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, ET AL.,

Petitioners, Cross-Respondents,

v.

AURELIUS INVESTMENT, LLC, ET AL.,

Respondents, Cross-Petitioners.

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

REPLY OF AURELIUS AND ASSURED

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
HELGI C. WALKER
LUCAS C. TOWNSEND
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Aurelius and Assured

Additional Captions Listed on Inside Cover

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

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,
Petitioner,
v.
AURELIUS INVESTMENT, LLC, ET AL.

UNITED STATES, *Petitioner,*
v.
AURELIUS INVESTMENT, LLC, ET AL.

UTIER, *Petitioner,*
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FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR
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INTRODUCTION

The Board has now thrown the remedial question in these cases into stark relief. On September 27, 2019, the Board filed with the district court below a proposed plan of adjustment for more than $129 billion of debts owed by the Commonwealth of Puerto Rico, including hundreds of millions of bonds owned or insured by Aurelius and Assured.[1] The Board pointedly does not deny that, as soon as this or any other plan of adjustment is implemented, the Board will claim that any challenges to the plan are barred by "equitable mootness." Board Reply 42-43 n.13. Yet more than two years ago, Aurelius and UTIER first challenged the constitutionality of the Board members' appointments, and more than seven months ago the First Circuit ruled that the Board members' selections violated the Appointments Clause. And even though the President subsequently nominated these same seven individuals to hold the office of Board member "for the remainder of the term expiring on August 30, 2019," 165 Cong. Rec. S3805 (June 18, 2019), the Senate did not act on those nominations before they expired. Nevertheless, the Board members continue to act as if it does not matter whether or not they validly hold their offices.

The Board's audacious approach illustrates precisely why this Court consistently has rejected application of the *de facto* officer doctrine to validate the actions of officials who hold governmental positions in violation of the Appointments Clause—and why the

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[1] Mary Williams Walsh & Karl Russell, *$129 Billion Puerto Rico Bankruptcy Plan Could Be Model for States*, N.Y. Times (Sept. 29, 2019), https://www.nytimes.com/2019/09/27/business/puerto-rico-bankruptcy-promesa.html.

Court must do so here. A person who occupies an office in violation of the Appointments Clause *does not have any legitimate authority to exercise the powers of the office*. The *de facto* officer doctrine cannot vest a person with powers that the Constitution withholds. Yet that is exactly what the First Circuit decision did: It purported to give the Board members authority that only conformity with the Appointments Clause could confer. That was error. Article III gives judges the power to say what the law is, but not to render advisory opinions by refusing to give successful litigants in the case at bar meaningful relief through creative and expansive interpretation of their "equitable" powers.

The First Circuit's promiscuous application of the *de facto* officer doctrine undermines the constitutional separation of powers. This Court repeatedly has recognized that protection of that fundamental principle requires vigorous private enforcement. That is because, rather than defend the Framers' tripartite division of powers, an encroached-upon branch often will find it politically expedient to acquiesce in another branch's trespass. But private parties will not undertake the effort and expense of litigation for a place in a law-school casebook. Instead, they will take up the cause of vindicating the Appointments Clause only when doing so will provide an actual remedy for an injury they have suffered at the hands of an unlawfully installed official.

If the *de facto* officer doctrine validates the acts of a person who occupies an office unconstitutionally, a private litigant injured by the acts of that official will have no incentive to pursue a judicial cure. Indeed, it would call into doubt how such a private litigant could

even establish Article III redressability, because the doctrine would extinguish any remedial relief. This "would create a disincentive to raise Appointments Clause challenges" and permanently hobble the defense of the constitutional separation of powers by ceding the field to a government that may be overtaken by the political winds of the moment. *Ryder* v. *United States*, 515 U.S. 177, 183 (1995).

This Court should not replace the clear rule of *Ryder*—that the *de facto* officer doctrine cannot validate acts of unconstitutionally appointed persons—with the freewheeling "balance of equities" now suggested by the United States. U.S. Reply 37.[2] The separation of powers needs sturdy fences with clear remedies for their breach—not indeterminate vagaries that will yield only litigation over the "equities" of requiring the government to act in accordance with the Constitution's requirements.

