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

UNITED STATES
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

REPLY BRIEF FOR UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.

JESSICA E. MÉNDEZ-COLBERG
Counsel of Record
ROLANDO EMMANUELLI-JIMÉNEZ
BUFETE EMMANUELLI, C.S.P.
P.O. Box 10779
Ponce, PR 00732
787-848-0666
jessica@bufete-emmanuelli.com
rolando@bufete-emmanuelli.com

Counsel for UTIER

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico and whether the *de facto* officer doctrine allows for unconstitutionally appointed principal Officers of the United States to validate their previous actions and also allow them to continue acting, leaving the party that challenges their appointment with an ongoing injury and without an appropriate relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that the Oversight Board members have occupied their offices in violation of the Appointments Clause since its creation three years ago. However, the court below erred by validating the Oversight Board's previous and future actions by applying the *de facto* officer doctrine. The court of appeals erroneously permitted the Board to continue operating "as until now," Joint App. 178, and eventually it further stayed its mandate until final disposition of the case by this Court. Joint App. 186.

The court below relied on an incorrect application of the *de facto* officer doctrine because it "fear[ed] that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now." Joint App. 177.

By validating the Board's previous and future actions applying the *de facto* officer doctrine, UTIER was left with no appropriate and effective remedy. By allowing the Oversight Board to continue operating despite their unconstitutional appointments, UTIER members were left subject to the broad and unfettered powers of an unconstitutional Board exposing them to ongoing injuries and impairments to their labor rights as well as the obliteration of the democratic governance of the People of Puerto Rico.

UTIER, as the primary workers' union of the Puerto Rico Electric Power Authority ("PREPA"), is a creditor and party in interest in PREPA's Title III case,

that was and continues to be extremely harmed by the Oversight Board. Those injuries arose since the creation of the Oversight Board when, at its sole discretion, on April 28, 2017, certified PREPA's Fiscal Plan. In this Fiscal Plan, the Oversight Board incorporated profound austerity measures that are an invasion of a legally protected interest, including a pecuniary interest, contract and property (employment, salaries, bonuses, academic and research resources, pensions and health plans) and that are still hurting UTIER's members.

UTIER is entitled to an appropriate relief, particularly because since the court of appeals' decision, the Oversight Board has rushed to finalize as many actions as possible, all while holding an unconstitutional appointment, thus, having no authority to act. In May 2019, the Board reached a Restructuring Support Agreement with PREPA's bondholders that threatens UTIER's priority rights under the previous Trust Agreement of 1974. *See Restructuring support agreement for Puerto Rico power company reached*.[1] This agreement will not only harm workers' rights and the retirement system, but it also threatens the instrumentality's feasibility as a going concern.[2]

---

[1] Lloréns Vélez, E., *Restructuring support agreement for Puerto Rico power company reached* (May 6, 2019), Caribbean Business, https://caribbeanbusiness.com/restructuring-support-agreement-for-puerto-rico-power-company-reached/.

[2] *See IEEFA Puerto Rico: PREPA bond deal is not a solution.* http://ieefa.org/ieefa-update-puerto-rico-prepa-bond-deal-shakes/; *IEEFA Puerto Rico: Hidden fees will drive up cost of debt deal even further.* http://ieefa.org/ieefa-puerto-rico-hidden-fees-will-drive-

Furthermore, on September 27, 2019, the Board filed a premature Plan of Adjustments of Debts for the Commonwealth of Puerto Rico, without the essential support of the major stakeholders and the majority of bondholders.[3] These are just a few examples of what now has become an argument before this Court of an impossible disentanglement of the Board's actions that, in its view, justifies leaving UTIER without a remedy in this case. This course of conduct is designed to position the Board to invoke—as it has already done—the "equitable mootness doctrine."[4]

In *Ryder v. U.S.*, 515 U.S. 177 (1995), this Court undoubtedly stated that the *de facto* officer doctrine does not allow courts to validate governmental actions taken in flagrant violation of the Appointments Clause over an undefined period. Moreover, courts certainly cannot invoke the *de facto* officer doctrine prospectively to legalize any future actions by unconstitutionally appointed officers. Nonetheless, that is precisely what the court of appeals did. The court's remedial holding is in direct conflict with this Court's precedents

---

up-cost-of-debt-deal-even-further/; *IEEFA Puerto Rico: What does LIPA's $7 billion bond deal tell us about PREPA's $8 billion deal?* http://ieefa.org/ieefa-puerto-rico-what-does-lipas-7-billion-bond-deal-tell-us-about-prepas-8-billion-deal/.

