No.

IN THE
Supreme Court of the United States

AURELIUS INVESTMENT LLC, ET AL.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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

Counsel for Petitioners

QUESTION PRESENTED

A panel of the United States Court of Appeals for the First Circuit unanimously held that all seven voting members of the Financial Oversight and Management Board for Puerto Rico, a federal entity that manages Puerto Rico's financial affairs and prosecutes its historic bankruptcy, have occupied their offices in violation of the Appointments Clause of the United States Constitution since 2016. Nevertheless, the First Circuit applied the so-called "*de facto* officer doctrine" to uphold *all* of the Board's actions prior to the First Circuit's decision, as well as the Board's actions for 150 days *after* the First Circuit's judgment.

The question presented is:

Does the *de facto* officer doctrine allow courts to deny meaningful relief to successful separation-of-powers challengers who are suffering ongoing injury at the hands of unconstitutionally appointed principal officers?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. The parties to the proceedings below were as follows:

Petitioners Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC (collectively, "Aurelius") are creditors of the Commonwealth of Puerto Rico and moved to dismiss case No. 17-bk-3283 (D.P.R.), initiated by Respondent the Financial Oversight and Management Board for Puerto Rico, in the district court and were appellants in the court of appeals.

Petitioners Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (collectively, "Assured") filed an adversary complaint seeking declaratory and injunctive relief and were appellants in the court of appeals.

Respondent Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER") filed an adversary complaint and was an appellant in the court of appeals.

Respondents the Commonwealth of Puerto Rico (the "Commonwealth"), the Financial Oversight and Management Board for Puerto Rico (the "Board"), José B. Carrión III, Andrew Biggs, Carlos M. García, Arthur J. González, Ana J. Matosantos, José R. González, and David A. Skeel, Jr. (collectively, the "Board members"), the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), the American Federation of State, County & Municipal Employees ("AFSCME"), the Official Committee of Retired Employees of the Commonwealth of Puerto Rico ("Retirees"), the Official Committee of Unsecured Creditors

("Unsecured Creditors"), the COFINA Senior Bondholders Coalition ("COFINA"), Fideicomiso Plaza, Decagon Holdings 1, LLC, Decagon Holdings 2, LLC, Decagon Holdings 3, LLC, Decagon Holdings 4, LLC, Decagon Holdings 5, LLC, Decagon Holdings 6, LLC, Decagon Holdings 7, LLC, Decagon Holdings 8, LLC, Decagon Holdings 9, LLC, Decagon Holdings 10, LLC, GoldenTree Asset Management, LP, Old Bellows Partners, LP, Scoggin Management, LP, Taconic Capital Advisors, LP, Aristeia Capital, LLC, Canyon Capital Advisors, LLC, Tilden Park Capital Management, LP, Aristeia Horizons, LP, Canery SC Master Fund, LP, Capital Management, LP, Crescent 1, LP, CRS Master Fund, LP, Cyrus Capital Partners, LP, Cyrus Opportunities Master Fund II, Ltd., Cyrus Select Opportunities Master Fund, Ltd., Cyrus Special Strategies Master Fund, LP, Merced Capital, LP, Merced Partners IV, LP, Merced Partners Limited Partnership, Merced Partners V, LP, Pandora Select Partners, LP, Puerto Rico Electric Power Authority ("PREPA"), River Canyon Fund Management, LLC, SB Special Situation Master Fund SPC, Scoggin International Fund, Ltd., Scoggin Worldwide Fund, Ltd., Segregated Portfolio D, Taconic Master Fund 1.5, LP, Taconic Opportunity Master Fund, LP, Tilden Park Investment Master Fund, LP, Varde Credit Partners Master, LP, Varde Investment Partners Offshore Master, LP, Varde Investment Partners, LP, Varde Skyway Master Fund, LP, Whitebox Asymmetric Partners, LP, Whitebox Institutional Partners, LP, Whitebox Multi-Strategy Partners, LP, Whitebox Term Credit Fund I, LP, and Whitebox Advisors, LLC, all filed oppositions to the motion to dismiss and/or were defendants or intervenors in the relevant adversary proceedings and were appellees before the court of appeals.

Respondent United States intervened to oppose the motion to dismiss and adversary proceedings and was an appellee before the court of appeals.

2. Counsel for petitioners certifies as follows:

Petitioner Aurelius Investment, LLC, is a limited liability company. It is not a corporation.

Petitioner Aurelius Opportunities Fund, LLC, is a limited liability company. It is not a corporation.

Petitioner Lex Claims, LLC, is a limited liability company. It is not a corporation.

Petitioner Assured Guaranty Corp. is a wholly owned indirect subsidiary of Assured Guaranty Ltd., which is a publicly traded corporation. No entity owns more than 10% of the outstanding stock of Assured Guaranty Ltd.

Petitioner Assured Guaranty Municipal Corp. is a wholly owned indirect subsidiary of Assured Guaranty Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, Lex Claims, LLC, Assured Guaranty Corp., and Assured Guaranty Municipal Corp. (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in consolidated appeals Nos. 18-1671, 18-1746, and 18-1787.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-47a, is reported at 915 F.3d 838. The opinion of the district court in No. 17-bk-3283 (D.P.R.), Pet. App. 65a-107a, is reported at 318 F. Supp. 3d 537. The district court's stipulated judgment in Adversary Proceeding No. 18-00087, Pet. App. 108a-111a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. A petition for rehearing was denied on March 7, 2019. Pet. App. 127a-131a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the Constitution provides, in relevant part: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not

herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Article IV of the Constitution provides, in relevant part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

Relevant portions of the Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016), 48 U.S.C. § 2101 *et seq.* ("PROMESA"), are reproduced at Pet. App. 132a-201a.

STATEMENT

In 2016, Congress enacted PROMESA and therein created the Financial Oversight and Management Board for Puerto Rico (the "Board"). Congress charged the Board with overseeing Puerto Rico's finances and guiding the Commonwealth into what would become the largest municipal bankruptcy in U.S. history. The seven voting members of the Board serve three-year terms and answer only to the President of the United States. But Congress effectively forced the President to select the Board members from secret lists compiled by individual members of Congress for appointment without Senate confirmation, thereby circumventing the exclusive means for appointing principal federal officers under the Appointments Clause of the U.S. Constitution: nomination by the President alone and confirmation by the Senate.