Even if the "equities" were relevant to the remedial question here, that analysis should start with the open and notorious nature of Congress's violation of the separation of powers in PROMESA. This is not a case in which a "technical" defect in the Board members' appointments was hidden from view while the Board acted under color of authority. The Board was created by a federal statute to administer and enforce federal law against third parties in federal court. Its members possess sweeping authority to take actions having "wide-ranging implications for the public as a whole." COFINA Br. 16. The Board members are appointed by federal officials, and the President of the

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[2] All internal quotation marks, citations, and footnotes are omitted unless otherwise indicated.

United States alone may remove them. It is obvious that the Board members are Officers of the United States subject to the Appointments Clause. Members of Congress acknowledged as much during their deliberations. And the United States has repeatedly noted concerns that PROMESA's list mechanism—which required the President to choose Board members from lists provided by individual members of Congress—independently violates the separation of powers by "impermissibly aggrandiz[ing] Congress's power at the expense of the President." U.S. Reply 8-9 & n.2; *see also* Aurelius & Assured Br. 33-34.

But even after the First Circuit held that the Board members' selection violated the Appointments Clause, the Board continues to proceed with its work, as if the members were lawful officers of the United States. That unabashed defiance of the Constitution compels an effective remedy against the Board's actions challenged by Aurelius and Assured here. The Court should order that Aurelius's motion to dismiss the Commonwealth Title III proceeding be granted, and that Assured be granted similar relief on its adversary complaint in the PRHTA Title III proceeding.

The Court should not be dissuaded by the opposing parties' unfounded claims of ensuing "chaos." Board Reply 2. These claims boil down to an extraordinary assertion that the constitutional violation here is simply *too blatant and too big* to remedy. That argument turns the Constitution upside down and would be the real recipe for constitutional chaos, for it would mean that the worse the constitutional injury, the less deserving are the victims of a remedy. *But see Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

Moreover, Aurelius and Assured have mapped out a remedial path that would entail minimal (if any) disruption to the ongoing proceedings. This Court can order the Commonwealth and PRHTA Title III proceedings dismissed and stay its mandate while the President nominates and the Senate confirms new Board members. The constitutionally appointed Board, exercising independent judgment, can then review the unconstitutional actions of the previous, invalid Board and determine whether those actions can be properly ratified. The automatic stay need not ever be lifted. This process would honor the separation of powers by granting the successful challengers relief from the Board's action on review and ensuring that officers vested with decision-making authority under PROMESA—not the courts—would decide in the first instance whether to validate the Board's actions. Tellingly, no party argues that this remedial path is infeasible. Application of the *de facto* officer doctrine thus is not only inappropriate but utterly unnecessary here and, in view of the irreparable damage it would do to the separation of powers, deeply destructive. The remedial holding of the First Circuit should be reversed.

ARGUMENT

I. *RYDER* CORRECTLY HELD THAT THE *DE FACTO* OFFICER DOCTRINE DOES NOT APPLY TO STRUCTURAL CONSTITUTIONAL VIOLATIONS.

The opposing parties devote much of their remedy arguments to the unremarkable proposition that the *de facto* officer doctrine has a long pedigree in common-law jurisdictions around the world. But that says little about what role the doctrine should play when a structural provision of the U.S. Constitution

is violated. Faced with that precise scenario, this Court correctly held that the *de facto* officer doctrine should play *no* role. *Ryder* v. *United States*, 515 U.S. 177, 182 (1995).

A. The *De Facto* Officer Doctrine May Not Deprive Litigants Of Relief From Timely Challenged Actions By Officials Exercising Power In Violation Of The Appointments Clause.

Ryder dictates the remedy to the constitutional violation in this case. No one disputes that Aurelius and Assured made "a timely challenge to the constitutional validity of the appointment[s]" of the Board members, and thus are entitled to "relief." 515 U.S. at 182-83. Instead, the opposing parties argue that, upon finding an Appointments Clause violation—in this case a blatant violation—courts should employ a multi-factor "balanc[ing]" approach, exercising "discretion" to determine whether to invalidate past actions. *See*, *e.g.*, Board Reply 43; U.S. Reply 37. But the cases the opposing parties cite do not involve the *de facto* officer doctrine, and the cases that do discuss that doctrine do not employ any sort of balancing test. Moreover, *Ryder* did not merely "instruct[] the lower court to determine what relief may be appropriate." Unsecured Creditors Reply 15. The Court in *Ryder* *vacated* the unlawful decision on review and ordered a *new* hearing before "properly appointed" officials. 515 U.S. at 188. The Court ordered the same remedy in *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018). Both cases firmly establish that the "appropriate relief" for a violation of the Appointments Clause is to invalidate the challenged action of the unconstitutional officer.

