No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AURELIUS INVESTMENT, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. 2101 *et seq.* (Supp. V 2017), to address the economic emergency facing the Commonwealth of Puerto Rico. The Act established a Financial Oversight and Management Board as an entity "within the territorial government" of Puerto Rico. 48 U.S.C. 2121(c)(1) (Supp. V 2017).

The question presented is whether members of the Board are "Officers of the United States" within the meaning of the Appointments Clause of the U.S. Constitution, Art. II, § 2, Cl. 2.

PARTIES TO THE PROCEEDING

Petitioner, the United States of America, was an appellee in the court of appeals.

Also appellees in the court of appeals were the following respondents: the Financial Oversight and Management Board for Puerto Rico; the Commonwealth of Puerto Rico, the American Federation of State County and Municipal Employees; the Official Committee of Retired Employees of the Commonwealth of Puerto Rico; the Official Committee of Unsecured Creditors; Puerto Rico Electric Power Authority (PREPA); the Puerto Rico Fiscal Agency and Financial Advisory Authority; Andrew G. Biggs; Jose B. Carrion, III; Carlos M. Garcia; Arthur J. Gonzalez; Jose R. Gonzalez; Ana J. Matosantos; David A. Skeel, Jr.; Cyrus Capital Partners, L.P.; Taconic Capital Advisors, L.P.; Whitebox Advisors LLC; Scoggin Management LP; Tilden Park Capital Management LP; Aristeia Capital, LLC; Canyon Capital Advisors, LLC; 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; Fideicosmiso Plaza; Jose F. Rodriguez-Perez; Cyrus Opportunities Master Fund II, Ltd.; Cyrus Select Opportunities Master Fund, Ltd.; Cyrus Special Strategies Master Fund, L.P.; Taconic Master Fund 1.5 LP; Taconic Opportunity Master Fund LP; Whitebox Asymmetric Partners, L.P.; Whitebox Institutional Partners, L.P.; Whitebox Multi-Strategy Partners, L.P.; Whitebox Term Credit Fund I L.P.; Scoggin International Fund, Ltd.; Scoggin Worldwide Fund Ltd.; Tilden Park Investment Master Fund LP; Varde Credit Partners Master, LP; Varde Investment

Partners, LP; Varde Investment Partners Offshore Master, LP; Varde Skyway Master Fund, LP; Pandora Select Partners, L.P.; SB Special Situation Master Fund SPC; Segregated Portfolio D; CRS Master Fund, L.P.; Crescent 1, L.P.; Canery SC Master Fund, L.P.; Merced Partners Limited Partnership; Merced Partners IV, L.P.; Merced Partners V, L.P.; Merced Capital, LP; Aristeia Horizons, LP; Golden Tree Asset Management LP; Old Bellows Partners LLP; and River Canyon Fund Management, LLC.

Appellants in the court of appeals were the following respondents: Aurelius Investment, LLC; Assured Guaranty Corporation; Assured Guaranty Municipal Corporation; Aurelius Opportunities Fund, LLC; Lex Claims, LLC; and Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 915 F.3d 838. The opinion and order of the district court (App., *infra*, 46a-81a) are published in the Federal Supplement at 318 F. Supp. 3d 537.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. A petition for rehearing was denied on March 7, 2019 (App., *infra*, 82a-86a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 87a-153a.

STATEMENT

1. In the summer of 2016, the Commonwealth of Puerto Rico faced a "dire fiscal emergency" more severe and debilitating than any in its history. App., *infra*, 49a.

a. At that time, the Commonwealth and its instrumentalities together carried approximately $71.5 billion in outstanding debt, more than the entire annual output of the island's economy. See Government Development Bank for Puerto Rico, *Commonwealth of Puerto Rico: Financial Information and Operating Data Report* 52 (Dec. 18, 2016).[1] Their credit ratings had been downgraded to junk, leaving them unable to access capital markets. *Id.* at 67-68; see *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016). At the same time, however, federal law did not permit Puerto Rico to obtain debt relief through the federal bankruptcy code. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1946.

Puerto Rico's financial catastrophe also precipitated a humanitarian crisis for the more than three million U.S. citizens living on the island. Hospitals were forced to turn away patients, schools closed their doors, and public pension funds were projected to be depleted within three years. See The White House, *Puerto Rico Hill Update—Humanitarian Crisis* 2-4 (Apr. 19, 2016).[2] Government suppliers, who were collectively owed nearly $2 billion, threatened to halt ongoing infrastructure projects and cut off essential services—including

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[1] https://go.usa.gov/xPZ2e.

[2] https://go.usa.gov/xPW4d.

the provision of gasoline to police and fire departments. *Id.* at 3. In the face of these challenges, "the Commonwealth's very ability to persist" was put in doubt. *Wal-Mart P.R., Inc.* v. *Zaragoza-Gomez*, 174 F. Supp. 3d 585, 592 (D.P.R.), aff'd, 834 F.3d 110 (1st Cir. 2016).

b. Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. 2101 *et seq.*, to address the "fiscal emergency" and arrest the island's "severe economic decline." 48 U.S.C. 2194(m)(1).[3] PROMESA was enacted "pursuant to article IV, section 3 of the Constitution of the United States." 48 U.S.C. 2121(b)(2) ("Constitutional basis"). That provision, known as the Territories Clause, gives Congress plenary power to "dispose of and make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2.

PROMESA reflects a "comprehensive approach" to Puerto Rico's economic recovery. 48 U.S.C. 2194(m)(4). As relevant here, the statute created a Financial Management and Oversight Board to provide independent oversight of Puerto Rico's financial affairs. 48 U.S.C. 2121. Congress established the Board as an entity "within the territorial government" of Puerto Rico, 48 U.S.C. 2121(c)(1), and vested it with extensive authority over Puerto Rico's fiscal policy. Among other things, the Board is authorized to approve fiscal plans and budgets for the Commonwealth and its instrumentalities, 48 U.S.C. 2141, 2142; to enforce compliance with those plans and budgets, 48 U.S.C. 2143, 2144; and to supervise the issuance, guarantee, and modification of Puerto Rico's debts, 48 U.S.C. 2147. Once the Commonwealth

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[3] All references in this petition to Title 48 of the United States Code are to Supplement V (2017) of the 2012 edition.

has reestablished adequate access to credit markets at reasonable interest rates and has balanced its budget for four consecutive years, the Board "shall terminate." 48 U.S.C. 2149.

The Board is composed of seven voting members and the Governor of Puerto Rico (or his designee), who sits as an *ex officio* nonvoting member. 48 U.S.C. 2121(e). The President selects all of the Board's voting members: One is selected by the President at his "sole discretion," 48 U.S.C. 2121(e)(2)(A)(vi); the other six "should be" selected from lists of candidates provided by congressional leadership, 48 U.S.C. 2121(e)(2)(A)(i)-(v). The President may also ask for the lists to be supplemented with additional names. 48 U.S.C. 2121(e)(2)(C). When the President makes a selection from one of the lists provided, "no Senate confirmation is required." 48 U.S.C. 2121(e)(2)(E). The President may also appoint individuals who are not on the lists with the advice and consent of the Senate. *Ibid.* In the event the President had not appointed all voting members of the Board by September 1, 2016, the President was required within two weeks to appoint the remaining members from the relevant lists. 48 U.S.C. 2121(e)(2)(G). Each voting member of the Board serves a three-year term, with service after that point permitted "until a successor has been appointed." 48 U.S.C. 2121(e)(5)(A) and (C). Board members may be removed by the President "only for cause." 48 U.S.C. 2121(e)(5)(B).

Among its other measures to reform Puerto Rico's finances, PROMESA establishes a debt-restructuring procedure for the island's governmental entities and instrumentalities. See 48 U.S.C. 2161-2177 (Title III). Title III, which incorporates numerous provisions of the Bankruptcy Code, is modeled in several ways on federal

bankruptcy law, including by providing for an automatic stay of all other litigation during the pendency of Title III proceedings. 48 U.S.C. 2161(a) (incorporating, *inter alia*, 11 U.S.C. 362). The Board serves as Puerto Rico's sole representative in Title III proceedings, and it is the only entity empowered to propose a debt-adjustment plan on behalf of Puerto Rico and its instrumentalities. See 48 U.S.C. 2172(a), 2175(b).

PROMESA was enacted with bipartisan support in June 2016. See 162 Cong. Rec. H3634-H3635 (daily ed. June 9, 2016); *id.* at S4702 (daily ed. June 29, 2016). Two months later, President Obama appointed all seven voting members of the Board, six of whom were chosen from the congressionally provided lists and one of whom was not. See The White House, *President Obama Announces the Appointment of Seven Individuals to the Financial Oversight and Management Board for Puerto Rico* (Aug. 31, 2016).[4] The President did not request that the lists be supplemented before the appointments were made, nor did he invoke his prerogative to nominate other non-list candidates with the advice and consent of the Senate.

2. In May 2017, the Board initiated a Title III proceeding on behalf of the Commonwealth in federal district court in Puerto Rico, App., *infra*, 52a, and thereafter initiated additional Title III proceedings on behalf of several Puerto Rico governmental instrumentalities, *ibid.* The Board filed a proposed plan of adjustment for the debts of the Puerto Rico Sales Tax Financing Corporation (COFINA, by its Spanish acronym), which the court confirmed on February 4, 2019. See D. Ct. Doc.

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[4] https://go.usa.gov/xP2ZG.

5045. According to the Board, creditors have filed approximately 165,000 proofs of claim in those proceedings, see D. Ct. Doc. 4052, at 6 (Oct. 16, 2018), which together implicate approximately $74 billion of bond debt and $49 billion of unfunded pension liabilities, see Special Investigation Comm., Fin. Oversight & Mgmt. Bd. for P.R., *Final Investigative Report* 2 (Aug. 20, 2018).[5]

a. In August 2017, a group of hedge funds and other entities holding outstanding bonds issued by the Commonwealth (collectively, Aurelius) moved the district court to dismiss the Commonwealth's Title III proceeding, arguing that the Board's members were appointed in violation of the Appointments Clause of the U.S. Constitution, Art. II, § 2, Cl. 2. See App., *infra*, 14a. As a result, Aurelius argued, the Board lacked authority to file a Title III petition on Puerto Rico's behalf. *Ibid.* The United States intervened, under 28 U.S.C. 2403(a), to defend the constitutionality of PROMESA. App., *infra*, 15a.

The district court denied Aurelius's motion to dismiss. App., *infra*, 46a-81a. The court explained that "Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but [that] include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States." *Id.* at 64a. Because "the Oversight Board is a territorial entity and its members are territorial officers," the court determined, there is "no constitutional defect in

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[5] https://assets.documentcloud.org/documents/4777926/FOMB-Final-Investigative-Report-Kobre-amp-Kim.pdf.

the method of appointment provided by Congress" for the Board's members. *Id.* at 78a, 80a.

In separate decisions, the district court dismissed two other adversary complaints: one filed by the Union de Trabajadores de la Industria Electrica y Riego (UTIER), in the Title III proceeding initiated on behalf of the Puerto Rico Electric Power Authority; and another filed by Assured Guaranty, in the Commonwealth's Title III proceeding and the Title III proceeding initiated on behalf of the Puerto Rico Highways & Transportation Authority. See 17-228 D. Ct. Doc. 130 (Aug. 15, 2018); 18-87 D. Ct. Doc. 14 (Aug. 3, 2018). The court then certified for appeal, under 48 U.S.C. 2166(e)(3)(A), the Appointments Clause question presented in Aurelius's motion to dismiss.

b. The court of appeals reversed. App., *infra*, 1a-45a.

At the outset, the court of appeals "reject[ed]"what it characterized as the Board's argument that "Article IV effectively allows Congress to assume what is otherwise a power of the President"—namely, the power to appoint executive officers. App., *infra*, 20a. In the court's view, the Territories Clause is a constitutional provision only "of general application authorizing Congress to engage in rulemaking for the temporary governance of territories," whereas the Appointments Clause "explicitly contemplates * * * the appointment of federal officers." *Id.* at 21a. Purporting to apply the "'specific governs the general'" canon of interpretation, the court determined that the Appointments Clause merits "strict enforcement" of its requirements in legislation governing the territories. *Ibid.*

The court of appeals acknowledged that this Court had previously held that another "structural limitation on Congress's exercise of its powers," the nondelegation

doctrine, does not restrain Congress in establishing systems of territorial governance. App., *infra*, 22a; see *id.* at 22a-24a (citing, among others, *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321-323 (1937)). The court of appeals found those cases distinguishable, however, on the ground that "territorial variations on the traditional restrictions of the nondelegation doctrine," unlike deviations from the Appointments Clause, "pose no challenge by Congress to the power of the other branches." *Id.* at 24a; see *id.* at 24a-26a. The court similarly rejected an analogy to Congress's creation of courts for the District of Columbia that do not comply with Article III, which this Court has also upheld. *Id.* at 26a-27a (discussing *Palmore* v. *United States*, 411 U.S. 389 (1973)). In the court of appeals' view, this Court's approval of such a "local D.C. court system" shows only that "Article III itself accommodates exceptions," a principle it deemed of no consequence here. *Id.* at 27a.

The court of appeals next determined that "the Board Members qualify within the rubric of 'Officers of the United States,'" as the Appointments Clause uses that term. App., *infra*, 30a. Applying this Court's test for distinguishing between officers and employees, articulated most recently in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), the court of appeals concluded that the Board's members "readily" qualify as officers. App., *infra*, 31a; see *id.* at 31a-33a. That conclusion, the court of appeals stated, was also consistent with "historical precedents" in which most (though not all) "major federal appointments to Puerto Rico's civil government throughout the first half of the 20th century" had been made in accordance with the Appointments Clause. *Id.* at 34a; see *id.* at 34a-36a. Unless Congress thought the Clause applied to territorial governments, the court stated, Congress

would have had no reason to adopt legislation for Puerto Rico that was "largely consistent" with its requirements. *Id.* at 36a.

The court of appeals further rejected the contention that applying the Appointments Clause to territorial officials would render unconstitutional so-called "home rule," App., *infra*, 24a, under which territorial officers are elected by residents or appointed by other territorial officials, see *id.* at 37a-38a. In the court's view, elected territorial officials, such as Puerto Rico's governor, and their appointees "are not federal officers" because "they exercise authority pursuant to the laws of the territory," rather than "'pursuant to the laws of the United States.'" *Id.* at 37a (quoting *Lucia*, 138 S. Ct. at 2051). The court acknowledged this Court's ruling in *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863 (2016), that "Commonwealth laws are themselves the product of authority Congress has delegated by statute." App., *infra*, 37a. "But," the court of appeals concluded, "that fact alone does not make the laws of Puerto Rico the laws of the United States, else every claim brought under Puerto Rico's laws would pose a federal question." *Id.* at 38a.

Turning to the appropriate remedy for the Appointments Clause violation, the court of appeals determined that the provisions in PROMESA authorizing the appointment of the Board's members without Senate confirmation were severable from the remainder of the statute, and it accordingly ordered invalidation only of those provisions. App., *infra*, 40a-42a. The court then rejected Aurelius's request to remedy the constitutional violation by "dismiss[ing] the Title III petitions" in their entirety, thus "cast[ing] a specter of invalidity over all of the Board's actions until the present day."

Id. at 42a. Instead, the court determined that the Board's prior acts were subject to the *de facto* officer doctrine, which "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 to office is deficient." *Id.* at 42a-43a (quoting *Ryder* v. *United States*, 515 U.S. 177, 180 (1995)) (ellipsis omitted). The court found application of that doctrine "especially appropriate in this case," given that the Board had acted at all times in "good faith" and "with the color of authority." *Ibid.* The court also emphasized that dismissal of the Title III proceeding would produce "negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now," and would "introduce further delay into a historic debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017." *Id.* at 43a-44a.

Finally, the court of appeals stayed the issuance of its mandate for 90 days, "so as to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with" its ruling. App., *infra*, 44a-45a. During that period, the court stated, the Board "may continue to operate as until now." *Id.* at 45a.

c. UTIER filed a petition for panel rehearing and rehearing en banc challenging the court of appeals' decision with regard to the remedy only. The court of appeals subsequently denied that petition on March 7, 2019. App., *infra*, 82a-86a; see Pet. for Reh'g 13. The Board moved to stay the mandate pending the filing and disposition of its petition for certiorari. The court denied

the motion but further extended the stay of its mandate until July 15, 2019. See Order of Ct. (May 6, 2019).

3. On April 29, 2019, the President announced that, in light of the court of appeals' decision, he intends to re-nominate the current Board members for Senate consideration and reappointment to the remainder of their current terms. See The White House, *President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts*.[6]

REASONS FOR GRANTING THE PETITION

The court of appeals has declared an act of Congress unconstitutional, and in doing so has simultaneously imperiled Puerto Rico's recovery from the worst fiscal crisis in its history and cast substantial doubt on the constitutionality of territorial self-governance. This case accordingly presents a question of exceptional importance that warrants this Court's review.

The decision below implicates fundamental issues regarding Congress's exercise of its plenary Article IV authority. For the first time in the Nation's history, a court has declared that territorial officials must be appointed in conformity with the Appointments Clause. That holding, which cannot be squared with this Court's precedents, necessarily implies that the government of Puerto Rico has been unconstitutional since its inception. The court of appeals' reasoning similarly calls into question territorial home rule, including statutes that establish popular elections in Puerto Rico, Guam, and the U.S. Virgin Islands. Although the court of appeals purported to distinguish elected territorial officials on the ground that they exercise only "authority pursuant

[6] https://go.usa.gov/xmF9q.

to the laws of the territory," App., *infra*, 37a, that assertion is flatly inconsistent with this Court's holding in *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863 (2016), that the authority exercised by Puerto Rico officials derives from federal law.

If allowed to stand, the court of appeals' decision would have devastating practical consequences for the ongoing economic recovery in Puerto Rico. PROMESA was enacted to address the island's impending fiscal and humanitarian crisis. The court's ruling calls into question all the work done by the Board to improve Puerto Rico's financial health since its creation; it also jeopardizes current Title III proceedings as they go forward. In an abundance of caution, the President has announced his intention to re-nominate the Board's members to the remainder of their current terms, but the citizens and creditors of Puerto Rico can have no assurance that the political process will reach a timely resolution. Nor, given the virtual certainty that Aurelius and other debtholders will continue to challenge the Board's legality after its members have been reappointed, will the Commonwealth be able to achieve the fresh start that Congress envisioned. Only this Court can prevent the damage done by the court of appeals' erroneous constitutional ruling.

A. The Court Of Appeals Erred In Holding That The Appointments Clause Applies To The Board's Members

The Appointments Clause establishes the mechanism for selecting "Officers of the United States" for whom the Constitution does not otherwise prescribe a method of appointment. U.S. Const. Art. II, § 2 Cl. 2. An "'Officer,'" for purposes of the Clause, is an individual who exercises "significant authority pursuant to the

laws of the United States" and holds an office "'established by Law.'" *Buckley* v. *Valeo*, 424 U.S. 1, 125-126 (1976) (per curiam) (citation omitted). The Clause provides that principal officers must be appointed by the President, by and with the advice and consent of the Senate, while Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. That two-tiered system, however, applies only to "Officers of the United States." Members of the Board are territorial officers, not "Officers of the United States" who serve within departments of the national government. As a result, their selection is not governed by the Appointments Clause and need not comply with its requirements.

1. The Board's members are territorial officers

The Constitution gives Congress "plenary power * * * over the territories of the United States." *El Paso & Ne. Ry. Co.* v. *Gutierrez*, 215 U.S. 87, 93 (1909). Article IV authorizes Congress to make "all needful Rules and Regulations respecting [a] Territory." U.S. Const. Art. IV, § 3, Cl. 2. This Court has explained that, when exercising that power to legislate for a territory, "Congress has the entire dominion and sovereignty, national and local, Federal and state." *Simms* v. *Simms*, 175 U.S. 162, 168 (1899); accord *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.). Just as state governments need not be organized in conformity with the federal government's tripartite structure, territorial governments need not be organized as if they were "subject to" the Constitution's "complex distribution of the powers of government." *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850). Instead, "[h]aving a right to erect a territorial government, [Congress]

may confer on it such powers, legislative, judicial, and executive, as [Congress] may deem best." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1319, at 195 (1833).

By vesting Congress with comprehensive and exclusive control of territorial governance, the Constitution permits Congress to legislate for the territories in a manner "that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it." *Palmore* v. *United States*, 411 U.S. 389, 398 (1973). For instance, Congress may create territorial courts and "clothe[]" them with the power "to decide all cases arising under the Constitution and laws of the United States," even though they do not comply with the strictures of Article III. *Clinton* v. *Englebrecht*, 80 U.S. (13 Wall.) 434, 447 (1872); see *American Ins.*, 26 U.S. (1 Pet.) at 546; cf. *Palmore*, 411 U.S. at 403 (Article III does not apply to the courts of the District of Columbia). Similarly, Congress may empower territorial legislatures to enact laws—including criminal laws governing the primary conduct of U.S. citizens—without regard for nondelegation principles. See *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322-323 (1937); *Dorr* v. *United States*, 195 U.S. 138, 142-143 (1904). These and many other examples reflect Congress's "broad latitude to develop innovative approaches to territorial governance." *Sanchez Valle*, 136 S. Ct. at 1876.

PROMESA is another such "innovative approach[] to territorial governance." *Sanchez Valle*, 136 S. Ct. at 1876. To enable Puerto Rico to address the fiscal and humanitarian crisis on the island, Congress established the Board as a new territorial agency and imbued it with powers to supervise and direct the Commonwealth's

finances—including certain powers that, before the law's enactment, the governor and legislature of Puerto Rico had possessed. See P.R. Const. Art. VI, §§ 2, 6-8 (Legislative Assembly's authority to issue, retire, and adjust debt); see also *id.* Art. IV, § 4 (Governor's authority to present budget to Legislative Assembly). If Congress had elected to address Puerto Rico's financial crisis not by creating an Oversight Board, but by requiring the governor and legislature of Puerto Rico to use their preexisting powers in a particular way, that decision plainly would not have transformed the territorial government into a federal agency. PROMESA's creation of the Title III process, which focuses on restructuring debts of the Commonwealth, is similarly territorial in nature.

Leaving no doubt about the source of constitutional authority under which it was created, PROMESA specifies that it was enacted "pursuant to article IV, section 3 of the Constitution of the United States," under Congress's "power to dispose of and make all needful rules and regulations for territories." 48 U.S.C. 2121(b)(2). PROMESA further provides that the Board was "created as an entity within the territorial government" of Puerto Rico, and that the Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C. 2121(c)(1) and (2). The Board was thus "expressly created pursuant to the plenary Art. [IV] power to legislate for [the territories] and to exercise the powers of a State government in all cases where legislation is possible." *Palmore*, 411 U.S. at 407 (citations, ellipsis, and internal quotation marks omitted).

Moreover, the Board's powers, structure, and functions confirm that Congress was exercising its authority

under Article IV, not Article I. The "focus of [the Board's] work is primarily upon" reforming the Commonwealth's budget, the restructuring of its debt, and other "matters of strictly local concern." *Palmore*, 411 U.S. at 407. In debt-adjustment proceedings under the Puerto Rico-specific Title III process, the Board acts as the "representative of the debtor" (*i.e.*, of the Commonwealth and its instrumentalities), 48 U.S.C. 2175(b), in much the same manner as a private trustee or debtor in possession would when settling an estate or pursuing reorganization under the federal Bankruptcy Code. See 48 U.S.C. 2172(a). The Board's other powers are similarly territorial in nature. Its subpoena powers, for example, are limited by Puerto Rico's personal-jurisdiction statutes, 48 U.S.C. 2124(f), while its enforcement powers extend only to Puerto Rico laws "prohibiting public sector employees from participating in a strike or lockout," 48 U.S.C. 2124(h). And any territorial employee who intentionally provides false or misleading information to the Board is subject to prosecution under Puerto Rico, not federal, law. 48 U.S.C. 2124(*l*). The Board thus exercises all of its powers "only under statutes that are applicable to [Puerto Rico] alone." *Palmore*, 411 U.S. at 407.

The Board also wields its territorial authority at considerable distance from the United States Government. No federal official directs or manages the Board's operations, 48 U.S.C. 2124; "[i]n any action brought by, on behalf of, or against" it, the Board "shall be represented by such counsel as *it* may hire or retain," 48 U.S.C. 2128(b) (emphasis added). The federal government also lacks financial control over the Board: Its operations are funded entirely by Puerto Rico, 48 U.S.C. 2127(b), and its members serve without compensation, 48 U.S.C.

2121(g). Indeed, the only mechanism through which federal employees may work for the Board is Title IV of the Intergovernmental Personnel Act of 1970, 5 U.S.C. 3371 *et seq.*, which authorizes the detail of federal employees to the government of any "State," a term defined to include Puerto Rico or another "territory or possession of the United States," 5 U.S.C. 3371(1)(A). See 48 U.S.C. 2123(d) (authorizing such a "detail").

Finally, in enacting PROMESA, Congress declined to subject the Board to federal laws, such as the Freedom of Information Act and the Administrative Procedure Act, that apply to federal agencies. See 48 U.S.C. 2124(c)(1). And where Congress *did* choose to apply federal law to the Board, it made clear that those laws did not apply to the Board of their own force. See, *e.g.*, 48 U.S.C. 2129(b) (requiring the Board's members to "conform to the same requirements set forth" in the federal Ethics in Government Act of 1978). Congress also expressly authorized the "Administrator of General Services" to provide services to the Board, 48 U.S.C. 2124(n), an instruction that would have been superfluous if the Board were *already* a "federal" or "executive" agency within the meaning of the General Services Administration's organic act, 40 U.S.C. 102(4)-(5).

2. Territorial officers are not subject to the Appointments Clause

Because the Board is a territorial entity, created under Article IV, its members do not occupy offices within the Executive Branch of the federal government. They are accordingly not "Officers *of the United States*," as the Appointments Clause uses that term. U.S. Const. Art. II, § 2, Cl. 2 (emphasis added). Instead, they are Article IV officers, exercising a delegated portion of Congress's *own* plenary authority over the territories.

See *Freytag* v. *Commissioner*, 501 U.S. 868, 913 (1991) (Scalia, J., concurring in part and concurring in the judgment) (Territorial courts "are neither Article III courts nor Article I courts, but Article IV courts—just as territorial governors are not Article I executives but Article IV executives."); see also *Binns* v. *United States*, 194 U.S. 486, 490, 492 (1904) (taxes levied for benefit of a territory are not subject to uniformity requirement that applies to federal taxes that "provide for * * * the general Welfare *of the United States*," U.S. Const. Art. I, § 8, Cl. 1 (emphasis added)).