In 2017, the Board initiated bankruptcy-like proceedings for the Commonwealth in federal court, as provided for in PROMESA. Petitioners own or insure Puerto Rico debt that is at issue in those proceedings. Shortly after the Title III proceedings had been initiated, they promptly challenged the Board members' appointments as violating the Appointments Clause and the Constitution's separation of powers, and sought dismissal of the proceedings on the ground that they were initiated by an unconstitutional entity, and declaratory and injunctive relief. The Board, the United States, and several interested parties opposed the challenge.

The district court held that the Board members' appointments did not violate the Appointments Clause, but a panel of the United States Court of Appeals for the First Circuit unanimously reversed. The panel held that the Board members' appointments violated the Appointments Clause because the Board members are principal officers neither nominated by the President nor confirmed by the Senate. Yet the First Circuit declared *all* of the Board's past actions "valid" under the so-called "*de facto* officer doctrine," an equitable remedy that has historically been invoked to cure only minor statutory defects in an officer's appointment. Pet. App. 45a. What is more, the First Circuit authorized the unconstitutional Board to continue to operate for an additional 90 days, and then for a further 60 days after that, and blessed those actions as valid. Pet. App. 46a, 61a-62a.

In excusing the Board's unconstitutionality in this way, the First Circuit denied petitioners the right to a bankruptcy process that is prosecuted by officers subject to the Appointments Clause's mechanisms of en-

suring accountability. The First Circuit also contravened numerous decisions of this Court that declined to apply the *de facto* officer doctrine to Appointments Clause and other separation-of-powers violations, and that limited past applications of the doctrine to the peculiar facts of the relevant cases. *See*, *e.g.*, *Ryder* v. *United States*, 515 U.S. 177 (1995).

As this Court has often explained, the Appointments Clause is fundamental "to safeguard individual liberty." *NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014). It "is among the significant structural safeguards of the constitutional scheme," *Edmond* v. *United States*, 520 U.S. 651, 659 (1997), and "a bulwark against one branch aggrandizing its power at the expense of another branch," *Ryder*, 515 U.S. at 182. For these reasons, Appointments Clause remedies must both advance the "structural purposes of the Appointments Clause" itself and "create incentives to raise Appointments Clause challenges" in the first place. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (alterations and quotation marks omitted).

The First Circuit's invocation of the *de facto* officer doctrine disregarded these principles. Despite the fact that petitioners brought their separation-of-powers challenge shortly after the Title III petition was initiated, and then ultimately prevailed, the Court of Appeals awarded them no meaningful remedy—not even reversal of the district court's order denying the motion to dismiss that was on appeal—and thereby granted Congress free license to pass laws that violate the Appointments Clause. This Court's review is warranted to ensure that when a branch of the federal government violates the core structural provisions of our Constitution, courts provide successful challengers with an effective remedy.

1. Enacted by Congress in 2016, PROMESA created a new federal entity: the Financial Oversight and Management Board for Puerto Rico. 48 U.S.C. § 2121. "Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island achieve fiscal responsibility and access to the capital markets." Pet. App. 8a (quotation marks omitted).

To achieve this objective, Congress vested the Board with "significant authority" under "the laws of the United States," including "the power to veto, rescind, or revise Commonwealth laws and regulations that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed pursuant to it." Pet. App. 32a-33a. The Board reviews and approves all Puerto Rico budgets. 48 U.S.C. § 2142. The Board has broad federal investigative and enforcement powers, including authority to hold hearings, take testimony, subpoena and receive evidence, and administer oaths. *Id*. § 2124(a),(f). It is the sole entity that "may seek judicial enforcement of its authority to carry out its responsibilities under [PROMESA]," and it does so in Article III courts. *Id.* § 2124(k). Congress also charged the Board with carrying out numerous other significant responsibilities "in its sole discretion." *See*, *e.g.*, *id.* §§ 2121(d)(1)(A)-(E), (d)(2)(A); 2124(i)-(j); 2127(b)(3); 2141(b)-(c)(3).

As relevant here, the Board has authority to initiate a bankruptcy-like proceeding in federal court under Title III of PROMESA, allowing for the adjustment of debts of the Commonwealth and its various instrumentalities. 48 U.S.C. § 2164. In these proceedings, known as Title III cases, the Board is the sole representative of, and decision-maker for, the

Commonwealth and its instrumentalities. *Id*. § 2175(b).

While PROMESA labels the Board "an entity within the territorial government," 48 U.S.C. § 2121(c)(1)-(2), the Board is an independent federal overseer of the Commonwealth and its finances, statutorily immune from "any control, supervision, oversight, or review" by the government or people of Puerto Rico. *Id*. § 2128(a)(1). Board members are subject to federal ethics laws, *id*. § 2129, and enjoy numerous other trappings of federal power, *see*, *e.g.*, *id.* § 2122 (use of federal facilities); *id.* § 2124(c) (use of federal information); *id.* § 2124(n) (support from General Services Administration). They are also subject to ongoing federal supervision, and are removable only by the President, for cause. *Id*. § 2121(e)(5)(B).

Although the Board members indisputably hold continuing office established by federal law and exercise "significant authority pursuant to the laws of the United States," *Lucia*, 138 S. Ct. at 2051 (quotation marks omitted); *Freytag* v. *Comm'r*, 501 U.S. 868, 881 (1991); *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam), PROMESA does not require the Board's members to be nominated by the President and confirmed by the Senate.

PROMESA instead provides for the President to select six of the Board's seven voting members—the "List-Members"—from secret lists submitted to the President by House and Senate leaders. 48 U.S.C. § 2121(e)(2)(A)-(B). The seventh may be selected "in the President's sole discretion," also without Senate confirmation. *Id.* § 2121(e)(2)(A)(vi).

PROMESA requires Senate confirmation only if the President makes "off-list" nominations. 48 U.S.C.

§ 2121(e)(2)(E). But PROMESA further required that if the Senate did not confirm an off-list nominee by September 1, 2016—only two months after PROMESA's enactment (during most of which time the Senate was on its summer recess)—then the President must appoint "from the list." *Id.* § 2121(e)(2)(G); *see* Pet. App. 14a ("[B]ecause the Senate was in recess for all but eight business days between enactment of the statute and September 1, one might conclude that, in practical effect, the statute forced the selection of persons on the list."). And all future vacancies "shall be filled in the same manner in which the original member was appointed." 48 U.S.C. § 2121(e)(6). A House Report candidly stated that the purpose of the scheme was to "ensure[] that a majority of [the Board's] members [were] effectively chosen by Republican congressional leaders on an expedited timeframe." H.R. Rep. No. 114-602, pt. 1, at 42 (2016).