Applying the *de facto* officer doctrine here would justify its use for *all* Appointments Clause violations, turning one of the Constitution's most essential structural protections into a meaningless aspiration.

The infinitely elastic and malleable balancing approach that the opposing parties favor was rejected in *Lucia*, *Ryder*, and earlier cases precisely because it is inconsistent with "basic constitutional protections." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (plurality). Indeed, as early as 1895 this Court noted that the *de facto* officer doctrine would not apply to a "trespass upon the executive power of appointment." *McDowell* v. *United States*, 159 U.S. 596, 598 (1895). In both *Glidden* and *Ryder*, when the Solicitor General invited the Court to apply the *de facto* officer doctrine to structural constitutional violations, the Court declined the invitation. The doctrine "does not obtain" when the appointment is defective on "constitutional grounds," because that doctrine "is plainly insufficient to overcome the strong interest … in maintaining the constitutional plan of separation of powers." *Glidden*, 370 U.S. at 535-36 (plurality). *Ryder* rejected a balancing approach to use of the *de facto* officer doctrine because rigorous enforcement of the Appointments Clause is necessary to preserve "the Constitution's structural integrity." 515 U.S. at 182-83.

Successful separation-of-powers challengers are entitled to have the agency action that aggrieves them set aside. When there is a constitutional violation that is subject to a timely challenge, courts may not simply validate the unconstitutional actions; those actions should be vacated, as in *NLRB* v. *Noel Canning*, 573 U.S. 513, 521, 557 (2014). Here, because the Board "never possessed the legal authority to file" the

Commonwealth and PRHTA Title III petitions, this Court should order those petitions dismissed pending ratification by a validly appointed Board. Aurelius & Assured Br. 59; *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 688 (2010).[3]

Applying the *de facto* officer doctrine to validate the otherwise unlawful initiation of the Title III cases would exacerbate the separation-of-powers violation by arrogating to the judiciary the power to decide which Executive-Branch actions and appointments should be retroactively authorized. Individuals who occupy an office in violation of the Appointments Clause lack any authority to exercise that office's powers. Granting *post hoc* validity to those invalid acts would amount to a *court* retroactively vesting those individuals with executive authority. But only a presidential appointment that conforms with the Appointments Clause can confer that authority. In light of the critical separation-of-powers interests at stake, the judiciary should not be deciding which individuals should occupy an executive office and which manifestly invalid executive actions should be validated.

Applying the *de facto* officer doctrine here would also "create a disincentive" to bring Appointments Clause and separation-of-powers challenges. *Ryder*, 515 U.S. at 182-83. Private parties like Aurelius and Assured invest time and resources in bringing suit because their real-world interests are jeopardized by the

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[3] The Board seeks to distinguish *New Process Steel* on the basis that the lack of a statutory quorum meant there was no jurisdiction, but the same is true here: Five validly appointed Board members must vote for a restructuring certification before filing a Title III petition, 48 U.S.C. §§ 2146(b), 2164(a), which never happened.

actions of unconstitutional actors. But absent effective relief redressing those harms, they will refrain from bringing separation-of-powers challenges—if Article III's redressability requirement would allow such suits at all. That would have permanent tragic consequences, because, as this case shows, the encroached-upon branch often acquiesces in the encroachment. The Executive Branch may find it politically expedient to disavow accountability for particular officers' actions, which is why this Court has declined to "defer to the Executive Branch's decision that there has been no legislative encroachment on Presidential prerogatives under the Appointments Clause." *Freytag* v. *Comm'r*, 501 U.S. 868, 879-80 (1991). The Senate also has avoided any accountability for the Board members' selection by evading its responsibility to provide advice and consent before principal officers take office. This absence of accountability is precisely what the Framers feared would cause the Legislature to redouble its encroachments, "mask[ing]" its maneuvers under "complicated and indirect measures," and "drawing all power into its impetuous vortex." *The Federalist No. 48*, at 309-10 (Madison) (C. Rossiter ed. 1961). Injured parties must have a reason to bring these constitutional challenges even when the Executive Branch turns its face away from a marauding Legislature, or when the Senate abdicates its role in the confirmation process.