The Appointments Clause has never been understood as applying to territorial officers or constraining Congress's authority to establish territorial governments. Structural constraints like the nondelegation doctrine and the Appointments Clause are designed to protect the separation of powers among Congress (Article I), the Executive (Article II), and the Judiciary (Article III). But those concerns are not implicated in the same manner when Congress is exercising its plenary Article IV power over the territories. See *Cincinnati Soap*, 301 U.S. at 322-323 (legislation enacted under Article IV is not subject to nondelegation constraints); *United States* v. *Heinszen & Co.*, 206 U.S. 370, 384-385 (1907) (under Article IV, Congress may authorize the President to legislate for a territory). That is why Congress may vest legislative, executive, and judicial power in territorial governments in ways that "would be incompatible with the Vesting Clauses of the Federal Constitution if those Clauses applied." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2197 (2018) (Alito, J., dissenting) (collecting cases). For example, Congress "may endow territorial governments with a plural executive; it may allow the executive to legislate; it may dispense with the

legislature or judiciary altogether." *Freytag*, 501 U.S. at 914 (Scalia, J., concurring in part and concurring in the judgment). Those choices, which are "at all times subject to such alterations as Congress may see fit to adopt," remain unconstrained by the Appointments Clause or other Article II strictures. *Snow* v. *United States*, 85 U.S. (18 Wall.) 317, 320 (1873).

Contrary to the decision below, the conclusion that Congress may create systems of territorial government unconstrained by the Appointments Clause is not undermined by the fact that territorial entities, such as the Board, invariably "trace their authority directly and exclusively to a federal law." App., *infra*, 33a. As this Court has explained, the "'ultimate source'" of *all* governmental authority in a territory is "the U.S. Congress." *Sanchez Valle*, 136 S. Ct. at 1874 (quoting *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978)). Yet though they owe their existence to federal law, territorial governments do not derive from Congress's power, under Article I, to enact "laws for the United States *considered as a political body of states in union*." *Cincinnati Soap*, 301 U.S. at 323 (emphasis added). Rather, territorial governments are products of Congress's far more "comprehensive" Article IV authority, and as such are "not subject to the same restrictions" that apply when Congress creates an office "of the United States"—*i.e.*, an office *within* the federal government. *Id.* at 322-323; see *Englebrecht*, 80 U.S. (13 Wall.) at 447 ("The judges of the Supreme Court of the Territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold courts of the United States."); see also *Palmore*, 411 U.S. at 400 (although "the District of Columbia Code, having been enacted by Congress, is a law of the United States,"

the District's courts do not exercise "the 'judicial Power' of the United States").

Historical practice dating back to the Founding confirms that the selection of territorial officers is not constrained by the Appointments Clause. In enacting the Northwest Ordinance, for instance, Congress provided for the direct election of a territorial house of representatives, as well as for a legislative council consisting of five members to be chosen by the President from a list of ten candidates submitted by the elected representatives of the territorial legislature. Act of Aug. 7, 1789, ch. 8, 1 Stat. 51 n.(a), 53. That pattern of non-Article II territorial appointments was repeated numerous times over the next two centuries. Indeed, Congress has established elected legislatures in the vast majority of territories for which it created governments.[7]

The history of the Commonwealth of Puerto Rico is itself illustrative. In 1900, Congress provided for a territorial governor who was authorized, *inter alia*, to appoint territorial judges with the advice and consent of

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[7] See 1 Stat. 123, 123 (1790) (Southwest Territory); 1 Stat. 549, 550 (1798) (Mississippi); 2 Stat. 58, 59 (1800) (Indiana); 2 Stat. 309, 309 (1805) (Michigan); 2 Stat. 322, 322 (1805) (Orleans); 2 Stat. 514, 515 (1809) (Illinois); 2 Stat. 743, 745 (1812) (Missouri); 3 Stat. 371, 372 (1817) (Alabama); 3 Stat. 493, 494 (1819) (Arkansas); 4 Stat. 332, 333 (1829) (Florida); 5 Stat. 10, 12 (1836) (Wisconsin); 5 Stat. 235, 236-237 (1838) (Iowa); 9 Stat. 323, 324 (1848) (Oregon); 9 Stat. 403, 404-405 (1849) (Minnesota); 9 Stat. 446, 448 (1850) (New Mexico); 9 Stat. 453, 454 (1850) (Utah); 10 Stat. 172, 173-174 (1853) (Washington); 10 Stat. 277, 278-279, 284-285 (1854) (Nebraska and Kansas); 12 Stat. 172, 173 (1861) (Colorado); 12 Stat. 209, 210-211 (1861) (Nevada); 12 Stat. 239, 240 (1861) (Dakota); 12 Stat. 664, 665 (1863) (Arizona); 12 Stat. 808, 809-810 (1863) (Idaho); 13 Stat. 85, 87 (1864) (Montana); 15 Stat. 178, 179 (1868) (Wyoming); 26 Stat. 81, 83-84 (1890) (Oklahoma); 31 Stat. 141, 144 (1900) (Hawaii); 37 Stat. 512, 513 (1912) (Alaska).

an executive council. See Act of Apr. 12, 1900, ch. 191, §§ 17, 18, 33, 31 Stat. 81, 84. Then, in the so-called Jones Act, Congress provided that heads of Puerto Rico's "executive departments" were to be appointed by the governor with the advice and consent of the territorial Senate. See Act of Mar. 2, 1917, ch. 145, § 13, 39 Stat. 955. In 1950, Congress passed legislation inviting the people of Puerto Rico to "organize a government pursuant to a constitution of their own adoption." Act of July 3, 1950, ch. 446, 64 Stat. 319. The new constitution was drafted by a convention whose members were popularly elected; the constitution itself was approved by plebiscite. See Act of July 3, 1952, ch. 567, 66 Stat. 327. Congress ultimately passed legislation approving that constitution—subject to several congressionally imposed revisions—and authorized it to take legal effect. *Ibid.* Today, every major U.S. territory is similarly governed by officials elected, under home-rule statutes, by the people of that territory: Gubernatorial elections have been held in Guam and the U.S. Virgin Islands since 1968, see Guam Elective Governor Act, Pub. L. No. 90-497, 82 Stat. 842; Virgin Islands Elective Governor Act, Pub. L. No. 90-496, 82 Stat. 837; in American Samoa since 1977, see 42 Fed. Reg. 48,398 (Sept. 23, 1977); and in the Northern Mariana Islands since 1986, see Proclamation No. 5564, 3 C.F.R. 146 (1986 comp.).

None of those "innovative approaches to territorial governance," *Sanchez Valle*, 136 S. Ct. at 1876, would have been possible if territorial officials were subject to the Appointments Clause. Just as territorial judges may be "elected by the people of the Territory" only because territorial courts are not "courts of the United States," *Englebrecht*, 80 U.S. (13 Wall.) at 447, territorial officials may be elected only because they are not

"Officers of the United States," U.S. Const. Art. II, § 2, Cl. 2. If the court of appeals were correct that the Appointments Clause restricts the selection of territorial governments, the long history of territorial home rule would be at an end.

3. The court of appeals' arguments to the contrary are unpersuasive

The court of appeals brushed aside the implications of its decision for territorial home rule by asserting that elected territorial officials "are not federal officers" because "they exercise authority pursuant to the laws of the territory," rather than "'pursuant to the laws of the United States.'" App., *infra*, 37a (quoting *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018)). That assertion is flatly contradicted by this Court's precedents, which make unmistakably clear that "there is no sovereignty in a Territory of the United States but that of the United States itself." *Snow*, 85 U.S. (18 Wall.) at 321; see *Puerto Rico* v. *Shell Co. (P.R.)*, 302 U.S. 253, 264 (1937) ("Both the territorial and federal laws * * * are creations emanating from the same sovereignty."); *Grafton* v. *United States*, 206 U.S. 333, 354 (1907) (judicial officers in the Philippines "exert all their powers by authority of the United States"). To be sure, Congress may, in its discretion, "[e]ntrust" to a territorial legislature the power to legislate on matters akin to those upon which a state legislature may act. *Simms*, 175 U.S. at 168. But because territories possess "no independent sovereignty comparable to that of a state," *Domenech* v. *National City Bank of N.Y.*, 294 U.S. 199, 204 (1935), Congress remains the "ultimate source of the power undergirding" the territorial government and its laws, *Sanchez Valle*, 136 S. Ct. at 1871 (internal quotation marks omitted).

In *Sanchez Valle*, for instance, the Court considered whether a defendant who had been prosecuted for illegal firearm sales under federal law could later be prosecuted for an analogous offense under Puerto Rican law. The Court determined that the two prosecutions were for the "same offence," and hence the latter was barred under the Double Jeopardy Clause. *Sanchez Valle*, 136 S. Ct. at 1867 (quoting U.S. Const. Amend. V). The Court explained that, despite Puerto Rico's "status as a self-governing Commonwealth"—under which Puerto Rico had assumed "newfound authority, including over local criminal laws"—the source of prosecutorial authority exercised by Puerto Rico officials "remains the U.S. Congress, just as back of a city's charter lies a state government." *Id.* at 1874-1875. *Sanchez Valle* thus makes clear that *all* territorial officials, whatever the manner of their selection, "exercise[] only such power as [i]s delegated by Congress through federal statutes." *Id.* at 1875 (internal quotation marks omitted). The authority exercised by Puerto Rico's elected officials and their appointees, therefore, is no more or less federal or territorial in nature than the authority invested in the Board by PROMESA; both trace their source to legislation enacted by Congress under Article IV.

In the decision below, the court of appeals acknowledged that "the Commonwealth['s] laws are themselves the product of authority Congress has delegated by statute," such that "the elected Governor's power ultimately depends on the continuation of a federal grant." App., *infra*, 38a-39a. The court nevertheless declared that fact insufficient to "make the laws of Puerto Rico the laws of the United States, else every claim brought

under Puerto Rico's laws would pose a federal question." *Id.* at 38a. That response is a complete *non sequitur*. It conflates two separate questions. The first is a statutory question: whether a dispute regarding territorial law "aris[es] under" federal law for purposes of the federal-question jurisdictional statute, 28 U.S.C. 1331. The second is a constitutional question: whether, when Congress delegates power to an official under Article IV, that official becomes an "Officer of the United States" for purposes of the Appointments Clause. See *Balzac* v. *Porto Rico*, 258 U.S. 298, 302 (1922) (describing Congress's decision to treat Puerto Rico as if it were a state for purposes of statutory jurisdiction).

Nor is there a basis to distinguish, for Appointments Clause purposes, between elected territorial officials who make fiscal policy for Puerto Rico under a federal home-rule statute and Board members who do so under PROMESA. The nature and source of their power—federal law enacted by Congress—is the same in either case. See *Sanchez Valle*, 136 S. Ct. at 1875 ("Back of the Puerto Rican people and their Constitution * * * remains the U.S. Congress."). The Appointments Clause did not require Puerto Rico's governor to be appointed with the advice and consent of the Senate between 1900 and 1947, yet permit him to be elected thereafter. Or put another way, the Clause does not contain an "elections exception."

The court of appeals' other attempts to justify its ruling are similarly unpersuasive. The court stated that "the major federal appointments to Puerto Rico's civil government throughout the first half of the 20th century all complied with the Appointments Clause," in that they required presidential appointment and Senate confirmation. App., *infra*, 34a. The court thus inferred

that Congress must have understood the Clause as applicable to such officials, or else "Congress's requirement of Senate confirmation for presidential nominees" to those offices would be "mere voluntary legislative surplusage." *Id.* at 35a. The court of appeals' argument fails on multiple levels.

For one thing, it ignores the long history of territorial home rule, which, as just explained, cannot be squared with the view that territorial officials are "Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. For another, "the Appointments Clause does not prevent Congress from treating a position that is not, in the constitutional sense, an office under the United States as nevertheless subject to statutory restrictions on offices or officers," and indeed "Congress often has done this." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116 (2007) (2007 OLC Mem.). For instance, the so-called Jay Treaty of 1794 provided for commissioners on a claims tribunal to be appointed by the President, with the advice and consent of the Senate. *Id.* at 103; see Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., arts. V & VI, Nov. 19, 1794, 8 Stat. 119. Although, as Alexander Hamilton noted, these commissioners "[we]re not in a strict sense Officers," and thus were not subject to the Appointments Clause, yet "it has not been deemed a violation of the provision to appoint" non-constitutional officials as if they were subject to it. 2007 OLC Mem. 103 (quoting Alexander Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *The Papers of Alexander Hamilton* 13, 20 (Harold C. Syrett ed., 1974)) (capitalization altered). In a related context, this Court held that the District of Columbia's government

was a municipal entity, rather than a federal one, notwithstanding that the District's commissioners were appointed by the President with the Senate's advice and consent. *Metropolitan R.R. Co.* v. *District of Columbia*, 132 U.S. 1, 8 (1889). "The mode of appointing [the District's] officers," the Court explained, "does not abrogate its character as a municipal body politic." *Ibid.*

In any event, the court of appeals' historical argument fails even on its own terms: Numerous territorial officials have been chosen *neither* by election *nor* in accordance with the Appointments Clause. For example, the Governor of Puerto Rico appoints the Secretary of Justice (the Commonwealth's chief law-enforcement officer) and the Justices of the Puerto Rico Supreme Court with the advice and consent of the Puerto Rico Senate, and appoints the Secretary of State with the advice and consent of the entire Puerto Rico legislature. See P.R. Const. Art. IV, §§ 5-6; *id.* Art. V, § 8. Similarly, the governors of Guam and the Virgin Islands "shall appoint, and may remove, all officers and employees of the executive branch of the [territorial] government." 82 Stat. 843 (Guam); 82 Stat. 838 (Virgin Islands). This method of appointment dates at least as far back as 1812, when Congress gave the governor of the Missouri Territory "power to appoint and commission all officers civil and of the militia." Act of June 4, 1812, ch. 95, § 2, 2 Stat. 744; see Act of Apr. 20, 1836, ch. 54, § 7, 5 Stat. 13 (authorizing the governor of the Wisconsin Territory to appoint judicial officers, justices of the peace, and sheriffs).[8]

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[8] Congress adopted similar appointment provisions in the organic acts governing at least 18 other territories. See 3 Stat. 493, 494 (1819) (Arkansas); 5 Stat. 235, 237 (1838) (Iowa); 9 Stat. 323, 330 (1848) (Oregon); 9 Stat. 403, 405 (1849) (Minnesota); 9 Stat. 446, 449 (1850) (New Mexico); 9 Stat. 453, 455 (1850) (Utah); 10 Stat. 172,

Many of these territorial officials, if subject to the Appointments Clause, would qualify as principal officers and thus would be required to undergo presidential nomination and Senate confirmation. Others would be "inferior Officers" whose appointment could be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. Yet *none* of them was chosen in compliance with the requirements of the Appointments Clause.[9] The court of appeals characterized those examples as insignificant, stressing Congress's "*largely* consistent adherence" to the Clause in making "*key* appointments" to "*major* federal" offices. App., *infra*, 34a-36a (emphases added). Yet the Appointments Clause does not contain an exception for unimportant "Officers of the United States"—even assuming that properly describes these many instances throughout history. The inescapable conclusion is that Congress has never regarded the Appointments Clause as applying to territorial officials.

Finally, the court of appeals relied on a supposed parallel between the Appointments Clause and the Presentment Clause, which requires "[e]very Bill which shall have passed the House of Representatives and the Senate" to be "presented to the President of the United States" before it becomes law. U.S. Const. Art. I, § 7,

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175-176 (1853) (Washington); 10 Stat. 277, 279-280, 286 (1854) (Nebraska and Kansas); 12 Stat. 172, 174 (1861) (Colorado); 12 Stat. 209, 212 (1861) (Nevada); 12 Stat. 239, 241 (1861) (Dakota); 12 Stat. 664, 665 (1863) (Arizona); 12 Stat. 808, 811 (1863) (Idaho); 13 Stat. 85, 88 (1864) (Montana); 15 Stat. 178, 180 (1868) (Wyoming); 26 Stat. 81, 85 (1890) (Oklahoma); 31 Stat. 141, 156 (1900) (Hawaii).

[9] The court of appeals correctly did not suggest that territorial governors are "Heads of Departments" within the meaning of the Appointments Clause.

Cl. 2. See App., *infra*, 21a-22a. Noting that laws enacted under Congress's Article IV powers must nevertheless satisfy the Presentment Clause, the court stated that "[l]ike the Presentment Clause, the Appointments Clause constitutionally regulates how Congress brings its power to bear." *Id.* at 22a. But the court's analogy is faulty: The Presentment Clause speaks to *how* Congress may legislate; the Appointments Clause speaks to *what* that legislation may contain. All legislation is subject to the former requirement, but only legislation establishing "Offices of the United States" must satisfy the latter.[10]

For similar reasons, even though the Constitution vests all "[t]he Judicial Power of the United States" in the Supreme Court and in inferior courts established by Congress, whose judges "hold their Offices during good Behavior," U.S. Const. Art. III, § 1, this Court has nevertheless held that Congress may "exercise[ ] its power under Art. IV * * * by creating territorial courts and manning them with judges appointed for a term of years," *Palmore*, 411 U.S. at 402-403; see *American Ins.*, 26 U.S. (1 Pet.) at 546. The court of appeals sought to explain away those decisions by stating that "Article III itself accommodates exceptions." App., *infra*, 27a.

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[10] The court of appeals' argument also proves too much, because the nondelegation doctrine, like the Appointments Clause, "constitutionally regulates how Congress brings its power to bear." App., *infra*, 22a; see *Mistretta* v. *United States*, 488 U.S. 361, 371-372 (1989) ("'[T]he integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (quoting *Field* v. *Clark*, 143 U.S. 649, 692 (1892)). Yet this Court has consistently made clear that nondelegation principles do not apply when Congress legislates under its Article IV powers. See *Cincinnati Soap*, 301 U.S. at 322-323; *Dorr*, 195 U.S. at 142-143.

That is merely a conclusion framed as an argument, and in any event points to the same result here: Like Article III, the Appointments Clause is inapplicable to territorial governments, and for the same reason. See *Territorial Judges Not Liable to Impeachment*, 3 Op. Att'y Gen. 409, 411 (1839) (Impeachment Clause, which applies to "all civil Officers of the United States," U.S. Const. Art. II, § 4, does not apply to territorial judges because "[t]hey are not civil officers of the United States, in the constitutional meaning of the phrase; they are merely Territorial officers").

B. The Question Presented Warrants This Court's Review

The court of appeals struck down an act of Congress. If left undisturbed, the court's ruling would have serious and potentially dire consequences for the Commonwealth of Puerto Rico; would threaten home rule for all U.S. territories; and would unduly constrain Congress's ability to exercise its Article IV authority in the future. The Board has filed its own petition for a writ of certiorari to the judgment below, *Financial Oversight & Mgmt. Bd. for P.R.* v. *Aurelius Inv., LLC*, No. 18-1334 (filed Apr. 23, 2019), and Aurelius has filed a response agreeing (Br. 3) that this case implicates "questions of the highest importance that should be definitively resolved by this Court." This Court's review is warranted.

The Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," even in the absence of a circuit conflict. *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013); see, *e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *United States* v. *Alvarez*, 567 U.S. 709 (2012); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010);

United States v. *Comstock*, 560 U.S. 126 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008). That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Here, no circuit conflict regarding the Board's constitutionality is likely ever to develop, both because PROMESA generally limits venue to the District of Puerto Rico, see 48 U.S.C. 2167(a), and because the ruling below, if left uncorrected, will force the Board to be reconstituted so as to prevent the issue from recurring.

Review is separately warranted because the decision below threatens to undermine Puerto Rico's continuing fiscal recovery. When PROMESA was enacted in 2016, the Commonwealth and its more than 3 million residents faced the worst fiscal catastrophe in its history, accompanied by an impending humanitarian crisis, see pp. 2-3, *supra*, that only grew graver in light of "the ravage of the hurricanes that affected Puerto Rico in September 2017," App., *infra*, 44a. Since its creation, the Board has used its statutory authority to make substantial progress toward restoring Puerto Rico's financial health. Most significantly, the Board has initiated five Title III proceedings on behalf of the Commonwealth and its instrumentalities, most of which remain ongoing, that together involve over $100 billion in claims. See Bankruptcy Case Nos. 17-BK-3283 (D.P.R. filed May 3, 2017), 17-BK-3284 (D.P.R. filed May 5, 2017), 17-BK-3566 (D.P.R. filed May 21, 2017), 17-BK-3567 (D.P.R. filed May 21, 2017), 17-BK-4780 (D.P.R. filed July 2, 2017).

If those Title III proceedings were a bankruptcy, they would constitute the largest such proceeding in the history of the United States. See Andrew Scurria & Heather Gillers, *Puerto Rico to Square Off With Creditors*, Wall Street Journal, May 4, 2017, at A1. The Board has also filed a proposed plan of adjustment for the debts of COFINA, which was confirmed on February 4, 2019. See D. Ct. Doc. 5045. The Board has represented that the COFINA settlement alone will save Puerto Rico $456 million each year. Pet. at 8, *Financial Oversight & Mgmt. Bd.*, *supra* (No. 18-1334). The court of appeals' decision has called these actions—indeed, *every* action the Board has taken since its creation—into doubt. See App., *infra*, 43a (acknowledging "the many, if not thousands, of innocent third parties who have relied on the Board's actions until now").

Although the court of appeals temporarily stayed its mandate, the stay will expire on July 15, 2019. See p. 11, *supra*. At that point, Puerto Rico's many creditors will undoubtedly seek dismissal of all pending Title III proceedings, on the theory that the Board lacked authority to initiate them. Aurelius sought precisely that relief below, and has already informed the district court of its intention to renew its challenges to the validity of the Board's actions. See Pet. at 32, *Financial Oversight & Mgmt. Bd.*, *supra* (No. 18-1334). If the court does indeed dismiss the pending Title III proceedings, thereby dissolving the automatic stay on other litigation, see 48 U.S.C. 2161(a), Puerto Rico would be exposed to numerous lawsuits seeking immediate payment of its outstanding debts. Because Puerto Rico cannot access the federal bankruptcy process, see *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), the result is likely to be a free-for-all in which the island's

creditors race against one another to get what they can before its resources are fully depleted. There is no telling what, if anything, will remain for Puerto Rico's schools, police and fire departments, hospitals, courts, shelters, retirees, and others who rely on governmental funding.

Finally, the court of appeals' decision threatens to upend the governmental structure of all U.S. territories. As far as we are aware, the decision represents the first time in the Nation's history that Congress has invoked its Article IV power to create a territorial entity, and a court has nevertheless held that the entity's officials are subject to the Appointments Clause. The court failed to identify any principled reason why, under its reasoning, the elected representatives of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands would not also be "Officers of the United States" who must be selected, not by election, but as the Clause requires. The court's decision accordingly opens the door to challenges to the validity of actions taken by all territorial officials who hold office in a manner inconsistent with the Appointments Clause. The ruling also substantially restricts the "broad latitude" that Congress has previously enjoyed to "develop innovative approaches to territorial governance," *Sanchez Valle*, 136 S. Ct. at 1876, thereby undermining Congress's ability to address future crises in the territories.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1671, 18-1746, and 18-1787

AURELIUS INVESTMENT, LLC, ET AL., APPELLANTS

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,
APPELLEES

ASSURED GUARANTY CORPORATION, ET AL.,
APPELLANTS

v.

FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD, ET AL., APPELLEES

UNIÓN DE TRABAJADORES DE LA INDUSTRIA
ELÉCTRICA Y RIEGO (UTIER), APPELLANT

v.

PUERTO RICO ELECTRIC POWER AUTHORITY, ET AL.,
APPELLEES

Filed: Feb. 15, 2019

Appeals from the United States District Court
for the District of Puerto Rico

[Hon. Laura Taylor Swain,[*] U.S. District Judge]

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[*] Of the Southern District of New York, sitting by designation.

Before: TORRUELLA, THOMPSON, and KAYATTA, Circuit Judges.

TORRUELLA, **Circuit Judge**. The matter before us arises from the restructuring of Puerto Rico's public debt under the 2016 Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). This time, however, we are not tasked with delving into the intricacies of bankruptcy proceedings. Instead, we are required to square off with a single question of constitutional magnitude: whether members of the Financial Oversight and Management Board created by PROMESA ("Board Members") are "Officers of the United States" subject to the U.S. Constitution's Appointments Clause. Title III of PROMESA authorizes the Board to initiate debt adjustment proceedings on behalf of the Puerto Rico government, and the Board exercised this authority in May 2017. Appellants seek to dismiss the Title III proceedings, claiming the Board lacked authority to initiate them given that the Board Members were allegedly appointed in contravention of the Appointments Clause.

Before we can determine whether the Board Members are subject to the Appointments Clause, we must first consider two antecedent questions that need be answered in sequence, with the answer to each deciding whether we proceed to the next item of inquiry. The first question is whether, as decided by the district court and claimed by appellees, the Territorial Clause displaces the Appointments Clause in an unincorporated territory such as Puerto Rico. If the answer to this first question is "no," our second area of discussion turns

to determining whether the Board Members are "Officers of the United States," as only officers of the federal government fall under the purview of the Appointments Clause. If the answer to this second question is "yes," we must then determine whether the Board Members are "principal" or "inferior" United States officers, as that classification will dictate how they must be appointed pursuant to the Appointments Clause. But before we enter fully into these matters, it is appropriate that we take notice of the developments that led to the present appeal.

BACKGROUND

The centerpieces of the present appeals are two provisions of the Constitution of the United States. The first is Article II, Section 2, Clause 2, commonly referred to as the "Appointments Clause," which establishes that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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.

The second is Article IV, Section 3, Clause 2, or the "Territorial Clause," providing Congress with the "power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

A. Puerto Rico's Financial Crisis

The interaction between these two clauses comes into focus because of events resulting from the serious economic downfall that has ailed the Commonwealth of Puerto Rico since the turn of the 21st Century, see Center for Puerto Rican Studies, Puerto Rico in Crisis Timeline, Hunter College (2017), https://centropr.hunter.cuny.edu/sites/default/files/PDF_Publications/Puerto-Rico-Crisis-Timeline-2017.pdf; see generally Juan R. Torruella, Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism", 131 Harv. L. Rev. F. 65 (2018), and its Governor's declaration in the summer of 2015 that the Commonwealth was unable to meet its estimated $72 billion public debt obligation, see Michael Corkery & Mary Williams Walsh, Puerto Rico's Governor Says Island's Debts Are "Not Payable", N.Y. Times (June 28, 2015), https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html. This obligation developed, in substantial part, from the triple tax-exempt bonds issued and sold to a large variety of individual and institutional investors, not only in Puerto Rico but also throughout the United States.[1] Given the unprecedented expansiveness of the default in terms of total debt, the number of creditors affected, and the creditors' geographic diversity, it became self-evident that the Commonwealth's insolvency necessitated a national response from Congress. Puerto Rico's default was of

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[1] Since 1917 Congress has authorized exemption of Puerto Rico bonds from taxation by the federal, state, and municipal governments. See An Act to provide a civil government for Porto Rico, and for other purposes, ch. 145, § 3, 39 Stat. 953 (1917).

particular detriment to the municipal bond market where Commonwealth bonds are traded and upon which state and local governments across the United States rely to finance many of their capital projects. See Nat'l Assoc. of Bond Lawyers, Tax-Exempt Bonds: Their Importance to the National Economy and to State and Local Governments 5 (Sept. 2012), https://www.nabl.org/portals/0/documents/NABL_White_Paper.pdf.