The dubious constitutionality of this scheme was obvious from the beginning. While the bill was being debated, Senator Cantwell stated: "The appointments clause requires that these officers, who are being appointed under the authority of Federal law, be appointed by the President and confirmed by the Senate," yet the bill would create "board members who have significant authority over Federal law" and "are not appointed by the President and they are not confirmed by the Senate." 162 Cong. Rec. S4687 (daily ed. June 29, 2016). "[I]t is going to be challenged constitutionally," Senator Cantwell warned. *Ibid.* Senator Reid similarly observed: "I take issue with the oversight board and their excessive powers and appointment structure." *Id.* at S4685.

Once PROMESA was enacted, the President acceded to its appointment procedure and chose all six

List-Members from the congressional lists, appointing the seventh himself. None of the Board members was Senate-confirmed. Pet. App. 15a.

2. In May 2017, the Board authorized Title III petitions on behalf of the Commonwealth and its instrumentalities, including the Puerto Rico Highways and Transportation Authority ("PRHTA"), in the United States District Court for the District of Puerto Rico under 48 U.S.C. §§ 2164(a) and 2166(a). Pet. App. 15a.

Petitioners Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC ("Aurelius") are beneficial holders of substantial amounts of outstanding general-obligation bonds that were issued by the Commonwealth and backed by a pledge of Puerto Rico's good faith, credit, and taxing power, and which benefit from a first-priority claim and lien on all of the Commonwealth's "available resources." P.R. Const. art. VI, § 8. Petitioners Assured Guaranty Corp. and Assured Guaranty Municipal Corp. ("Assured") insure general-obligation bonds issued by the Commonwealth and bonds issued by PRHTA. On August 7, 2017, the Aurelius Petitioners timely sought to "dismiss the [Board's Title III] petition" because the Board members' appointments violated the Appointments Clause and the separation of powers. Aurelius's Obj. and Mot. to Dismiss, No. 17-bk-3283 (D.P.R.), Doc. 913; *see* Pet. App. 109-110a.[1]

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[1] The timeliness of Petitioners' challenges has never been disputed. Indeed, Aurelius moved to dismiss on August 7, 2017, 25 days *before* PROMESA even *permitted* the district court to dismiss that action. Aurelius's Obj. & Mot. to Dismiss at 5. Respondent Unión de Trabajadores de la Industria Eléctrica y Riego de Puerto Rico ("UTIER") filed an adversary complaint

The Board, the United States, and five interested parties opposed Aurelius's motion to dismiss, arguing that the Board members are not Officers of the United States because Congress purported to create the Board as part of Puerto Rico's territorial government. Pet. App. 110a. The United States also urged the court to employ the "constitutional avoidance" doctrine to spare the President from having to comply with PROMESA's list procedure when making *future* Board appointments. U.S. Br. 34 n.15, No. 17-bk-3283 (D.P.R.), Doc. 1929.

The district court denied Aurelius's motion. Congress had stated "that it was acting pursuant to its Article IV" authority in enacting PROMESA, and that assertion, the court concluded, "is entitled to substantial deference." Pet. App. 93a. Accordingly, "the Oversight Board is an instrumentality of the territory of Puerto Rico, established pursuant to Congress's plenary powers under Article IV of the Constitution," and therefore "its members are not 'Officers of the United States'" under the Appointments Clause. Pet. App. 106a. Aurelius timely appealed under 48 U.S.C. § 2166(e), and the district court also certified its Order for interlocutory review under 48 U.S.C. § 2166(e)(3)(A). Pet. App. 113a-114a. Additionally, the district court entered a stipulated final judgment against Assured, Pet. App. 109a-111a, which Assured timely appealed. UTIER also timely appealed. The

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hours earlier on the same date. Pet. App. 17a. On July 23, 2018, Assured filed a similar adversary complaint against the Board, seeking a declaration that the Board members' appointments violated the Appointments Clause and the separation of powers, dismissal of the Commonwealth and PRHTA Title III cases, and an injunction against the Board's continued operation until its members were properly appointed. Pet. App. 17a-18a.

First Circuit allowed the certified appeal and consolidated all appeals. Pet. App. 121a-122a.

3. A panel of the First Circuit unanimously reversed.

First, the court "reject[ed] [the] notion that Article IV" created an exception to the Appointments Clause, just as there is no Article IV exception to the Presentment Clause. Pet. App. 22a-23a. Rather, the Appointments Clause applies "to *all* Officers of the United States." Pet. App. 23a (quotation marks and ellipsis omitted).

The court then "ha[d] no trouble in concluding" that in light of the text, history, and relevant Supreme Court precedent, "[i]t [could not] be clearer or more unequivocal that the Appointments Clause" applies to the Board members. Pet. App. 23a, 30a. The Board members easily meet the test for "Officers of the United States" under *Lucia*, *Freytag*, and *Buckley* because they (1) "occup[y] … 'continuing' position[s] established by federal law"; (2) "exercise[] significant authority"; and (3) do so "pursuant to the laws of the United States." Pet. App. 32a. This conclusion was confirmed by "the teaching of founding era history" in the territories. Pet. App. 26a.

Next, the court concluded that the Board members were principal officers because they are "answerable to and removable only by the President." Pet. App. 41a. Additionally, they possess "vast duties and jurisdiction," with the power to "formulate policy for the Government" over the entire "economy of Puerto Rico." Pet. App. 41a-42a. The court therefore held that the Board members "should have been appointed by the President, by and with the advice and consent

of the Senate," but were not, thus rendering their appointments "unconstitutional." Pet. App. 42a. The court accordingly severed the offending provisions of PROMESA. Pet. App. 46a.

After declaring the Board members' appointments unconstitutional, however, the First Circuit denied petitioners the remedy they sought. The First Circuit "reject[ed]" Petitioners' desired remedy of dismissal of the Commonwealth Title III case—which Petitioners had sought with the understanding that a duly appointed Board could ratify the actions of the improperly appointed Board, if it so chose—fearing it might "cast a specter of invalidity over all of the Board's actions until the present day." Pet. App. 44a. Instead, the court invoked "the *de facto* officer doctrine" to declare all of the Board's past actions "valid," asserting that the Board members' appointments "were never in question until our resolution of this appeal." Pet. App. 44a-45a. The court also prospectively validated all future actions of the Board taken prior to the issuance of the court's mandate, which it stayed first for 90 days "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause," Pet. App. 46a, and then for a further 60 days, Pet. App. 61a-62a. During the stay period, the court said, the Oversight Board "may continue to operate as until now." Pet. App. 46a.[2] While the President has announced an intention to nominate the current occupants of the Board to be its Senate-confirmed members, as of this date, the President has yet to submit any such nominations to the Senate.