B. The Opposing Parties' Remaining Arguments Lack Merit.

None of the other arguments raised by the opposing parties justifies application of the *de facto* officer doctrine here.

1. The opposing parties stress that the *de facto* officer doctrine is an ancient maxim that has been applied for hundreds of years. Board Reply 34-35; U.S. Reply 26. But these historical cases did not involve structural violations of the U.S. Constitution. *Norton* v. *Shelby County*, for instance, applied the doctrine to a violation of the Tennessee Constitution. 118 U.S. 425, 443 (1886). *See also* U.S. Reply 32 (listing state constitutional cases). These cases are inapposite where, as here, the "claim is based on the Appointments Clause of Article II of the Constitution—a claim that there *has* been a trespass upon the executive power of appointment." *Ryder*, 515 U.S. at 182.

The United States asserts that it has found examples of the Court applying the *de facto* officer doctrine to federal constitutional violations, pointing to cases involving claims that elections violated the Equal Protection Clause. U.S. Reply 31. But *Ryder* itself noted that those cases did *not* apply to a constitutional "defect in a specific officer's title"; rather, they involved "challenge[s] to the composition of an entire legislative body." *Ryder*, 515 U.S. at 183.

The United States' other cases land even further from the mark. The United States admits that *Ex Parte Ward*, 173 U.S. 452, 456 (1899), and *Griffin's Case*, 11 F. Cas. 7, 19 (C.C.D. Va. 1869), involve "collateral" challenges, U.S. Reply 33, meaning they are not "timely" under *Ryder*. Its remaining cases are Reconstruction-era decisions involving the validity of laws enacted by secessionist legislatures. *Id.* at 31. Again, these decisions involved "challenge[s] to the composition of an entire legislative body," not "a defect in a specific officer's title." *Ryder*, 515 U.S. at 183. Moreover, those cases held that, when the challenged

state act implicates a federal structural constitutional provision, the *de facto* officer doctrine does not apply. *Texas* v. *White*, 74 U.S. (7 Wall.) 700, 733 (1869). Thus, the Court in *Texas* "g[a]ve no effect" to a secessionist statute that was made "in furtherance of war against the United States," declaring it "void" and nullifying the contract that the act had allowed. *Id*. at 734. These cases provide further examples of this Court declining to apply the *de facto* officer doctrine to violations of the Constitution's structure.

2. The Board is plainly mistaken to argue that the Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), rejected the challengers' request to invalidate the FEC's past actions. Board Reply 35. The *Buckley* plaintiffs did not seek to invalidate past decisions. They sought only forward-looking "declaratory and injunctive relief," and it "was awarded to them." *Ryder*, 515 U.S. at 183; *see also FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("[T]he relief sought [in *Buckley*], declaratory and injunctive remedies, could have purely prospective impact."). The challengers had not challenged any past FEC actions because the Commission had not yet exercised its enforcement authority. *See Buckley*, 424 U.S. at 114-18 & n.157. At that time, "the agency was relatively new and had yet to engage in significant regulatory activity." Kent Barnett, *To the Victor Goes the Toil: Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481 (2014). Chief Justice Burger made clear that the question of affording validity to past actions was "not before us and we cannot know what acts we are ratifying." *Buckley*, 424 U.S. at 255 (Burger, C.J., dissenting). The issue had not even been briefed. *See* Conference Memorandum from Justice Rehnquist re: *Buckley* v. *Valeo* (Jan. 20, 1976) ("I

do not think that it would be wise for the Court to make a holding [as to the proper remedy] without the benefit of any argument or briefing."); *see also* Barnett, *supra*, at 530 & n.2. *Ryder* was correct that *Buckley*'s *de facto* holding, done "quite summarily," should not be applied beyond its facts. 515 U.S. at 183.