From 1938 until 1984, Puerto Rico was able, like all other U.S. jurisdictions, to seek the protection of Chapter 9 of the U.S. Bankruptcy Code when its municipal instrumentalities ran into financial difficulties. See Franklin Cal. Tax-Free Trust v. Puerto Rico, 805 F.3d 322, 345-50 (1st Cir. 2015) (Torruella, J., concurring). But without any known or documented explanation, in 1984, Congress extirpated from the Bankruptcy Code the availability of this relief for the Island. Id. at 350. In an attempt to seek self-help, and amidst the Commonwealth's deepening financial crisis, the Puerto Rico Legislature passed its own municipal bankruptcy legislation in 2014. See Puerto Rico Public Corporation Debt Enforcement and Recovery Act of 2014, 2014 P.R. Laws Act No. 71; see generally Lorraine S. McGowen, Puerto Rico Adopts a Debt Recovery Act for Its Public Corporations, 10 Pratt's J. Bankr. L. 453 (2014). The Commonwealth's self-help journey, however, was cut short by the Supreme Court in Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016), which invalidated the Puerto Rico bankruptcy statute. Coincidentally, the Supreme Court decided Franklin Cal. on June 13, 2016—seven days before the following congressional intervention into this sequence of luckless events.

B. Congress Enacts PROMESA

On June 30, 2016, Congress's next incursion into Puerto Rico's economic fortunes took place in the form of Public Law 114-187, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA),[2] 48 U.S.C. § 2101 et seq., which Congress found necessary to deal with Puerto Rico's "fiscal emergency" and to help mitigate the Island's "severe economic decline." See id. § 2194(m)(1). Congress identified the Territorial Clause as the source of its authority to enact this law. See id. § 2121(b)(2).

To implement PROMESA, Congress created the Financial Oversight and Management Board of Puerto Rico (the "Board"). 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." Id. § 2121(a). In so proceeding, Congress stipulated that the Board was "an entity [created] within the territorial government" of Puerto Rico, id. § 2121(c)(1), which "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government," id. § 2121(c)(2), and that it was to be funded entirely from Commonwealth resources, id. § 2127.[3]

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[2] Since its proposed enactment this legislation has been labeled by the acronym "PROMESA," which in the Spanish language stands for "promise."

[3] A new account—under the Board's exclusive control—was required to be established by the Puerto Rico government within its Treasury Department to fund Board operations.

Although PROMESA places the Board "within" the Puerto Rico territorial government, Section 108 of PROMESA, which is labeled "Autonomy of Oversight Board," id. § 2128, precludes the Puerto Rico Governor and Legislature from exercising any power or authority over the so-called "territorial entity" that PROMESA creates. Instead, it subordinates the Puerto Rico territorial government to the Board, as it unambiguously pronounces that:

> (a) . . . Neither the Governor nor the Legislature may—
>
> (1) exercise any control, supervision, oversight, or review over the . . . Board or its activities; or
>
> (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the . . . Board.

Id. § 2128(a).

PROMESA also provides additional authority and powers to the Board with similarly unfettered discretion. For example, Section 101(d)(1)(A) grants the Board, "in its sole discretion at such time as the . . . Board determines to be appropriate," the designation of "any territorial instrumentality as a covered territorial instrumentality that is subject to the requirements of [PROMESA]." Id. § 2121(d)(1)(A). Under Section 101(d)(1)(B), the Board, "in its sole discretion," may require the Governor of Puerto Rico to submit "such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the . . . Board determines to be necessary . . . " Id. § 2121(d)(1)(B).

Pursuant to Section 101(d)(1)(C), the Board is allowed, "in its sole discretion," to require separate budgets and reports for covered territorial instrumentalities apart from the Commonwealth's budget, and to require the Governor to develop said separate documents. Id. § 2121(d)(1)(C). Per Section 101(d)(1)(D), the "Board may require, in its sole discretion," that the Governor "include a covered territorial instrumentality in the applicable Territory Fiscal Plan." Id. § 2121(d)(1)(D). Further, as provided in Section 101(d)(1)(E), the Board may, "in its sole discretion," designate "a covered territorial instrumentality to be the subject of [a separate] Instrumentality Fiscal Plan." Id. § 2121(d)(1)(E). Finally, Section 101(d)(2)(A) bestows upon the Board, again "in its sole discretion, at such time as the . . . Board determines to be appropriate," the authority to "exclude any territorial instrumentality from the requirements of [PROMESA]." Id. § 2121(d)(2)(A).

PROMESA also requires the Board to have an office in Puerto Rico and elsewhere as it deems necessary, and that at any time the United States may provide the Board with use of federal facilities and equipment on a reimbursable or non-reimbursable basis. Id. § 2122. Additionally, Section 103(c) waives the application of Puerto Rico procurement laws to the Board, id. § 2123(c), while Section 104(c) authorizes the Board to acquire information directly from both the federal and Puerto Rico governments without the usual bureaucratic hurdles, id. § 2124(c). Moreover, the Board's power to issue and enforce compliance with subpoenas is to be carried out in accordance with Puerto Rico law. Id.

§ 2124(f).[4] Finally, PROMESA directs the Board to ensure that any laws prohibiting public employees from striking or engaging in lockouts be strictly enforced. Id. § 2124(h).

We thus come to PROMESA's Title III, the central provision of this statute, which creates a special bankruptcy regime allowing the territories and their instrumentalities to adjust their debt. Id. §§ 2161-77. This new bankruptcy safe haven applies to territories more broadly than Chapter 9 applies to states because it covers not just the subordinate instrumentalities of the territory, but also the territory itself. Id. § 2162.

An important provision of PROMESA's bankruptcy regime is that the Board serves as the sole representative of Puerto Rico's government in Title III debtor-related proceedings, id. § 2175(b), and that the Board is empowered to "take any action necessary on behalf of the debtor"—whether the Commonwealth government or any of its instrumentalities—"to prosecute the case of the debtor," id. § 2175(a).

C. Appointment of Members to PROMESA's Board

PROMESA establishes that the "Board shall consist of seven members appointed by the President," who must comply with federal conflict of interest statutes.

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[4] We note that 48 U.S.C. § 2124(f)(1) makes reference to the Puerto Rico Rules of Civil Procedure of 1979, 32 L.P.R.A. App. III, even though those rules were repealed and replaced by the Puerto Rico Rules of Civil Procedure of 2009, 32 L.P.R.A. App. V.

Id. § 2121(e)(1)(A).[5] The Board's membership is divided into six categories, labelled A through F, with one member for Categories A, B, D, E, and F, and two members for Category C. Id. § 2121(e)(1)(B).[6] The Governor of Puerto Rico, or his designee, also serves on the Board, but in an ex officio, non-voting capacity. Id. § 2121(e)(3). The Board's duration is for an indefinite period, at a minimum four years and likely more, given the certifications that Section 209 of PROMESA requires.[7]

Pursuant to Section 101(f) of PROMESA, individuals are eligible for appointment to the Board only if they:

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[5] Section 2121(e)(1)(A) of PROMESA cross-references section 2129(a), which, for its part, incorporates 18 U.S.C. § 208's dispositions governing conflicts of interest.

[6] As will be discussed in detail below, the assigned category affects a prospective Board member's eligibility requirements and appointment procedure.

[7] Section 209 of PROMESA states that the Board shall terminate when it certifies that:

> (1) the applicable territorial government has adequate access to short-term and long-term credit markets at reasonable interest rates to meet the borrowing needs of the territorial government; and
>
> (2) for at least 4 consecutive fiscal years—
>
> > (A) the territorial government has developed its Budgets in accordance with modified accrual accounting standards; and
> >
> > (B) the expenditures made by the territorial government during each fiscal year did not exceed the revenues of the territorial government during that year, as determined in accordance with modified accrual accounting standards.

48 U.S.C. § 2149.

> (1) ha[ve] knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and
>
> (2) prior to appointment, [they are] not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.

Id. § 2121(f). In addition, there are certain primary residency or primary business place requirements that must be met by some of the Board Members. Id. § 2121(e)(2)(B)(i), (D) (requiring that the Category A Board Member "maintain a primary residence in the territory or have a primary place of business in the territory").

Of particular importance to our task at hand is Section 101(e)(2)(A), which outlines the procedure for the appointment of the Board Members:

> (A) The President shall appoint the individual members of the . . . Board of which—
>
> (i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives;
>
> (ii) the Category B member should be selected from a separate, non-overlapping list of individuals submitted by the Speaker of the House of Representatives;
>
> (iii) the Category C member should be selected from a list submitted by the Majority Leader of the Senate;

> (iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives;
>
> (v) the Category E member should be selected from a list submitted by the Minority leader of the Senate; and
>
> (vi) the category F member may be selected in the President's sole discretion.

Id. § 2121(e)(2)(A).

In synthesis, pursuant to this scheme, six of the seven Board Members shall be selected by the President from the lists provided by House and Senate leadership, with PROMESA allowing the President to select the seventh member at his or her sole discretion. Senatorial advice and consent is not required if the President makes the appointment from one of the aforementioned lists. Id. § 2121(e)(2)(E). In theory, the statute allows the President to appoint a member to the Board who is not on the lists, in which case, "such an appointment shall be by and with the advice and consent of the Senate." Id. Consent by the Senate had to be obtained by September 1, 2016 so as to allow an off-list appointment, else the President was required to appoint directly from the lists. And because 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.

As was arguably inevitable, on August 31, 2016, the President chose all Category A through E members from the lists submitted by congressional leadership

and appointed the Category F member at his sole discretion.[8]

It is undisputed that the President did not submit any of the Board member appointments to the Senate for its

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[8] President Obama Announces the Appointment of Seven Individuals to the Financial Oversight and Management Board for Puerto Rico, The White House Off. of the Press Sec'y (Aug. 31, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/08/31/president-obama-announces-appointment-seven-individuals-financial. The appointees included **Andrew G. Biggs**, a resident scholar at the American Enterprise Institute, and former holder of multiple high ranking positions in the Social Security Administration; **José B. Carrión III**, an experienced insurance industry executive from Puerto Rico and the President and Principal Partner of HUB International CLC, LLC, which operates therein; **Carlos M. García**, a resident of Puerto Rico, the Chief Executive Officer of BayBoston Managers LLC, Managing Partner of BayBoston Capital LP, who formerly served as Senior Executive Vice President and board member at Santander Holdings USA, Inc. (2011-2013), among other executive posts at Santander entities (1997-2008), and as Chairman of the Board, President, and CEO of the Government Development Bank for Puerto Rico (2009-2011); **Arthur J. González**, a Senior Fellow at the New York University School of Law and former U.S. Bankruptcy Judge in the Southern District of New York (1995-2002); **José R. González**, CEO and President of the Federal Home Loan Bank of New York, which he joined in 2013, former Chief Executive Officer and President of Santander Bancorp (2002-2008), and President of Santander Securities Corporation (1996-2001) and the Government Development Bank of Puerto Rico (1986-1989); **Ana J. Matosantos**, President of Matosantos Consulting, former Director of the State of California's Department of Finance (2009-2013) and Chief Deputy Director for Budgets (2008-2009); and, **David A. Skeel Jr.**, professor of Corporate Law at the University of Pennsylvania Law School, which he joined in 1999.

advice and consent prior to the Board Members assuming the duties of their office, or, for that matter, at any other time.

D. Litigation Before the District Court

In May 2017, the Board initiated Title III debt adjustment proceedings on behalf of the Commonwealth in the U.S. District Court for the District of Puerto Rico. See Title III Petition, In re Commonwealth of P.R., Bankruptcy Case No. 17-BK-3283 (LTS) (D.P.R. May 3, 2017). This was followed by the filing of several other Title III proceedings on behalf of various Commonwealth government instrumentalities. See Title III Petitions in: In re P.R. Sales Tax Fin. Corp. (COFINA), Bankruptcy Case No. 17-BK-3284 (LTS) (D.P.R. May 5, 2017); In re Emps. Ret. Sys. of the Gov't of the Commonwealth of P.R. (ERS), 17-BK-3566 (LTS) (D.P.R. May 21, 2017); In re P.R. Highways and Transp. Aut. (HTA); Bankruptcy Case No. 17-BK-3567 (LTS) (D.P.R. May 21, 2017); In re P.R. Elec. Power Auth. (PREPA) [hereinafter In re PREPA], Bankruptcy Case No. 17-BK-4780 (LTS) (D.P.R. Jul. 7, 2017). Thereafter, some entities—now the appellants before us—arose in opposition to the Board's initiation of debt adjustment proceedings on behalf of the Commonwealth.

Among the challengers are Aurelius Investment, LLC, et al. and Assured Guaranty Corporation, et al. ("Aurelius"). Before the district court, Aurelius argued that the Board lacked authority to initiate the Title III proceeding because its members were appointed in violation of the Appointments Clause and the principle of separation of powers. The Board rejected this argument, positing that its members were not "Officers of

the United States" within the meaning of the Appointments Clause, and that the Board's powers were purely local in nature, not federal as would be needed to qualify for Appointments Clause coverage. The Board further argued that, in any event, the Appointments Clause did not apply even if the individual members were federal officers, because they exercised authority in Puerto Rico, an unincorporated territory where the Territorial Clause endows Congress with plenary powers. This, according to the Board, exempted Congress from complying with the Appointments Clause when legislating in relation to Puerto Rico. In the alternative, the Board argued that the Board Members' appointment did not require Senate advice and consent because they were "inferior officers." The United States intervened on behalf of the Board, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of PROMESA and the validity of the appointments and was generally in agreement with the Board's contentions.

The other challenger to the Board's appointments process, and an appellant here, is the Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER"), a Puerto Rican labor organization that represents employees of the government-owned electric power company, the Puerto Rico Electric Power Authority ("PREPA"). The Board had also filed a Title III petition on behalf of PREPA, see In re PREPA, supra, which led the UTIER to file an adversary proceeding as a party of interest before the District Court in which it raised substantially the same arguments as Aurelius regarding the Board Members' defective appointment, see Unión de Trabajadores de la Industria Eléctrica y Riego v. P.R. Elec. Power Auth., No. 17-228 (LTS) (D.P.R. Aug. 15, 2018); see also Adversary Complaint, Unión de Trabajadores

de la Industria Eléctrica y Riego v. P.R. Elec. Power Auth., No. 17-229 (LTS) (D.P.R. Aug. 7, 2017) (describing the terms of the UTIER-PREPA collective bargaining agreement).

E. The District Court's Opinion

The district court, in separate decisions, ruled against Aurelius and UTIER and rejected their motions to dismiss the Board's Title III petitions. In re Commonwealth of P.R., Bankruptcy Case No. 17-BK-3283 (LTS) (D.P.R. July 3, 2018); Assured Guar. Mun. Corp. v. Fin. Oversight and Mgmt. Bd. for P.R., No. 18-87 (LTS) (D.P.R. Aug. 3, 2018); UTIER v. PREPA, No. 17-228 (LTS). In brief, the district court determined that the Board is an instrumentality of the Commonwealth government established pursuant to Congress's plenary powers under the Territorial Clause, that Board Members are not "Officers of the United States," and that therefore there was no constitutional defect in the method of their appointment. The court arrived at this conclusion after considering the jurisprudence and practice surrounding the relationship between Congress and the territories, including Puerto Rico, along with Congress's intent with regards to PROMESA.

The district court based its ruling on the premise that "the Supreme Court has long held that Congress's power under [the Territorial Clause] is both 'general and plenary.'" Such a plenary authority is what, according to the district court, allows Congress to "establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States." The district court

further pronounced that Congress "has exercised [its plenary] power with respect to Puerto Rico over the course of nearly 120 years, including the delegation to the people of Puerto Rico elements of its . . . Article IV authority by authorizing a significant degree of local self-governance."

The district court also relied on judicial precedents holding that Congress may create territorial courts that do not "incorporate the structural assurances of judicial independence" provided for in Article III of the Constitution—namely, life tenure and protection against reduction in pay—as decisive authority. From the perdurance of these non-Article III courts across the territories (excepting, of course, Puerto Rico which although still an unincorporated territory has had, since 1966, an Article III court),[9] the district court reasoned that "Congress can thus create territorial entities that are distinct

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[9] Act of Sept. 12, 1966, Public Law 89-571, 80 Stat. 764 (granting judges appointed to the District of Puerto Rico the same life tenure and retirement rights granted to judges of all other United States district courts); see also Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594 n.26 (1976) ("The reason given [by Congress] for [Public Law 89-571] was that the Federal District Court in Puerto Rico 'is in its jurisdiction, powers, and responsibilities the same as the U.S. district courts in the (several) States.'" (quoting S. Rep. No. 89-1504 at 2 (1966))); Igartúa-De La Rosa v. United States, 417 F.3d 145, 169 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) ("An Article III District Court sits [in Puerto Rico], providing nearly one-third of the appeals filed before [the Court of Appeals for the First Circuit], which sits in Puerto Rico at least twice a year, also in the exercise of Article III power."); United States v. Santiago, 23 F. Supp. 3d 68, 69 (D.P.R. Feb. 12, 2014) (collecting cases and scholarly articles).

in structure, jurisdiction, and powers from the federal government."

Turning to the relationship between Congress and Puerto Rico, the district court noted that "Congress has long exercised its Article IV plenary power to structure and define governmental entities for the island," in reference to the litany of congressional acts that have shaped Puerto Rico's local government since 1898, including the Treaty of Paris of 1898, the Foraker Act of 1900, the Jones-Shafroth Act of 1917, and Public Law 600 of 1950.

Furthermore, with regards to PROMESA and its Board, the district court afforded "substantial deference" to "Congress's determination that it was acting pursuant to its Article IV territorial powers in creating the . . . Board as an entity of the government of Puerto Rico." The district court then proceeded to consider whether Congress can create an entity that is not inherently federal. It concluded in the affirmative, because finding otherwise would "ignore[] both the plenary nature of congressional power under Article IV and the well-rooted jurisprudence . . . establish[ing] that any powers of self-governance exercised by territorial governments are exercised by virtue of congressional delegation rather than inherent local sovereignty." Accordingly, the district court found that the "creation of an entity such as the . . . Board through popular election would not change the . . . Board's ultimate source of authority from a constitutional perspective." The court deemed this so because "neither the case law nor the historical practice . . . compels a finding that federal appointment necessarily renders an appointee a

federal officer." The district court therefore concluded that the Board is a territorial entity notwithstanding

> [t]he fact that the . . . Board's members hold office by virtue of a federally enacted statutory regime and are appointed by the President[,] [because this] does not vitiate Congress's express provisions for creation of the . . . Board as a territorial government entity that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government."

After ruling that the Board is a "territorial entity and its members are territorial officers," the district court finally determined that "Congress had broad discretion to determine the manner of selection for members of the . . . Board," which Congress "exercised . . . in empowering the President with the ability to both appoint and remove members from the . . . Board." On this final point, the district court observed that "[a]lthough historical practice . . . indicates that Congress has required Senate confirmation for certain territorial offices, nothing in the Constitution precludes the use of that mechanism for positions created under Article IV, and its use does not establish that Congress was obligated to invoke it."

The district court was certainly correct that Article IV conveys to Congress greater power to rule and regulate within a territory than it can bring to bear within the fifty states. In brief, within a territory, Congress has not only its customary power, but also the power to make rules and regulations such as a state government may make within its state. See U.S. Const. art. IV, § 3, cl. 2; D.C. v. John R. Thompson Co., 346 U.S. 100, 106 (1953); Simms v. Simms, 175 U.S. 162, 168 (1899). As

we will explain, however, we do not view these expanded Article IV powers as enabling Congress to ignore the structural limitations on the manner in which the federal government chooses federal officers, and we deem the Board Members—save its ex officio member[10]—to be federal officers.

DISCUSSION

A. The Territorial Clause Does Not Trump the Appointments Clause

However much Article IV may broaden the reach of Congress's powers over a territory as compared to its power within a state, this case presents no claim that the substance of PROMESA's numerous rules and regulations exceed that reach. Instead, appellants challenge the way the federal government has chosen the individuals who will implement those rules and regulations. This challenge trains our focus on the power of Congress vis-à-vis the other branches of the federal government. Specifically, the Board claims that Article IV effectively allows Congress to assume what is otherwise a power of the President, and to share within the two bodies of Congress a power only assigned to the Senate.

We reject this notion that Article IV enhances Congress's capabilities in the intramural competitions established by our divided system of government. First, the Board seems to forget—and the district court failed

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[10] No Appointments Clause challenge has been brought concerning the Governor of Puerto Rico, or the Governor's designee, who serves as an ex officio Board member without voting rights. See 48 U.S.C. § 2121(e)(3). Our holding is therefore limited to the seven Board Members appointed pursuant to 48 U.S.C. § 2121(e)(1)-(2).

to recognize and honor—the ancient canon of interpretation that we believe is a helpful guide to disentangle the interface between the Appointments Clause and the Territorial Clause: generalia specialibus non derogant (the "specific governs the general"). See, e.g., Turner v. Rogers, 564 U.S. 431, 452-53 (2011) (Thomas, J., dissenting) (applying this canon in the context of constitutional interpretation in a conflict between the Due Process Clause and the Sixth Amendment); Albright v. Oliver, 510 U.S. 266, 273-74 (1994) (plurality opinion).

The Territorial Clause is one of general application authorizing Congress to engage in rulemaking for the temporary governance of territories. See Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion). But such a general empowerment does not extend to areas where the Constitution explicitly contemplates a particular subject, such as the appointment of federal officers. Nowhere does the Territorial Clause reference the subject matter of federal appointments or the process to effectuate them. On the other hand, federal officer appointment is, of course, the raison d'etre of the Appointments Clause. It cannot be clearer or more unequivocal that the Appointments Clause mandates that it be applied to "all . . . Officers of the United States." U.S. Const. art II, § 2, cl. 2 (emphasis added). Thus, we find in answering the first question before us a prime candidate for application of the specialibus canon and for the strict enforcement of the constitutional mandate contained in the Appointments Clause.

Consider next the Presentment Clause of Article I, Section 7. Under that clause, a bill passed by both chambers of Congress cannot become law until it is pre-

sented to, and signed by, the President (or the President's veto is overridden). U.S. Const. art. I, § 7, cl. 2. Surely no one argues that Article IV should be construed so as to have allowed Congress to enact PROMESA without presentment, or to have overridden a veto without the requisite super-majority vote in both houses. Nor does anyone seriously argue that Congress could have relied on its plenary powers under Article IV to alter the constitutional roles of its two respective houses in enacting PROMESA.

Like the Presentment Clause, the Appointments Clause constitutionally regulates how Congress brings its power to bear, whatever the reach of that power might be. The Appointments Clause serves as one of the Constitution's important structural pillars, one that was intended to prevent the "manipulation of official appointments"—an "insidious . . . weapon of eighteenth century despotism." Freytag v. Comm'r, 501 U.S. 868, 883 (1991) (citations omitted); see also Edmond v. United States, 520 U.S. 651, 659 (1997). The Appointments Clause was designed "to prevent[] congressional encroachment" on the President's appointment power, while "curb[ing] Executive abuses" by requiring Senate confirmation of all principal officers. Edmond, 520 U.S. at 659. It is thus universally considered "among the significant structural safeguards of the constitutional scheme." Id.

It is true that another restriction that is arguably a structural limitation on Congress's exercise of its powers —the nondelegation doctrine—does bend to the peculiar demands of providing for governance within the territories. In normal application, the doctrine requires that "when Congress confers decisionmaking authority upon

agencies," it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). Otherwise, Congress has violated Article I, Section 1 of the Constitution, which vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." Id.; see also U.S. Const. art. I, § 1. In connection with the territories, though, Congress can delegate to territorial governments the power to enact rules and regulations governing territorial affairs. See John R. Thompson Co., 346 U.S. at 106 ("The power of Congress to delegate legislative power to a territory is well settled."); Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-23 (1937); see also Simms, 175 U.S. at 168 ("In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory."). The Supreme Court has analogized the powers of Congress over the District of Columbia and the territories to that of states over their municipalities. See John R. Thompson Co., 346 U.S. at 109. In the state-municipality context, "[a] municipal corporation . . . is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality." Barnes v. D.C., 91 U.S. 540, 544 (1875); see also John R. Thompson Co., 346 U.S. at 109 ("It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no

constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power subject of course to constitutional limitations to which all law-making is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted."). The Supreme Court has also made clear that, in delegating power to the territories, Congress can only act insofar as "other provisions of the Constitution are not infringed." Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932).

The territorial variations on the traditional restrictions of the nondelegation doctrine pose no challenge by Congress to the power of the other branches. Any delegation must take the form of a duly enacted statute subject to the President's veto. Furthermore, the territorial exception to the nondelegation doctrine strikes us as strongly implicit in the notion of a territory as envisioned by the drafters of the Constitution. The expectation was that territories would become states. See Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting). Hence, Congress had a duty—at least a moral duty—to manage a transition from federal to home rule. While the final delegation takes place in the act of formally creating a state, it makes evident sense that partial delegations of home-rule powers would incrementally precede full statehood. Accordingly, from the very beginning, Congress created territorial legislatures to which it delegated rule-making authority. See, e.g., An Ordinance for the Government of the Territory of the United States north-west of the river Ohio (1787), ch. 8, 1 Stat. 50, 51 n.(a) (1789).

None of these justifications for limiting the nondelegation doctrine to accommodate one of Congress's most salient purposes in exercising its powers under Article IV applies to the Appointments Clause. Nor does the teaching of founding era history. To the contrary, the evidence suggests strongly that Congress in 1789 viewed the process of presidential appointment and Senate confirmation as applicable to the appointment by the federal government of federal officers within the territories. That first Congress passed several amendments to the Northwest Ordinance of 1787 "so as to adopt the same to the present Constitution of the United States." Id. at 51. One such conforming amendment eliminated the pre-constitutional procedure for congressional appointment of officers within the territory and replaced it with presidential nomination and appointment "by and with the advice and consent of the Senate." Id. at 53.

More difficult to explain is United States v. Heinszen, 206 U.S. 370, 384-85 (1907). The actual holding in Heinszen sustained tariffs on goods to the Philippines where the tariffs were imposed first by the President and then thereafter expressly ratified by Congress. In sustaining those tariffs, the Court stated that Congress could have delegated the power to impose the tariffs to the President beforehand, citing United States v. Dorr, 195 U.S. 138 (1904), a case that simply held that Congress could provide for criminal tribunals in the territories without also providing for trial by jury. Id. at 149. Heinszen cannot be explained as an instance of Congress enabling home rule in a territory. Rather, it seems to allow Congress to delegate legislative power to the President, citing the territorial context as a justification. Heinszen, though, has no progeny that might

shed light on how reliable it might serve as an apt analogy in the case before us. Moreover, Heinszen concerned a grant of power by Congress, not a grab for power at the expense of the executive.

For the foregoing reasons, we find in the nondelegation doctrine no apt example to justify an exception to the application of the Appointments Clause within the territories. An exception from the Appointments Clause would alter the balance of power within the federal government itself and would serve no necessary purpose in the transitioning of territories to states.

