1886), the Tennessee Legislature had enacted a statute creating a Board of County Commissioners and investing it with the powers and duties of a county court, including the authority to issue bonds. *Id.* at 436. After the board

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[3] Nor can the doctrine be invoked when an officer or an agency has advance knowledge of a potential defect in its jurisdiction. *See, e.g.*, *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). Here, members of Congress debated the constitutionality of PROMESA and even predicted that its validity would need to be litigated. *See* 162 Cong. Rec. S4685-87 (daily ed. June 29, 2016) (Senator Cantwell observing that "[t]he appointments clause requires that these officers, who are being appointed under the authority of Federal law, be appointed by the President and confirmed by the Senate" and predicting that "it is going to be challenged constitutionally").

had issued several such bonds, the Tennessee Supreme Court concluded that the statute creating the board violated the state constitution and that the office of county commissioner was therefore invalid. *Id.* at 441. Bondholders subsequently sought to collect on their bonds, claiming that the commissioners had been acting as *de facto* officers. *Id.* at 435. But this Court declined to apply the *de facto* officer doctrine because the Tennessee Supreme Court's holding was not simply that there was a technical defect in *who* was appointed to the office of county commission—rather, the problem was that the *office itself* was unconstitutional. This Court held that the *de facto* officer doctrine was not an available remedy because "the idea of an officer implies the existence of an office which he holds," and "[a]n unconstitutional act … creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* at 441–42.

Other of this Court's cases have confirmed the same rule. For example, in *McClaughry v. Deming*, 186 U.S. 49 (1902), a member of the Volunteer Army was convicted by a court-martial composed of officers of the Regular Army, contrary to statute. *Id.* at 50–51. This Court concluded that because the court-martial had been established in violation of an act of Congress, it was invalid. *Id.* at 64. Accordingly, "[t]he officers composing the alleged court were not *de facto* officers thereof, for there was no court, and therefore it could not have *de facto* officers." *Id.* (citing *Norton*, 118 U.S. at 441); *see also United States v. Royer*, 268 U.S. 394, 397 (1925) ("[T]here can be no incumbent *de facto* of an office if there be no office to fill."); *cf. McDowell v. United States*, 159 U.S. 596, 601–02 (1895) ("[T]he rule is well settled that *where there is an office to be*

filled, and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public.") (emphasis added). *McClaughry* contrasted the example of a judge of a constitutional court, as to which the *de facto* officer doctrine could apply if the judge "had some color of authority although not in truth an officer *de jure*." 186 U.S. at 64. In that circumstance, "[t]he court exists even though the judge may be disqualified or not lawfully appointed or elected." *Id.*; *see also Ryder*, 515 U.S. at 180 (explaining that the *de facto* officer doctrine can apply to a purported officer when "it is later discovered that the legality of *that person's* appointment or election to office is deficient") (emphasis added).

Consistent with this Court's cases, an early treatise on the *de facto* officer doctrine highlighted the longstanding "general rule" that "the existence of a *de jure* office is a condition precedent to the existence of an officer *de facto*, and that without such an office the pretended officer can never be afforded any legal recognition." Albert Constantineau, *A Treatise on the De Facto Doctrine* 41 (1910). An important "corollary" of that general rule—one that is particularly apt in this case—is that "an unconstitutional Act, being no law, is incapable of creating a *de jure* office, and therefore the incumbent of an office thus created is not an officer *de facto*." *Id.* at 51.

Here, the First Circuit concluded that PROMESA violated the Constitution by establishing a Board that the President was required to fill in violation of the Appointments Clause. *Aurelius Inv.*, 915 F.3d at 856. In other words, the problem was not as to the eligibility or qualifications of the individuals that he

selected; rather, the office was itself flawed and therefore ineligible for application of the *de facto* officer doctrine. In nonetheless applying the doctrine, the First Circuit's decision failed to comply with the traditional and historical limits consistently recognized by this Court.

B. The Court should reaffirm that *Buckley v. Valeo*'s aberrant use of the *de facto* officer doctrine (or something like it) has been limited to its facts.