The opposing parties similarly cite cases involving the Court's prior practice of "prospective decision-making," in which the Court would grant relief to the litigant at bar but no others. *See* U.S. Reply 37. This practice was "the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation." *Williams* v. *United States*, 401 U.S. 667, 676 (1971) (Harlan, J., dissenting). The Court repudiated that practice in *Harper* v. *Virginia Department of Taxation*, because it violates "basic norms of constitutional adjudication." 509 U.S. 86, 97 (1993). And the Court in *Ryder* specifically addressed this line of authority, holding that it could not justify a court's invocation of the *de facto* officer doctrine to deny meaningful relief to the party before it. 515 U.S. at 184-85 & n.3.

3. The opposing parties' contention that *Ryder* applies only to "judicial" officers (COFINA Br. 17) does not withstand the most cursory scrutiny.

First, the judges at issue in *Ryder* were not Article III officers but were part of "the Executive Branch." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2176 (2018). So was the Administrative Law Judge in *Lucia*, 138 S. Ct. at 2049. The Court in *Lucia* and *Ryder* nevertheless invalidated the challenged actions. Indeed, no case limits *Ryder* to "adjudicative" officers; instead, courts have read *Ryder* broadly. *See SW*

Gen., Inc. v. *NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015) ("the Supreme Court [in *Ryder*] has limited the [*de facto* officer] doctrine, declining to apply it when reviewing Appointments Clause challenges"), *aff'd*, 137 S. Ct. 929 (2017); *cf. NRA Political Victory Fund*, 6 F.3d at 822, 828 (the *de facto* officer doctrine does not apply when an unconstitutional actor "lacks authority to bring" an action).

Second, the opposing parties' proposed distinction between "adjudicative" and "executive" acts is untenable. Agencies generally may exercise their power through adjudication or other forms of agency action. *See SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). But there is nothing in the nature of adjudications that makes them uniquely susceptible to invalidation. The United States posits that "the costs of invalidating past acts tend to be lower for adjudicators than for other officers." U.S. Reply 39. Even if that were correct—and *New Process Steel*, which invalidated "almost 600" NLRB adjudications, 560 U.S. at 678, 688, suggests otherwise—this Court generally has not weighed the "costs" of requiring adherence to the Constitution's mandates. For example, in *INS* v. *Chadha*, this Court invalidated provisions in nearly 200 statutes on separation-of-powers grounds, even though those legislative acts had far broader application than any individual adjudication. 462 U.S. 919, 944 (1983); *id.* at 967 (White, J., dissenting). What the "costs" of invalidation "tend to be" is an illogical and manifestly unprincipled basis for the categorical limitation on relief from past actions that the opposing parties urge.

In any event, PROMESA itself allows the Board to exercise its powers through adjudications. Had the

unconstitutional Board members here exercised their "discretion" as to whether to file the Title III petitions (48 U.S.C. § 2146(a)) by donning black robes, "administer[ing] oaths," "hold[ing] hearings," "tak[ing] testimony, and receiv[ing] evidence" (*id.* § 2124(a)), that would not have changed in any way the "costs" of vacating that unlawful exercise of power. Aurelius's and Assured's entitlement to relief cannot possibly turn on such formalisms. If there were any "sound reason[] for treating adjudicators differently than other kinds of officers," U.S. Reply 39, then the Board should be treated in the same manner as the NLRB. And, as in *New Process Steel*, whatever concerns the United States might have about vacating a rulemaking or other regulatory action of general applicability, those concerns are not implicated here.

4. The COFINA bondholders insist that application of the *de facto* officer doctrine is appropriate here because the Appointments Clause violation is "[m]erely [f]ormal." COFINA Br. 40. That *ipse dixit* could not be more wrong. The Appointments Clause is not a mere "matter of etiquette or protocol." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997). It is a structural component of the Constitution's separation of powers designed "to preserve individual freedom." *Morrison* v. *Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). And the violation here is not trivial. None of the Board members has been confirmed by the Senate. That they carry on in office amounts to a frank repudiation of a fundamental, vital structural constitutional command. If the *de facto* officer doctrine can be applied here, it is difficult to

envision an Appointments Clause violation that the doctrine could not paper over.[4]

The COFINA bondholders further argue that there was not sufficient reason to think that PROMESA's appointments provision was unconstitutional, because the constitutional defect had been raised by only "a few Senators." COFINA Br. 40. Of course, a separation-of-powers challenger need not show that the agency acted with constitutional malice aforethought to obtain relief from an unconstitutional officer's past actions. *See Ryder*, 515 U.S. 179-80, 184, 185.