Further, the Board points us to Palmore v. United States, 411 U.S. 389 (1973). That case arose out of Congress's exercise of its plenary powers over the District of Columbia under Article I, Section 8, Clause 17, powers which are fairly analogous to those under Article IV. See John R. Thompson Co., 346 U.S. at 105-09. The Court held that Congress could create local courts—like state courts—that did not satisfy the requirements of Article III. Palmore, 411 U.S. at 410. The Board would have us read Palmore as an instance of Congress's plenary powers over a territory trumping the requirements of another structural pillar of the Constitution. We disagree. The Court explained at length how Article III itself did not require that all courts created by Congress satisfy the selection and tenure requirements of Article III. Id. at 407 ("It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against

salary reduction."). Rather, the requirements of Article III are applicable to courts "devoted to matters of national concern," id. at 408, and that local courts "primarily . . . concern[ed] . . . with local law and to serve as a local court system" created by Congress pursuant to its plenary powers are simply another example of those courts that did not fit the Article III template (like state courts empowered to hear federal cases, military tribunals, the Court of Private Land Claims, and consular courts), id. at 404, 407, 408. In short, Article III was not trumped by Congress's creation of local courts pursuant to its Article I power. Rather, Article III itself accommodates exceptions, and the local D.C. court system fits within the range of those exceptions. That there are courts in other territories of the same ilk does not alter this analysis. Palmore therefore offers no firm ground upon which to erect a general Article IV exception to separation-of-powers stalwarts such as the Appointments Clause.

Finally, nothing about the "Insular Cases"[11] casts doubt over our foregoing analysis. This discredited[12] lineage

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[11] De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes, 182 U.S. 244; Huus v. New York & Porto Rico Steamship Co., 182 U.S. 392 (1901).

[12] See, e.g., Christina Duffy Burnett, A Convenient Constitution?: Extraterritoriality After Boumediene, 109 Colum. L. Rev. 973, 982 (2009) (noting the Insular Cases have "long been reviled" for concluding that "the Constitution does not 'follow the flag' outside the United States"); Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 437 (2011) (criticizing that "the Insular Cases relied on Dred Scott as authority for the constitutional relationship between Congress and acquired territories"); Andrew Kent, Boumediene, Munaf,

of cases, which ushered the unincorporated territories doctrine, hovers like a dark cloud over this case. To our knowledge there is no case even intimating that if Congress acts pursuant to its authority under the Territorial Clause it is excused from conforming with the Appointments Clause, whether this be by virtue of the "Insular Cases" or otherwise. Nor could there be, for it would amount to the emasculation from the Constitution of one of its most important structural pillars. We thus have no trouble in concluding that the Constitution's structural provisions are not limited by geography and follow the United States into its unincorporated territories. See Downes, 182 U.S. at 277 (Brown, J.) (noting that "prohibitions [going] to the very root of the power

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and the Supreme Court's Misreading of the Insular Cases, 97 Iowa L. Rev. 101 (2011); Charles E. Littlefield, The Insular Cases, 15 Harv. L. Rev. 169, 170 (1901) ("The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history."); Gerald L. Neuman, Anomalous Zones, 48 Stan. L. Rev. 1197, 1221 (1996) (observing that "the colonialism authorized in the Insular Cases . . . was not justified by either peculiar necessity or consent"); Efrén Rivera Ramos, The Legal Construction of American Colonialism: The Insular Cases (1901-1922), 65 Rev. Jur. U.P.R. 225 (1996); Juan R. Torruella, The Insular Cases: The Establishment of a Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283 (2007); Adriel I. Cepeda Derieux, Note, A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure, 110 Colum. L. Rev. 797 (2010); Lisa María Pérez, Note, Citizenship Denied: The Insular Cases and the Fourteenth Amendment, 94 Va. L. Rev. 1029 (2008); see also José A. Cabranes, Puerto Rico: Colonialism as Constitutional Doctrine, 100 Harv. L. Rev. 450 (1986) (reviewing Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1985)).

of Congress to act at all, irrespective of time or place" are operative in the unincorporated territories).

Notwithstanding this doctrine, appellant UTIER asks us to go one step further and reverse the "Insular Cases." Although there is a lack of enthusiasm for the perdurance of these cases,[13] which have been regarded as a "relic from a different era," Reid, 354 U.S. at 12, and which Justice Frankfurter described as "historically and juridically, an episode of the dead past about as unrelated to the world of today as the one-hoss shay is to the latest jet airplane," Reid v. Covert 351 U.S. 487, 492 (1956) (Frankfurter, J., reserving judgment), we cannot be induced to engage in an ultra vires act merely by siren songs. Not only do we lack the authority to meet UTIER's request, but even if we were writing on a clean slate, we would be required to stay our hand when dealing with constitutional litigation if other avenues of decision were available, and we believe there are in this case.

In this respect, we are aided again by the Supreme Court's decision in Reid, which although refusing to reverse the "Insular Cases" outright, provides in its plurality opinion instructive language that outlines the appropriate course we ought to pursue in the instant appeal:

> The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental

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[13] See supra note 12.

> power is American citizenship. . . . [I]t is our judgment that neither the cases nor their reasoning should be given any further expansion.

Reid, 354 U.S. at 14 (plurality opinion) (emphasis added); see also Boumediene v. Bush, 553 U.S. 723, 765 (2008) ("Our basic charter cannot be contracted away. . . . The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.").

The only course, therefore, which we are allowed in light of Reid is to not further expand the reach of the "Insular Cases." Accordingly, we conclude that the Territorial Clause and the "Insular Cases" do not impede the application of the Appointments Clause in an unincorporated territory, assuming all other requirements of that provision are duly met.

B. Board Members Are "Officers of the United States" Subject to the Appointments Clause

We must now determine whether the Board Members qualify within the rubric of "Officers of the United States," the Appointments Clause's job description that marks the entry point for its coverage. The district court determined that the Board Members do not fall under such a rubric. We disagree.

We begin our analysis by turning to a triad of Supreme Court decisions: Lucia v. SEC, 138 S. Ct. 2044 (2018); Freytag, 501 U.S. 868; and Buckley v. Valeo, 424 U.S. 1 (1976). From these cases, we gather that the following "test" must be met for an appointee to qualify as an "Officer of the United States" subject to the Appointments Clause: (1) the appointee occupies a "continuing" posi-

tion established by federal law; (2) the appointee "exercis[es] significant authority"; and (3) the significant authority is exercised "pursuant to the laws of the United States." See Lucia, 138 S. Ct. at 2050-51; Freytag, 501 U.S. at 881; Buckley, 424 U.S. at 126. In our view, the Board Members readily meet these requirements.

First, Board Members occupy "continuing positions" under a federal law since PROMESA provides for their appointment to an initial term of three years and they can thereafter be reappointed and serve until a successor takes office. 48 U.S.C. § 2121(e)(5)(A), (C)-(D). The continuity of the Board Members' position is fortified by the provision that only the President can remove them from office and then only for cause. Id. § 2121(e)(5)(B). In fact, the Board Members' term in office could well extend beyond three years, as PROMESA stipulates that the Board will continue in operation until it certifies that the Commonwealth government has met various fiscal objectives "for at least 4 consecutive fiscal years." Id. § 2149(2).

Second, the Board Members plainly exercise "significant authority." For example, PROMESA empowers the Board Members to initiate and prosecute the largest bankruptcy in the history of the United States municipal bond market, see Yasmeen Serhan, Puerto Rico Files for Bankruptcy, The Atlantic (May 3, 2017), https://www.theatlantic.com/news/archive/2017/05/puerto-rico-files-for-bankruptcy/525258/, with the bankruptcy power being a quintessential federal subject matter, see U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish uniform Laws on the subject of Bankruptcies throughout the United States."). The Supreme Court recently reminded the Commonwealth

government of the bankruptcy power's exclusive federal nature in Franklin Cal. Tax-Free Trust, 136 S. Ct. at 1938.

The Board Members' federal authority includes 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. See 48 U.S.C. § 2144 ("Review of activities to ensure compliance with fiscal plan."). Likewise, the Board showcases what can be construed as nothing but its significant authority when it rejects the budget of the Commonwealth or one of its instrumentalities, see id. § 2143 ("Effect of finding of noncompliance with budget"); when it rules on the validity of a fiscal plan proposed by the Commonwealth, id. § 2141(c)(3); when it issues its own fiscal plan if it rejects the Commonwealth's proposed plan, id. § 2141(d)(2) (authorizing the Board to develop a "Revised Fiscal Plan"); and when it exercises its sole discretion to file a plan of adjustment for Commonwealth debt, id. § 2172(a) ("Only the Oversight Board . . . may file a plan of adjustment of the debts of the debtor."). The Board can only employ these significant powers because a federal law so provides.

Moreover, Board Members' investigatory and enforcement powers, as carried out collectively by way of the Board, exceed or are at least equal to those of the judicial officers the Supreme Court found to be "Officers of the United States" in Lucia. See 138 S. Ct. at 2053. There, the Supreme Court held that administrative law judges are "Officers of the United States," in part, because they can receive evidence at hearings and administer oaths. Id. PROMESA grants the Board Members the same right and more. See 48 U.S.C. § 2124(a); id. § 2124(b) ("Any member . . . of the Oversight Board

may, if authorized by the Oversight Board, take any action that the Oversight Board is authorized to take by this section."); id. § 2124(c) ("Obtaining official data"); id. § 2124(f) ("Subpoena power"). In short, the Board Members enjoy "significant discretion" as they carry out "important functions," Freytag, 501 U.S. at 881, under a federal law—qualities that the Supreme Court has considered for decades as the birthmark of federal officers who are subject to the Appointments Clause.

Third, the Board Members' authority is exercised "pursuant to the laws of the United States." The Board Members trace their authority directly and exclusively to a federal law, PROMESA. That federal law provides both their authority and their duties. Essentially everything they do is pursuant to federal law under which the adequacy of their performance is judged by their federal master. And this federal master serves in the seat of federal power, not San Juan. The Board Members are, in short, more like Roman proconsuls picked in Rome to enforce Roman law and oversee territorial leaders than they are like the locally selected leaders that Rome allowed to continue exercising some authority. See, e.g., Louis J. Sirico, Jr., The Federalist and the Lessons of Rome, 75 Miss. L.J. 431, 484 (2006); Dávila Asks House for Reily Inquiry, N.Y. Times (Apr. 5, 1922), https://timesmachine.nytimes.com/timesmachine/1922/04/05/112681107.pdf. (comparing the then-appointed Governor of Puerto Rico to a Roman proconsul)

The United States makes two arguments in support of the district court's opinion and PROMESA's current appointments protocol that warrant our direct response at this point. First, the United States argues that his-

torical precedent suggests the inapplicability of the Appointments Clause to the territories. Second, the United States contends that if we find for appellants, such a ruling will invalidate the present-day democratically elected local governments of Puerto Rico and the other unincorporated territories because the officers of such governments took office without the Senate's advice and consent. We reject each argument in turn.

The relevant historical precedents of which we are aware lead us to a different conclusion than that claimed by the United States. Excepting the short period during which Puerto Rico was under military administration following the Spanish-American War, the major federal appointments to Puerto Rico's civil government throughout the first half of the 20th century all complied with the Appointments Clause.

Beginning in 1900 with the Foraker Act, the Governor of Puerto Rico was to be nominated by the President and confirmed by the Senate to a term of four years "unless sooner removed by the President." An Act temporarily to provide revenues and a civil government for Porto Rico, ch. 191, 31 Stat. 77, 81 (1900). The Foraker Act also mandated presidential nomination and Senate confirmation of the members of Puerto Rico's "Executive Council" (which assumed the dual role of executive cabinet and upper chamber of the territorial legislature). Id. The Executive Council consisted of a secretary, an attorney general, a treasurer, an auditor, a commissioner of the interior, a commissioner of education, and five other persons "of good repute." Id. In addition, the Foraker Act also subjected the justices of the Puerto Rico Supreme Court, along with the marshal and judge of the territorial U.S. District Court for the District of

"Porto" Rico, to the strictures of the Appointments Clause. Id. Even the three members of a commission established to compile and revise the laws of "Porto" Rico were made subject to the Appointments Clause. Id.

The Foraker Act regime lasted until 1917, when Congress passed the Jones-Shafroth Act. See An Act to provide a civil government for Porto Rico, ch. 145, 39 Stat. 951 (1917). Here again, Congress provided for all key appointments by Washington to Puerto Rico's territorial government to meet the Appointments Clause: the governor, attorney general, commissioner of education, supreme court justices, district attorney, U.S. marshal, and U.S. territorial district judge were to be appointed by the President with the advice and consent of the Senate. Id. In sum, between 1900 and 1947—the last time the Island had a federally-selected Governor—each of the presidentially appointed Governors of Puerto Rico acquired their office after receiving the Senate's blessing.[14]

As the United States would have it, Congress's requirement of Senate confirmation for presidential nominees in all of the aforementioned contexts was mere voluntary legislative surplusage. This position, however,

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[14] The early appointments to high-level office in the territorial governments of the Philippines, Guam, and the Virgin Islands also conformed with the Appointments Clause. See Organic Act of Guam of 1950, § 6, 64 Stat. 512 (1950) (providing that the Governor of Guam "shall be appointed by the President, by and with the advice and consent of the Senate of the United States"); Organic Act of Virgin Islands, § 20, 49 Stat. 1807 (1936) (providing for the presidential nomination and Senate confirmation of the Governor, who will then be under supervision of the Secretary of the Interior). Even the Panama Canal Zone, during its period under United States control, had a Governor appointed by the President "by and with the advice of the Senate." See Panama Canal Act, 37 Stat. 560 (1912).

directly contravenes the published opinions of the United States' own Office of Legal Counsel issued as recently as 2007. See "Officers of the United States Within the Meaning of the Appointments Clause," 31 Op. O.L.C. 73, 122 (2007) ("[A]n individual who will occupy a position to which has been delegated by legal authority a portion of the sovereign powers of the federal government, which is 'continuing,' must be appointed pursuant to the Appointments Clause."); see also Jennifer L. Mascott, Who Are "Officers of the United States", 70 Stan. L. Rev. 443, 564 (2018) ("Extensive evidence suggests that the original public meaning of 'officer' in Article II includes all federal officials with responsibility for an ongoing statutory duty."). At a minimum, the United States' posture runs head against the sound principle of legislative interpretation bordering on dogma that "'[l]ong settled and established practice is a consideration of great weight in proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014) (citing The Pocket Veto Case, 279 U.S. 655, 689 (1929)). Furthermore, the United States fails to support its assertion with legislative history or other evidence establishing that Congress's largely consistent adherence to Appointments Clause procedures in appointing territorial officials was gratuitous. Lacking such an explanation, we believe it is more probable that Congress was simply complying with what the Constitution requires. Furthermore, that largely consistent compliance with Appointment Clause procedures in hundreds if not thousands of instances over two centuries belies any claim that adherence to those procedures impedes Congress's exercise of its plenary powers within the territories.

The United States, as well as the Board, also point to the manner in which Congress has for centuries allowed territories to elect territorial officials, including for example the governor of Puerto Rico since 1947. See An Act to amend the Organic Act of Puerto Rico, ch. 490, 61 Stat. 770 (1947). Congress created many of these territorial positions and they were filled not through presidential nomination and Senate confirmation, but rather by elections within the territory. The Board's basic point (and the United States' basic point as well) is this: If we find that the Board Members must be selected by presidential nomination and Senate confirmation, then that would mean that, for example, all elected territorial governors and legislators have been selected in an unconstitutional manner.

We disagree. The elected officials to which the Board and the United States point—even at the highest levels—are not federal officers. They do not "exercise significant authority pursuant to the laws of the United States." See Lucia, 138 S. Ct. at 2051; Freytag, 501 U.S. at 881; Buckley, 424 U.S. at 126; see also United States v. Germaine, 99 U.S. 508, 511-12 (1878). Rather, they exercise authority pursuant to the laws of the territory. Thus, in Puerto Rico for example, the Governor is elected by the citizens of Puerto Rico, his position and power are products of the Commonwealth's Constitution, see Puerto Rico Const. art. IV, and he takes an oath similar to that taken by the governor of a state, id. § 16; see also, e.g., N.Y. Const. art. XIII, § 1; Ala. Const. art. XVI, § 279; N.H. Const. pt. II, art. 84.

It is true that the Commonwealth laws are themselves the product of authority Congress has delegated by statute. See Puerto Rico v. Sánchez Valle, 136 S. Ct.

1863, 1875 (2016). So the elected Governor's power ultimately depends on the continuation of a federal grant. But that fact alone does not make the laws of Puerto Rico the laws of the United States, else every claim brought under Puerto Rico's laws would pose a federal question. See Viqueira v. First Bank, 140 F.3d 12, 19 (1st Cir. 1998) ("[T]he plaintiffs' complaint alleges manifold claims under Puerto Rico law, but it fails to assert any claim arising under federal law. Accordingly, no jurisdiction lies under 28 U.S.C. § 1331."); Everlasting Dev. Corp. v. Sol Luis Descartes, 192 F.2d 1, 6 (1st Cir. 1951) ("Of course, in so far as the controversy relates to the construction of an insular [Puerto Rico] tax exemption statute, that is not a federal question.").

C. The Board Members are Principal Officers of the United States

Having concluded that the Board Members are indeed United States officers, we now turn to the specific means by which they must be appointed pursuant to the Appointments Clause. If the officer is a "principal" officer, the only constitutional method of appointment is by the President, by and with the advice and consent of the Senate. U.S. Const. Art. II, § 2, cl. 2; Edmond, 520 U.S. at 659. But when an officer is "inferior," Congress may choose to vest the appointment in the President alone, the courts, or a department head. Edmond, 520 U.S. at 660; U.S. Const. Art. II, § 2, cl. 2. And the Board argues (but we do not decide) that the President appointed the Board Members notwithstanding the restricted choice from congressional lists.

In Morrison v. Olson, the Supreme Court held that an independent counsel was an "inferior" officer because she was subject to removal by the attorney general and

because she had limited duties, jurisdiction, and tenure, among other factors. 487 U.S. 654, 671-672 (1988). More than a decade later, the Court held that an "inferior" officer was one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Edmond, 520 U.S. at 663. Our circuit later squared the two cases by holding that Edmond's supervision test was sufficient, but not necessary.[15] See United States v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000). Therefore, inferior officers are those who are directed and supervised by a presidential appointee; otherwise, they "might still be considered inferior officers if the nature of their work suggests sufficient limitations of responsibility and authority." Id.

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[15] There has been long-lasting confusion as to whether Morrison is still good law. See NLRB v. SW Gen., Inc., 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring) ("Although we did not explicitly overrule Morrison in Edmond, it is difficult to see how Morrison's nebulous approach survived our opinion in Edmond."); Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 810, 811 (1999) (arguing that Morrison provided "a doctrinal test good for one day only" and that in Edmond the Supreme Court "apparently abandoned Morrison's ad hoc test"); but see In re Grand Jury Investigation, 315 F. Supp. 3d 602, 640 (D.D.C. 2018) (considering the Morrison factors in determining that special counsel is an inferior officer of the United States). More recently, in Free Enter. Fund v. Public Co. Accounting Oversight Bd., the Supreme Court held that members of the Public Company Accounting Oversight Board, who were supervised by the SEC, were inferior officers. 561 U.S. 477, 510 (2010). In so doing, the Court cited Edmond for the proposition that "[w]hether one is an 'inferior' officer depends on whether he has a superior." Id. However, the Edmond language has already been analyzed by this court and reconciled with Morrison. Because Free Enterprise does not explicitly overrule Morrison, it does not affect our precedent.

The Board Members clearly satisfy the Edmond test. They are answerable to and removable only by the President and are not directed or supervised by others who were appointed by the President with Senate confirmation. 48 U.S.C. § 2121(e)(5)(B); Edmond, 520 U.S. at 663. Considering the additional Morrison factors does not change the calculus. Though the Board Members' tenure "is 'temporary' in the sense that [they are] appointed essentially to accomplish a single task, and when that task is over the [Board] is terminated," Morrison, 487 U.S. at 672, the Board's vast duties and jurisdiction are insufficiently limited. Significantly, while the independent counsel in Morrison was unable to "formulate policy for the Government or the Executive Branch," PROMESA explicitly grants such authority. See 48 U.S.C. § 2144(b)(2). And whereas the jurisdiction of the independent counsel was limited, Morrison, 487 U.S. at 672, the Board's authority spans across the economy of Puerto Rico—a territory with a population of nearly 3.5 million—overpowering that of the Commonwealth's own elected officials. Under Edmond and Morrison, the Board Members are "principal" United States officers. See Hilario, 218 F.3d at 25. They therefore should have been appointed by the President, by and with the advice and consent of the Senate. Art. II, § 2, cl. 2.

THE REMEDY

Having concluded that the process PROMESA provides for the appointment of Board Members is unconstitutional, we are left to determine the relief to which appellants are entitled. Both Aurelius and the UTIER ask that we order dismissal of the Title III petitions that

the Board filed to commence the restructuring of Commonwealth debt. In doing so, appellants suggest that we ought to deem invalid all of the Board's actions until today and that this case does not warrant application of the de facto officer doctrine. It would then be on a constitutionally reconstituted Board, they say, to ratify or not ratify the unconstitutional Board's actions. Appellants also request that we sever from 48 U.S.C. § 2121(e) the language that authorizes the Board Members' appointment without Senate confirmation.

There is no question but that in fashioning a remedy to correct the constitutional violation we have found it is unlikely that a perfect solution is available. In choosing among potential options, we ought to reduce the disruption that our decision may cause. But we are readily aided by several factors in this respect.

First, PROMESA itself contains an express severability clause, stating as follows:

> Except as provided in subsection (b) [regarding uniformity of similarly situated territories], if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby, provided that subchapter III is not severable from subchapters I and II, and subchapters I and II are not severable from subchapter III.

48 U.S.C. § 2102.

Such a clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of [a] constitutionally offensive

provision." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987).

Severability in this instance is especially appropriate because Congress, within PROMESA, has already provided an alternative appointments mechanism, at least as to six of the Board Members. PROMESA directs that if the mechanism we found unconstitutional is not employed, "[w]ith respect to the appointment of a Board member . . . such an appointment shall be by and with the advice and consent of the Senate, unless the President appoints an individual from a list, . . . in which case no Senate confirmation is required." 48 U.S.C. § 2121(e)(2)(E) (emphasis added).

Accordingly, we hold that the present provisions allowing the appointment of Board Members in a manner other than by presidential nomination followed by the Senate's confirmation are invalid and severable. We do not hold invalid the remainder of the Board membership provisions, including those providing the qualifications for office and for appointment by the President with the advice and consent of the Senate.

Second, we reject appellants' invitation to dismiss the Title III petitions and cast a specter of invalidity over all of the Board's actions until the present day. To the contrary, we find that application of the de facto officer doctrine is especially appropriate in this case.

An ancient tool of equity, 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 . . . to office is deficient." Ryder v. United States, 515 U.S. 179, 180 (1995) (citing Norton v. Shelby Cnty.,

118 U.S. 425, 440 (1886)); see also Note, The De Facto Officer Doctrine, 63 Colum. L. Rev. 909, 909 n.1 (1963) ("The first reported case to discuss the concept of de facto authority was The Abbe of Fountaine, 9 Hen. VI, at 32(3) (1431)."). A de facto officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." Waite v. Santa Cruz, 184 U.S. 302, 323 (1902). Our sister court for the D.C. Circuit has described the doctrine as "protect[ing] citizens' reliance on past government actions and the government's ability to take effective and final action." Andrade v. Lauer, 729 F.2d 1475, 1499 (D.C. Cir. 1984).

Here, the Board Members were acting with the color of authority—namely, PROMESA—when, as an entity, they decided to file the Title III petitions on the Commonwealth's behalf, a power squarely within their lawful toolkit. And there is no indication but that the Board Members acted in good faith in moving to initiate such proceedings. See Leary v. United States, 268 F.2d 623, 627 (9th Cir. 1959). Moreover, the Board Members' titles to office were never in question until our resolution of this appeal.

Other considerations further counsel for our application of the de facto officer doctrine. We fear that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now. In addition, a summary invalidation of everything the Board has done since 2016 will likely introduce further delay into a historic debt

restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017. See Stephanie Gleason, Puerto Rico's Bankruptcy Delayed, Moved to New York Following Hurricane María, The Street (Sept. 26, 2017), https://www.thestreet.com/story/14320965/1/puerto-rico-s-bankruptcy-delayed-moved-to-new-york-following-hurricane-maria.html. At a minimum, dismissing the Title III petitions and nullifying the Board's years of work will cancel out any progress made towards PROMESA's aim of helping Puerto Rico "achieve fiscal responsibility and access to the capital markets." 48 U.S.C. § 2121(a).

We therefore decline to order dismissal of the Board's Title III petitions. Our ruling, as such, does not eliminate any otherwise valid actions of the Board prior to the issuance of our mandate in this case. In so doing, we follow the Supreme Court's exact approach in Buckley, 424 U.S. at 1, which involved an Appointments Clause challenge to the then recently formed Federal Election Commission. Although the Court held that the Commission was in fact constituted in violation of the Appointments Clause, id. at 140, it nonetheless found that such a constitutional infirmity did "not affect the validity of the Commission's . . . past acts," id. at 142. We conclude the same here and find that severance is the appropriate relief to which appellants are entitled after they successfully and "timely challenge[d] . . . the constitutional validity of" the Board Members' appointment. Ryder, 515 U.S. at 182-83.

Finally, our mandate in these appeals shall not issue for 90 days, so as to allow the President and the Senate

to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause. Cf. Weinberger v. Romero-Barceló, 456 U.S. 305, 312-313 (1982). During the 90-day stay period, the Board may continue to operate as until now.

CONCLUSION

In sum, we hold that the Board Members (other than the ex officio Member) must be, and were not, appointed in compliance with the Appointments Clause. Accordingly, the district court's conclusion to the contrary is reversed. We direct the district court to enter a declaratory judgment to the effect that PROMESA's protocol for the appointment of Board Members is unconstitutional and must be severed. We affirm, however, the district court's denial of appellants' motions to dismiss the Title III proceedings. Each party shall bear its own costs.

So ordered.

Reversed in part and Affirmed in part.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PROMESA Title III

No. 17 BK 3283-LTS
(Jointly Administered)

IN RE THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE OF COMMONWEALTH OF PUERTO RICO, ET AL., DEBTORS[1]

Filed: July 13, 2018

OPINION AND ORDER DENYING THE AURELIUS MOTIONS TO DISMISS THE TITLE III PETITION AND FOR RELIEF FROM THE AUTOMATIC STAY

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[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are (i) the Commonwealth of Puerto Rico (the "Commonwealth") (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("PRHTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 04780-LTS) (Last Four Digits of Federal Tax ID: 3747).