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[2] A petition for rehearing en banc by respondent UTIER was denied on March 7, 2019. Pet. App. 128a.

REASONS FOR GRANTING THE PETITION

The First Circuit correctly held that the Board members have occupied their offices in violation of the Appointments Clause since the creation of the Board more than two years ago. But its application of the *de facto* officer doctrine to excuse that serious violation of the Constitution flatly contradicts this Court's decision in *Ryder* and reopens a divide among courts of appeals over the question whether the *de facto* officer doctrine can be applied when an officer's selection violates the Constitution. As *Ryder* makes plain, the *de facto* officer doctrine does not allow courts to validate governmental actions taken in flagrant violation of the Appointments Clause over a prolonged period; otherwise, no "rational litigant" would bring such a structural challenge. 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). And a court of appeals certainly cannot invoke the *de facto* officer doctrine prospectively to validate any future actions unconstitutionally selected officers may take. Yet that is precisely what the First Circuit did. The First Circuit's remedial holding conflicts sharply with this Court's precedents that dictate the proper scope of the *de facto* officer doctrine. Review is warranted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS REFUSING TO APPLY THE *DE FACTO* OFFICER DOCTRINE TO CONSTITUTIONAL VIOLATIONS.

"The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder* v. *United States*, 515 U.S. 177,

180 (1995). But this Court has never applied the *de facto* officer doctrine to cure a constitutional violation on direct review. To the contrary, this Court has held that the doctrine does not apply when the officer has "not been appointed in accordance with the dictates of the Appointments Clause." *Id.* at 179. The First Circuit compounded its error of blessing all past actions of the Board by then invoking the doctrine to validate *future* action for 150 (and perhaps more) days. Review is necessary to resolve the "apparent conflict with this Court's precedents." *Okla. Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

A. The *De Facto* Officer Doctrine Cannot Validate The Actions Of Officers Selected In Violation Of The Appointments Clause.

1. For more than a century, this Court has limited the *de facto* officer doctrine to two circumstances. First, the Court has used the doctrine to limit relief flowing from "merely technical" statutory defects in an officer's appointment. *Nguyen* v. *United States*, 539 U.S. 69, 77 (2003) (quotation marks omitted). For instance, in *Wright* v. *United States*, 158 U.S. 232, 238 (1895), the Court held that a duly appointed deputy marshal was a *de facto* officer, even if his oath of office had not been administered by the proper official. Second, the Court has applied the doctrine to excuse defects in an officer's appointment that are raised in a "collateral[] attack[]" on a judgment, such as in a habeas petition. *Ex parte Ward*, 173 U.S. 452, 456

(1899).[3] The Court has 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 (quotation marks omitted), and guards against procedural gamesmanship by "preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535 (1962) (plurality).

The Appointments Clause, however, is no mere technical "matter of etiquette or protocol." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (quotation marks omitted). It "is among the significant structural safeguards of the constitutional scheme." *Ibid.* 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 (quotation marks omitted).

The *de facto* officer doctrine therefore does not apply when there has been "a trespass upon the executive power of appointment," *Ryder*, 515 U.S. at 181 (quoting *McDowell* v. *United States*, 159 U.S. 596, 598 (1895)), or when the defect threatens "the constitutional plan of separation of powers," *Glidden*, 370 U.S. at 536. In fact, the doctrine does not even apply to serious *statutory* violations; therefore, it is "[*a*] *fortiori*" inapplicable "when the challenge is based upon nonfrivolous constitutional grounds," *ibid.*, and even

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[3] *See also*, *e.g.*, *McDowell* v. *United States*, 159 U.S. 596, 601 (1895) (applying doctrine to bar untimely attack on conviction); *Ball* v. *United States*, 140 U.S. 118, 128-29 (1891) (same).

more so "if a violation [of the separation of powers] indeed occurred," *Ryder*, 515 U.S. at 177 (citing *Glidden*), as here.

The reason the doctrine is inapplicable to constitutional defects like Appointments Clause violations is because those errors are "structural," *Freytag* v. *Comm'r*, 501 U.S. 868, 878-79 (1991), and therefore "subject to automatic reversal," *Neder* v. *United States*, 527 U.S. 1, 8 (1999); *see also*, *e.g.*, *Bandimere* v. *SEC*, 844 F.3d 1168, 1181 n.31 (10th Cir. 2016) (Appointments Clause violations are "structural errors" that "are subject to automatic reversal"); *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."). 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).

Whether the *de facto* officer doctrine possibly could excuse an unconstitutional appointment was conclusively resolved by this Court in *Ryder*.[4] Ryder

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[4] Prior to *Ryder*, the circuits were split over whether the *de facto* officer doctrine applied to violations of structural constitutional guarantees like the Appointments Clause. *Compare Silver* v. *U.S. Postal Serv.*, 951 F.2d 1033, 1036 n.2 (9th Cir. 1991) (per curiam) (recognizing the split and "declin[ing] to apply the de facto officer doctrine" to an Appointments Clause violation); *FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (refusing to apply "*de facto* officer doctrine" to separation-of-powers challenge because "the party who challenged the constitutionality of the statute [must be] afforded relief"); *and Andrade* v. *Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984) ("the court should avoid an interpretation of the de facto officer doctrine that would" make it "impossible" to bring Appointments Clause challenges),

challenged his court-martial conviction on the basis that two judges on the Coast Guard Court of Military Review had been unconstitutionally appointed. 515 U.S. at 179. The United States Court of Military Appeals had "held that the actions of those [unconstitutional] judges were valid" under the "*de facto* officer doctrine." *Ibid.*

This Court unanimously reversed. The Court explained that it had applied the *de facto* officer doctrine only in "several cases" where the party sought to "collaterally attack" the judgment. 515 U.S. at 181-82 (citing *Ball*, *McDowell*, and *Ward*). But Ryder had raised the challenge on direct review "before those very judges and prior to their action on his case." *Id.* at 182. Further, *Ball*, *McDowell*, and *Ward* involved the mere "misapplication of a statute"; Ryder's challenge, by contrast, was "based on the Appointments Clause of Article II of the Constitution." *Ibid.* Indeed, the *McDowell* Court itself had declared that the *de facto* officer doctrine would not apply if there had been a claim of "a 'trespass upon the executive power of appointment.'" *Ibid.* (quoting *McDowell*, 159 U.S. at 598).