Here, however, the constitutional violation had been noticed even before PROMESA was enacted. Whether the problem was raised by one Senator or one hundred, the point is that it *was* raised. Moreover, it was echoed by the nonpartisan Congressional Budget Office ("CBO"), which recognized that the Board is federal. The House Report on PROMESA included a CBO cost estimate, which described PROMESA as empowering "the federal government to oversee the fiscal and budgetary affairs of certain U.S. territories." H.R. Rep. No. 114-602, pt. 1, at 69 (2016). "In CBO's view," the Board "should be considered a federal entity largely because of the extent of federal

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[4] The COFINA bondholders draw no support from *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), a case having nothing to do with the separation of powers. If anything, the plurality opinion in *Lemon* supports Aurelius and Assured: Applying the *de facto* officer doctrine would "substantially undermine" the constitutional interests at stake; it is widely recognized that the Board members exercise significant authority pursuant to the laws of the United States; and there was no delay in bringing the challenges. *Id.* at 201-05 (plurality).

control involved in its establishment and operations." *Ibid.*; *see id.* at 72 ("the activities of such board[] should be considered federal activities … because of the significant degree of federal control involved in its establishment and operations," including its congressional "establishment," the President's appointment of "all seven voting members of the board," and the Board's "broad sovereign powers to effectively overrule decisions by Puerto Rico's legislature, governor, and other public authorities"). "As a result, in CBO's view, all cash flows related to the" Board "should be recorded in the federal budget." *Ibid.* And this accords with the view widely shared in Puerto Rico and expressed here by UTIER and in several *amicus* briefs that the Board is a federal overseer. *See*, *e.g.*, San Juan *Amicus* Br. 4-19.

Aurelius's and Assured's claim for "retrospective relief" is at least as strong as that in *Ryder*. PROMESA's violation of the Appointments Clause was widely noticed within Congress. Aurelius brought its Appointments Clause challenge soon after the Board's initiation of the Commonwealth Title III case. And still the Board chose to carry on as if the Constitution did not contain an Appointments Clause at all. If the *de facto* officer doctrine exists in part to protect third parties who might have justifiably relied on the actions of officials whose appointments previously had been unquestioned, *see McDowell*, 159 U.S. at 601, it can have no application here, where each of the Board members took office under a cloud of unconstitutionality and where UTIER, Aurelius, and Assured have litigated that unconstitutionality for more than two years.

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Ultimately, the opposing parties' arguments are a veiled attempt to overturn *Ryder*. But *Ryder* was correctly decided by a unanimous Court and controls the outcome here: The *de facto* officer doctrine does not apply, and Aurelius and Assured are entitled to meaningful relief in this case consistent with the judiciary's basic obligation under Article III to decide cases and controversies, not make abstract pronouncements of law.

II. THE OPPOSING PARTIES' FEARS OF DISRUPTION ARE UNSUPPORTED AND EXAGGERATED.

The opposing parties' alarmist speculation of "bedlam" if the Constitution is enforced (U.S. Reply 36) is entirely unsupported. In *Ryder*, the United States similarly claimed that granting relief would "spawn extensive collateral litigation" and cause "disruptive" consequences. U.S. Br. 30-31, *Ryder* v. *United States*, 1995 WL 130573 (Mar. 23, 1995). Nevertheless, the Court rejected the government's plea for an *ad hoc* exception. *Ryder*, 515 U.S. at 185-86. The government's apocalyptic prophecies were addressed by limiting relief to those who brought timely and direct (not collateral) challenges. *Ibid.*; *see also id.* at 182 ("timely challenge"); *Glidden*, 370 U.S. at 535 (*de facto* officer doctrine applies when litigant was "previously aware" of defect). In the same way, the opposing parties' baseless predictions of disorder should not deter the Court from ordering the dismissal of the Commonwealth and PRHTA Title III petitions.

A. Aurelius and Assured consistently have outlined a path that would permit courts to hold that the Board members' appointments were unconstitutional, provide an orderly opportunity for a new Board to be

appointed, and allow that valid Board to decide how to proceed in the first instance.