LAURA TAYLOR SWAIN, United States District Judge

Before the Court are (I) the *Objection and Motion of Aurelius to Dismiss Title III Petition* (Docket Entry No.[2] 913, the "Motion to Dismiss"), and (II) the *Motion of Aurelius for Relief from the Automatic Stay* (Docket Entry No. 914, the "Lift Stay Motion" and, together with the Motion to Dismiss, the "Motions"). The movants are Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC (collectively, "Aurelius"). Aurelius argues principally that the debt adjustment case filed for the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico") under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 et seq. ("PROMESA"), must be dismissed as unauthorized. Aurelius also argues that further PROMESA-related activity must be enjoined because the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), which filed the Title III proceeding on behalf of the Commonwealth, was appointed in a manner inconsistent with the requirements of the Appointments Clause of Article II, Section 2, Clause 2 of the Constitution of the United States (the "Constitution"). A submission supporting the position advanced by Aurelius was filed by the Ad Hoc Group of General Obligation Bondholders. (Docket Entry No. 1627.) Opposition submissions have been filed by the United States of America (the "United States"), the Oversight Board, the American Federation of State, County and Municipal Employees, the Official

[2] All docket entry references are to entries in Case No. 17-BK-3283-LTS, unless otherwise specified.

Committee of Retired Employees of the Commonwealth of Puerto Rico, the Official Committee of Unsecured Creditors (the "Committee"), the COFINA Senior Bondholders' Coalition (the "COFINA Seniors"), and the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"). (Docket Entry Nos. 1610, 1622, 1623, 1629, 1631, 1634, 1638, 1640, 1929.) The Court heard argument on the instant Motions on January 10, 2018 (the "Hearing"), and has considered carefully all of the arguments and submissions made in connection with the Motions.[3] For the reasons that follow, the Motion to Dismiss is denied in its entirety and the Lift Stay Motion is denied in light of the determinations set forth below, for failure to show cause.

I.

BACKGROUND

The following summary reflects matters that are undisputed in the parties' submissions, or of which the Court may take judicial notice.

As discussed in more detail below, Puerto Rico became a territory of the United States under the Treaty of Paris, following the Spanish American War of 1898. Treaty of Paris art. 9, Dec. 10, 1898, 30 Stat. 1759. In accordance with the Territories Clause of the Constitution, U.S. Const. art. IV, § 3, cl. 2, which provides that

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[3] The Court also heard oral argument at the Hearing in connection with a motion to dismiss the complaint in Union De Trabajadores De La Industria Electrica Y Riego (UTIER) v. PREPA, et al., 17-AP-228-LTS (D.P.R.), an adversary proceeding filed in PREPA's Title III case that raises issues substantially similar to those argued in this current motion practice. The Court will address that motion in a separate decision.

Congress "shall have Power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," Congress has provided for military, and then civilian, local governance of Puerto Rico. Pursuant to a constitution developed by the people of Puerto Rico and approved by Congress, Puerto Rico's status has been that of a Commonwealth since 1952, led by a popularly elected Governor and Legislature. See Act of July 3, 1952, 66 Stat. 327; P.R. Const. art. I, §§ 1, 2.

In 2016, in response to the longstanding and dire fiscal emergency of the Commonwealth, Congress enacted PROMESA "pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories." 48 U.S.C.A. § 2121(b)(2) (West 2017). PROMESA established, among other things, federal statutory authority pursuant to which federal territories, including the Commonwealth, may restructure their debts.[4] See Id. § 2194(n).

PROMESA created the Oversight Board as "an entity within the territorial government" of Puerto Rico. Id. § 2121(c)(1).[5] Funding for the Oversight Board is derived entirely from the Commonwealth's resources.

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[4] PROMESA is codified at 48 U.S.C. § 2101 et seq. References to "PROMESA" provisions in the remainder of this Opinion are to the uncodified version of the legislation unless otherwise indicated. Puerto Rico and its public instrumentalities are not authorized to seek debt relief under the United States Bankruptcy Code.

[5] PROMESA further provides that the Oversight Board "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C.A. § 2121(c)(2) (West 2017).

Id. § 2127. The Oversight Board is tasked with developing "a method [for Puerto Rico] to achieve fiscal responsibility and access to the capital markets." Id. § 2121(a). In aid of that purpose, PROMESA empowers the Oversight Board to, among other things, approve the fiscal plans and budgets of the Commonwealth and its instrumentalities, override Commonwealth executive and legislative actions that are inconsistent with approved fiscal plans and budgets, and commence a bankruptcy-type proceeding in federal court on behalf of the Commonwealth or its instrumentalities. Id. §§ 2141-2152; 2175(a). In a Title III proceeding, the Oversight Board acts as the sole representative of the debtor and may "take any action necessary on behalf of the debtor to prosecute the case of the debtor." Id. § 2175(a). The Oversight Board is the only entity empowered to propose a plan of debt adjustment on behalf of the Commonwealth or a debtor instrumentality. Id. § 2172(a). In carrying out its duties under PROMESA, the Oversight Board may hold hearings, take testimony, and receive evidence; obtain data from the federal and territorial governments; obtain creditor information; issue subpoenas; enter into contracts; enforce certain laws of the Commonwealth; and seek judicial enforcement of its authority. Id. § 2124(a), (c)-(d), (f)-(h), (k). While it is created as an entity within the government of Puerto Rico, it is not subject to supervision or control by the Governor of Puerto Rico (the "Governor") or the Legislature of Puerto Rico (the "Legislature"). Id. § 2128(a). It is, however, required to submit an annual report to the President of the United States (the "President") and Congress of the United States ("Congress") and the Governor and Legislature. Id. § 2148.

The Oversight Board is composed of seven voting members, with the Governor or his designee serving ex officio as an additional non-voting member. Id. § 2121(e)(1), (3).[6] PROMESA provides that the President "shall appoint" the seven voting members as follows: one "may be selected in the President's sole discretion" and six "should be selected" from specific lists of candidates provided by congressional leaders.[7] Id. § 2121(e)(2)(A)-(B) (emphasis added). PROMESA does not require Presidential nomination and Senate confirmation for the President's discretionary appointees and members chosen from the congressional lists. Id. § 2121(e)(2)(E). However, in the event that the President appoints members that are not named on the congressional lists, Senate confirmation is required under PROMESA.[8] Id. On August 31,

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[6] Congress modeled the Oversight Board's structure after an entity created by Congress in 1995 to address a fiscal crisis in the District of Columbia. See 162 Cong. Rec. H3604 (daily ed. June 9, 2016) (statement of Rep. Lucas) (stating that, in 1995, Congress "passed a bill very similar to [PROMESA]. We set up a supervisory board that took control of [D.C.'s] finances to help right the ship."); see also District of Columbia Financial Responsibility Management and Assistance Act of 1995 ("DCFRMAA"), Pub. L. No. 104-8, 109 Stat. 97 (1995). The Financial Responsibility and Management Assistance Authority ("D.C. Control Board") was established within the District of Columbia government, see DCFRMAA, § 101(a), and its members were appointed by the President without Senate confirmation, id. § 101(b).

[7] Under PROMESA, the lists may be supplemented upon the President's request. 48 U.S.C.A. § 2121(e)(2)(C).

[8] PROMESA also provides that if any of the seven voting members had not been appointed by September 1, 2016, the President was required to appoint an individual from the list associated with the vacant position by September 15, 2016. 48 U.S.C.A. § 2121(e)(2)(G). Under PROMESA, any vacancies must be filled "in the same manner in which the original member was appointed." Id. § 2121(e)(6).

2016, President Obama appointed the seven voting members, six members from the congressional lists and one member in his sole discretion. (Docket Entry No. 1929, the "U.S. Mem. of Law," at 6.) Board members are appointed to serve for a term of three years and until the appointment of their successors. 48 U.S.C.A. § 2121(e)(5) (West 2017). As of the date hereof, all of the original appointees continue to serve on the Oversight Board. Thus, to date, no appointment to the Oversight Board has been subject to Senate confirmation. Oversight Board members can be removed only by the President, and only for cause prior to the end of the member's term. Id. § 2121(e)(5)(B).

On May 3, 2017, the Oversight Board commenced a debt adjustment proceeding on behalf of the Commonwealth by filing a petition in this Court under Title III of PROMESA.[9] (See Docket Entry No. 1, the "Title III Petition"). Shortly thereafter, the Oversight Board commenced Title III proceedings on behalf of certain Puerto Rican government instrumentalities, including PREPA.

II.

DISCUSSION

A. Motion to Dismiss

1. Questions Presented

As noted above, Aurelius moves to dismiss the Commonwealth's Title III Petition on the basis that the Oversight Board's membership was not properly appointed and therefore lacked the power to properly invoke Title III of PROMESA by filing the Title III Petition on behalf of the Commonwealth. Section 304(b) of

[9] See Id. §§ 2164, 2172-2174.

PROMESA provides that the Court, after notice and a hearing, may dismiss a petition that "does not meet the requirements of" Title III of PROMESA.[10] 48 U.S.C.A. § 2164(b) (West 2017). Section 302 enumerates the statutory prerequisites that a debtor must satisfy to avail itself of relief pursuant to Title III of PROMESA. Id. § 2162. Specifically, it provides that "[a]n entity may be a debtor" under Title III of PROMESA if:

> (1) the entity is—
>
> (A) a territory that has requested the establishment of an Oversight Board or has had an Oversight Board established for it by the United States Congress in accordance with section 2121 of [PROMESA]; or
>
> (B) a covered territorial instrumentality of a territory described in paragraph (1)(A);
>
> (2) The Oversight Board has issued a certification under section 2146(b) of [PROMESA] for such entity; and
>
> (3) the entity desires to effect a plan to adjust its debts.

Id. § 2162. Aurelius argues that the requirements of Title III are not satisfied in this case because the Oversight Board, as currently constituted, is itself an unlawful entity. Aurelius contends that the selection mechanism established under PROMESA for members of the

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[10] Section 304(b) of PROMESA provides that a Title III petition may not be dismissed during the first 120 days after the commencement of the case. 48 U.S.C.A. § 2164(b) (West 2017). The 120 day waiting period has expired.

Oversight Board is unconstitutional under the Appointments Clause, such that the existing Oversight Board could not lawfully make the requisite certifications and file the petition commencing the Commonwealth's Title III proceeding.

The Appointments Clause of Article II of the Constitution prescribes the method of appointment for "Officers of the United States" whose appointments are not otherwise provided for in the Constitution. U.S. Const. art. II, § 2, cl. 2; see Buckley v. Valeo, 424 U.S. 1, 125-26, 132 (1976). In Buckley, the Supreme Court held that the term "Officers of the United States," as used in Article II of the U.S. Constitution, is "intended to have substantive meaning" and must include "any appointee exercising significant authority pursuant to the laws of the United States." 424 U.S. 1, 125-26. The Appointments Clause distinguishes between "principal officers," who must be nominated by President with advice and consent of the Senate, and "inferior officers," who may be appointed by the "President alone, Courts of Law, or Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Aurelius argues principally that the Appointments Clause procedures were mandatory notwithstanding PROMESA's statutory appointment provisions because the members of the Oversight Board are either (i) principal "Officers of the United States" who could only be validly appointed through presidential nomination and Senate confirmation or, in the alternative, (ii) inferior officers of the United States whose appointment was improperly delegated to the President. (Mot. to Dismiss at 13.) Aurelius requests that the Court dismiss the Title III Petition and terminate this proceeding.

The United States, which has exercised its statutory authority to intervene in these proceedings to defend PROMESA's constitutionality (see 28 U.S.C. § 2403(a)), argues that PROMESA's appointment mechanism is not subject to the Appointments Clause because (i) the Oversight Board members are territorial officers rather than "Officers of the United States," and (ii) the Appointments Clause does not govern the appointment of such territorial officers. (See generally U.S. Mem. of Law.) In support of its position, the United States cites historical practice and argues that Congress's plenary power over the territories is not subject to the distribution of powers provisions that regulate the federal government. (Id. at 8-15.) The Oversight Board primarily raises the same argument. (Docket Entry No. 1622, the "FOMB Opposition," at 7-21.) In addition, the Oversight Board contends that (i) the Appointments Clause does not constitute a "fundamental" constitutional provision and, as such, it does not apply to Puerto Rico, and (ii) even if the Appointments Clause is applicable, the Oversight Board members were properly appointed. (Id. at 23-31.) The other opponents raise substantially similar arguments to those advanced by the United States and the Oversight Board. (See generally, Docket Entry Nos. 1610, 1629, 1631, 1634, 1638, 1640.) The Oversight Board, the Committee and AAFAF further argue that the Court should hold the Oversight Board's past actions de facto valid in the event that the Court finds the Oversight Board's appointment unconstitutional. (FOMB Opp. at 32; Docket Entry No. 1631 at 27; Docket Entry No. 1640 at 31.)

The principal question thus presented for the Court on this motion practice is whether the Constitution required compliance with the Appointments Clause in the

appointment of the Oversight Board members. If such compliance was required, the Court must examine whether the process that was undertaken pursuant to PROMESA was sufficient to meet the constitutional requirement and, if the process was not compliant, whether the Petition must be dismissed as noncompliant with PROMESA. The Court turns now to the principal question. Because Puerto Rico is a territory of the United States, rather than a state, or part of the federal government, and because Congress identified the Constitution's Territories Clause as the source of its authority in enacting PROMESA, the Court looks first to the text and historical interpretation and application of the Territories Clause.

2. Congress's Power Under the Territories Clause

The Territories Clause of Article IV of the Constitution vests Congress with the "[p]ower 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. The Supreme Court has long held that Congress's power under this clause is both "general and plenary." Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) (reasoning that the people of the United States became the "sovereign owners" of the territory of Utah upon its acquisition, that the United States as their government exercises power over the territory subject only to the provisions of the Constitution, and that Congress therefore could supersede pre-acquisition legislative acts). Acting under the Territories Clause, Congress may, for example, create local governments for the territories of the United States. See, e.g., United States v. Wheeler, 435 U.S. 313, 321-22

(1978) (stating that "a territorial government is entirely the creation of Congress," while noting the unique status of Native American tribes, whose prior sovereignty is preserved in certain respects). The constitutional division between state sovereignty over affairs within state borders and affairs ceded to the federal government pursuant to the Constitution is not applicable to territories, whose governments are "the creations, exclusively, of [Congress], and subject to its supervision and control." Benner v. Porter, 50 U.S. 235, 242 (1850); see also Cincinnati Soap Co. v. United States, 301 U.S. 308, 323 (1937) (explaining that "[i]n dealing with the territories . . . Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union").

A federal territory's "relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations." First Nat'l Bank v. Yankton Cty., 101 U.S. 129, 133 (1879). Congress can thus amend the acts of a territorial legislature, abrogate laws of territorial legislatures, and exercise "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." Id. With respect to territorial governance, Congress exercises the governance powers reserved under the Constitution to the people in respect of state matters. Id. In this sense, Congress occupies a dual role with respect to the territories of the United States: as the national Congress of the United States, and as the local legislature of the territory. See Cincinnati Soap Co., 301 U.S. at 317 ("A [territory] has no government but that of the United States, except in

so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible."); see also Keller v. Potomac Elec. Power Co., 261 U.S. 428, 442-43 (1923) (recognizing that, in exercising Congress's substantially identical power over the District of Columbia, Congress had power to create courts "of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts"); Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828) (recognizing the power of Congress to create a territorial court with jurisdiction that could not otherwise have been constitutionally granted to a state court); United States v. McMillan, 165 U.S. 504, 510-11 (1897) (explaining that territorial courts are not "courts of the United States, and do not come within the purview of acts of Congress which speak of 'courts of the United States' only," although Congress exercises the combined powers of the general government, and of a state government with respect to territories and could directly legislate for any territory or "extend the laws of the United States over it, in any particular that congress may think fit.").[11]

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[11] On July 6, 2018, the Court received and reviewed a supplemental informative motion filed by Aurelius (Docket Entry No. 3451, the "Aurelius Supplement") The Court subsequently received and reviewed informative motions filed by the Oversight Board, the United States, and the COFINA Seniors in response to the Aurelius Supplement. (Docket Entry Nos. 3494, 3495, 3500.) In its submission,

Due to its unique role with respect to federal territories, Congress may act "in a manner that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it. . . . " Palmore v. United States, 411 U.S. 389, 398 (1973) (upholding creation of criminal courts for District of Columbia whose judges are not life-tenured). For example, as discussed in more detail below, the Supreme Court has held that the non-delegation doctrine, which prohibits Congress from delegating its legislative authority to another branch of the Government, does not preclude Congress from delegating its

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Aurelius cites the Supreme Court's June 22, 2018 decision in Ortiz v. United States, 138 S. Ct. 2165 (2018), for the propositions that military and territorial courts are created pursuant to similar powers, and if separation of powers concerns pertain to one they must necessarily pertain to the other. (Docket Entry No. 3451 at 5.) The Ortiz Court's focus has no such implications, however. The Court was examining the question of whether the military court rulings before it were within its appellate jurisdiction. It cited past examples of judicial proceedings in state, military and territorial courts from which it had entertained appeals, emphasizing the judicial review, as opposed to executive action or original determination, aspects of the matter that was before it in Ortiz. Ortiz does not speak to the question of whether Congress can create a territorial court or any other entity that is not a court of the United States and is not subject to the Appointments Clause. The Ortiz Court's treatment of the Appointments Clause is similarly inapposite, as the Court held that Congress was empowered to permit the challenged military officer to perform in the job in question and the appellant's Appointments Clause argument (which the Court rejected) concerned whether a single person could be both a principal and an inferior officer of the United States, an issue that is not raised here. See Ortiz, 138 S. Ct. at 2183-84. The supplemental informative brief also cites the Lucia case, which is similarly inapposite as it involved a distinction between an officer of the United States and an employee. Lucia v. S.E.C., 138 S. Ct. 2044 (2018).

legislative authority to a territorial government. See, e.g., District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953) (upholding delegation by Congress of legislative authority to District of Columbia in the context of a challenge to a District law prohibiting racial discrimination); Cincinnati Soap Co., 301 U.S. at 323 (rejecting argument that a revenue measure constituted an unlawful delegation and explaining that the "congressional power of delegation to a [territorial] government is and must be as comprehensive as the needs").

The Supreme Court's jurisprudence regarding territorial courts is instructive with respect to the distinction between territorial and federal entities. In American Insurance Co., the Supreme Court considered a challenge to the admiralty jurisdiction conferred on territorial courts of Florida by a territorial legislature established by congressional legislation. 26 U.S. 511. Chief Justice Marshall, writing for a unanimous Court, drew a distinction between "Constitutional" courts established pursuant to Article III of the Constitution, which, inter alia, commits admiralty jurisdiction to the life-tenured federal judiciary, and courts established pursuant to congressional legislation for the territory of Florida. The judges of the Florida territorial courts established by Congress were appointed only for terms of years. Because Congress had acted under "those general powers which that body possesses over the territories of the United States," the constitutional constraint on admiralty jurisdiction was inapplicable to the "legislative courts" created for the territory and the territorial court, unlike a non-"Constitutional" court situated within a state, could validly rule on admiralty matters. Id. at 546. Legislative Courts in territories derive their power from Congress's ability to create courts under the Territories

Clause of the U.S. Constitution and are vested with jurisdiction by Congress. Id. Their structure and jurisdiction need not comport with those prescribed by the Constitution for courts exercising the "judicial power of the United States" pursuant to Article III. "The jurisdiction with which they are invested, is not a part of that judicial power, which is defined in the [third] article of the Constitution, but is conferred by Congress in the execution of those general powers . . . over the territories of the United States." Id. at 546. Chief Justice Marshall explained that:

> Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the [third] article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.

Id.

Subsequent Supreme Court decisions likewise recognized Congress's power to create judicial structures within territories that have characteristics peculiar to those territories and could not necessarily have been established as courts exercising power on behalf of the United States. See, e.g., Benner, 50 U.S. at 244-45 (holding that, upon admission of Florida as a state, the prior legislative courts created by Congress "in the exercise of its powers in the organization and government of the Territories" could not exercise jurisdiction of matters invoking the judicial power of the United States under Article III of the Constitution and "[n]o place was left unoccupied for the Territorial organization"); Clinton v. Englebrecht, 80 U.S. 434 (1871) (stating that "[t]he judges

of the Supreme Court of the Territory [of Utah] are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold 'courts of the United States'"). Just as territorial courts can, if permitted by Congress, exercise powers that Congress could not have granted to similar courts within the states of the United States, the Constitution does not require Congress to incorporate the structural assurances of judicial independence in Article III of the Constitution (e.g., life tenure and protection against reduction in pay) in establishing such courts. The Supreme Court so held in Palmore, a decision concerning the Superior Court for the District of Columbia. 411 U.S. 389 (1973). Upholding the Superior Court's exercise of jurisdiction of federal criminal felony proceedings, the Court reasoned that its approach was "consistent" with the "view of [the] Court" concerning territorial courts. Id. at 403. Congress can thus create territorial entities that are distinct in structure, jurisdiction, and powers from the federal government.

Turning to Puerto Rico, Congress has long exercised its Article IV plenary power to structure and define governmental entities for the island. Puerto Rico became a territory of the United States, under the Treaty of Paris, following the Spanish American War of 1898. Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. The Treaty of Paris expressly committed to Congress the task of determining "[t]he civil rights and political status" of the inhabitants of Puerto Rico. Id. Shortly thereafter Congress, acting pursuant to its power under the Territories Clause, enacted the Foraker Act and established a civilian government for Puerto Rico. Organic Act of 1900, ch. 191, 31 Stat. 77; see also Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016).

In 1917, Congress again addressed the governance of Puerto Rico by enacting the Jones Act. That federal statute granted United States citizenship to the people of Puerto Rico and allowed the residents of Puerto Rico to elect a bicameral legislature by popular vote. See Organic Act of Puerto Rico, ch. 145, §§ 5, 26, 39 Stat. 951, 953, 958 (1917). Then, in 1947, Congress further shaped Puerto Rico's government by enacting the Elective Governor Act and allowing the residents of Puerto Rico to elect their own governor. See Act of Aug. 5, 1947, ch. 490, § 1, 61 Stat. 770, 771 (1947). In 1950, Congress passed Public Law 600 and gave the Puerto Rican people the right to form an elected self-government and adopt a constitution. Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319 (1950). Pursuant to Public Law 600, the people of Puerto Rico approved a draft constitution and submitted it to Congress for its approval. See id. Congress revised and, on July 3, 1952, approved the Puerto Rico Constitution. See Act of July 3, 1952, ch. 567, 66 Stat. 327 (1952). On July 25, 1952, the Governor proclaimed the effectiveness of the Puerto Rico Constitution and a new political entity was born, the Commonwealth of Puerto Rico. P.R. Const. art. I, §§ 1, 2. In creating these governance structures for Puerto Rico, Congress delegated its direct territorial governance authority to institutions it established for Puerto Rico in a manner that would not have been permissible in the context of the exercise of its powers within the federal government.

As the Supreme Court observed in John R. Thompson Co., "[t]he power of Congress to delegate legislative power to a territory is well settled." 346 U.S. at 106. The Court went on to note that:

> [i]t would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter or revoke the authority granted.

Id. at 109. In Cincinnati Soap Co., the Supreme Court held that the non-delegation doctrine did not preclude Congress from delegating its legislative authority to the territorial government of the Philippines. 301 U.S. 308. The Court explained that Congress's plenary power over the territories "is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union." Id. at 323. Similarly, in United States v. Heinszen, the Supreme Court rejected the argument that Congress was unable to delegate its legislative authority, under the Territories Clause, to the President. 206 U.S. 370, 384-85 (1907).

In summary, Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States. It has exercised this power with respect to Puerto Rico over the course of nearly 120 years, including the delegation to the people of Puerto Rico elements of its plenary Article IV authority by authorizing a significant

degree of local self-governance. Such territorial delegations and structures may, however, be modified by Congress. John R. Thompson, 346 U.S. at 109. Congress purported to do so in creating the Oversight Board as an entity of the territorial government of Puerto Rico. The Court now turns to the question of whether the Oversight Board is a territorial entity and its members officers of the territorial government, or whether its members are officers of the United States who must be appointed pursuant to procedures consistent with the requirements of the Appointments Clause.

3. The Oversight Board

Congress explicitly invoked the Territories Clause, and only the Territories Clause, as its source of authority in enacting PROMESA:

> Constitutional Basis—The Congress enacts [PROMESA] pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.

48 U.S.C.A. § 2121(b)(2) (West 2017). Aurelius argues, nonetheless, that the appointment of Oversight Board members is governed by Article II of the Constitution which, according to Aurelius, requires unfettered nomination by the President and confirmation by the Senate of Oversight Board members as principal officers of the United States. Aurelius urges this proposition on the basis of (i) the federal (as opposed to territorial) authority of the appointing institution, (ii) what Aurelius characterizes as federal control and supervision of the Oversight Board's operations, and (iii) Oversight Board au-

thority that Aurelius contends extends beyond local territorial matters. (Mot. to Dismiss at 18.) The United States, the Oversight Board, and other opponents point to similar factors in arguing that the Oversight Board is territorial and its members lawfully appointed.[12] While neither the parties nor the Court's own research has identified a definitive set of factors relevant to the determination of whether an entity is territorial or federal, many of the factors argued by the parties have been considered in connection with controversies over whether congressionally created entities are private or governmental.[13]

Having examined the factors argued by the parties, the Court finds that Congress's invocation of the Territories Clause is consistent with the entity it purported to create, that the method of selection that Congress

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[12] The United States argues that the Court should consider the "Oversight Board's creation, statutory objectives, authority, characteristics, and relationship with the Federal Government." (U.S. Mem. of Law at 21.) The Oversight Board argues that the Court should consider whether (i) Congress invoked its Article IV power in creating the entity and (ii) the entity's objectives and authority are local rather than national, or whether its responsibilities over local affairs are subordinate and incidental. (FOMB Opp. at 13.) Other parties-in-interest advance similar or alternative standards.

[13] In the context of determining whether an entity is a federal instrumentality for constitutional purposes, the Supreme Court has looked at factors similar to those advanced by the parties. Specifically, in Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 383-400 (1995), and Department of Transportation v. Association of American Railroads, 135 S. Ct. 1225, 1231-33 (2015), the Supreme Court considered the creation, objectives, and practical operation of an entity in determining whether the nominally private entity should be treated as a federal government instrumentality for purposes of individual rights and separation of powers.

fashioned for the membership of the Oversight Board is consistent with the exercise of plenary congressional power under that Clause, and that neither Presidential nomination nor Senate confirmation of the appointees to the Oversight Board is necessary as a constitutional matter to legitimize the exercise of the Oversight Board's powers under PROMESA because the members of the Oversight Board are not "Officers of the United States" subject to the Appointments Clause.

a. Authority for Creation of Board

As noted above, Congress explicitly stated that it was acting pursuant to the Territories Clause when it enacted PROMESA, creating the Oversight Board as a new entity within the Government of Puerto Rico. Congress is entitled to substantial deference when it acts pursuant to its plenary Article IV power. See, e.g., Romeu v. Cohen, 265 F.3d 118, 124 (2d Cir. 2001) (upholding, "[g]iven the deference owed to Congress [under the Territories Clause]" and in light of other constitutional provisions relating to voting rights, a statute providing that Puerto Rican citizens who moved from mainland States to Puerto Rico could not vote in federal presidential elections); Quiban v. Veterans Admin., 928 F.2d 1154, 1160 (D.C. Cir. 1991) (stating that "[t]o require the government . . . to meet the most exacting standard of review . . . would be inconsistent with Congress's '[l]arge powers' to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States'" and thus applying a rational basis test in evaluating the constitutionality of exclusion of veterans of Philippine armed forces from certain federal benefits) (citations omitted).