The Court in *Ryder* also rejected the lower court's reliance on *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Court had accorded *de facto* validity to past actions of the Federal Election Commission ("FEC"), despite that agency's unconstitutional appointments procedure. *Buckley* had not "explicitly relied on the *de facto* officer doctrine," the

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with Franklin Sav. Ass'n v. *Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1150 (10th Cir. 1991) (acknowledging *Andrade* but affirming the district court's application of the *de facto* officer doctrine to validate action by unconstitutionally appointed director of the Office of Thrift Supervision).

Court explained, and to the extent it "may be thought to have implicitly applied a form of the *de facto* officer doctrine, we are not inclined to extend [it] beyond [its] facts." 515 U.S. at 183-84.

Accordingly, the Court held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer" is "entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder*, 515 U.S. at 182-83. "Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable" appointments. *Id.* at 183. Because of the Appointments Clause violation, the Court remanded for a new hearing before a panel of properly appointed officers. *Id.* at 188.

Ryder leaves no doubt that whatever the applicability of the *de facto* officer doctrine in cases involving minor statutory defects or untimely challenges, the doctrine does not apply when the officer whose actions are directly challenged was selected in violation of the Appointments Clause. As the D.C. Circuit has acknowledged, "the Supreme Court [in *Ryder*] has limited the [*de facto* officer] doctrine, declining to apply it when reviewing Appointments Clause challenges." *SW General, Inc.* v. *NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017); *see also D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 353 (5th Cir. 2013) (noting that *Ryder* "held that the *de facto* officer doctrine generally is inapplicable to a timely constitutional challenge to the appointment of an officer").

2. The remedial aspect of the decision of the First Circuit is irreconcilable with *Ryder* and conflicts squarely with decisions of other courts of appeals that have applied *Ryder*. Under *Ryder*, the *de facto* officer

doctrine has no application to petitioners' timely challenge to PROMESA's unconstitutional appointments scheme.

PROMESA endowed the Oversight Board members with immense federal power. *See*, *e.g.*, 48 U.S.C. §§ 2121, 2124, 2127, 2141-2143, 2175. But rather than conform to the dictates of the Appointments Clause, Congress effectively required the President to select Board members from congressional leaders' lists without Senate confirmation by placing impracticable time constraints on the President's nomination and the Senate's confirmation of off-list nominees. *Id.* § 2121(e)(2)(G). Congress then cemented that procedure in place by mandating that any vacancy on the Board "shall be filled in the same manner in which the original member was appointed." *Id.* § 2121(e)(6). Remarkably, the United States essentially conceded the unconstitutionality of the latter requirement by urging the district court and the First Circuit below to apply the "constitutional avoidance" canon to read PROMESA as "not hav[ing] any constraining effect on the President's authority going forward." Gov't C.A. Br. 46; U.S. Br. 34 n.15, No. 17-bk-3283 (D.P.R.), Doc. 1929. There is no basis to find that, unless judicially modified, the prescribed appointment process is unconstitutional as to future appointments but not to the original ones.

As the First Circuit correctly held, the Board members' appointments violated the Constitution. Because the Appointments Clause applies "to *all* Officers of the United States," it could not "be clearer or more unequivocal that the Appointments Clause" applies to the Board members. Pet. App. 23a (ellipsis omitted). And because the Board members were never Senate-confirmed, the court "ha[d] no trouble in

concluding" that they were unconstitutionally appointed. Pet. App. 30a.

Nevertheless, though *Ryder* establishes that it would be "err[or]" for a court to "accord[] *de facto* validity to" the Board's "actions" in the face of this constitutional violation, *Ryder*, 515 U.S. at 188, that is what the First Circuit did. Indeed, despite *Ryder*, the court found "application of the *de facto* officer doctrine [to be] especially appropriate." Pet. App. 44a. That holding cannot be squared with this Court's precedents. Because petitioners brought "a timely challenge to the constitutional validity of the appointment of an officer," they are "entitled" to "appropriate" relief. *Ryder*, 515 U.S. at 182-83; *accord Lucia*, 138 S. Ct. at 2055.

The First Circuit—like the United States Court of Military Appeals in *Ryder*, 515 U.S. at 180—purported to follow *Buckley* when it applied the *de facto* officer doctrine. Pet. App. 46a. The court's interpretation of *Buckley* was just as erroneous. *See Ryder*, 515 U.S. at 183. *Ryder* expressly limited *Buckley* to its facts, and made clear that the doctrine is inapplicable when a challenger seeks to dismiss or vacate a pending proceeding. As the *Ryder* Court explained, the plaintiffs in *Buckley* sought purely prospective "declaratory and injunctive relief," and that is exactly what the Court awarded. *Ibid*. Those plaintiffs never challenged any action taken by the FEC; no FEC act was even at issue in the litigation. The case involved only "future rulings and determinations by the Commission" that had not yet happened. *Buckley*, 424 U.S. at 117. In fact, at the time of that ruling, the FEC "had yet to engage in significant regulatory activity" at all. Barnett, *supra*, at 532. *Buckley* thus stands in stark contrast to the petitioners' challenge

here, which seeks to vacate particular agency actions to which they are unconstitutionally subject.

The remedy that this Court granted in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality), further illuminates the First Circuit's error. In that case, the challengers had argued that, because the bankruptcy courts violated Article III, the suit filed against them in the bankruptcy proceeding must be dismissed. The plurality agreed with the challengers on the constitutional issue, and held that its decision "appl[ies] only prospectively" for actions not implicated in that litigation. *Id.* at 88. But for the case before it, the Court in *Northern Pipeline* "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 n.3; *see also N. Pipeline*, 458 U.S. at 89 (Rehnquist, J., concurring in judgment) ("Marathon may object to proceeding further with this lawsuit on the [constitutional] grounds"); *accord Stern* v. *Marshall*, 564 U.S. 462, 503 (2011) (because bankruptcy court lacked Article III power to rule on state-law counterclaim, that claim must be dismissed). Therefore, "*Northern Pipeline* is not a case in which the Court invoked the *de facto* officer doctrine to deny relief to the party before it." *Ryder*, 515 U.S. at 184 n.3.