Aurelius asked the district court to dismiss the Title III proceedings but stay its decision so that a new Board could be quickly installed; then, "after [the Board was] reconstituted consistent with the Appointments Clause," that new Board could "revisit its prior acts taken pursuant to Title III, such as the decision whether to certify the Title III petition." Aurelius Reply 29, No. 17-bk-3283 (D.P.R.), Doc. 1833. In the First Circuit, Aurelius and Assured similarly argued that the court should hold the Board members' appointments unconstitutional, but, "[t]o prevent unnecessary disruption," "stay [the] mandate pending appointment of Board members in accordance with the Appointments Clause" so that "[a] constitutionally appointed Board could then determine, in the first instance, whether grounds exist for upholding the unconstitutional Board's actions." C.A. Br. 64-65.

Importantly, no party denies that this Court could order exactly what Aurelius and Assured have consistently proposed. *See* U.S. Reply 46-47. The COFINA bondholders admit that "[t]his Court could" dismiss the Title III petitions before it. COFINA Br. 38 n.10. And the Board agrees that if the Court rules in Aurelius's and Assured's favor, it can, and should, "stay its judgment for 60 days to permit Senate confirmation." Board Reply 42. And the autonomous municipality of San Juan—whose metropolitan area includes over a third of Puerto Rico's citizens—*supports* Aurelius and Assured on the remedies question. San Juan Br. 19-22 & n.8.

Despite the fact that this Court granted Aurelius, Assured, and UTIER's petitions for writs of certiorari

on the proper remedy, the United States nevertheless asks this Court merely to remand for the United States to get a do-over on remedy. U.S. Br. 46-47. But the United States has had ample opportunity to argue against dismissal in the more than two years since Aurelius first sought that remedy. The First Circuit's judgment—reversing the district court's Appointments Clause ruling but incongruously *affirming* the denial of dismissal—is squarely before this Court. There is no reason to subject Aurelius and Assured to further delay and more costly litigation in their effort to obtain a meaningful remedy.

B. The opposing parties oddly resist the sensible process that Aurelius and Assured propose, but their concerns do not withstand scrutiny.

Several parties conflate the various Title III proceedings, suggesting that dismissal of the Commonwealth and PRHTA proceedings will affect other proceedings or actions that Aurelius and Assured are not challenging, such as the COFINA Title III proceeding. Board Reply 40; U.S. Reply 47. Aurelius and Assured do not seek dismissal of the COFINA Title III proceeding, and that proceeding is not implicated here. Indeed, PROMESA prohibits "substantive consolidation of the cases of affiliated debtors," 48 U.S.C. § 2164(f), so the various Title III proceedings are distinct and separate as a matter of law, and are being "administer[ed] … jointly" only for judicial convenience, *id.* § 2164(g). By law, dismissing the Commonwealth and

PRHTA Title III proceedings should not affect the other Title III cases.[5]

The COFINA bondholders suggest that if the Commonwealth and PRHTA Title III petitions are dismissed, "there [will be] no valid Commonwealth budget." COFINA Br. 34. But PROMESA's requirement for Board approval of the Commonwealth's budget comes into effect only after "all of the members and the Chair have been appointed," 48 U.S.C. § 2142(a), which has never happened. Until that occurs, the Commonwealth's budget applies of its own force.

The COFINA bondholders also note that it is "uncertain" that a constitutionally appointed Board would "immediately ratify" "all" of the unconstitutional Board's actions. COFINA Br. 39. But the uncertainty of which the COFINA bondholders complain flows naturally from the Appointments Clause's presumption that constitutionally appointed officers—for whose conduct the President would be held accountable, and whose competence and integrity the Senate would publicly vet—will be more qualified, and will be better supervised, than unconstitutionally appointed ones. If it were certain that a constitutionally appointed Board would immediately rubber-stamp all actions of the unconstitutional Board, there would be little purpose in enforcing the Appointments Clause. A salutary consequence of restoring constitutional accountability to Executive-Branch decision-making is

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[5] The COFINA bondholders' settlement with the Commonwealth would not be undone if Aurelius and Assured prevail because, as the COFINA bondholders concede, COFINA Br. 7, the same settlement was entered in the COFINA Title III proceeding, *see* Doc. 561, No. 17 BK 3284-LTS.

that future decisions made by constitutionally appointed officers may differ from actions taken by usurpers. Similarly, the possibility of "[l]itigation over ratification" (Board Reply 41) is no reason to prevent the Board from making those determinations in the first instance. Accountable governmental actors must expect that their decisions may be challenged and subjected to judicial scrutiny, so it should be unremarkable that Aurelius and Assured have "preserved" their "right to challenge" certain Board actions in future proceedings. COFINA Br. 12.