Congress's determination that it was acting pursuant to its Article IV territorial powers in creating the Oversight Board as an entity of the government of Puerto Rico is entitled to substantial deference. Indeed, Supreme Court jurisprudence regarding Congress's governance of the territories consistently looks to Congress's express declaration regarding whether it is acting pursuant to its power under the Territory Clause of Article IV of the Constitution. See, e.g., Cincinnati Soap Co., 301 U.S. at 323; Binns v. United States, 194 U.S. 486, 494 (1904). As shown above, those powers are plenary and include the power to create and shape the contours of territorial governments. Cf. Palmore, 411 U.S. at 407 (holding that courts in the District of Columbia are local rather than federal because Congress "expressly created" the courts pursuant to its plenary authority and created a body with authority over matters of "strictly local concern").

This factor thus weighs in favor of the legitimacy of the Oversight Board as currently constituted.

b. Can Congress Create an Entity that Is Not Inherently Federal?

Aurelius argues that a fundamental distinction exists between officials appointed by the federal government and those who take their office by virtue of local, territorial authority. (Mot. to Dismiss at 18.) Specifically, Aurelius contends that individuals appointed to their office by the federal government are federal officers, regardless of whether or not the office has federal or national responsibilities. (Id. at 19.) Under the premise advanced by Aurelius, Congress is incapable of both creating and filling a territorial office or entity. Rather, the only officers who may be considered "territorial" are

those who are popularly elected by the residents of a federal territory. (Id. at 21.)

Aurelius' argument that only Puerto Rico itself could have created an entity that was not effectively part of the federal government is unavailing because it ignores both the plenary nature of congressional power under Article IV and the well-rooted jurisprudence, discussed above, that establishes that any powers of self-governance exercised by territorial governments are exercised by virtue of congressional delegation rather than inherent local sovereignty. Thus, creation of an entity such as the Oversight Board through popular election would not change the Oversight Board's ultimate source of authority from a constitutional perspective. Aurelius' argument is therefore meritless. Popular elective authority in territories of the United States derives from Congress, which explicitly states in PROMESA that it has exercised its own power to create a territorial entity.

Aurelius relies principally on two decisions and historical practice in support of its argument. (Id. at 18-19.) It cites Wise v. Withers, in which the Supreme Court concluded that a justice of the peace in the District of Columbia was an "Officer of the United States" for purposes of a statute exempting such officers from military service. 7 U.S. (3 Cranch) 331, 335-37 (1806). The Court did not, however, analyze whether the justice of the peace was an "Officer of United States" for constitutional purposes.[14] Moreover, to the extent Wise can be

[14] The Wise Court appears to have relied on Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), as settling the proposition that a justice of the peace for the District of Columbia is an officer of the United States. Wise, 7 U.S. (3 Cranch) at 336 (stating that "[i]t has been de-

read as establishing that presidential appointment or congressional creation of an office renders the appointee or the institution to which the person is appointed federal, the Supreme Court has deviated from this view in subsequent decisions. See, e.g., Englebrecht, 80 U.S. at 447 (presidential appointment of territorial judges does not render their courts "courts of the United States" within the meaning of the Constitution). Aurelius also relies on United States v. Hartwell, where the Supreme Court considered whether a clerk employed in the federal Treasury Department was an "officer" of the federal government for purposes of federal bank fidelity and embezzlement statutes. 73 U.S. 385, 397 (1867). Although the Hartwell Court noted that the defendant had been appointed by "the head of a department within the meaning of the constitutional provision upon the subject of the appointing power," the Court's focus was on the language of the statute and on the general nature of government office, rather than on the Constitutional status of the office held by the defendant. See id. at 393-95. No issue was presented as to whether the defendant could have been an officer of any government other than that of the United States.

Turning to historical practice, Aurelius points to territorial offices that were established during the early years of the country's history, including positions with authority over the Northwest Territory. (Mot. to Dismiss at 19.) In the instances Aurelius cites, Congress

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cided in this court, that a justice of the peace is an officer"). However, the proposition that Marbury was an officer of the United States was not contested in that 1803 case and the Marbury Court's decision did not expressly address the significance of the identity of the appointing authority or the significance of the method of appointment for the determination of the officer status of the appointee.

provided for the government positions and required that the appointees be appointed by the President and confirmed by the Senate. Aurelius argues that these historical examples evidence an "established" practice and general understanding that federally appointed positions are inherently federal offices. (Id.) Aurelius further argues that historical practice also indicates that officials who are elected by the people of a territory (or who are appointed by popularly elected representatives) are not officers of the federal government. (Id. at 21-22.)

The Oversight Board, and various parties in interest, fundamentally disagree with Aurelius' position and, instead, argue that the source of an official's appointment is irrelevant in determining whether the office is territorial or federal. (See, e.g., FOMB Opp. at 18.) Noting that "there is no evidence . . . that Congress believed advice and consent was constitutionally required" in the past instances where Congress decided to require that certain territorial offices be filled through advice and consent (id. at 11), the Oversight Board contends that Aurelius putative distinction between a federally appointed and a popularly elected official is baseless because a territorial "official's authority always derives from Congress." (Id. at 19 (emphasis in original) (citing Sanchez Valle, 136 S. Ct. at 1875 ("[Behind] the Puerto Rican people and their Constitution, the 'ultimate' source of prosecutorial power remains the U.S. Congress.")).) The Oversight Board argues that "any time Congress exercises its Article IV power to confer authority on a territorial government, it does so by means of a federal statute." (Id. at 20); cf. Barnes v. District of Columbia, 91 U.S. 540 (1875) (holding that the board of public works for the District of Columbia was a part of the mu-

nicipal government. Although its members were "nominated by the President" with the "advice and consent of the Senate," the Court held that "it is quite immaterial, on the question whether [the] board is a municipal agency, from what source the power comes to these officers,—whether by appointment of the President, or by the legislative assembly, or by election."); Metro. R. Co. v. District of Columbia, 132 U.S. 1, 8 (1889) ("The mode of appointing [] officers does not abrogate [an entity's] character as a municipal body politic. We do not suppose that it is necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people.").

The Court agrees with the Oversight Board that neither the case law nor the historical practice cited by Aurelius compels a finding that federal appointment necessarily renders an appointee a federal officer. Any time Congress exercises its Article IV power it does so by means of a federal statute, and all local governance in Puerto Rico traces back to Congress. See United States v. Sanchez, 992 F.2d 1143, 1152 (11th Cir. 1993) (stating that although "Congress has [] delegated more authority to Puerto Rico over local matters . . . . this has not changed in any way Puerto Rico's constitutional status as a territory, or the source of power over Puerto Rico. Congress continues to be the ultimate source of power pursuant to the Territory Clause of the Constitution") (citing United States v. Lopez Andino, 831 F.2d 1164, 1176 (1st Cir. 1987) (Torruella, J, concurring)) (emphasis in original). The fact that the Oversight Board's members hold office by virtue of a federally enacted statutory regime and are appointed by the President does not vitiate Congress's express provisions for creation of the Oversight Board as a territorial government

entity that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." 48 U.S.C.A. § 2121(c) (West 2017). The jurisprudence, historical practice, and Congress's express intention establish that Congress can and has created a territorial entity in this case.

c. Control and Supervision of the Oversight Board

Aurelius argues that a defining characteristic of an entity's territorial or federal status is whether the federal government controls the ongoing operations of the entity. (Mot. to Dismiss at 22.) Aurelius argues that the federal government continues to control and supervise the Oversight Board because of the following:

(i) The Oversight Board reports to the President and Congress under Section 208 of PROMESA. 48 U.S.C.A. § 2148(a) (West 2017).

(ii) The Oversight Board's ongoing ethics obligations are governed by federal conflicts of interest and financial disclosure statutes. Id. § 2129.

(iii) The Oversight Board members may be removed by the President. Id. § 2121(e)(5)(B).

(iv) The Commonwealth's Governor may not remove Board members and "[n]either the Governor nor the Legislature may . . . exercise any control, supervision, oversight, or review over the Oversight Board or its activities." Id. § 2128(a).

(v) The Oversight Board wields its authority pursuant to the provisions of a federal statute, PROMESA.

(Mot. to Dismiss at 22-23.) The Oversight Board argues, inter alia, that these qualities are not determina-

tive of whether the office is territorial or federal, because federal appointment and removal have historically been common attributes of territorial offices due to Congress's unique role in structuring local governance for federal territories. (FOMB Opp. at 20.) In fact, the United States contends that "the nature of degree of the Federal Government's supervision of the Oversight Board is consistent with the Oversight's Board territorial character." (U.S. Mem. of Law at 23.) These points are well taken.

Furthermore, Aurelius reads excessive significance into the provisions of PROMESA upon which it relies. Although Section 208 of PROMESA does require the "[Oversight] Board [to make] reports to the President and Congress" (Mot. to Dismiss at 22), such reports must simultaneously go to the Governor and Legislature. 48 U.S.C.A. § 2148 (West 2017). They are no more indicative of supervision by federal authorities than of supervision by the territorial authorities. Indeed, PROMESA's express prohibition of the exercise of control over the Oversight Board by the Governor and Legislature (see id. § 2128(a)) suggests that the reporting requirement is not an instrument of control or supervision at all. Notably, the statute provides that the Oversight Board may use the reporting mechanism as an opportunity to provide "recommendations to the President and Congress on changes to [PROMESA] or other Federal laws . . . that would assist [Puerto Rico] in complying with any certified Fiscal Plan." Id. § 2148(a)(3). The fact that the President and Congress are included in the list of parties entitled to receive the Oversight Board's annual report does not mean that the Oversight Board is

subject to the federal government's control.[15] Nor is it unprecedented for Congress to require a territorial officer to report to the federal government. For example, under the Jones Act, the Governor was required to report annually to Congress and the executive branch, despite the fact that the Governor was elected by the people of Puerto Rico. Jones Act § 12.

The fact that members of the Oversight Board may not be removed by the Governor or the Legislature and are, instead, only removable by the President "for cause" is indicative of the autonomy and independence that Congress intended for the Oversight Board rather than of control by the federal government. See, e.g., Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (upholding a for cause removal provision in the context of the Federal Trade Commission); Mistretta v. United States, 488 U.S. 361, 411 (1989) (Congress "insulated" Sentencing Commission members from Presidential removal except for good cause "precisely to ensure that they would

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[15] In Association of American Railroads, the Supreme Court considered whether Amtrak constituted a federal entity rather than a private one for constitutional purposes. 135 S. Ct. 1225 (2015). Specifically, the Association of American Railroads sued the Department of Transportation and others, claiming that the section of Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") requiring Amtrak to jointly develop standards to evaluate performance of Amtrak's intercity passenger trains was unconstitutional. In determining that Amtrak constituted a federal instrumentality for constitutional purposes, the Court cited the fact that Amtrak was required to submit various annual reports to Congress and the President, among many other factors. Id. at 1232. The Court also considered Amtrak's creation, objectives, and practical operation. Although the Oversight Board in this case provides annual reports to the President and Congress, that factor is not alone dispositive.

not be subject to coercion."). Some mechanism for removal was obviously necessary as a practical matter. Provision for removal by the territorial Governor or Legislature would have undermined the express statutory preclusion of the exercise of control by those authorities over the Oversight Board. Removal by act of Congress would have raised practical impediments to swift action when necessary. Delegating removal authority to the President, the most powerful executive officer in the nation, and limiting such removal to circumstances where there is cause, appears to ensure that the power will not be used lightly and is thus consistent with the intended independence of the Oversight Board. The Court finds no basis for interpretation of the removal provision as an indicator of federal control that would render the board members officers of the United States rather than territorial officials.

Aurelius is correct in asserting that the Oversight Board exercises authority that was "conferred by a federal statute" and that the nature of its work often requires the Oversight Board to turn to the requirements specified in a federal statute. That is not, however, remarkable, since the Oversight Board was created as an instrumentality of a territory that is under the sovereign control of the federal government. Congress is capable of operating only through the enactment of legislation. As detailed above, Congress has established the structure of Puerto Rico's local governance on numerous instances and, in each instance, it has done so through the enactment of legislation. Territorial governments are "the creations, exclusively, of the legislative department" and the local governance within a federal territory is necessarily derived from Congress. Benner, 50 U.S. at

242. For example, the Commonwealth's own constitution was subject to congressional approval prior to becoming effective. The facts that the Oversight Board's authority was conferred upon it by a federal statute and that the statute delineates its duties do not of themselves render the Oversight Board a federal entity.

d. Oversight Board's Statutory Objectives and Scope of Authority

The parties generally agree that the Court should examine the objectives and authority of the Oversight Board to determine whether they are targeted towards purely local matters. (See, e.g., Mot. to Dismiss at 18; FOMB Opp. at 14.) The plain language of the statute indicates that the Oversight Board's objectives and authority are centered on Puerto Rico. PROMESA is specifically directed towards federal territories and the purpose of the Oversight Board is confined to an express territorial objective: "provid[ing] a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets." 48 U.S.C.A. § 2121(a) (West 2017). Pursuant to PROMESA, the Oversight Board is required to maintain an office in Puerto Rico. Id. § 2122. The Oversight Board's primary responsibilities are solely concentrated on Puerto Rico's economic recovery. See, e.g., id. §§ 2141 (approval of fiscal plans), 2164 (commencement of restructuring court proceedings). The Oversight Board does not receive funding from the federal government and is instead funded entirely by Puerto Rico.[16] Id. § 2127. The Oversight Board acts as Puerto Rico's representative in invoking the debt adjustment

[16] Compare Ass'n of Am. R.Rs., 135 S. Ct. at 1232 (considering the fact that an entity was dependent on federal financial support in considering whether such entity was "federal").

authority of the federal government, just as a private debtor, trustee, or debtor in possession would do in settling an estate or pursuing a reorganization under the federal Bankruptcy Code. Puerto Rican law, as opposed to federal law, prescribes the Oversight Board's investigative authority. Id. § 2124(f). PROMESA's express declaration that the Oversight Board is not a federal agency exempts the Board from numerous federal laws that apply to federal agencies (e.g., the Freedom of Information Act ("FOIA") and the Administrative Procedure Act (the "APA")). See 5 U.S.C.A. §§ 551(1)(c), 552(f) (2017) (FOIA applies to "each authority of the Government of the United States," but not "the governments of the territories"); 5 U.S.C.A. § 701(b)(1)(c) (2017) (regarding the APA and providing the same exclusion). While it is true that Congress has chosen to apply federal ethics rules and requirements to the Oversight Board, the invocation of that body of law does not change the substantive focus or nature of the exercise of authority of the Oversight Board to purposes extraneous to Puerto Rico's economic health and future prospects, nor does it expand PROMESA's reach beyond the affairs of covered territories. The Oversight Board's statutory objectives and scope of authority thus mark its character as territorial rather than federal.

e. Selection Mechanism

Given that the Oversight Board is a territorial entity and its members are territorial officers, Congress had broad discretion to determine the manner of selection for members of the Oversight Board. Congress exercised that discretion in empowering the President with the ability to both appoint and remove members from

the Oversight Board. The President's role in the selection process does not change the fundamental nature of the Oversight Board, which is a territorial entity. Nor does the manner of selection constitute an improper delegation of power[17] or encroachment on the President's general appointment authority, because Congress used its Article IV powers and did not attempt to allow the President to appoint the Board as a federal entity within the Executive Branch. Cf. Brewer v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 953 F. Supp. 406, 410 (D.D.C. 1997) (rejecting a separation-of-powers challenge involving the D.C. Control Board because "[t]he

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[17] Aurelius cites Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) ("MWAA"), in support of the proposition that Congress's Property Clause authority is subject to separation of powers. In that case, an Act of Congress authorized the transfer of operating control of two airports from the Department of Transportation to the Metropolitan Washington Airports Authority (the "Authority"). The Authority was created pursuant to a compact between the state of Virginia and the District of Columbia. The Act of Congress also authorized the creation of a board of review (the "Review Board"), consisting solely of congressional members and vested with the authority to veto decisions made by the Authority's board of directors. The Supreme Court held that the Review Board was unconstitutional on separation of powers grounds, notwithstanding the fact that Congress was acting pursuant to the Property Clause. MWAA, 501 U.S. at 270-71. Specifically, through the Review Board, Congress either encroached on the Executive Branch by exercising executive power or failed to satisfy the bicameralism and presentment requirements by exercising legislative power. Id. at 276. Importantly, the Court's holding was premised on a finding that the Review Board was a federal entity wielding federal power. In this case, the Oversight Board does not include members of Congress and, as explained above, the Oversight Board is an entity within the territorial government of Puerto Rico that exercises power delegated to it by Congress.

Executive Branch has no constitutional role with respect to the District that corresponds or competes with that of Congress"). Although historical practice, as detailed above, indicates that Congress has required Senate confirmation for certain territorial offices, nothing in the Constitution precludes the use of that mechanism for positions created under Article IV, and its use does not establish that Congress was obligated to invoke it.

f. Conclusion—Motion to Dismiss the Petition

Affording substantial deference to Congress and for the foregoing reasons, the Court finds that 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, that its members are not "Officers of the United States" who must be appointed pursuant to the mechanism established for such officers by Article II of the Constitution, and that there is accordingly no constitutional defect in the method of appointment provided by Congress for members of the Oversight Board. Since the alleged defect in the appointment method is the only ground upon which Aurelius argues that the Commonwealth's Title III Petition fails to comport with the requirements of PROMESA, Aurelius' motion to dismiss the Petition is denied. In light of the foregoing determinations, it is unnecessary to address the parties' remaining arguments.

B. Motion to Lift the Automatic Stay

In connection with its Motion to Dismiss, Aurelius filed a Lift Stay Motion seeking either (i) clarification that the automatic stay under 11 U.S.C. §§ 362 and 922 (made applicable to Title III proceedings generally by

48 U.S.C. § 2162(a)) does not apply to its effort to invalidate the actions of the current Oversight Board, or, in the alternative, (ii) relief from the stay so that Aurelius may pursue an independent action for declaratory and injunctive relief outside the Title III case against the Oversight Board based on the same arguments that Aurelius has advanced in support of its Motion to Dismiss. At the Hearing, counsel for Aurelius stated that Aurelius filed the Lift Stay Motion as a precaution to ensure that it could obtain full scope injunctive relief if it were to prevail on its Appointments Clause challenge. (Tr. P. 36, 16-24.) For the reasons detailed above, Aurelius has failed to demonstrate any prospect of entitlement to injunctive relief. Accordingly, there is no cause for relief from the automatic stay to pursue an injunction and the Lift Stay Motion is denied in its entirety.

III.

CONCLUSION

For the foregoing reasons, the *Objection and Motion of Aurelius to Dismiss Title III Petition* (Docket Entry No. 913) is denied, and the *Motion of Aurelius for Relief from the Automatic Stay* (Docket Entry No. 914) is denied as well. This Opinion and Order resolves docket entry nos. 913 and 914.

SO ORDERED.

Dated: July 13, 2018

/s/ LAURA TAYLOR SWAIN
LAURA TAYLOR SWAIN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 18-1671, 18-1746, and 18-1787

AURELIUS INVESTMENT, LLC, ET AL., APPELLANTS

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,
APPELLEES

ASSURED GUARANTY CORPORATION, ET AL.,
APPELLANTS

v.

FINANCIAL OVERSIGHT AND MANAGEMENT
BOARD, ET AL., APPELLEES

UNIÓN DE TRABAJADORES DE LA INDUSTRIA
ELÉCTRICA Y RIEGO (UTIER), APPELLANT

v.

PUERTO RICO ELECTRIC POWER AUTHORITY, ET AL.,
APPELLEES

Entered: Mar. 7, 2019

ORDER OF COURT

Before: HOWARD, Chief Judge, TORRUELLA, LYNCH, THOMPSON, KAYATTA and BARRON*, Circuit Judges.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Helgi C. Walker
Theodore B. Olson
Matthew D. McGill
Luis A. Oliver-Fraticelli
Katarina Stipec Rubio
Jeremy Max Christiansen
Lucas Townsend
Lochlan Francis Shelfer
Wandymar Burgos-Vargas
Hermann D. Bauer-Alvarez
Timothy W. Mungovan
Donald B. Verrilli Jr.
Susana I. Penagaricano Brown
Carla Garcia-Benitez
Ubaldo M. Fernandez
Chantel L. Febus
Michael R. Hackett

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* Judge Barron is recused and did not participate in the consideration of this matter.

Stephen L. Ratner
Margaret Antinori Dale
John E. Roberts
Mark David Harris
Martin J. Bienenstock
Ehud Barak
Daniel Jose Perez-Refojos
Michael Luskin
Stephan E. Hornung
Chad Golder
Michael A. Firestein
Lary Alan Rappaport
Ginger D. Anders
William D. Dalsen
Jeffrey W. Levitan
Sarah G. Boyce
Rachel G. Miller Ziegler
Guy Brenner
Andres W. Lopez
Walter Dellinger
Peter M. Friedman
John J. Rapisardi
Suzzanne Uhland
William J. Sushon
Mariana E. Bauza Almonte
Mark R. Freeman
Michael Shih
Laura Myron
Jeffrey B. Wall
Jose Ramon Rivera-Morales
Lawrence S. Robbins
Richard A. Rosen
Mark Stancil
Donald Burke

Ariel N. Lavinbuk
Kyle J. Kimpler
Walter Rieman
Andrew N. Rosenberg
Karen R. Zeituni
Manuel A. Rodriguez-Banchs
Michael Louis Artz
Antonio Juan Bennazar-Zequeira
Ian Heath Gershengorn
Richard B. Levin
Robert D. Gordon
Catherine Steege
Melissa M. Root
Diana M. Batlle-Barasorda
Juan J. Casillas-Ayala
Luc A. Despins
Alberto Juan Enrique Aneses-Negron
Georg Alexander Bongartz
Michael E. Comerford
Sylvia M. Arizmendi-Lopez de Victoria
Rafael Escalera-Rodriguez
Charles J. Cooper
Fernando Van Derdys
Carlos R. Rivera-Ortiz
Susheel Kirpalani
David Michael Cooper
Gustavo Adolfo Pabon-Rico
Howard C. Nielson Jr.
Haley N. Proctor
Michael W. Kirk
John Ohlendorf
Ralph C. Ferrara
Ann M. Ashton
Raul Castellanos-Malave

Joseph P. Davis III
Katiuska Bolanos-Lugo
Monsita Lecaroz-Arribas
Emil J. Rodriguez Escudero
Jorge Martinez-Luciano
Anibal Acevedo-Vila
Jose A. Hernandez-Mayoral
Hector J. Ferrer-Rios
Heriberto J. Burgos-Perez
Ricardo F. Casellas-Sanchez
Diana Perez-Seda
Rolando Emmanuelli-Jimenez
Jessica Esther Mendez-Colberg
Lindsay C. Harrison
William K. Dreher
Matthew S. Blumin

APPENDIX D

1. 48 U.S.C. 2121 (Supp. V 2017) provides:

Financial Oversight and Management Board

(a) Purpose

The purpose of the Oversight Board is to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.

(b) Establishment

(1) Puerto Rico

A Financial Oversight and Management Board is hereby established for Puerto Rico.

(2) Constitutional basis

The Congress enacts this chapter pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.

(c) Treatment

An Oversight Board established under this section—

(1) shall be created as an entity within the territorial government for which it is established in accordance with this subchapter; and

(2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.

(d) Oversight of territorial instrumentalities

(1) Designation

(A) In general

An Oversight Board, in its sole discretion at such time as the Oversight Board determines to be appropriate, may designate any territorial instrumentality as a covered territorial instrumentality that is subject to the requirements of this chapter.

(B) Budgets and reports

The Oversight Board may require, in its sole discretion, the Governor to submit to the Oversight Board such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the Oversight Board determines to be necessary and may designate any covered territorial instrumentality to be included in the Territory Budget; except that the Oversight Board may not designate a covered territorial instrumentality to be included in the Territory Budget if applicable territory law does not require legislative approval of such covered territorial instrumentality's budget.

(C) Separate Instrumentality Budgets and reports

The Oversight Board in its sole discretion may or, if it requires a budget from a covered territorial instrumentality whose budget does not require legislative approval under applicable territory law, shall designate a covered territorial instrumentality to be the subject of an Instrumen-

tality Budget separate from the applicable Territory Budget and require that the Governor develop such an Instrumentality Budget.

(D) Inclusion in Territory Fiscal Plan

The Oversight Board may require, in its sole discretion, the Governor to include a covered territorial instrumentality in the applicable Territory Fiscal Plan. Any covered territorial instrumentality submitting a separate Instrumentality Fiscal Plan must also submit a separate Instrumentality Budget.

(E) Separate Instrumentality Fiscal Plans

The Oversight Board may designate, in its sole discretion, a covered territorial instrumentality to be the subject of an Instrumentality Fiscal Plan separate from the applicable Territory Fiscal Plan and require that the Governor develop such an Instrumentality Fiscal Plan. Any covered territorial instrumentality submitting a separate Instrumentality Fiscal Plan shall also submit a separate Instrumentality Budget.

(2) Exclusion

(A) In general

An Oversight Board, in its sole discretion, at such time as the Oversight Board determines to be appropriate, may exclude any territorial instrumentality from the requirements of this chapter.

(B) Treatment

A territorial instrumentality excluded pursuant to this paragraph shall not be considered to be a covered territorial instrumentality.

(e) Membership

(1) In general

(A) The Oversight Board shall consist of seven members appointed by the President who meet the qualifications described in subsection (f) and section 2129(a) of this title.

(B) The Board shall be comprised of one Category A member, one Category B member, two Category C members, one Category D member, one Category E member, and one Category F member.

(2) Appointed members

(A) The President shall appoint the individual members of the Oversight Board, of which—

(i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives;

(ii) the Category B member should be selected from a separate, non-overlapping list of individuals submitted by the Speaker of the House of Representatives;

(iii) the Category C members should be selected from a list submitted by the Majority Leader of the Senate;

(iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives;

(v) the Category E member should be selected from a list submitted by the Minority Leader of the Senate; and

(vi) the Category F member may be selected in the President's sole discretion.

(B) After the President's selection of the Category F Board member, for purposes of subparagraph (A) and within a timely manner—

(i) the Speaker of the House of Representatives shall submit two non-overlapping lists of at least three individuals to the President; one list shall include three individuals who maintain a primary residence in the territory or have a primary place of business in the territory;

(ii) the Senate Majority Leader shall submit a list of at least four individuals to the President;

(iii) the Minority Leader of the House of Representatives shall submit a list of at least three individuals to the President; and

(iv) the Minority Leader of the Senate shall submit a list of at least three individuals to the President.

(C) If the President does not select any of the names submitted under subparagraphs (A) and (B), then whoever submitted such list may supplement the lists provided in this subsection with additional names.