Thus, when litigants timely and successfully challenge the actions of an unconstitutional entity, they are entitled to have the invalid action at issue nullified or dismissed. In *Northern Pipeline*, the Court granted the prevailing party's motion to dismiss the suit filed against it by the respondent. 458 U.S. at 88; *accord Stern*, 564 U.S. at 503. In *Lucia* and *Ryder*, the

Court vacated the adjudication before the unconstitutionally selected judge. *Lucia*, 138 S. Ct. at 2055 & nn.5-6; *Ryder*, 515 U.S. at 183. Here, the court should have granted Aurelius's motion to dismiss the Commonwealth Title III petition and vindicated Assured's claim for retrospective and prospective declaratory and injunctive relief. *Accord NRA Political Victory Fund*, 6 F.3d at 828 (when a litigant raises a "constitutional challenge as a defense to an enforcement action," courts may not "declare the Commission's structure unconstitutional without providing relief to the [challengers] in th[at] case"). Otherwise, the court's opinion is merely advisory. *See Teague* v. *Lane*, 489 U.S. 288, 315 (1989) (plurality) (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").

To be sure, when plaintiffs seek solely prospective remedies, such as declaratory and injunctive relief aimed at actions that have yet to occur, courts have no reason to vacate past agency actions; they are simply not implicated in the litigation. *See Buckley*, 424 U.S. at 142; *see also*, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010) (granting plaintiffs the forward-looking "declaratory relief" they sought). Here, however, the Aurelius petitioners successfully challenged the constitutionality of the Board members' appointments and sought dismissal of the Title III actions. Pet. App. 42a, 109a-110a. Additionally, the Assured petitioners sought declaratory and injunctive relief against past and future actions of the unconstitutional Board. Pet. App. 110a. Having prevailed in their challenge, petitioners were entitled to that relief, and the *de facto* officer doctrine was inapplicable.

Indeed, the *de facto* officer doctrine is inapplicable by definition. It applies only to officers acting "by virtue of an appointment *regular on its face*," *McDowell*, 159 U.S. at 601, which is only "*later discovered*" to be unlawful, *Ryder*, 515 U.S. at 180 (emphases added). Here, by contrast, Congress's violation of the Appointments Clause was open and notorious. During the course of the legislative process, the House conceded that the appointments scheme was meant to "ensure[] that a majority of [the Board's] members are effectively chosen by Republican congressional leaders on an expedited timeframe," H.R. Rep. No. 114-602, pt. 1, at 42 (2016). And Senators publicly acknowledged that the Board's appointment mechanism was unconstitutional, or at least arguably so. *See* 162 Cong. Rec. S4687 (daily ed. June 29, 2016) (Senator Cantwell) ("The appointments clause requires that these officers … be appointed by the President and confirmed by the Senate," and the law therefore "is going to be challenged constitutionally."); *id.* at S4685 (Senator Reid) ("I take issue with the oversight board and their excessive powers and appointment structure."). PROMESA's unconstitutionality thus was obvious from the beginning. No precedent supports application of the *de facto* officer doctrine in such a circumstance.

The court of appeals' statement that the Board members' "titles to office were never in question until [the court's] resolution of this appeal," Pet. App. 40a, blinks reality. Not only was Congress's violation egregious and widely understood at the time PROMESA was enacted, but the Board itself, the court, and the public at large were definitively put on notice of the "question" as to the validity of the Board members' appointments early in the Title III proceedings—before the Board had taken any significant actions—when

Aurelius and UTIER brought their challenges. *See SW Gen., Inc.*, 796 F.3d at 82 (*de facto* officer doctrine inapplicable because agency put on notice as soon as litigants brought their challenges); *Andrade* v. *Regnery,* 824 F.2d 1253, 1256 (D.C. Cir. 1987) ("The filing of the underlying suit … in and of itself notified the government."). In response, there were numerous filings on this constitutional issue by creditors, other interested parties, the Board itself, and even the United States. The First Circuit thus erred in determining that the Board members' "titles to office were never in question" until February 15, 2019. And even if the *de facto* officer doctrine somehow applied to widely broadcasted constitutional challenges, it could not conceivably apply to actions taken by the Board *after* the court of appeals declared it to be unconstitutional on that date.

The Board members have been wielding significant federal power in violation of one of the Constitution's core structural provisions for more than two years—and since August 2017, Aurelius and UTIER have been publicly challenging the constitutionality of the Board members' appointments. Petitioners have diligently litigated this constitutional challenge from the earliest opportunity. This Court has never applied the *de facto* officer doctrine to deny parties who prevailed in their timely constitutional challenge the relief they sought. The *de facto* officer doctrine should have no application here.

B. The De Facto Officer Doctrine Cannot Be Deployed To Validate *Future* Actions Of Unconstitutionally Appointed Officers.

Perhaps the most troubling part of the First Circuit's opinion is its decision to invoke the *de facto* officer doctrine to validate actions the Board would take in the months *after* the court held the Board members' selection to be unconstitutional. The First Circuit held that its decision would not "eliminate any otherwise valid actions of the Board prior to the issuance of our mandate." Pet. App. 45a-46a. This severely undermines the separation of powers by explicitly permitting unconstitutional actors to freely operate, and it violates long-settled law.

Once it is determined that an agency's "composition violates the Constitution's separation of powers," that agency "lacks authority" to further "enforce[]" its organic statute. *NRA Political Victory Fund*, 6 F.3d at 822. If invalidly appointed officers take actions before remedying their appointments, those actions are "void *ab initio*" and must be vacated. *Noel Canning* v. *NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). Thus, unconstitutionally structured agencies generally cannot take further actions unless and until they have been "reconstituted" in conformity with the separation of powers. *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996).

This Court has long adhered to this principle. In *Free Enterprise Fund*, this Court used severance and declaratory relief to reconstitute the PCAOB into a validly structured agency. 561 U.S. at 509-10. The PCAOB could not take further actions until then, because the petitioners were "entitled" to have the regulatory standards "be enforced only by a constitutional

agency accountable to the Executive." *Id.* at 513-14. In *Buckley*, too, this Court made clear that "most of the powers conferred" by statute on the FEC could "be exercised only by 'Officers of the United States,' appointed in conformity with Art. II, § 2, cl. 2, of the Constitution and therefore cannot be exercised by the Commission as presently constituted." *Buckley*, 424 U.S. at 143. Accordingly, the Court awarded the successful plaintiffs the "injunctive relief they sought," prohibiting the agency from acting against the plaintiffs until it was constitutionally sound. *Ryder*, 515 U.S. at 183. An unconstitutional agency cannot continue enforcing its organic statute until the constitutional defect is corrected.