In *Buckley v. Valeo*, this Court took what was arguably a detour from the traditional approach described above. 424 U.S. 1 (1976). In that case, the Court agreed that the creation of the Federal Elections Commission violated the Appointments Clause, but nonetheless concluded that "[t]he past acts of the Commission [should be] accorded de facto validity." *Id.* at 142. The Court did not give a substantial explanation for that conclusion; rather, it simply cited a handful of cases that upheld legislative acts even though some legislators had been elected under an unconstitutional apportionment plan. *Id.*[4]

Given *Buckley*'s perfunctory ruling, it is unclear whether the Court was applying the *de facto* officer doctrine, a separate doctrine of "*de facto* validity," or

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[4] In addition, *Buckley*'s decision to uphold past FEC actions was made "without any briefing from the parties on the proper remedy." Kent Barnett, *To the Victor Goes the Toil–Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 530 & n.272 (2014); *see also Buckley*, 424 U.S. at 255 (Burger, C.J., dissenting) ("I disagree that we should give blanket de facto validation to all actions of the Commission undertaken until today. The issue is not before us and we cannot know what acts we are ratifying.").

something else entirely. *Compare* Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 113 n.470 (2016) ("[I]n *Buckley* the Court invoked the de facto officer doctrine to uphold the acts of an improperly constituted [FEC]."), *with Ryder*, 515 U.S. at 183 (noting that *Buckley* did not "explicitly rel[y] on the *de facto* officer doctrine, though the result … validated the past acts of public officials"), *and* Barnett, *supra* at 532 (referring to "the *Buckley* Court's reliance on a de facto validity doctrine—similar to, but apparently distinct from, the de facto officer doctrine").

Regardless, this Court unanimously cabined *Buckley*'s reach in *Ryder*. In *Ryder*, a member of the Coast Guard challenged his conviction by a court-martial, claiming that two of the three judges had been appointed in violation of the Appointments Clause. *Id.* at 179. On appeal, the Court of Military Appeals agreed that the court-martial violated the Appointments Clause but, relying on *Buckley*, nonetheless upheld the decision of the tribunal as *de facto* valid. *Id.* at 180.

This Court reversed, holding that the lower court "erred in according *de facto* validity to the actions of the [court-martial]." *Id.* at 188. As for *Buckley*, the Court concluded that "[t]o the extent [*Buckley*] may be thought to have implicitly applied a form of the *de facto* officer doctrine, we are not inclined to extend [it] beyond [its] facts." *Id.* at 184. Those "facts" included that the *Buckley* plaintiffs had received all the relief they requested: "the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." *Id.* at 183.

The decision in *Ryder* thus significantly narrowed *Buckley*'s "*de facto* validity" ruling. At most, it now means that courts need not invalidate prior acts of unconstitutionally appointed officers where the plaintiff does not request that remedy. Yet despite *Ryder*, some lower courts—including the First Circuit in this case—remain confused about *Buckley*'s scope. *See, e.g.*, *Aurelius Inv.*, 915 F.3d at 862–63 (citing *Buckley* to support application of the *de facto* officer doctrine); *Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1225 (D. Minn. 2018) (same), *appeal filed*, No. 18-2506 (8th Cir. July 16, 2018); *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 113 P.3d 1062 (Cal. 2005) (same). To resolve the confusion, this Court should settle the issue once and for all. It should specify in no uncertain terms that *Buckley*'s use of "*de facto* validity" does not extend to factually dissimilar cases or otherwise excuse noncompliance with the structural protections of the Appointments Clause. Moreover, it should hold that the First Circuit erred in relying on *Buckley* because the challengers in this case did not limit their requested relief to prospective only.[5]

C. The Court should reverse the First Circuit's application of the *de facto* officer doctrine.

Beyond its mistaken reliance on *Buckley*, the First Circuit's use of the *de facto* officer doctrine has two other problems: (1) it undermines key structural

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[5] The challengers urged the courts below to not only invalidate the Board's actions but also to dismiss the Title III petitions. *See* Appellants Brief, First Circuit Nos. 18-1671 & 18-1746 at 66–67.

constitutional protections and (2) it creates improper incentives for both affected parties and lawmakers.

1. The decision undermines important constitutional protections.

The First Circuit failed to give sufficient weight to the importance of the structural protections at issue. As this Court has explained, the Appointments Clause plays two important functions: first, it is "among the significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), and second, it is necessary to "safeguard individual liberty," *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014); *see also Bond v. United States*, 564 U.S. 211, 222 (2011) (holding that in addition to "protect[ing] each branch of government from incursion by the others," "[t]he structural principles secured by the separation of powers protect the individual as well"); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 949 (2017) ("The Clause, like all of the Constitution's structural provisions, is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty.") (internal quotation marks omitted). The Clause also helps assure that responsibility for official decisionmaking is shouldered by the proper parties: "By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660.