(D) The Category A member shall maintain a primary residence in the territory or have a primary place of business in the territory.

(E) With respect to the appointment of a Board member in Category A, B, C, D, or E, such an appointment shall be by and with the advice and consent of the Senate, unless the President appoints an individual from a list, as provided in this subsection, in which case no Senate confirmation is required.

(F) In the event of a vacancy of a Category A, B, C, D, or E Board seat, the corresponding congressional leader referenced in subparagraph (A) shall submit a list pursuant to this subsection within a timely manner of the Board member's resignation or removal becoming effective.

(G) With respect to an Oversight Board for Puerto Rico, in the event any of the 7 members have not been appointed by September 1, 2016, then the President shall appoint an individual from the list for the current vacant category by September 15, 2016, provided that such list includes at least 2 individuals per vacancy who meet the requirements set forth in subsection (f) and section 2129 of this title, and are willing to serve.

(3) Ex officio member

The Governor, or the Governor's designee, shall be an ex officio member of the Oversight Board without voting rights.

(4) Chair

The voting members of the Oversight Board shall designate one of the voting members of the Oversight Board as the Chair of the Oversight Board (referred to hereafter in this chapter as the "Chair") within 30 days of the full appointment of the Oversight Board.

(5) Term of service

(A) In general

Each appointed member of the Oversight Board shall be appointed for a term of 3 years.

(B) Removal

The President may remove any member of the Oversight Board only for cause.

(C) Continuation of service until successor appointed

Upon the expiration of a term of office, a member of the Oversight Board may continue to serve until a successor has been appointed.

(D) Reappointment

An individual may serve consecutive terms as an appointed member, provided that such reappointment occurs in compliance with paragraph (6).

(6) Vacancies

A vacancy on the Oversight Board shall be filled in the same manner in which the original member was appointed.

(f) Eligibility for appointments

An individual is eligible for appointment as a member of the Oversight Board only if the individual—

(1) has knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and

(2) prior to appointment, an individual is not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.

(g) No compensation for service

Members of the Oversight Board shall serve without pay, but may receive reimbursement from the Oversight Board for any reasonable and necessary expenses incurred by reason of service on the Oversight Board.

(h) Adoption of bylaws for conducting business of Oversight Board

(1) In general

As soon as practicable after the appointment of all members and appointment of the Chair, the Oversight Board shall adopt bylaws, rules, and procedures governing its activities under this chapter, including procedures for hiring experts and consultants. Such bylaws, rules, and procedures shall be public documents, and shall be submitted by the Oversight Board upon adoption to the Governor, the Legislature, the President, and Congress. The Oversight Board may hire professionals as it determines to be necessary to carry out this chapter.

(2) Activities requiring approval of majority of members

Under the bylaws adopted pursuant to paragraph (1), the Oversight Board may conduct its operations under such procedures as it considers appropriate, except that an affirmative vote of a majority of the members of the Oversight Board's full appointed membership shall be required in order for the Oversight Board to approve a Fiscal Plan under section 2141 of this title, to approve a Budget under section 2142 of this title, to cause a legislative act not to be enforced under section 2144 of this title, or to approve or disapprove an infrastructure project as a Critical Project under section 2213 of this title.

(3) Adoption of rules and regulations of territorial government

The Oversight Board may incorporate in its bylaws, rules, and procedures under this subsection such rules and regulations of the territorial government as it considers appropriate to enable it to carry out its activities under this chapter with the greatest degree of independence practicable.

(4) Executive session

Upon a majority vote of the Oversight Board's full voting membership, the Oversight Board may conduct its business in an executive session that consists solely of the Oversight Board's voting members and any professionals the Oversight Board determines necessary and is closed to the public, but only for the business items set forth as part of the vote to convene an executive session.

2. 48 U.S.C. 2123 (Supp. V 2017) provides:

Executive Director and staff of Oversight Board

(a) Executive Director

The Oversight Board shall have an Executive Director who shall be appointed by the Chair with the consent of the Oversight Board. The Executive Director shall be paid at a rate determined by the Oversight Board.

(b) Staff

With the approval of the Chair, the Executive Director may appoint and fix the pay of additional personnel as the Executive Director considers appropriate, except that no individual appointed by the Executive Director may be paid at a rate greater than the rate of pay for the Executive Director unless the Oversight Board provides for otherwise. The staff shall include a Revitalization Coordinator appointed pursuant to subchapter V of this chapter. Any such personnel may include private citizens, employees of the Federal Government, or employees of the territorial government, provided, however, that the Executive Director may not fix the pay of employees of the Federal Government or the territorial government.

(c) Inapplicability of certain employment and procurement laws

The Executive Director and staff of the Oversight Board may be appointed and paid without regard to any provision of the laws of the covered territory or the Federal Government governing appointments and salaries. Any provision of the laws of the covered territory governing procurement shall not apply to the Oversight Board.

(d) Staff of Federal agencies

Upon request of the Chair, the head of any Federal department or agency may detail, on a reimbursable or nonreimbursable basis, and in accordance with the Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371-3375), any of the personnel of that department or agency to the Oversight Board to assist it in carrying out its duties under this chapter.

(e) Staff of territorial government

Upon request of the Chair, the head of any department or agency of the covered territory may detail, on a reimbursable or nonreimbursable basis, any of the personnel of that department or agency to the Oversight Board to assist it in carrying out its duties under this chapter.

3. 48 U.S.C. 2124 (Supp. V 2017) provides:

Powers of Oversight Board

(a) Hearings and sessions

The Oversight Board may, for the purpose of carrying out this chapter, hold hearings, sit and act at times and places, take testimony, and receive evidence as the Oversight Board considers appropriate. The Oversight Board may administer oaths or affirmations to witnesses appearing before it.

(b) Powers of members and agents

Any member or agent of the Oversight Board may, if authorized by the Oversight Board, take any action that the Oversight Board is authorized to take by this section.

(c) Obtaining official data

(1) From Federal government

Notwithstanding sections 552 (commonly known as the Freedom of Information Act), 552a (commonly known as the Privacy Act of 1974), and 552b (commonly known as the Government in the Sunshine Act) of title 5, the Oversight Board may secure directly from any department or agency of the United States information necessary to enable it to carry out this chapter, with the approval of the head of that department or agency.

(2) From territorial government

Notwithstanding any other provision of law, the Oversight Board shall have the right to secure copies, whether written or electronic, of such records, documents, information, data, or metadata from the territorial government necessary to enable the Oversight Board to carry out its responsibilities under this chapter. At the request of the Oversight Board, the Oversight Board shall be granted direct access to such information systems, records, documents, information, or data as will enable the Oversight Board to carry out its responsibilities under this chapter. The head of the entity of the territorial government responsible shall provide the Oversight Board with such information and assistance (including granting the Oversight Board direct access to automated or other information systems) as the Oversight Board requires under this paragraph.

(d) Obtaining creditor information

(1) Upon request of the Oversight Board, each creditor or organized group of creditors of a covered territory or covered territorial instrumentality seeking to participate in voluntary negotiations shall provide to the Oversight Board, and the Oversight Board shall make publicly available to any other participant, a statement setting forth—

(A) the name and address of the creditor or of each member of an organized group of creditors; and

(B) the nature and aggregate amount of claims or other economic interests held in relation to the issuer as of the later of—

(i) the date the creditor acquired the claims or other economic interests or, in the case of an organized group of creditors, the date the group was formed; or

(ii) the date the Oversight Board was formed.

(2) For purposes of this subsection, an organized group shall mean multiple creditors that are—

(A) acting in concert to advance their common interests, including, but not limited to, retaining legal counsel to represent such multiple entities; and

(B) not composed entirely of affiliates or insiders of one another.

(3) The Oversight Board may request supplemental statements to be filed by each creditor or organized group of creditors quarterly, or if any fact in the most recently filed statement has changed materially.

(e) Gifts, bequests, and devises

The Oversight Board may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Oversight Board. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in such account as the Oversight Board may establish and shall be available for disbursement upon order of the Chair, consistent with the Oversight Board's bylaws, or rules and procedures. All gifts, bequests or devises and the identities of the donors shall be publicly disclosed by the Oversight Board within 30 days of receipt.

(f) Subpoena power

(1) In general

The Oversight Board may issue subpoenas requiring the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers, documents, electronic files, metadata, tapes, and materials of any nature relating to any matter under investigation by the Oversight Board. Jurisdiction to compel the attendance of witnesses and the production of such materials shall be governed by the statute setting forth the scope of personal jurisdiction exercised by the covered territory, or in the case of Puerto Rico, 32 L.P.R.A. App. III. R. 4. 7., as amended.

(2) Failure to obey a subpoena

If a person refuses to obey a subpoena issued under paragraph (1), the Oversight Board may apply to the court of first instance of the covered territory.

Any failure to obey the order of the court may be punished by the court in accordance with civil contempt laws of the covered territory.

(3) Service of subpoenas

The subpoena of the Oversight Board shall be served in the manner provided by the rules of procedure for the courts of the covered territory, or in the case of Puerto Rico, the Rules of Civil Procedure of Puerto Rico, for subpoenas issued by the court of first instance of the covered territory.

(g) Authority to enter into contracts

The Executive Director may enter into such contracts as the Executive Director considers appropriate (subject to the approval of the Chair) consistent with the Oversight Board's bylaws, rules, and regulations to carry out the Oversight Board's responsibilities under this chapter.

(h) Authority to enforce certain laws of the covered territory

The Oversight Board shall ensure the purposes of this chapter are met, including by ensuring the prompt enforcement of any applicable laws of the covered territory prohibiting public sector employees from participating in a strike or lockout. In the application of this subsection, with respect to Puerto Rico, the term "applicable laws" refers to 3 L.P.R.A. 1451q and 3 L.P.R.A. 1451r, as amended.

(i) Voluntary agreement certification

(1) In general

The Oversight Board shall issue a certification to a covered territory or covered territorial instrumentality if the Oversight Board determines, in its sole discretion, that such covered territory or covered territorial instrumentality, as applicable, has successfully reached a voluntary agreement with holders of its Bond Claims to restructure such Bond Claims—

(A) except as provided in subparagraph (C), if an applicable Fiscal Plan has been certified, in a manner that provides for a sustainable level of debt for such covered territory or covered territorial instrumentality, as applicable, and is in conformance with the applicable certified Fiscal Plan;

(B) except as provided in subparagraph (C), if an applicable Fiscal Plan has not yet been certified, in a manner that provides, in the Oversight Board's sole discretion, for a sustainable level of debt for such covered territory or covered territorial instrumentality; or

(C) notwithstanding subparagraphs (A) and (B), if an applicable Fiscal Plan has not yet been certified and the voluntary agreement is limited solely to an extension of applicable principal maturities and interest on Bonds issued by such covered territory or covered territorial instrumentality, as applicable, for a period of up to one year during which time no interest will be paid on the Bond Claims affected by the voluntary agreement.

(2) Effectiveness

The effectiveness of any voluntary agreement referred to in paragraph (1) shall be conditioned on—

(A) the Oversight Board delivering the certification described in paragraph (1); and

(B) the agreement of a majority in amount of the Bond Claims of a covered territory or a covered territorial instrumentality that are to be affected by such agreement, provided, however, that such agreement is solely for purposes of serving as a Qualifying Modification pursuant to subsection[1] 2231(g) of this title and shall not alter existing legal rights of holders of Bond Claims against such covered territory or covered territorial instrumentality that have not assented to such agreement until an order approving the Qualifying Modification has been entered pursuant to section 2231(m)(1)(D) of this title.

(3) Preexisting voluntary agreements

Any voluntary agreement that the territorial government or any territorial instrumentality has executed before May 18, 2016, with holders of a majority in amount of Bond Claims that are to be affected by such agreement to restructure such Bond Claims shall be deemed to be in conformance with the requirements of this subsection.

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[1] So in original. Probably should be a "section".

(j) Restructuring filings

(1) In general

Subject to paragraph (3), before taking an action described in paragraph (2) on behalf of a debtor or potential debtor in a case under subchapter III, the Oversight Board must certify the action.

(2) Actions described

The actions referred to in paragraph (1) are—

(A) the filing of a petition; or

(B) the submission or modification of a plan of adjustment.

(3) Condition for plans of adjustment

The Oversight Board may certify a plan of adjustment only if it determines, in its sole discretion, that it is consistent with the applicable certified Fiscal Plan.

(k) Civil actions to enforce powers

The Oversight Board may seek judicial enforcement of its authority to carry out its responsibilities under this chapter.

(*l*) Penalties

(1) Acts prohibited

Any officer or employee of the territorial government who prepares, presents, or certifies any information or report for the Oversight Board or any of its agents that is intentionally false or misleading, or, upon learning that any such information is false or misleading, fails to immediately advise the Oversight

Board or its agents thereof in writing, shall be subject to prosecution and penalties under any laws of the territory prohibiting the provision of false information to government officials, which in the case of Puerto Rico shall include 33 L.P.R.A. 4889, as amended.

(2) Administrative discipline

In addition to any other applicable penalty, any officer or employee of the territorial government who knowingly and willfully violates paragraph (1) or takes any such action in violation of any valid order of the Oversight Board or fails or refuses to take any action required by any such order, shall be subject to appropriate administrative discipline, including (when appropriate) suspension from duty without pay or removal from office, by order of the Governor.

(3) Report by Governor on disciplinary actions taken

In the case of a violation of paragraph (2) by an officer or employee of the territorial government, the Governor shall immediately report to the Oversight Board all pertinent facts together with a statement of the action taken thereon.

(m) Electronic reporting

The Oversight Board may, in consultation with the Governor, ensure the prompt and efficient payment and administration of taxes through the adoption of electronic reporting, payment and auditing technologies.

(n) Administrative support services

Upon the request of the Oversight Board, the Administrator of General Services or other appropriate Federal agencies shall promptly provide to the Oversight Board, on a reimbursable or non-reimbursable basis, the administrative support services necessary for the Oversight Board to carry out its responsibilities under this chapter.

(*o*) Investigation of disclosure and selling practices

The Oversight Board may investigate the disclosure and selling practices in connection with the purchase of bonds issued by a covered territory for or on behalf of any retail investors including any underrepresentation of risk for such investors and any relationships or conflicts of interest maintained by such broker, dealer, or investment adviser is as provided in applicable laws and regulations.

(p) Findings of any investigation

The Oversight Board shall make public the findings of any investigation referenced in subsection (*o*).

4. 48 U.S.C. 2127 (Supp. V 2017) provides:

Budget and funding for operation of Oversight Board

(a) Submission of budget

The Oversight Board shall submit a budget for each fiscal year during which the Oversight Board is in operation, to the President, the House of Representatives Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature.

(b) Funding

The Oversight Board shall use its powers with respect to the Territory Budget of the covered territory to ensure that sufficient funds are available to cover all expenses of the Oversight Board.

(1) Permanent funding

Within 30 days after June 30, 2016, the territorial government shall designate a dedicated funding source, not subject to subsequent legislative appropriations, sufficient to support the annual expenses of the Oversight Board as determined in the Oversight Board's sole and exclusive discretion.

(2)(A) Initial funding

On the date of establishment of an Oversight Board in accordance with section 2121(b) of this title and on the 5th day of each month thereafter, the Governor of the covered territory shall transfer or cause to be transferred the greater of $2,000,000 or such amount as shall be determined by the Oversight Board pursuant to subsection (a) to a new account established by the territorial government, which shall be available to and subject to the exclusive control of the Oversight Board, without any legislative appropriations of the territorial government.

(B) Termination

The initial funding requirements under subparagraph (A) shall terminate upon the territorial government designating a dedicated funding source not subject to subsequent legislative appropriations under paragraph (1).

(3) Remission of excess funds

If the Oversight Board determines in its sole discretion that any funds transferred under this subsection exceed the amounts required for the Oversight Board's operations as established pursuant to subsection (a), any such excess funds shall be periodically remitted to the territorial government.

5. 48 U.S.C. 2128 (Supp. V 2017) provides:

Autonomy of Oversight Board

(a) In general

Neither the Governor nor the Legislature may—

(1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or

(2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board.

(b) Oversight Board legal representation

In any action brought by, on behalf of, or against the Oversight Board, the Oversight Board shall be represented by such counsel as it may hire or retain so long as the representation complies with the applicable professional rules of conduct governing conflicts of interests.

6. 48 U.S.C. 2129 (Supp. V 2017) provides:

Ethics

(a) Conflict of interest

Notwithstanding any ethics provision governing employees of the covered territory, all members and staff of the Oversight Board shall be subject to the Federal conflict of interest requirements described in section 208 of title 18.

(b) Financial disclosure

Notwithstanding any ethics provision governing employees of the covered territory, all members of the Oversight Board and staff designated by the Oversight Board shall be subject to disclosure of their financial interests, the contents of which shall conform to the same requirements set forth in section 102 of the Ethics in Government Act of 1978 (5 U.S.C. App.).

7. 48 U.S.C. 2141 (Supp. V 2017) provides:

Approval of Fiscal Plans

(a) In general

As soon as practicable after all of the members and the Chair have been appointed to the Oversight Board in accordance with section 2121(e) of this title in the fiscal year in which the Oversight Board is established, and in each fiscal year thereafter during which the Oversight Board is in operation, the Oversight Board shall deliver a notice to the Governor providing a schedule for the process of development, submission, approval, and certification of Fiscal Plans. The notice may also set forth

a schedule for revisions to any Fiscal Plan that has already been certified, which revisions must be subject to subsequent approval and certification by the Oversight Board. The Oversight Board shall consult with the Governor in establishing a schedule, but the Oversight Board shall retain sole discretion to set or, by delivery of a subsequent notice to the Governor, change the dates of such schedule as it deems appropriate and reasonably feasible.

(b) Requirements

(1) In general

A Fiscal Plan developed under this section shall, with respect to the territorial government or covered territorial instrumentality, provide a method to achieve fiscal responsibility and access to the capital markets, and—

(A) provide for estimates of revenues and expenditures in conformance with agreed accounting standards and be based on—

(i) applicable laws; or

(ii) specific bills that require enactment in order to reasonably achieve the projections of the Fiscal Plan;

(B) ensure the funding of essential public services;

(C) provide adequate funding for public pension systems;

(D) provide for the elimination of structural deficits;

(E) for fiscal years covered by a Fiscal Plan in which a stay under subchapters III or IV is not effective, provide for a debt burden that is sustainable;

(F) improve fiscal governance, accountability, and internal controls;

(G) enable the achievement of fiscal targets;

(H) create independent forecasts of revenue for the period covered by the Fiscal Plan;

(I) include a debt sustainability analysis;

(J) provide for capital expenditures and investments necessary to promote economic growth;

(K) adopt appropriate recommendations submitted by the Oversight Board under section 2145(a) of this title;

(L) include such additional information as the Oversight Board deems necessary;

(M) ensure that assets, funds, or resources of a territorial instrumentality are not loaned to, transferred to, or otherwise used for the benefit of a covered territory or another covered territorial instrumentality of a covered territory, unless permitted by the constitution of the territory, an approved plan of adjustment under subchapter III, or a Qualifying Modification approved under subchater VI; and

(N) respect the relative lawful priorities or lawful liens, as may be applicable, in the constitution, other laws, or agreements of a covered territory or covered territorial instrumentality in effect prior to June 30, 2016.

(2) Term

A Fiscal Plan developed under this section shall cover a period of fiscal years as determined by the Oversight Board in its sole discretion but in any case a period of not less than 5 fiscal years from the fiscal year in which it is certified by the Oversight Board.

(c) Development, review, approval, and certification of Fiscal Plans

(1) Timing requirement

The Governor may not submit to the Legislature a Territory Budget under section 2142 of this title for a fiscal year unless the Oversight Board has certified the Territory Fiscal Plan for that fiscal year in accordance with this subsection, unless the Oversight Board in its sole discretion waives this requirement.

(2) Fiscal Plan developed by Governor

The Governor shall submit to the Oversight Board any proposed Fiscal Plan required by the Oversight Board by the time specified in the notice delivered under subsection (a).

(3) Review by the Oversight Board

The Oversight Board shall review any proposed Fiscal Plan to determine whether it satisfies the requirements set forth in subsection (b) and, if the

Oversight Board determines in its sole discretion that the proposed Fiscal Plan—

(A) satisfies such requirements, the Oversight Board shall approve the proposed Fiscal Plan; or

(B) does not satisfy such requirements, the Oversight Board shall provide to the Governor—

(i) a notice of violation that includes recommendations for revisions to the applicable Fiscal Plan; and

(ii) an opportunity to correct the violation in accordance with subsection (d)(1).

(d) Revised Fiscal Plan

(1) In general

If the Governor receives a notice of violation under subsection (c)(3), the Governor shall submit to the Oversight Board a revised proposed Fiscal Plan in accordance with subsection (b) by the time specified in the notice delivered under subsection (a). The Governor may submit as many revised Fiscal Plans to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits.

(2) Development by Oversight Board

If the Governor fails to submit to the Oversight Board a Fiscal Plan that the Oversight Board determines in its sole discretion satisfies the requirements set forth in subsection (b) by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop and submit to the Governor and

the Legislature a Fiscal Plan that satisfies the requirements set forth in subsection (b).

(e) Approval and certification

(1) Approval of Fiscal Plan developed by Governor

If the Oversight Board approves a Fiscal Plan under subsection (c)(3), it shall deliver a compliance certification for such Fiscal Plan to the Governor and the Legislature.

(2) Deemed approval of Fiscal Plan developed by Oversight Board

If the Oversight Board develops a Fiscal Plan under subsection (d)(2), such Fiscal Plan shall be deemed approved by the Governor, and the Oversight Board shall issue a compliance certification for such Fiscal Plan to the Governor and the Legislature.

(f) Joint development of Fiscal Plan

Notwithstanding any other provision of this section, if the Governor and the Oversight Board jointly develop a Fiscal Plan for the fiscal year that meets the requirements under this section, and that the Governor and the Oversight Board certify that the fiscal plan[1] reflects a consensus between the Governor and the Oversight Board, then such Fiscal Plan shall serve as the Fiscal Plan for the territory or territorial instrumentality for that fiscal year.

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[1] So in original. Probably should be "Fiscal Plan".

8. 48 U.S.C. 2142 (Supp. V 2017) provides:

Approval of Budgets

(a) Reasonable schedule for development of Budgets

As soon as practicable after all of the members and the Chair have been appointed to the Oversight Board in the fiscal year in which the Oversight Board is established, and in each fiscal year thereafter during which the Oversight Board is in operation, the Oversight Board shall deliver a notice to the Governor and the Legislature providing a schedule for developing, submitting, approving, and certifying Budgets for a period of fiscal years as determined by the Oversight Board in its sole discretion but in any case a period of not less than one fiscal year following the fiscal year in which the notice is delivered. The notice may also set forth a schedule for revisions to Budgets that have already been certified, which revisions must be subject to subsequent approval and certification by the Oversight Board. The Oversight Board shall consult with the Governor and the Legislature in establishing a schedule, but the Oversight Board shall retain sole discretion to set or, by delivery of a subsequent notice to the Governor and the Legislature, change the dates of such schedule as it deems appropriate and reasonably feasible.

(b) Revenue forecast

The Oversight Board shall submit to the Governor and Legislature a forecast of revenues for the period covered by the Budgets by the time specified in the notice delivered under subsection (a), for use by the Governor in developing the Budget under subsection (c).

(c) Budgets developed by Governor

(1) Governor's proposed budgets

The Governor shall submit to the Oversight Board proposed Budgets by the time specified in the notice delivered under subsection (a). In consultation with the Governor in accordance with the process specified in the notice delivered under subsection (a), the Oversight Board shall determine in its sole discretion whether each proposed Budget is compliant with the applicable Fiscal Plan and—

(A) if a proposed Budget is a compliant budget, the Oversight Board shall—

(i) approve the Budget; and

(ii) if the Budget is a Territory Budget, submit the Territory Budget to the Legislature; or

(B) if the Oversight Board determines that the Budget is not a compliant budget, the Oversight Board shall provide to the Governor—

(i) a notice of violation that includes a description of any necessary corrective action; and

(ii) an opportunity to correct the violation in accordance with paragraph (2).

(2) Governor's revisions

The Governor may correct any violations identified by the Oversight Board and submit a revised proposed Budget to the Oversight Board in accordance with paragraph (1). The Governor may submit as many revised Budgets to the Oversight Board as

the schedule established in the notice delivered under subsection (a) permits. If the Governor fails to develop a Budget that the Oversight Board determines is a compliant budget by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop and submit to the Governor, in the case of an Instrumentality Budget, and to the Governor and the Legislature, in the case of a Territory Budget, a revised compliant budget.

(d) Budget approval by Legislature

(1) Legislature adopted budget

The Legislature shall submit to the Oversight Board the Territory Budget adopted by the Legislature by the time specified in the notice delivered under subsection (a). The Oversight Board shall determine whether the adopted Territory Budget is a compliant budget and—

(A) if the adopted Territory Budget is a compliant budget, the Oversight Board shall issue a compliance certification for such compliant budget pursuant to subsection (e); and

(B) if the adopted Territory Budget is not a compliant budget, the Oversight Board shall provide to the Legislature—

(i) a notice of violation that includes a description of any necessary corrective action; and

(ii) an opportunity to correct the violation in accordance with paragraph (2).

(2) Legislature's revisions

The Legislature may correct any violations identified by the Oversight Board and submit a revised Territory Budget to the Oversight Board in accordance with the process established under paragraph (1) and by the time specified in the notice delivered under subsection (a). The Legislature may submit as many revised adopted Territory Budgets to the Oversight Board as the schedule established in the notice delivered under subsection (a) permits. If the Legislature fails to adopt a Territory Budget that the Oversight Board determines is a compliant budget by the time specified in the notice delivered under subsection (a), the Oversight Board shall develop a revised Territory Budget that is a compliant budget and submit it to the Governor and the Legislature.

(e) Certification of Budgets

(1) Certification of developed and approved Territory Budgets

If the Governor and the Legislature develop and approve a Territory Budget that is a compliant budget by the day before the first day of the fiscal year for which the Territory Budget is being developed and in accordance with the process established under subsections (c) and (d), the Oversight Board shall issue a compliance certification to the Governor and the Legislature for such Territory Budget.

(2) Certification of developed Instrumentality Budgets

If the Governor develops an Instrumentality Budget that is a compliant budget by the day before the first day of the fiscal year for which the Instrumentality Budget is being developed and in accordance

with the process established under subsection (c), the Oversight Board shall issue a compliance certification to the Governor for such Instrumentality Budget.

(3) Deemed certification of Territory Budgets

If the Governor and the Legislature fail to develop and approve a Territory Budget that is a compliant budget by the day before the first day of the fiscal year for which the Territory Budget is being developed, the Oversight Board shall submit a Budget to the Governor and the Legislature (including any revision to the Territory Budget made by the Oversight Board pursuant to subsection (d)(2)) and such Budget shall be—

(A) deemed to be approved by the Governor and the Legislature;

(B) the subject of a compliance certification issued by the Oversight Board to the Governor and the Legislature; and

(C) in full force and effect beginning on the first day of the applicable fiscal year.