In conflict with these cases, the First Circuit purported to allow seven federal officers to continue to act in an official capacity for a period of 150 days *after* they were determined to have been appointed unconstitutionally. From the moment the First Circuit issued its Judgment on February 15, 2019, the Board members had no arguable basis on which to continue to exercise significant governmental power or otherwise act under color of official right—yet the First Circuit expressly held that for the next 90 days (later extended by another 60 days), "the Board may continue to operate as until now." Pet. App. 46a. The effect of that holding was to incentivize the unconstitutional Board to hasten its activities during the stay period and thereby exacerbate the constitutional injury to the prevailing petitioners. That "remedy" provided no relief at all. The Board members have been determined to be "usurper[s]" and "intruder[s]" to the offices they hold, *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 323 (1902), and therefore cannot continue to operate as if the First Circuit had not issued any decision at all.

To be sure, on rare occasions, this Court has allowed an unconstitutional governmental entity—after a finding of unconstitutionality—to continue to operate. *See*, *e.g.*, *N. Pipeline*, 458 U.S. at 88 (temporarily staying judgment to "afford Congress an opportunity to reconstitute the bankruptcy courts … without impairing the interim administration of the bankruptcy laws"). But even then, this Court has been careful to award the challengers retrospective relief, such as favorable action on the order on review. *See Ryder*, 515 U.S. at 184 n.3 (noting that *Northern Pipeline* affirmed the grant of the successful party's motion to dismiss). This Court has never forced successful challengers to continue to be subject to the actions of an unconstitutional entity moving forward.

Thus, not only did the First Circuit ignore this Court's holdings in cases such as *Ryder* and *Northern Pipeline* when it refused to dismiss the unconstitutional proceeding to which petitioners are subject, but it exacerbated that error by applying the *de facto* officer doctrine to all of the Board's future acts, thereby forcing petitioners to *continue* to be at the mercy of the Board members for months after they had been publicly adjudged to be unconstitutional interlopers. This Court's cases provide no support for the proposition that a successful challenger must continue to be subject to an unconstitutional agency for any period of time, let alone months or even a year into the future.

Allowing the unconstitutional Board to continue to operate is especially pernicious here because the Board evidently intends to argue that its actions in the Title III proceedings during this interim period render this case "equitably moot." As the Board readily acknowledges, it is aggressively "attempting to negotiate" important matters with groups of creditors so

that it can "fil[e] and prosecut[e] a plan of adjustment for the Commonwealth"—all while under a cloud of unconstitutionality. *See* Board C.A. Mot. to Stay Mandate at 22-23. This course of conduct seems calculated to position the Board to invoke "the curious"—and likely invalid—"doctrine of 'equitable mootness'" before the constitutional issue can be adjudicated by this Court. *In re Cont'l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (Alito, J., dissenting). The Board has refused to deny that this is its plan, Board C.A. Reply in Support of Mot. to Stay Mandate at 8, and in fact is *already* taking that position in other PROMESA-related litigation, *see* Appellees' Mot. to Dismiss Appeal as Equitably Moot at 2, *Elliot* v. *Commonwealth of Puerto Rico*, No. 19-1182 (1st Cir. Apr. 12, 2019). If that gambit were successful, it would completely deprive creditors and the public of their right to a debt-restructuring process conducted in conformity with the Appointments Clause. It would be entirely inappropriate for equitable mootness to prevent this Court from adjudicating the important constitutional issues in this appeal.

Thus, the First Circuit's decision to apply the *de facto* officer doctrine to the Board's future acts plainly conflicts with this Court's precedents. It should go without saying that a court of appeals cannot declare a federal Board unconstitutional and simultaneously declare that future actions that the same Board takes against the successful challengers are valid. To be sure, the First Circuit was free to stay its mandate to allow a new Board to be nominated by the President and confirmed by the Senate. But a court cannot preemptively validate any and all future actions that an unconstitutional entity might choose to take. None of the Board's actions in the Commonwealth or PRHTA Title III proceedings—either before or after

February 15—have *de facto* validity. They must either be ratified by a constitutionally appointed Board, or else are null and void. This Court's review of the First Circuit remedy ruling is therefore warranted.

II. THE QUESTION PRESENTED IS IMPORTANT.

Congress has underscored the significance of all issues arising under PROMESA, noting that it is "the duty of … the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this Chapter." 48 U.S.C. § 2126(d). Moreover, whether the *de facto* officer doctrine can bless an unconstitutional officer's past and future actions is a question of the utmost importance, deserving this Court's immediate review.

The First Circuit's decision threatens the separation of powers by disincentivizing private litigants from bringing separation-of-powers challenges, encouraging Congress to usurp Executive authority, and thrusting Article III courts into the role of deciding which substantive policy choices made by unconstitutionally appointed individuals to ratify. The First Circuit's remedy in this case—which includes affording *prospective* validity to the actions of a powerful federal entity that has been adjudged unconstitutional—threatens to undermine the enforcement of our most fundamental constitutional protections, and so far departs from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power. The importance of the question presented is itself an independent reason for this Court to grant the petition. *See* S. Ct. R. 10(a).

1. "The very essence of civil liberty … consists in the right of every individual to claim the protection of

the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). "[W]here there is a legal right, there is also a legal remedy." *Ibid.* (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)).

This principle is paramount when Congress has violated the Constitution, and in particular, the separation of powers. When "basic constitutional protections" are violated, this Court will supply a remedy. *Glidden*, 370 U.S. at 536. There can be no question that the separation of powers is fundamental "to safeguard individual liberty," *Noel Canning*, 573 U.S. at 525, and thus violations of the separation of powers demand a meaningful remedy for the aggrieved party.

For that reason, when this Court was faced with the question whether to apply the *de facto* officer doctrine to validate the past acts of an unconstitutionally appointed officer in *Ryder*, the Court unequivocally (and unanimously) answered *no*. "Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable … appointments." 515 U.S. at 182-83. For that same reason, the Court reiterated this important remedial doctrine last term in *Lucia*, holding that the Administrative Law Judges ("ALJs") of the Securities and Exchange Commission ("SEC") are "officers of the United States," and that the ALJ overseeing Mr. Lucia's hearing was unconstitutionally appointed. In addition to ordering that the SEC order on review be vacated by granting the petition for review, the Court remanded for a *new hearing* before a different, properly appointed ALJ, because "Appointments Clause remedies" must be "designed not only" to advance the "structural purposes of the Appointments Clause" it-

self, "but also to create incentives to raise Appointments Clause challenges" in the first place. 138 S. Ct. at 2055 n.5 (alterations and quotation marks omitted).