[3] *See* Commonwealth Plan of Adjustment available at https://oversightboard.pr.gov/plan-of-adjustment/.

[4] *See* Board's Mot. to Dismiss Appeal as Equitably Moot at 2, *Elliot v. Commonwealth of Puerto Rico*, No. 19-1182 (1st Cir. Apr. 12, 2019).

that dictate the scope of the *de facto* officer doctrine. Reversal is warranted.

If the Oversight Board is unconstitutional, UTIER "is entitled to a decision on the merits of the question and whatever relief may be appropriate." *Ryder*, 515 U.S. at 182–83. Therefore, this Court should sever the relevant language from PROMESA and order that all the Board's actions and determinations taken from the time of their appointments to the present are unconstitutional and void *ab initio.* If a federal officer holds a position without legal authority, his previous and future actions are void until the legal or constitutional defect is corrected. *See Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886).

No one can doubt the dire financial situation of Puerto Rico. UTIER's members suffer it every day. But this cannot be the case that establishes the precedent to allow constitutional violations to be pardoned in light of avoiding reaching a difficult decision. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). The result in this case should not be at the expense of the Constitution.

ARGUMENT

Even though the court of appeals correctly concluded that the Board members have occupied their offices in violation of the Appointments Clause since its

creation more than three years ago, it validated the Board's previous and future actions by applying the *de facto* officer doctrine. Consequently, UTIER was left with no appropriate and effective remedy. In fact, UTIER was left in a worse position than it was when it first made its claim. The validation of the Board's future acts has allowed it to continue operating and imposing its determinations on the affected stakeholders like UTIER, without the constitutional authority to do so.

With respect to the applicability of the *de facto* officer doctrine to constitutional challenges, this Court explained in *Ryder v. U.S.*, that "the cases in which we had relied on that doctrine *did not involve basic constitutional protections* designed in part for the benefit of litigants." *Id.*, at 182 (internal quotations omitted, emphasis added). The question presented in *Ryder* specifically involved an Appointments Clause challenge and this Court squarely rejected to apply the *de facto* officer doctrine to deny a remedy to the claimant. Otherwise, no "rational litigant" would bring such a structural challenge.[5] Being this case is one of an Appointments Clause challenge as well, *Ryder* is the controlling authority.

After the court of appeals' decision, UTIER members were left subject to the broad and unfettered powers of an unconstitutional Oversight Board exposing

---

[5] Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014).

them to ongoing injuries and impairments to their labor rights as well as the obliteration of the democratic governance of the People of Puerto Rico. The ruling of the court of appeals on the *de facto* officer doctrine represents an incentive for Congress and the United States Government to enact laws with constitutional defects in violation of the fundamental principle of separation-of-powers without any consequences as there would be no effective remedy for a challenging party.

A. The remedy should be retroactive.

In an attempt to justify the court of appeals' ruling, the Oversight Board and the United States insist in the applicability of the *de facto* officer doctrine to Appointments Clause challenges and that "[u]nder the *de facto* doctrine [. . .] a court need not redress an unlawful appointment through backward-looking relief that sets aside the appointee's past acts." U.S. Br. 27; Board Br. 35. However, this Court has refused the application of this doctrine with respect to Appointments Clause challenges. *See Ryder*, 515 U.S. at 183–84, and with respect to the remedy, "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions * * * for nearly a thousand years.'" *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94 (1993) (*quoting Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

To validate the Oversight Board's previous actions according to the *de facto* officer doctrine, the court of

appeals relied on this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), "which involved an Appointments Clause challenge to the then recently constituted Federal Election Commission and the Court allowed "*de facto* validity" to the past administrative actions of the Commission. *Id*. Nonetheless, in *Buckley*, "the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." *Ryder*, 515 U.S. at 183.