Violations of these key protections cannot be easily waved aside. Remedies for violations of the Appointments Clause must assure that the "structural purposes of the Appointments Clause" are

protected. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (alterations omitted). Yet here, although the First Circuit upheld the constitutional principles underlying the Appointments Clause by finding a violation, it undermined those same principles by failing to provide a meaningful remedy for the violation. *See Aurelius Inv.*, 915 F.3d at 851–52. In allowing the past decisions of an unconstitutionally created agency to stand, the court instead provided only a pyrrhic victory that left "the prevailing party … in no better (or indeed perhaps a worse) position than it was before the challenge." Barnett, *supra* at 518. This empty vindication of Appointments Clause protections (in name only) harms both structural protections and individual liberty. It should be reversed.

2. The decision disincentivizes Appointments Clause challenges and fails to deter violations.

Remedies for violations of the Appointments Clause should "create incentives to raise Appointments Clause challenges" in the first place. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations and quotation marks omitted); *see also Ryder*, 515 U.S. at 183 (declining to apply the *de facto* officer doctrine because doing so "would create a disincentive to raise Appointments Clause challenges with respect to questionable … appointments"). Similarly, remedies for those violations should deter Congress from enacting, and the President from signing, laws that violate the structural protections inherent in the Appointments Clause. The First Circuit's decision fails on both counts.

Because the legislative and executive branches may at times ignore—or even collude together to violate—structural constitutional protections, the task of bringing challenges to unconstitutional arrangements is often left to private parties. *See Bond*, 564 U.S. at 222 ("[T]he claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances."); *see also SW Gen., Inc.*, 137 S. Ct. at 949 ("That the Senate voluntarily relinquished its advice-and-consent power … does not make this end-run around the Appointments Clause constitutional."). It is critical that private parties have incentive to bring such challenges, both to remedy the affected parties' injuries and—more broadly—to preserve the underlying constitutional norms. *See* Barnett, *supra* at 509 ("Meaningful remedies should provide wronged parties with incentives to enforce their interests because otherwise the underlying norm has no traction in the real world."). In contrast, where "affected parties have no incentive to enforce a norm, that norm may cease to operate." *Id.* at 497. In other words, unless non-governmental actors have incentive to challenge violations of the Appointments Clause, the structural protections embodied in the Clause will begin to erode.

Accordingly, this Court in *Lucia* recently concluded that a party who successfully brought an Appointments Clause challenge against an administrative law judge (ALJ) was entitled to a new

hearing. 138 S. Ct. at 2055 n.5.[6] That is the type of meaningful remedy that makes constitutional challenges effective and worth pursuing for affected parties. In contrast, the First Circuit's decision to provide no meaningful relief threatens the separation of powers embodied in the Clause.[7]

Equally important, remedies for Appointments Clause violations should hold Congress and the executive accountable for their failure to protect the separation of powers—and should deter them from doing so in the future. "Structural remedies better satisfy remedial values for prevailing parties when courts require the political branches to respond to the structural violation with curative action." Barnett, *supra* at 527. In contrast, where Congress and the President can rely on the judiciary to sanitize unconstitutional actions, they will lack incentive to be either careful or compliant as to constitutional restrictions. Here, the First Circuit's decision to validate all past action of an unconstitutionally created Board will not deter Congress or the President

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[6] The Court even required that the hearing be conducted before either an entirely different ALJ, or the agency itself. 138 S. Ct. at 2055 n.5.

[7] Although *Lucia* arose in the context of judicial appointments, there is no principled distinction as to improperly appointed executive officers. Indeed, relief may even more important in the context of improperly appointed executive officials. While improper judicial actions are generally subject to immediate appeal, it is often difficult for an impacted party to challenge improper executive action in a timely fashion. Therefore, it is even more important that successful challenges result in meaningful relief and create "incentive[s] to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5.

from continuing to violate the Constitution in future legislation. It should therefore be reversed.

II. The First Circuit Erred in Allowing the Board to Continue to Act After It Was Determined to Be Unconstitutional.

In addition to ratifying the past actions of the Board under the *de facto* officer doctrine, the First Circuit went a step further. It allowed the Board—an agency that the court concluded was never constitutionally structured—to continue to unlawfully exercise authority for a period of 90 days (which was then extended for an additional 60 days). *Aurelius Inv.*, 915 F.3d at 863 ("During the 90-day stay period, the Board may continue to operate as until now."); JA at 184 (extending the stay for 60 additional days). This inexplicable decision is unmoored from precedent and, if allowed to stand, will have a further chilling effect on the willingness of parties to challenge the validity of government agency action.

