

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

AURELIUS INVESTMENT, LLC, ET AL., *Petitioners*,

v.

COMMONWEALTH OF PUERTO RICO, *Respondent*.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

UNITED STATES, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents*.

UTIER, *Petitioner*,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR
PUERTO RICO, *Respondent*.

**On Writ of Certiorari to the United States Court of
Appeals for the First Circuit**

**REPLY BRIEF FOR PUERTO RICO FISCAL AGENCY
AND FINANCIAL ADVISORY AUTHORITY**

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**REPLY BRIEF FOR PUERTO RICO
FISCAL AGENCY AND FINANCIAL
ADVISORY AUTHORITY**

The Puerto Rico Fiscal Agency and Financial Advisory Authority (AAFAF) represents the elected government of Puerto Rico on all matters related to PROMESA. *See* AAFAF Br. 1-2. While other parties purport to represent the interests of Puerto Rico, it is AAFAF—and AAFAF alone—that speaks for and on behalf of the government of Puerto Rico.

AAFAF’s opening brief explained that the protections of the Appointments Clause apply within Puerto Rico as elsewhere in the United States—namely, to “Officers of the United States.” Here, Congress granted the Oversight Board members only territorial powers, structuring the Board to operate as part of the territorial government. Accordingly, the Board members are territorial officers, not officers of the United States, and the Appointments Clause mechanisms do not govern their appointment.

In order to best aid the Court, this reply submission focuses on those issues on which AAFAF—as the representative of Puerto Rico’s elected government—can offer a unique perspective.

1. As a threshold matter, respondents repeatedly paraphrase the dispositive question as whether the Appointments Clause applies to Puerto Rico—or, said otherwise, whether there exists a “territories exception to the Appointments Clause.” Aurelius Br. 2; *accord*, *e.g.*, UTIER Br. 63 (“The Opposing Parties[]” ask the Court “to make inapplicable the

Appointments Clause to Puerto Rico.”). Not only is that shorthand unduly inflammatory, it elides the actual question confronting the Court.

The actual question is not whether the Appointments Clause applies to Puerto Rico (the entire constitution does, and so the Appointments Clause applies under the appropriate circumstances, AAFAF Br. 14-17), it is whether the Appointments Clause governs appointments under PROMESA. The answer is unequivocally no, because the Oversight Board members are not officers of the United States in light of their statutory responsibilities.

2. Under PROMESA, the Board functions as part of the territorial government and exercises purely local authority relating entirely to Puerto Rico. *See* AAFAF Br. 43-45. The Board has the power to act in specific statutorily authorized ways on behalf of Puerto Rico, its activities are integrated within the structures of Puerto Rico’s government, and its functions all relate directly to Puerto Rico’s internal governance or its restructuring. Indeed, all of the Board’s core duties—certifying and monitoring compliance with Commonwealth and instrumentality fiscal plans and budgets, issuing restructuring certifications to the Commonwealth and its instrumentalities, and serving as the debtor’s representatives for those entities in restructuring proceedings—are accomplished in coordination with Puerto Rico’s government. *See* 48 U.S.C. §§ 2141-44, 2146.

Conversely, the Board does not exercise or administer any powers that must be exercised by

officers of the United States. *See* AAFAF Br. 36-41. The Board has no say in appropriating or administering federal funds. *See* AAFAF Br. 41. Although the Board has the right to budget Puerto Rico's funds, the Board may not obligate the federal treasury. *See id.* Moreover, the financial burdens of paying for the Oversight Board (which have reached into the hundreds of millions of dollars) fall exclusively on the territorial treasury of Puerto Rico; its members receive no federal compensation. *See* AAFAF Br. 39 & n.8. The Board can neither implement any actions of the federal government, nor promulgate any federal rules or regulations. *See* AAFAF Br. 40-41. Put simply, the Board acts exclusively on behalf of Puerto Rico and lacks authority to represent or bind federal interests in any way.

In short, a faithful analysis of the actual responsibilities that Congress granted the Oversight Board confirms that the powers delegated to the Board are purely territorial in nature. Indeed, the Board's statutory powers wholly bear out its formal denomination as "an entity within the territorial government for which it is established," 48 U.S.C. § 2121(c)(1), that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government," *id.* § 2121(c)(2).