However, in *Ryder* this Court clarified that *Buckley* did not explicitly relied on the *de facto* officer doctrine. That is why this Court made it clear that, although *Buckley* may be thought to have *implicitly* applied a form of the *de facto* officer doctrine, there is no inclination of this Court to extend it beyond its facts. *Id*. at 184.

Historically, this Court has applied the *de facto* officer doctrine to limit relief following "merely technical" statutory defects in an officer's appointment. *Nguyen v. United States*, 539 U.S. 69, 77 (2003); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962). Also, it has been applied to excuse defects in an officer's appointment that are raised in a "collateral attack" on a judgment, such as in a *habeas corpus* petition. *See Ex parte Ward*, 173 U.S. 452, 456 (1899). In *Ryder*, this Court explained that, in these limited circumstances, the doctrine "protect[s] the public by insuring the orderly functioning of the government despite technical defects in title to office." *Ryder*, 515 U.S. at 180. However, the Appointments Clause is not a mere technical

matter of "etiquette or protocol." *Edmond v. U.S.*, 520 U.S. 651, 659 (1997). It "is among the significant structural safeguards of the constitutional scheme." *Id.* It "preserves [. . .] the Constitution's structural integrity," standing as "a bulwark against one branch aggrandizing its power at the expense of another branch. . . ." *Ryder*, 515 U.S. at 182. "But it is more: 'it preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointments power.'" *Id.* (*citing Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

In *Ryder*, "the petitioner challenged the composition of the Coast Guard Court of Military Review while his case was pending before that court on direct review." *Id.* at 182. This Court emphasized that a claim that is based on the Appointments Clause is "a claim that there has been a 'trespass upon the executive power of appointment,' rather than a misapplication of a statute [. . . .]" *Id.* (*citing McDowell v. U.S.*, 159 U.S. 596, 598 (1895)).

The *de facto* officer doctrine is inapplicable to constitutional defects like Appointments Clause violations because those errors are structural, *see Freytag v. Commissioner*, 501 U.S. at 878–80,[6] and therefore, subject to automatic reversal. *See Neder v. United States*, 527

[6] *Freytag v. Commissioner*, 501 U.S. at 880 (1991) (holding that "[t]he structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II. [. . .]. The structural interests protected by the Appointments Clause are not those of any one of Government but of the entire Republic)."

U.S. 1, 8 (1999).[7] Thus, when a proceeding is "tainted with an appointments violation," the challenger "is entitled" to an entirely "new" proceeding. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

Moreover, the *de facto* officer doctrine should not be invoked on cases that involve "basic constitutional protections designed in part for the benefit of litigants." *Ryder*, 515 U.S. at 182 (*citing Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). As a matter of fact, this Court emphasized in *Ryder* that "[. . .] one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits [. . .] and whatever relief may be appropriate if a violation indeed occurred." *Id.* at 182-83. Also, acknowledging its importance, this Court expressed that "[p]roviding relief to a claimant raising an Appointments Clause challenge [. . .] invalidates actions taken pursuant to a defective title." *Id.* at 185. Thus, in *Ryder* this Court reversed the judgment of the Court of Military Appeals which granted *de facto* validity to the actions of the civilian judges of the Coast Guard Court of Military Review. *Id.* at 188. Also, this Court held that the petitioner was entitled to the remedy of a hearing before a properly appointed panel of the Coast Guard Court of Military Review. *Id.* "Any other rule would create a disincentive to raise Appointments Clause

---

[7] *See also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) ("[A]n Appointments Clause violation is a structural error that warrants reversal.").

challenges with respect to questionable [. . .] appointments." *Id.* at 183.

Ryder is the controlling authority in this case. Therefore, according to *Ryder*, this Court should reverse the court of appeals' determination on the *de facto* officer doctrine, grant UTIER's remedy and forbid an unconstitutional Board from operating and making decisions that are irreparably affecting UTIER's members.