A. The decision to allow ongoing unconstitutional decisionmaking is contrary to precedent.

An agency "lacks authority" when its "composition violates the Constitution's separation of powers." *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). Its actions are "void *ab initio*." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). In *Noel Canning*, this Court upheld the D.C. Circuit's invalidation of the orders of an administrative board that lacked a quorum due to the improper appointment of three of its five members. *Id.* Here, the First Circuit concluded that every single member of

the Board was improperly appointed, and so that conclusion applies with even more force.

Because the actions of the Board are "void *ab initio*," they cannot be given legal imprimatur, especially prospectively. Even if there had previously been some ambiguity as to whether members of the Board were properly appointed, the First Circuit decisively ruled on that question. What justification could there be to allow the Board to continue to wield authority for months after being held unconstitutional?

The First Circuit gave no compelling answer. It did not claim to rely on the *de facto* officer doctrine to support this point, and nothing in that doctrine would justify the prospective unlawful exercise of authority. As this Court explained in *Ryder*, the *de facto* officer doctrine applies to past acts when "it is *later* discovered that the legality of that person's appointment … to the office is deficient." *Ryder*, 515 U.S. at 180 (emphasis added). The doctrine cannot be applied to prospectively validate the unlawful exercise of authority. In any event, the First Circuit gave no clear rationale for its decision to allow ongoing unconstitutional decisionmaking, and the only case it cited in support of its actions merely discusses a court's discretion to craft equitable remedies and does not in any way justify or endorse the remedy that the court chose. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312–13 (1982).

The closest that this Court has come to applying a remedy similar to the First Circuit's is in *Buckley*, where the Court granted a 30-day stay to enforcement of its decision. As discussed above, *Buckley*'s conclusions concerning the *de facto* officer doctrine

have been significantly undermined by *Ryder*. 515 U.S. at 183–84. And to the extent that *Buckley* remains good law, the plaintiff in *Buckley* did in fact obtain some meaningful relief from the agency's unlawful action: "the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." *Id.* at 183.

In contrast here, the First Circuit's decision—which was nominally in favor of the parties raising the constitutional challenge—allowed the Board to *continue to make binding decisions* that would affect the challengers and their claims against Puerto Rico. And indeed, the Board would be incentivized to make as many binding decisions as it could as quickly as possible in case its authority were to lapse prior to remedial congressional actions. So unlike in *Buckley*, the net result of the First Circuit's ruling is that the prevailing parties received no relief whatsoever, and little more than an advisory opinion. Put simply, the court's declaration of the Board's unconstitutionality changed nothing about the day-to-day operation of the Board. That outcome runs headlong into this Court's assertion that "one who makes a timely challenge to the constitutional validity of the appointment of an officer … is entitled to relief." *Lucia*, 138 S. Ct. at 2055.

B. Allowing unconstitutional agencies to retain authority creates perverse incentives and discourages constitutional challenges.

As discussed above, remedies must "provide[ ] a suitable incentive to make such challenges." *Ryder*, 515 U.S. at 186; *see also* Barnett, *supra* at 509

("Meaningful remedies should provide wronged parties with incentives to enforce their interests because otherwise the underlying norm has no traction in the real world."). Unfortunately, the First Circuit's decision to allow continued Board action will have an immediate and dramatic impact on the willingness of litigants to challenge unlawful government action. If a plaintiff knows that, even if successful, she will not only receive no relief from past unlawful government conduct, but also will continue to be subject to that same agency's unlawful conduct, then what incentive is there to bring such a lawsuit? Litigation is costly, and rational plaintiffs do not pursue litigation where there is no hope of a remedy. And even a plaintiff that receives *pro bono* representation will be dissuaded from becoming ensnared in a lengthy legal battle and risking retaliation by the agency that retains authority even if the plaintiff prevails. *See* Barnett, *supra* at 510 (noting that "limited remedies and frequent interaction with agencies sometimes encourage timidity in challenging administrative structure" and that "[p]ublic-choice theory … suggests that regulated repeat players will not want to risk offending the same officials whose cooperation and favor they may need in the future"). Public interest organizations that offer *pro bono* representations, like this Amicus, will also face ethical and other practical constraints in bringing otherwise meritorious cases if no remedy will be provided.

In fact, if the First Circuit's remedy is repeated in future cases, then a plaintiff who successfully challenges an appointment may end up worse off as a result because the agency will feel pressured to exercise its authority as speedily and assertively as

possible while it still retains authority. A pyrrhic victory and an increased injury does not serve justice.