The decision below fails to comply with this simple yet important directive, and, if left unchecked, threatens to undermine incentives to bring separation-of-powers challenges. In many cases, the entire purpose of bringing the challenge is to remedy past actions taken by the unconstitutional entity that have injured the challenger. *See*, *e.g.*, *Lucia*, 138 S. Ct. at 2055-56; *Noel Canning*, 573 U.S. at 557; *Stern*, 564 U.S. at 503; *Ryder*, 515 U.S. at 183; *N. Pipeline*, 458 U.S. at 88. Applying the *de facto* officer doctrine to those past acts, to further acts taken during the pendency of the constitutional litigation, and even to acts taken after a court has found unconstitutionality, would deter many parties from taking on the burdens and costs of mounting a constitutional challenge in the first place. *See* Barnett, *supra*, at 518 (incentives diminish when "the prevailing party [is] left in no better (or indeed perhaps a worse) position than it was before the challenge").

Private parties are not vying for a place in a law school casebook. They have real interests that are actually harmed by the actions of unconstitutional entities like the Board. But without effective relief, they will stop bringing separation-of-powers challenges. *See* Barnett, *supra*, at 509 ("If the right or norm's value is lower than the cost of asserting the claim or if the remedy does little to advance the litigant's related interests, the rational litigant will not bother to assert that interest.").

That would be a dangerous scenario, because, as this Court has recognized, it is possible that the

branches encroached upon may not challenge—or may even defend—the encroachment. *See*, *e.g.*, *Free Enter. Fund*, 561 U.S. at 497. Thus, if private parties lose their incentive to bring these challenges due to the *de facto* officer doctrine, "the separation of powers" will "depend on the views of individual Presidents []or on whether the encroached-upon branch approves the encroachment." *Ibid*. (quotation marks and citation omitted). The Constitution's structural guarantees cannot hinge on such contingencies. The proper remedy is one that "afford[s] [the challenger] the relief requested pursuant to its constitutional challenge." *Ryder*, 515 U.S. at 184 n.3 (citing *N. Pipeline*, 458 U.S. at 57).

The First Circuit's decision, which disincentivizes private litigants from bringing separation-of-powers challenges, raises an important question that should be resolved by this Court.

2. Not only does the court of appeals' decision strip private litigants of a significant incentive to bring separation-of-powers challenges, it has an even more dangerous effect: It *encourages* Congress to aggrandize itself, "provid[ing] a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role," *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-77 (1991). This, too, is a critically important issue necessarily raised by the First Circuit's decision, making this question appropriate for the Court's resolution.

The Framers were acutely aware of the threat posed by Congress "extending the sphere of its activity, and drawing all power into its impetuous vortex," particularly through "encroachments which it makes on the co-ordinate departments" of our government.

The Federalist Papers No. 48 (Clinton Rossiter ed., 1961) (Madison). And because "the most insidious and powerful weapon of eighteenth century despotism" that the crown wielded over the American colonies was the "manipulation of official appointments," *Freytag*, 501 U.S. at 883, the Framers carefully balanced the appointment power between the President and the Senate. *See* U.S. Const. art. II, § 2, cl. 2. Their aim was to "prevent[] congressional encroachment," while "curb[ing] Executive abuses." *Edmond*, 520 U.S. at 659.

The First Circuit's decision, however, will only embolden Congress to continue to disregard the Constitution. The court invoked the "fear" of "negative consequences" from "cancel[ing] out any progress made towards PROMESA's aim of helping Puerto Rico 'achieve fiscal responsibility and access to capital markets.'" Pet. App. 45a (quoting 48 U.S.C. § 2121(a)). But "[t]he 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). This Court has not hesitated to strike down laws that violate the separation of powers, even when the consequences were far more significant. *See*, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 944-45 (1983) (invalidating hundreds of statutes on separation-of-powers grounds); *N. Pipeline*, 458 U.S. at 87-88 (dismissing bankruptcy case entirely, and striking down entire bankruptcy court system Nation-wide).[5] It is precisely in these situa-

[5] Even though this Court stayed the effect of its ruling in *Northern Pipeline*, the Court's patience with Congress (which did not act within the time given by the Court) was limited. *See N.*

tions that political branches are most tempted to violate basic constitutional protections and guarantees, and the Court's scrutiny should thus be "sharpened rather than blunted by [that] fact." *Chadha*, 462 U.S. at 944.

The First Circuit's lack of a remedy in this case telegraphs to Congress that it is free to push the boundaries as far as it likes, consequence-free. This looming incentive, itself, raises an exceedingly important issue deserving of this Court's resolution.

3. The question presented further merits review because grave separation-of-powers concerns are implicated when Article III courts decide which unauthorized executive actions should be validated. "The executive Power" is "vested in [the] President," and it is *his* duty—not the duty of Congress nor the courts—to "take Care that the Laws be faithfully executed" and to appoint all principal "Officers of the United States" who will assist him in discharging that duty. U.S. Const. art. II, §§ 1, 3. The numerous decisions committed by statute to the Board's "sole discretion," 48 U.S.C. §§ 2121(d)(1)(A)-(E); 2141(a); 2142(a); 2146(a), are actions that can be taken *only* by constitutionally valid officers of the United States. Yet no constitutionally authorized individual has sanctioned *any* of the Board's actions taken to date with respect to its responsibilities under Title II or Puerto Rico's Title III proceedings. Rather, individuals handpicked by four members of Congress but never confirmed by the Senate have done so.

Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 459 U.S. 1094 (1982) (denying the Solicitor General's request "to further extend the stay of the judgment").

Given that "[t]he Judiciary is not suited to second-guess [Executive Branch] determinations," *Munaf* v. *Geren*, 553 U.S. 674, 702 (2008), it certainly cannot make them in the first instance through the *de facto* officer doctrine. Similarly, just as Presidents cannot "bind [their] successors," *Free Enter. Fund*, 561 U.S. at 497, an Article III court cannot do so through the *de facto* officer doctrine. Doing so would wrest Executive power even further from its proper home in Article II and further threaten the separation of powers.

CONCLUSION

There will never be a better vehicle for deciding the important constitutional question presented in this petition. The Board's constitutional infirmity is stark; the constitutional challenge was swiftly initiated; the First Circuit's remedy ruling is sweeping; and the related petition on the merits of the Appointments Clause issue is also before the Court. This Court's review is warranted.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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

Counsel for Petitioners

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