After *Ryder*, this Court has not applied or even mentioned the *de facto* officer doctrine to cases where the plaintiffs have brought Appointments Clause challenges. In those cases, the past actions by the unconstitutionally appointed "Officers of the United States" have been declared void and null *ab initio*, and the remedies sought by the aggrieved party, granted. *See NLRB v. Canning*, 573 U.S. 513 (2014); *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

According to the United States' interpretation of *Ryder*, and in an attempt to avoid its controlling ruling over this case, it states that *Ryder* only "stands for the modest proposition that a court ordinarily should not apply the *de facto* doctrine to an unconstitutional appointment of a judge or other adjudicator." U.S. Br. 27; Board Br. 34, 37, 43. To try to distinguish *Ryder* on that basis is meritless. There is no indication in *Ryder* or *Lucia* that this Court would *only* grant retroactive relief when the officers' functions concern adjudicators or prosecutors. Since 1895, this Court explained that the *de facto* officer doctrine would be inapplicable when

there was any "trespass upon the executive power of appointment," *McDowell*, 159 U.S. at 598, and that power of appointment extends to *all* officers of the United States whether they are from the judiciary or the executive branch. U.S. Const. art. II, § 2, cl. 2. The Opposing Parties have not presented a reason why *Ryder* or *Lucia* should be limited to adjudicators or prosecutors rather than applying such rationale to all "Officers of the United States" within the meaning of the Appointments Clause.

It is equally important (if not to say more important) to not apply the *de facto* officer doctrine when it comes to executive officials. In *Ryder*, this Court rejected the Government's argument that "any defect there may have been in the proceedings before the Coast Guard Court of Military Review was in effect cured by the review available to petitioner in the Court of Military Appeals." *Id.*, at 186. The Court, thus, examined the "difference in function and authority between the Coast Guard Court of Military Review and the Court of Military Appeals" and concluded that "the former had broader discretion to review claims of error, revise factual determinations, and revise sentences than did the latter." *Id.*, at 187. Therefore, the Court stated that it could not be said that "review by the properly constituted Court of Military Appeals gave petitioner all the possibility for relief that review by a properly constituted Coast Guard Court of Military Review would have given him." *Id.* In contrast, the Oversight Board is vested with traditional prerogatives of the Executive Branch (such as budgeting expenses for

the various agencies) and of the Legislative Branch (such as approving budgets), while placing some Board decisions outside the purview of the Judicial Branch. And while exercising all of its authority, the Board, its members and its employees are not liable for any obligation of or claim against them resulting from actions taken to carry out PROMESA. 48 U.S.C. § 2125. Here, PROMESA vests the Oversight Board with the power to make determinations *at its sole discretion* and many of its critical decisions are not even subject to judicial review; *e.g.*, 48 U.S.C. § 2126(e) precludes review on challenges to the Oversight Board's certification determinations of the Fiscal Plan.[8] The Oversight Board operates with authority to generate fiscal policy, implement said policy and interpret said policy, without a chance for the Government of Puerto Rico to act on it,[9] or the People of Puerto Rico to challenge it in court. Thus, it is more critical in this case to disregard the applicability of the *de facto* officer doctrine to preclude a party from the relief that it is entitled.

---

[8] (e) There shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under this Act. 48 U.S.C. § 2126(e).

[9] *See*, *e.g.*, 48 U.S.C. § 2128(a)(2) (establishing that the government of Puerto Rico may not "enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board.").

B. UTIER prayed and is entitled to a meaningful relief.

When a litigant raises a "constitutional challenge as a defense to an enforcement action," courts cannot make an unconstitutional determination "without providing relief to the [litigant]." *Accord FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). By not awarding any meaningful remedy, the court of appeals' determination is just an advisory opinion. When a court makes a new constitutional ruling, it "ha[s] to give [the challenger] the benefit of that new rule"; this is "an unavoidable consequence" of Article III's prohibition against "advisory opinions." *Teague v. Lane*, 489 U.S. 288, 315 (1989) (*citing Griffith v. Kentucky*, 479 U.S. 314, 327–28 (1987)).