The First Circuit decision also perversely incentivizes Congress to freely create officer positions that do not require appointment and Senate confirmation in accordance with the Appointments Clause. "A structural-redesign grace period [such as the 90-day stay granted here] implicitly tells Congress that it may blatantly violate the Constitution's structural safeguards (or at least push structural boundaries to the maximum) and then later create a proper agency, if it acts fast enough, without any adverse consequences at all." Barnett, *supra* at 531–32. And as this case shows, if the President and Congress fail to act to remedy a constitutional violation, courts will be inclined to continue to grant additional extensions—further prolonging the constitutional injury and encouraging "legislative lethargy," *id*. at 535; *see also* JA at 184 (granting a 60-day extension despite the fact that neither the Senate nor the Board exhibited a "sense of any urgency" to remedy the constitutional violation). Thus, the First Circuit's tacit approval of ongoing constitutional violation will further incentivize Congress to act unlawfully.

C. There are remedial alternatives that protect reliance interests while still vindicating a plaintiff's right to a meaningful remedy.

In mandating a meaningful remedy for Appointments Clause violations, this Court need not "surrender in advance [its] authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or

the unfairness caused by unexpected judicial decisions." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) (Kennedy, J., concurring).[8] But the logic of the First Circuit's decision would allow this narrow exception to swallow the rule. In almost every Appointments Clause challenge, a decision that a government agency or board was improperly constituted will result in some delays or inconvenience, and such challenges also routinely involve reliance arguments. But that cannot be enough of a justification to allow an agency to continue to act without any color of law, especially when narrower and more specifically tailored remedial measures are available.

For example, in this case the First Circuit could have remanded to the district court to allow the Board to request narrower equitable relief, such as a limited stay of all pending proceedings to give Congress and the President the chance to properly constitute the Board and for the new Board to move to substitute itself for the unconstitutional Board. *See N. Pipeline Const. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 88 (1982). Indeed, this is the remedy that the Board itself requested before the First Circuit in the event that the First Circuit found an Appointments Clause violation. *See* Case 18-1671, Appellee Brief of Financial Oversight and Management Board at 51 ("If the Court severs parts of PROMESA, it should stay its mandate pending appointment of Board members in

[8] There may also remain cases in the legislative context where some inherent authority must remain in an otherwise invalid legislative body in order to permit the enactment of remedial legislation. *See Fortson v. Morris*, 385 U.S. 231, 235–36 (1966); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675–76 (1964).

accordance with the Appointments Clause."). The Board even *agreed* that a successful Appointments Clause challenge should lead to enjoining prospective Board action. *Id.* at 54 ("If this Court rules for Appellants, the parties agree that it must sever any offending language and enjoin any prospective action by the current Board."). The challengers, and other interested parties, should then have been given the opportunity to either argue against a stay or argue that any effort by a newly constituted board to ratify its past unlawful actions is invalid. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117 (D.C. Cir. 2015) (explaining that for a ratification to be effective, "a properly appointed official" must have "the power to conduct an independent evaluation of the merits" and have actually "do[ne] so"); *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (rejecting an agency's attempt to ratify past agency action as untimely). Whether or not such a narrow stay would be granted or a subsequent concrete ratification would be approved, there was no justification for the First Circuit's decision to insulate the Board and prospectively ratify all of its actions for months afterward.[9]

In the selection of a remedy for a constitutional violation, the key principle must be that a litigant receives meaningful relief. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J.

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[9] Automatic ratification would similarly disincentivize constitutional challenges and should therefore also be rejected. *Accord Ryder*, 515 U.S. at 183 (rejecting the adoption of remedies that "would create a disincentive to raise Appointments Clause challenges with respect to questionable … appointments").

1425, 1427 (1987) ("Whenever [governments] do act unconstitutionally, they must in some way undo the violation by ensuring that victims are made whole."). Of course, there is no guarantee that a litigant who prevails in an Appointments Clause challenge will prevail on the merits once the agency is properly constituted. Indeed, after this Court's decision in *Noel Canning*, the newly constituted board reached the same results as in the invalidated procedure and the D.C. Circuit affirmed that new result. *Noel Canning v. NLRB*, 823 F.3d 76 (D.C. Cir. 2016). But at the very least, the *Noel Canning* plaintiff's victory before this Court provided meaningful relief in the opportunity to be heard before a validly constituted board. In contrast, in this case, the successful challengers were denied any meaningful remedy, as they were both bound by all of the Board's past decisions and required to continue to participate in proceedings instituted and directed by the same Board.

Conclusion

This Court should reverse the First Circuit's application of the *de facto* officer doctrine and remand for further proceedings consistent with its ruling on the Appointments Clause arguments.

DATED: August, 2019.

Respectfully submitted,

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