The Board also speculates that the automatic stay might be lifted. Board Reply 33-34. But as Aurelius and Assured repeatedly have suggested, and as no party disputes, this Court could stay its mandate for a limited duration, *see* Board Reply 42 (suggesting "60 days"), and a constitutionally appointed Board could decide whether to ratify the initiation of the Commonwealth and PRHTA Title III proceedings. Should that happen, the automatic stays could remain in place without interruption. The Board worries that appointment and ratification might not occur before this Court's judgment becomes effective. Board Reply 40. But that is the constitutionally accorded prerogative of the President and the Senate.

There accordingly is no reason to think that "chaos" will ensue from a judgment in Aurelius's and Assured's favor upholding the Appointments Clause.

III. THE *DE FACTO* OFFICER DOCTRINE CANNOT VALIDATE THE BOARD'S FUTURE ACTIONS.

There no basis for the *de facto* officer doctrine to apply to any of the Board's actions, but not even the

opposing parties can articulate a rationale for applying that doctrine to *prospectively validate* actions taken by the Board after February 15, 2019, when the First Circuit adjudged the Board members unconstitutionally appointed. Indeed, the *de facto* officer doctrine applies only to "acts performed by a person acting *under the color* of official title" when "it is *later* discovered" that the person's appointment was defective. *Ryder*, 515 U.S. at 180 (emphases added). That logic cannot apply to acts taken by officials *after* their appointments were publicly adjudged to be unconstitutional.

Aurelius and Assured did not "waiv[e]" their challenge to the validity of actions taken by the Board members after their appointments were ruled unconstitutional. Board Reply 49; U.S. Reply 45. At all stages of this case, Aurelius and Assured consistently argued that after the Board members' appointments are held unconstitutional, the Board can continue to take actions while the court's judgment or mandate is stayed, subject to one critical qualification: A constitutionally appointed Board must "validate or ratify" those actions. Oral Argument 1:25:42-1:27:39 (1st Cir. Dec. 3, 2018). It is surprising that the Board and the United States would fail to acknowledge counsel's clear statement that the Board's ability to continue to act must be "subject to the fact that, substantively, ultimately, those decisions are going to have to be approved by the constitutionally appointed Board." *Id.* at 1:27:24-45.

The First Circuit, however, did *not* hold that the Board's ability to continue to act was subject to ratification. Rather, the court of appeals held that during the stay period, the Board "may continue to operate as

until now," JA178—that is, with *de facto* validity. But no authority holds that a court may declare future actions of an unconstitutional actor *de facto* valid, and Aurelius and Assured certainly never asked for that very peculiar remedy.

Furthermore, as San Juan states in its *amicus* brief, the fact that the Board members "have been found to be acting pursuant to an unconstitutional appointment has made no difference to the Board members and their decision-making." San Juan Br. 20. Quite the contrary, the Board has been proceeding apace with the aim of rendering both the Appointments Clause challenge and the substantive objections in the Title III proceedings "equitably moot" and presenting reviewing courts with a *fait accompli*. Board Reply 42-43 n.13; U.S. Reply 47; COFINA Br. 33 n.8. The doctrine of equitable mootness has questionable underpinnings in any case, but it would be wholly inappropriate if premised upon actions that were timely challenged and deemed "*de facto* valid." This is true of all of the Board's actions, both before and after the First Circuit's decision on February 15, 2019. But it would be especially inappropriate for a court to invite unconstitutional actors to take *future* actions that the court may be unable to review in a later challenge. If nothing else, the Court should make clear that the invalid Board's actions must be ratified by a constitutionally appointed Board, and that those actions cannot be rendered unreviewable by equitable mootness.

CONCLUSION

The Court should hold that the Board's appointments were unconstitutional and grant Aurelius and Assured their requested relief on the motion and adversary complaint at issue.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
HELGI C. WALKER
LUCAS C. TOWNSEND
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Aurelius and Assured

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