The Committee of Unsecured Creditors of all Title III Debtors Other than COFINA ("UCC") admits that a purely prospective relief is warranted only in an extreme circumstance. UCC Br. 8 ("[t]he First Circuit correctly determined that this case presented one of those rare occasions that demands purely prospective relief."). However, to justify the court of appeals' ruling, the UCC tried to establish a distinction between the *de facto* officer doctrine applied by the court of appeals that is under consideration in this case and a newly coined doctrine of *de facto* validity. UCC Br. 23. This distinction is meritless because in all instances this Court issued an appropriate relief according to the prayers of the parties. Here, the court of appeals left UTIER without a remedy and the UCC tries to categorize the relief sought as a "special treatment" (UCC Br.

6), as opposed to it being the relief to which UTIER is entitled.

The proposition that the court of appeals can rule in favor of UTIER and still somehow allow the Board to continue unimpeded is unprecedented because it largely relies on a misconstruction of the remedies granted in *Buckley* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In those cases, the prevailing challenger was granted a relief. *Ryder v. U.S.*, 515 U.S. at 182–84 & n.3.

True, in *Buckley* the result reached was that past acts of public officials were validated despite that the Court found that the appointment method contravened the provisions of the Appointments Clause. But in *Buckley*, the Court had to consider first an issue of ripeness because, "[t]he Court of Appeals held that of the five specific certified questions directed at the Commission's authority, only its powers to render advisory opinions and to authorize excessive convention expenditures were ripe for adjudication." *Buckley*, 424 U.S. at 114. This Court acknowledged that "[w]hile many of [the Commission's] other functions remain as yet *unexercised*, the date of their all but certain exercise is now closer by several months than it was at the time the Court of Appeals ruled." *Id.*, at 116 (emphasis added). This Court distinguished *Buckley* from *Glidden Co. v. Zdanok*, 307 U.S. 433 (1939) and stated, "[i]n *Glidden*, of course, the challenged adjudication had already taken place, whereas in this case appellant's claim *is of impending future rulings and determinations by the Commission*." *Id.*, at 117. That is why the

plaintiffs requested a prospective relief. Thus, the Court had no reason to disturb the Commission's past acts as they were not implicated in the litigation. The "constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." *Ryder*, 515 U.S. at 183. Still, "to the extent *Buckley* may be thought to have implicitly applied a form of the *de facto* officer doctrine, [this Court is] not inclined to extend [it] beyond [it's] facts." *Id.*, at 184.

On the other hand, in *Northern Pipeline*, the court declared the broad grant of jurisdiction to Article I bankruptcy courts unconstitutional "and applied its decision prospectively only," but "affirmed the judgment of the District Court, which had dismissed petitioner's bankruptcy action and afforded respondent the relief requested pursuant to its constitutional challenge." *Ryder*, 515 U.S. at 184. *See also Stern v. Marshall* where this Court ruled that, because the bankruptcy court lacked the Article III power to rule on a state-law counterclaim, that claim must be dismissed. 564 U.S. 462, 503 (2011).

There is no precedent of a violation of the Appointments Clause that failed to grant the requested relief. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("[W]e are aware of no theory that would permit us to declare the [FEC's] structure unconstitutional without providing relief to the appellants in this case."). If the Oversight Board is unconstitutional, UTIER is entitled to a decision on

the merits of the question and whatever relief may be appropriate. *See Ryder v. U.S.*, 515 U.S. at 182–83.

The United States avers that this Court has "applied the *de facto* officer doctrine to violations of numerous other constitutional provisions." U.S. Br. 30–32. However, all those cases are distinguishable for various reasons: collateral attack, *Ex parte Ward*, 173 U.S. 452 (1899), *Bolling v. Lersner*, 91 U.S. 594, 594 (1876); the Court stated the validity of acts "not forbidden by the Constitution," *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99 (1875); the particular circumstances, *Georgia v. United States*, 411 U.S. 526 (1973), *Connor v. Williams*, 404 U.S. 549, 550 (1972); no constitutional violation, *Fortson v. Morris*, 385 U.S. 231 (1966), *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869); Court did not address the *de facto* officer doctrine, *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964), *Griffin's Case*, 11 F. Cas. 7, 27 (C.C.D. Va. 1869) (No. 5815), *Cocke v. Halsey*, 41 U.S. 71 (1842).