3. Respondents protest that because a federal law—namely, PROMESA—is the source of the Board's powers, the Board members exercise "significant authority" under federal law and are thus

officers of the United States. *See* Aurelius Br. 15-20; UTIER Br. 29-40. But AAFAF has already answered that argument. *See* AAFAF Br. 32-35. Respondents overlook the critical point that, given the current territorial status of Puerto Rico, Congress is the source of *all* territorial authority; that is, the elected government of Puerto Rico (like the governments of D.C. and all the other territories) *also* derives its power from the federal government. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875 (2016). Indeed, PROMESA itself grants broad powers to the elected government of Puerto Rico. *See* 48 U.S.C. §§ 2141, 2142, 2143(a), 2144(a). Yet no one doubts that the power exercised by the Governor under PROMESA is territorial in nature.

Respondents' emphasis on the Board's restructuring authority under PROMESA, *see* Aurelius Br. 15-18; UTIER Br. 29-30, is likewise misplaced. PROMESA makes clear that in terms of restructuring, the Board inhabits a role akin to that of both a state and a municipality. *See* AAFAF Br. 46-47. Specifically, the Board exercises rights as the Commonwealth's representative that any municipality would be entitled to exercise if it filed for a chapter 9 bankruptcy under the bankruptcy code.* In so doing, that municipality would not be exercising

* The Board's powers as the debtor's representative are similar to, but not identical to, those of a municipal debtor. While AAFAF acknowledges these similarities, it reserves all rights to further litigate the scope of the Board's power in its representative capacity, including whether the Board has the power to initiate a proceeding under PROMESA for a territorial instrumentality without the elected government's consent.

significant federal authority—and neither does the Board.

At bottom, Respondents make the same mistake as the court below: Respondents ignore the textual limitation within the Appointments Clause itself, which limits its application to “Officers of the United States.” That is, the office in question must be established within the federal government, and the officers in question must exercise significant authority that is federal in nature. *See* AAFAF Br. 17-18. The Board, which exists within the territorial government of Puerto Rico and exercises only territorial power, satisfies neither condition.

4. Respondent UTIER incorrectly suggests that reversal of the Court below depends on re-affirming and extending the Insular Cases. *See* UTIER Br. 56-66. According to UTIER, any decision reversing the First Circuit’s Appointments Clause ruling would mean that the people of Puerto Rico have somehow fewer rights than other citizens.

Not so. As AAFAF explained in its opening brief (Br. 14-17), the Insular Cases were wrongly decided and must be overruled. The U.S. Constitution—including the Appointments Clause—applies within Puerto Rico and to its people without qualification. But contrary to UTIER’s suggestion, that does not mean the decision below should be upheld. As explained above, the Board members are not officers of the United States. So even though the Appointments Clause and separation-of-powers principles protect the people of Puerto Rico, just like

all other U.S. citizens, no Appointments Clause violation occurred here.

Indeed, just the opposite is true. *Affirmance* of the ruling below—not reversal—would endanger the legitimacy of the elected government of Puerto Rico. The fact that the Appointments Clause does not constrain territorial governance—*i.e.*, those officials who exercise territorial, not federal, powers—is what gives Congress latitude to allow democratic participation in those governments by elected representatives of the people of Puerto Rico who are not appointed by the President with the consent of the Senate. Respondents’ unprecedented reading of the Appointments Clause—to apply to territorial officers who wield territorial authority—would undermine the legitimacy of the governmental framework for Puerto Rico, as well as the other territories and the District of Columbia

To be sure, the colonialism concerns raised by Respondent are quite real—but they have nothing to do with the Appointments Clause issue to be decided here, and everything to do with Puerto Rico’s current relationship to the United States. Congress’s decision to unilaterally alter Puerto Rico’s framework of self-government by creating the Oversight Board is an insult to the people of Puerto Rico. But it is an affront that flows directly from Puerto Rico’s current territorial status. And the Court’s decision in this case cannot remedy that fundamental indignity; it will only be remedied the day Puerto Rico is no longer subject to the Territorial Clause.

5. AAFAF refers the Court to the arguments made in the Board's brief in reply insofar as Respondents mischaracterize the historical practice regarding application of the Appointments Clause to territorial officials. *See* Board Reply 19-26.

6. AAFAF likewise incorporates by reference the arguments made in the Board's brief in reply as to appropriate application of the *de facto* officer doctrine. *See* Board Reply 33-50.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals concerning the Appointments Clause should be reversed.

Respectfully submitted,

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