Furthermore, the court of appeals' determination to allow the Oversight Board to continue operations after it determined that the appointment of the Board members is unconstitutional and unprecedented. The court could not find case law to support this ruling. Allowing an unconstitutional Oversight Board to continue to operate has been particularly destructive here because the Board evidently intends to argue that its actions in the Title III proceedings during this interim

period render the cases "equitably moot."[10] Moreover, the continuation of the Board's operations—despite their appointments being unconstitutional—has aggravated (and will continue to aggravate) UTIER's injuries. It would be entirely incongruous for equitable mootness to, in the end, preclude this Court from adjudicating the important issue of appropriate relief.

C. Equity considerations of this case do not outweigh separations of powers and liberty.

The Opposing Parties argue that the remedy requested "would undo years of progress toward Puerto Rico's economic recovery, causing devastating practical consequences for the people of the island and for innocent third parties who have relied on the Board's acts." U.S. Br. 26–27; Board Br. 33, 39; UCC Br. 25. However, "[C]ourts cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (*quoting INS v. Chadha*, 462 U.S. 919, 943 (1983)), especially when freedom and preventing tyranny is at stake. James Madison, writing in the Federalist No. 47,[11] stated it precisely: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Thus, "[t]he very essence of

---

[10] *See* Board's Mot. to Dismiss Appeal as Equitably Moot at 2, *supra*, note 4.

[11] The Federalist No. 47 p. 299 (G. P. Putnam's Sons ed. 1908).

civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," for "where there is a legal right, there is also a legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (*quoting* 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). UTIER has been continuously and directly injured by the actions and determinations of the Oversight Board, while holding their office unconstitutional, thus appropriate remedy is warranted.

This Court has not hesitated to grant meaningful relief, even if it could be considered disruptive as remedy to violations of the constitutional separation-of-powers. *E.g.*, *INS v. Chadha*, 462 U.S. 919, 944–45 (1983) (invalidating hundreds of statutes on separation-of-powers grounds); *Northern Pipeline*, 458 U.S. at 87-88 (striking down entire bankruptcy court system nationwide). In 2010, in *New Process Steel, L.P. v. NLRB*, this Court invalidated "almost 600" National Labor Relations Board cases decided in violation of the NLRB's statutory quorum requirement, and refused to construe the quorum requirement to permit "*de facto* delegation to a two-member group." 560 U.S. 674, 678, 681 (2010).

The relief requested is not a "special treatment." UCC Br. 20. The Board has acted since its inception with no authority to do so, affecting in its way all of those for who the Opposing Parties are concerned. To deny UTIER an appropriate remedy, contrary to this Court's own precedent, would establish a dangerous precedent that would send the clear message that an

unconstitutional act can subsist with no consequence and, as such, the constitutional scheme of checks and balances will crumble. The separation-of-powers protection of individual liberty has an incalculable worth that cannot be diminished by inconveniences, monetary losses or the practical result desired. "[C]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (alteration omitted). Freedom is invaluable. As this Court stated, "[t]he leading Framers of our Constitution viewed the principle of separation-of-powers as the central guarantee of a just government." *Freytag*, 501 U.S. at 870. In the words of James Madison: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 324 (J. Cooke ed. 1961). As such, the economic consequences of any given case cannot overcome an affront to the Constitution, specially the separation-of-powers scheme, and serve as a basis to leave a party without a remedy.

To be sure, the appropriate relief is to declare null and void *ab initio* all the actions and determinations of the Board; that includes dismissing the Title III proceedings. Because of its unconstitutional appointments, the Oversight Board lacked authority to even file the Title III proceedings on behalf of the Commonwealth or the instrumentalities. *See Ullrich v. Welt (In re Nica Holdings, Inc.)*, 810 F.3d 781 (11th Cir. 2015) ("It is well-settled that [ ] a bankruptcy filing is a specific act requiring specific authorization," *quoting In re*

N2N Commerce, Inc., 405 B.R. 34, 41 (Bankr. D. Mass. 2009)) (quotation omitted) (collecting cases). Moreover, an agency "lacks authority" when its "composition violates the Constitution's separation of powers." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993).

Regarding the remedy, the Opposing Parties aver that if the Court concludes that the *de facto* officer doctrine does not extend in these circumstances to the asserted violation of the Appointments Clause, the Court should vacate the court of appeals' judgment with respect to the remedy and remand these cases for further proceedings. U.S. Br. 46; UCC Br. 30. Still, this Court would make an express ruling declaring the Oversight Board's actions void *ab initio*. The UCC invoked the provisions of 11 U.S.C. § 349, as made applicable to this case by 48 U.S.C. § 2161. However, section 349(b) only has relevance, precisely, after dismissal of the bankruptcy case. UCC Br. 25. According to section 349(b), the district court would have to show cause, thus, safeguarding the protections of the due process of law, and then it would determine how to return to the *status quo*.

The Oversight Board, on its part, states that "[i]f this Court holds that the Board members' appointments are invalid [. . .] [t]he Court should stay its judgement for 60 days to permit Senate confirmation." Board Br. 42. But that is unacceptable. The most evident error of the court of appeals was to allow the Oversight Board to continue operating notwithstanding the unconstitutionality determination. The court of

appeals relied on the so-called "progress made towards PROMESA's aim" without actually being properly briefed about the matter. Since then, *see for example, Velázquez, Grijalva Call for Puerto Rico Oversight Board to Reject Electric Authority Debt Agreement* ("the agreement will protect the payments to creditors levied on the backs of the residents that pay their electricity"; "As currently drafted now, the terms of the RSA do not provide for the comprehensive transformation of the Puerto Rico Electric Power Authority necessary to lower electricity costs.");[12] *Senator Warren Statement Against Use of Puerto Ricans' Pensions to Pay Off Wall Street Bondholders* ("Congress and the Oversight Board it installed, have allowed Wall Street to pillage the resources Puerto Ricans need to survive and recover. This is what happens when you have a government that works great for the big banks and the big corporations but not for anyone else.").[13]

In the proceedings below, the Oversight Board also suggested to the court of appeals that it should stay its mandate. *See* Case 18-1671, Appellee Brief of Oversight Board at 51 ("If the Court severs parts of

---

[12] *See Velázquez, Grijalva Call for Puerto Rico Oversight Board to Reject Electric Authority Debt Agreement* (June 16, 2017) available at https://velazquez.house.gov/sites/velazquez.house.gov/files/06162017%20FINAL%20Letter%20to%20OB%20on%20PREPA%20RSA.pdf.

[13] *See Senator Warren Statement Against Use of Puerto Ricans' Pensions to Pay Off Wall Street Bondholders* (April 1, 2019) available at https://www.warren.senate.gov/newsroom/press-releases/senator-warren-statement-against-use-of-puerto-ricans-pensions-to-pay-off-wall-street-bondholders.

PROMESA, it should stay its mandate pending appointment of Board members in accordance with the Appointments Clause."). But the Board also agreed that with a successful Appointments Clause challenge the court "must sever any offending language *and enjoin any prospective action by the current Board*."). *Id.* at 54 (emphasis added). Now, the Board has taken advantage of the court of appeals' determination to stay its mandate by allowing it to continue operating as if they had the constitutional authority to do so. The Board intends to do the same before this Court. There was no justification for the court of appeals to stay its mandate and, worse, to allow the Board to continue operating. The hurricanes, unfortunate and disastrous as they were, should not have played any role in the court of appeals' reasoning to apply the *de facto* officer doctrine and to allow the Board to continue operating. Joint App. 177. Absent a justification of the real "progress" at stake, the court of appeals could not rely on assumptions to invoke the *de facto* officer doctrine and even apply it prospectively. Because of it, UTIER's members were not only left with no remedy at all, but they were left in a worse position than they were when UTIER filed its complaint.

This Court should not allow the Oversight Board to continue operations after its final ruling. The Board has rushed to finalize as many actions as possible, all while holding an unconstitutional appointment. On May 2019, the Board reached a Restructuring Support Agreement with PREPA's bondholders that threatens UTIER's priority rights under the previous Trust

Agreement of 1974. *See Restructuring support agreement for Puerto Rico power company reached*.[14] This agreement will not only harm worker's rights and the retirement system, but it also threatens the instrumentality's feasibility as a going concern.[15] Also, just as the deadline for claims for fraudulent transactions expired (avoidance actions under the Bankruptcy Code), the Oversight Board filed over 250 suits, most of them against local companies that served as suppliers for the government, to recover money that was spent through payments that allegedly conflicted with the U.S. Bankruptcy Code and Puerto Rico laws. All these suits surpass a million dollars per claim and have the potential to throw these companies into bankruptcy, thus, substantially affecting the local economy. *See Puerto Rico's Debt Battles: The Oversight Board Goes on a Suing Spree*.[16] Furthermore, on September 27, 2019, the Oversight Board filed a premature Plan of Adjustments of Debts for the Commonwealth of Puerto Rico, without the essential support of the major

---

[14] Lloréns Vélez, E., *Restructuring support agreement for Puerto Rico power company reached* (May 6, 2019), Caribbean Business, https://caribbeanbusiness.com/restructuring-support-agreement-for-puerto-rico-power-company-reached/.

[15] *See IEEFA Puerto Rico: PREPA bond deal is not a solution, supra*, note 2; *IEEFA Puerto Rico: Hidden fees will drive up cost of debt deal even further, supra*, note 2; *IEEFA Puerto Rico: What does LIPA's $7 billion bond deal tell us about PREPA's $8 billion deal?*, *supra*, note 2.

[16] Dennis, A., *Puerto Rico's Debt Battles: The Oversight Board Goes on a Suing Spree* (June 5, 2019) available at https://news.littlesis.org/2019/06/05/puerto-ricos-debt-battles-the-oversight-board-goes-on-a-suing-spree/.

stakeholders and the majority of bondholders.[17] These are just a few, but substantial, examples of the so-called "progress" of the Board and what has now become an argument before this Court of an impossible disentanglement of its actions; and this, in its view, justifies leaving UTIER without a remedy in this case. This course of conduct is designed to position the Board to invoke—as it has already done—the "equitable mootness doctrine" before the constitutional issue can be adjudicated by this Court.[18]

The remedy requested does not invalidate PROMESA in its entirety, nor does it deny Puerto Rico of the protection of the Title III proceedings. On the contrary, it protects UTIER and the People from ongoing damages caused by the actions and decisions of an unconstitutionally appointed Board. The remedy sought gives the opportunity to the President to nominate, and the Senate to confirm, a new Oversight Board compliant with the Appointments Clause, ensuring accountability and preserving the separation-of-powers.

This newly constituted Board would have the authority to determine whether it ratifies the previous actions of the unconstitutional Board and the interested parties will have the opportunity to argue as to the ratification of such actions. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111,

---

[17] *See* Commonwealth Plan of Adjustment, *supra*, note 3.

[18] *See* Board's Mot. to Dismiss Appeal as Equitably Moot at 2, *supra*, note 4.

117 (D.C. Cir. 2015) (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).

CONCLUSION

This Court should affirm the court of appeals' findings that the Board members were not appointed in compliance with the Appointments Clause. The Court should reverse the remedial portion of the court of appeals' judgment, declare the Oversight Board's actions and determinations null and void *ab initio* and order the dismissal of the Title III petitions.

Respectfully submitted,

JESSICA E. MÉNDEZ-COLBERG
Counsel of Record
ROLANDO EMMANUELLI-JIMÉNEZ
BUFETE EMMANUELLI, C.S.P.
P.O. Box 10779
Ponce, PR 00732
787-848-0666
jessica@bufete-emmanuelli.com
rolando@bufete-emmanuelli.com

Counsel for UTIER

October 4th, 2019