(4) Deemed certification of Instrumentality Budgets

If the Governor fails to develop an Instrumentality Budget that is a compliant budget by the day before the first day of the fiscal year for which the Instrumentality Budget is being developed, the Oversight Board shall submit an Instrumentality Budget to the Governor (including any revision to the Instrumentality Budget made by the Oversight Board pursuant to subsection (c)(2)) and such Budget shall be—

(A) deemed to be approved by the Governor;

(B) the subject of a compliance certification issued by the Oversight Board to the Governor; and

(C) in full force and effect beginning on the first day of the applicable fiscal year.

(f) Joint development of Budgets

Notwithstanding any other provision of this section, if, in the case of a Territory Budget, the Governor, the Legislature, and the Oversight Board, or in the case of an Instrumentality Budget, the Governor and the Oversight Board, jointly develop such Budget for the fiscal year that meets the requirements under this section, and that the relevant parties certify that such budget reflects a consensus among them, then such Budget shall serve as the Budget for the territory or territorial instrumentality for that fiscal year.

9. 48 U.S.C. 2143 (Supp. V 2017) provides:

Effect of finding of noncompliance with Budget

(a) Submission of reports

Not later than 15 days after the last day of each quarter of a fiscal year (beginning with the fiscal year determined by the Oversight Board), the Governor shall submit to the Oversight Board a report, in such form as the Oversight Board may require, describing—

(1) the actual cash revenues, cash expenditures, and cash flows of the territorial government for the preceding quarter, as compared to the projected revenues, expenditures, and cash flows contained in the certified Budget for such preceding quarter; and

(2) any other information requested by the Oversight Board, which may include a balance sheet or a requirement that the Governor provide information for each covered territorial instrumentality separately.

(b) Initial action by Oversight Board

(1) In general

If the Oversight Board determines, based on reports submitted by the Governor under subsection (a), independent audits, or such other information as the Oversight Board may obtain, that the actual quarterly revenues, expenditures, or cash flows of the territorial government are not consistent with the projected revenues, expenditures, or cash flows set forth in the certified Budget for such quarter, the Oversight Board shall—

(A) require the territorial government to provide such additional information as the Oversight Board determines to be necessary to explain the inconsistency; and

(B) if the additional information provided under subparagraph (A) does not provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate, advise the territorial government to correct the inconsistency by implementing remedial action.

(2) Deadlines

The Oversight Board shall establish the deadlines by which the territorial government shall meet the requirements of subparagraphs (A) and (B) of paragraph (1).

(c) Certification

(1) Inconsistency

If the territorial government fails to provide additional information under subsection (b)(1)(A), or fails to correct an inconsistency under subsection (b)(1)(B), prior to the applicable deadline under subsection (b)(2), the Oversight Board shall certify to the President, the House of Representatives Committee on Natural Resources, the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature that the territorial government is inconsistent with the applicable certified Budget, and shall describe the nature and amount of the inconsistency.

(2) Correction

If the Oversight Board determines that the territorial government has initiated such measures as the Oversight Board considers sufficient to correct an inconsistency certified under paragraph (1), the Oversight Board shall certify the correction to the President, the House of Representatives Committee on Natural Resources, the Senate Committee on Energy and Natural Resources, the Governor, and the Legislature.

(d) Budget reductions by Oversight Board

If the Oversight Board determines that the Governor, in the case of any then-applicable certified Instrumentality Budgets, and the Governor and the Legislature, in the case of the then-applicable certified Territory Budget, have failed to correct an inconsistency identified by the Oversight Board under subsection (c), the Oversight Board shall—

(1) with respect to the territorial government, other than covered territorial instrumentalities, make appropriate reductions in nondebt expenditures to ensure that the actual quarterly revenues and expenditures for the territorial government are in compliance with the applicable certified Territory Budget or, in the case of the fiscal year in which the Oversight Board is established, the budget adopted by the Governor and the Legislature; and

(2) with respect to covered territorial instrumentalities at the sole discretion of the Oversight Board—

(A) make reductions in nondebt expenditures to ensure that the actual quarterly revenues and expenses for the covered territorial instrumentality are in compliance with the applicable certified Budget or, in the case of the fiscal year in which the Oversight Board is established, the budget adopted by the Governor and the Legislature or the covered territorial instrumentality, as applicable; or

(B)(i) institute automatic hiring freezes at the covered territorial instrumentality; and

(ii) prohibit the covered territorial instrumentality from entering into any contract or engaging in any financial or other transactions, unless the contract or transaction was previously approved by the Oversight Board.

(e) Termination of Budget reductions

The Oversight Board shall cancel the reductions, hiring freezes, or prohibition on contracts and financial transactions under subsection (d) if the Oversight Board determines that the territorial government or covered territorial instrumentality, as applicable, has initiated appropriate measures to reduce expenditures or increase revenues to ensure that the territorial government or covered territorial instrumentality is in compliance with the applicable certified Budget or, in the case of the fiscal year in which the Oversight Board is established, the budget adopted by the Governor and the Legislature.

10. 48 U.S.C. 2144 (Supp. V 2017) provides:

Review of activities to ensure compliance with Fiscal Plan

(a) Submission of legislative acts to Oversight Board

(1) Submission of acts

Except to the extent that the Oversight Board may provide otherwise in its bylaws, rules, and procedures, not later than 7 business days after a territorial government duly enacts any law during any fiscal year in which the Oversight Board is in operation, the Governor shall submit the law to the Oversight Board.

(2) Cost estimate; certification of compliance or non-compliance

The Governor shall include with each law submitted to the Oversight Board under paragraph (1) the following:

(A) A formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues.

(B) If the appropriate entity described in subparagraph (A) finds that the law is not significantly inconsistent with the Fiscal Plan for the fiscal year, it shall issue a certification of such finding.

(C) If the appropriate entity described in subparagraph (A) finds that the law is significantly inconsistent with the Fiscal Plan for the fiscal year, it shall issue a certification of such finding, together with the entity's reasons for such finding.

(3) Notification

The Oversight Board shall send a notification to the Governor and the Legislature if—

(A) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by the estimate required under paragraph (2)(A);

(B) the Governor submits a law to the Oversight Board under this subsection that is not accompanied by either a certification described in paragraph (2)(B) or (2)(C); or

(C) the Governor submits a law to the Oversight Board under this subsection that is accompanied by a certification described in paragraph (2)(C) that the law is significantly inconsistent with the Fiscal Plan.

(4) Opportunity to respond to notification

(A) Failure to provide estimate or certification

After sending a notification to the Governor and the Legislature under paragraph (3)(A) or (3)(B) with respect to a law, the Oversight Board may direct the Governor to provide the missing estimate or certification (as the case may be), in accordance with such procedures as the Oversight Board may establish.

(B) Submission of certification of significant inconsistency with Fiscal Plan and Budget

In accordance with such procedures as the Oversight Board may establish, after sending a notification to the Governor and Legislature under paragraph (3)(C) that a law is significantly inconsistent with the Fiscal Plan, the Oversight Board shall direct the territorial government to—

(i) correct the law to eliminate the inconsistency; or

(ii) provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate.

(5) Failure to comply

If the territorial government fails to comply with a direction given by the Oversight Board under paragraph (4) with respect to a law, the Oversight Board may take such actions as it considers necessary, consistent with this chapter, to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan, including preventing the enforcement or application of the law.

(6) Preliminary review of proposed acts

At the request of the Legislature, the Oversight Board may conduct a preliminary review of proposed legislation before the Legislature to determine whether the legislation as proposed would be consistent with the applicable Fiscal Plan under this subtitle,[1] except that any such preliminary review shall not be binding on the Oversight Board in reviewing any law subsequently submitted under this subsection.

(b) Effect of approved Fiscal Plan on contracts, rules, and regulations

(1) Transparency in contracting

The Oversight Board shall work with a covered territory's office of the comptroller or any functionally equivalent entity to promote compliance with the applicable law of any covered territory that requires agencies and instrumentalities of the territorial government to maintain a registry of all contracts executed, including amendments thereto, and to remit a copy to the office of the comptroller for inclusion in a

[1] See References in Text note below.

comprehensive database available to the public. With respect to Puerto Rico, the term "applicable law" refers to 2 L.P.R.A. 97, as amended.

(2) Authority to review certain contracts

The Oversight Board may establish policies to require prior Oversight Board approval of certain contracts, including leases and contracts to a governmental entity or government-owned corporations rather than private enterprises that are proposed to be executed by the territorial government, to ensure such proposed contracts promote market competition and are not inconsistent with the approved Fiscal Plan.

(3) Sense of Congress

It is the sense of Congress that any policies established by the Oversight Board pursuant to paragraph (2) should be designed to make the government contracting process more effective, to increase the public's faith in this process, to make appropriate use of the Oversight Board's time and resources, to make the territorial government a facilitator and not a competitor to private enterprise, and to avoid creating any additional bureaucratic obstacles to efficient contracting.

(4) Authority to review certain rules, regulations, and executive orders

The provisions of this paragraph shall apply with respect to a rule, regulation, or executive order proposed to be issued by the Governor (or the head of any department or agency of the territorial government) in the same manner as such provisions apply to a contract.

(5) Failure to comply

If a contract, rule, regulation, or executive order fails to comply with policies established by the Oversight Board under this subsection, the Oversight Board may take such actions as it considers necessary to ensure that such contract, rule, executive order or regulation will not adversely affect the territorial government's compliance with the Fiscal Plan, including by preventing the execution or enforcement of the contract, rule, executive order or regulation.

(c) Restrictions on budgetary adjustments

(1) Submissions of requests to Oversight Board

If the Governor submits a request to the Legislature for the reprogramming of any amounts provided in a certified Budget, the Governor shall submit such request to the Oversight Board, which shall analyze whether the proposed reprogramming is significantly inconsistent with the Budget, and submit its analysis to the Legislature as soon as practicable after receiving the request.

(2) No action permitted until analysis received

The Legislature shall not adopt a reprogramming, and no officer or employee of the territorial government may carry out any reprogramming, until the Oversight Board has provided the Legislature with an analysis that certifies such reprogramming will not be inconsistent with the Fiscal Plan and Budget.

(3) Prohibition on action until Oversight Board is appointed

(A) During the period after a territory becomes a covered territory and prior to the appointment of all members and the Chair of the Oversight Board, such covered territory shall not enact new laws that either permit the transfer of any funds or assets outside the ordinary course of business or that are inconsistent with the constitution or laws of the territory as of June 30, 2016, provided that any executive or legislative action authorizing the movement of funds or assets during this time period may be subject to review and rescission by the Oversight Board upon appointment of the Oversight Board's full membership.

(B) Upon appointment of the Oversight Board's full membership, the Oversight Board may review, and in its sole discretion, rescind, any law that—

(i) was enacted during the period between, with respect to Puerto Rico, May 4, 2016; or with respect to any other territory, 45 days prior to the establishment of the Oversight Board for such territory, and the date of appointment of all members and the Chair of the Oversight Board; and

(ii) alters pre-existing priorities of creditors in a manner outside the ordinary course of business or inconsistent with the territory's constitution or the laws of the territory as of, in the case of Puerto Rico, May 4, 2016, or with respect to any other territory, 45 days prior to the establishment of the Oversight Board for such territory;

but such rescission shall only be to the extent that the law alters such priorities.

(d) Implementation of Federal programs

In taking actions under this chapter, the Oversight Board shall not exercise applicable authorities to impede territorial actions taken to—

(1) comply with a court-issued consent decree or injunction, or an administrative order or settlement with a Federal agency, with respect to Federal programs;

(2) implement a federally authorized or federally delegated program;

(3) implement territorial laws, which are consistent with a certified Fiscal Plan, that execute Federal requirements and standards; or

(4) preserve and maintain federally funded mass transportation assets.

11. 48 U.S.C. 2147 (Supp. V 2017) provides:

Oversight Board authority related to debt issuance

For so long as the Oversight Board remains in operation, no territorial government may, without the prior approval of the Oversight Board, issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt.

12. 48 U.S.C. 2149 (Supp. V 2017) provides:

Termination of Oversight Board

An Oversight Board shall terminate upon certification by the Oversight Board that—

(1) the applicable territorial government has adequate access to short-term and long-term credit markets at reasonable interest rates to meet the borrowing needs of the territorial government; and

(2) for at least 4 consecutive fiscal years—

(A) the territorial government has developed its Budgets in accordance with modified accrual accounting standards; and

(B) the expenditures made by the territorial government during each fiscal year did not exceed the revenues of the territorial government during that year, as determined in accordance with modified accrual accounting standards.

13. 48 U.S.C. 2161 (Supp. V 2017) provides:

Applicability of other laws; definitions

(a) Sections applicable to cases under this subchapter

Sections 101 (except as otherwise provided in this section), 102, 104, 105, 106, 107, 108, 112, 333, 344, 347(b), 349, 350(b), 351, 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(2), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 902 (except as otherwise provided in this section), 922, 923, 924, 925, 926, 927, 928, 942, 944, 945, 946, 1102,

1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1123(d), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, 1145, and 1146(a) of title 11 apply in a case under this subchapter and section 930 of title 11 applies in a case under this subchapter; however, section 930 shall not apply in any case during the first 120 days after the date on which such case is commenced under this subchapter.

(b) Meanings of terms

A term used in a section of title 11, made applicable in a case under this subchapter by subsection (a), has the meaning given to the term for the purpose of the applicable section, unless the term is otherwise defined in this subchapter.

(c) Definitions

In this subchapter:

(1) Affiliate

The term "affiliate" means, in addition to the definition made applicable in a case under this subchapter by subsection (a)—

(A) for a territory, any territorial instrumentality; and

(B) for a territorial instrumentality, the governing territory and any of the other territorial instrumentalities of the territory.

(2) Debtor

The term "debtor" means the territory or covered territorial instrumentality concerning which a case under this subchapter has been commenced.

(3) Holder of a claim or interest

The term "holder of a claim or interest", when used in section 1126 of title 11, made applicable in a case under this subchapter by subsection (a)—

(A) shall exclude any Issuer or Authorized Instrumentality of the Territory Government Issuer (as defined under subchapter VI of this chapter) or a corporation, trust or other legal entity that is controlled by the Issuer or an Authorized Territorial Instrumentality of the Territory Government Issuer, provided that the beneficiaries of such claims, to the extent they are not referenced in this subparagraph, shall not be excluded, and that, for each excluded trust or other legal entity, the court shall, upon the request of any participant or beneficiary of such trust or entity, at any time after the commencement of the case, order the appointment of a separate committee of creditors pursuant to section 1102(a)(2) of title 11; and

(B) with reference to Insured Bonds, shall mean the monoline insurer insuring such Insured Bond to the extent such insurer is granted the right to vote Insured Bonds for purposes of directing remedies or consenting to proposed amendments or modifications as provided in the applicable documents pursuant to which such Insured Bond was issued and insured.

(4) Insured Bond

The term "Insured Bond" means a bond subject to a financial guarantee or similar insurance contract, policy and/or surety issued by a monoline insurer.

(5) Property of the estate

The term "property of the estate", when used in a section of title 11 made applicable in a case under this subchapter by subsection (a), means property of the debtor.

(6) State

The term "State"[1] when used in a section of title 11 made applicable in a case under this subchapter by subsection (a)[1] means State or territory when used in reference to the relationship of a State to the municipality of the State or the territorial instrumentality of a territory, as applicable.

(7) Trustee

The term "trustee", when used in a section of title 11 made applicable in a case under this subchapter by subsection (a), means the Oversight Board, except as provided in section 926 of title 11. The term "trustee" as described in this paragraph does not mean the U.S. Trustee, an official of the United States Trustee Program, which is a component of the United States Department of Justice.

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[1] So in original. Probably should be followed by a comma.

(d) Reference to subchapter

Solely for purposes of this subchapter, a reference to "this title", "this chapter", or words of similar import in a section of title 11 made applicable in a case under this subchapter by subsection (a) or to "this title", "title 11", "Chapter 9", "Chapter 11", "the Code", or words of similar import in the Federal Rules of Bankruptcy Procedure made applicable in a case under this subchapter shall be deemed to be a reference to this subchapter.

(e) Substantially similar

In determining whether claims are "substantially similar" for the purpose of section 1122 of title 11, made applicable in a case under this subchapter by subsection (a), the Oversight Board shall consider whether such claims are secured and whether such claims have priority over other claims.

(f) Operative clauses

A section made applicable in a case under this subchapter by subsection (a) that is operative if the business of the debtor is authorized to be operated is operative in a case under this subchapter.

14. 48 U.S.C. 2166 (Supp. V 2017) provides:

Jurisdiction

(a) Federal subject matter jurisdiction

The district courts shall have—

(1) except as provided in paragraph (2), original and exclusive jurisdiction of all cases under this subchapter; and

(2) except as provided in subsection (b), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, original but not exclusive jurisdiction of all civil proceedings arising under this subchapter, or arising in or related to cases under this subchapter.

(b) Property jurisdiction

The district court in which a case under this subchapter is commenced or is pending shall have exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of the case.

(c) Personal jurisdiction

The district court in which a case under this subchapter is pending shall have personal jurisdiction over any person or entity.

(d) Removal, remand, and transfer

(1) Removal

A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce the police or regulatory power of the governmental unit, to the district court for the district in which the civil action is pending, if the district court has jurisdiction of the claim or cause of action under this section.

(2) Remand

The district court to which the claim or cause of action is removed under paragraph (1) may remand the claim or cause of action on any equitable ground.

An order entered under this subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291 or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

(3) Transfer

A district court shall transfer any civil proceeding arising under this subchapter, or arising in or related to a case under this subchapter, to the district court in which the case under this subchapter is pending.

(e) Appeal

(1) An appeal shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district court.

(2) The court of appeals for the circuit in which a case under this subchapter has venue pursuant to section 2167 of this title shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under this subchapter by the district court.

(3) The court of appeals for the circuit in which a case under this subchapter has venue pursuant to section 2167 of this title shall have jurisdiction to hear appeals of interlocutory orders or decrees if—

(A) the district court on its own motion or on the request of a party to the order or decree certifies that—

(i) the order or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the order or decree involves a question of law requiring the resolution of conflicting decisions; or

(iii) an immediate appeal from the order or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and

(B) the court of appeals authorizes the direct appeal of the order or decree.

(4) If the district court on its own motion or on the request of a party determines that a circumstance specified in clauses (i), (ii), or (iii) of paragraph (3)(A) exists, then the district court shall make the certification described in paragraph (3).

(5) The parties may supplement the certification with a short statement of the basis for the certification issued by the district court under paragraph (3)(A).

(6) Except as provided in section 2164(d) of this title, an appeal of an interlocutory order or decree does not stay any proceeding of the district court from which the appeal is taken unless the district court, or the court of appeals in which the appeal is pending, issues a stay of such proceedings pending the appeal.

(7) Any request for a certification in respect to an interlocutory appeal of an order or decree shall be made not later than 60 days after the entry of the order or decree.

(f) Reallocation of court staff

Notwithstanding any law to the contrary, the clerk of the court in which a case is pending shall reallocate as many staff and assistants as the clerk deems necessary to ensure that the court has adequate resources to provide for proper case management.

15. 48 U.S.C. 2167 (Supp. V 2017) provides:

Venue

(a) In general

Venue shall be proper in—

(1) with respect to a territory, the district court for the territory or, for any territory that does not have a district court, the United States District Court for the District of Hawaii; and

(2) with respect to a covered territorial instrumentality, the district court for the territory in which the covered territorial instrumentality is located or, for any territory that does not have a district court, the United States District Court for the District of Hawaii.

(b) Alternative venue

(1) If the Oversight Board so determines in its sole discretion, then venue shall be proper in the district court for the jurisdiction in which the Oversight Board maintains an office that is located outside the territory.

(2) With respect to paragraph (1), the Oversight Board may consider, among other things—

(A) the resources of the district court to adjudicate a case or proceeding; and

(B) the impact on witnesses who may be called in such a case or proceeding.

16. 48 U.S.C. 2172 (Supp. V 2017) provides:

Filing of plan of adjustment

(a) Exclusivity

Only the Oversight Board, after the issuance of a certificate pursuant to section 2124(j) of this title, may file a plan of adjustment of the debts of the debtor.

(b) Deadline for filing plan

If the Oversight Board does not file a plan of adjustment with the petition, the Oversight Board shall file a plan of adjustment at the time set by the court.

17. 48 U.S.C. 2175 (Supp. V 2017) provides:

Role and capacity of Oversight Board

(a) Actions of Oversight Board

For the purposes of this subchapter, the Oversight Board may take any action necessary on behalf of the debtor to prosecute the case of the debtor, including—

(1) filing a petition under section 2164 of this title;

(2) submitting or modifying a plan of adjustment under sections 2172 and 2173 of this title; or

(3) otherwise generally submitting filings in relation to the case with the court.

(b) Representative of debtor

The Oversight Board in a case under this subchapter is the representative of the debtor.

18. 48 U.S.C. 2194 (Supp. V 2017) provides:

Automatic stay upon enactment

(a) Definitions

In this section:

(1) Liability

The term "Liability" means a bond, loan, letter of credit, other borrowing title, obligation of insurance, or other financial indebtedness for borrowed money, including rights, entitlements, or obligations whether such rights, entitlements, or obligations arise from contract, statute, or any other source of law related to such a bond, loan, letter of credit, other borrowing

title, obligation of insurance, or other financial indebtedness in physical or dematerialized form, of which—

(A) the issuer, obligor, or guarantor is the Government of Puerto Rico; and

(B) the date of issuance or incurrence precedes June 30, 2016.

(2) Liability Claim

The term "Liability Claim" means, as it relates to a Liability—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(b) In general

Except as provided in subsection (c) of this section, the establishment of an Oversight Board for Puerto Rico (i.e., the enactment of this chapter) in accordance with section 2121 of this title operates with respect to a Liability as a stay, applicable to all entities (as such term is defined in section 101 of title 11), of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding

against the Government of Puerto Rico that was or could have been commenced before the enactment of this chapter, or to recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this chapter;

(2) the enforcement, against the Government of Puerto Rico or against property of the Government of Puerto Rico, of a judgment obtained before the enactment of this chapter;

(3) any act to obtain possession of property of the Government of Puerto Rico or of property from the Government of Puerto Rico or to exercise control over property of the Government of Puerto Rico;

(4) any act to create, perfect, or enforce any lien against property of the Government of Puerto Rico;

(5) any act to create, perfect, or enforce against property of the Government of Puerto Rico any lien to the extent that such lien secures a Liability Claim that arose before the enactment of this chapter;

(6) any act to collect, assess, or recover a Liability Claim against the Government of Puerto Rico that arose before the enactment of this chapter; and

(7) the setoff of any debt owing to the Government of Puerto Rico that arose before the enactment of this chapter against any Liability Claim against the Government of Puerto Rico.

(c) Stay not operable

The establishment of an Oversight Board for Puerto Rico in accordance with section 2121 of this title does not operate as a stay—

(1) solely under subsection (b)(1) of this section, of the continuation of, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was commenced on or before December 18, 2015; or

(2) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

(d) Continuation of stay

Except as provided in subsections (e), (f), and (g) the stay under subsection (b) continues until the earlier of—

(1) the later of—

(A) the later of—

(i) February 15, 2017; or

(ii) six months after the establishment of an Oversight Board for Puerto Rico as established by section 2121(b) of this title;

(B) the date that is 75 days after the date in subparagraph (A) if the Oversight Board delivers a certification to the Governor that, in the Oversight Board's sole discretion, an additional 75 days are needed to seek to complete a voluntary process under subchapter VI of this chapter with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

(C) the date that is 60 days after the date in subparagraph (A) if the district court to which an application has been submitted under subparagraph[1] 2231(m)(1)(D) of this title determines, in the exercise of the court's equitable powers, that an additional 60 days are needed to complete a voluntary process under subchapter VI of this chapter with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities; or

(2) with respect to the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, the date on which a case is filed by or on behalf of the government of the Commonwealth of Puerto Rico or any of its territorial instrumentalities, as applicable, under subchapter III.

(e) Jurisdiction, relief from stay

(1) The United States District Court for the District of Puerto Rico shall have original and exclusive jurisdiction of any civil actions arising under or related to this section.

(2) On motion of or action filed by a party in interest and after notice and a hearing, the United States District Court for the District of Puerto Rico, for cause shown, shall grant relief from the stay provided under subsection (b) of this section.

(f) Termination of stay; hearing

Forty-five days after a request under subsection (e)(2) for relief from the stay of any act against property of the Government of Puerto Rico under subsection (b),

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[1] So in original. Probably should be "section".

such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (e)(2). A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (e)(2). The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (e)(2) if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the thirty-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(g) Relief to prevent irreparable damage

Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (b) as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (e) or (f).

(h) Act in violation of stay is void

Any order, judgment, or decree entered in violation of this section and any act taken in violation of this section is void, and shall have no force or effect, and any person found to violate this section may be liable for

damages, costs, and attorneys' fees incurred in defending any action taken in violation of this section, and the Oversight Board or the Government of Puerto Rico may seek an order from the court enforcing the provisions of this section.

(i) Government of Puerto Rico

For purposes of this section, the term "Government of Puerto Rico", in addition to the definition set forth in section 2104(11) of this title, shall include—

(1) the individuals, including elected and appointed officials, directors, officers of and employees acting in their official capacity on behalf of the Government of Puerto Rico; and

(2) the Oversight Board, including the directors and officers of and employees acting in their official capacity on behalf of the Oversight Board.

(j) No default under existing contracts

(1) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, the holder of a Liability Claim or any other claim (as such term is defined in section 101 of title 11) may not exercise or continue to exercise any remedy under a contract or applicable law in respect to the Government of Puerto Rico or any of its property—

(A) that is conditioned upon the financial condition of, or the commencement of a restructuring, insolvency, bankruptcy, or other proceeding (or a similar or analogous process) by, the Government of Puerto Rico, including a default or an event of default thereunder; or

(B) with respect to Liability Claims—

(i) for the non-payment of principal or interest; or

(ii) for the breach of any condition or covenant.

(2) The term "remedy" as used in paragraph (1) shall be interpreted broadly, and shall include any right existing in law or contract, including any right to—

(A) setoff;

(B) apply or appropriate funds;

(C) seek the appointment of a custodian (as such term is defined in section 101(11) of title 11);

(D) seek to raise rates; or

(E) exercise control over property of the Government of Puerto Rico.

(3) Notwithstanding any contractual provision or applicable law to the contrary and so long as a stay under this section is in effect, a contract to which the Government of Puerto Rico is a party may not be terminated or modified, and any right or obligation under such contract may not be terminated or modified, solely because of a provision in such contract is conditioned on—

(A) the insolvency or financial condition of the Government of Puerto Rico at any time prior to the enactment of this chapter;

(B) the adoption of a resolution or establishment of an Oversight Board pursuant to section 2121 of this title; or

(C) a default under a separate contract that is due to, triggered by, or a result of the occurrence of the events or matters in paragraph (1)(B).

(4) Notwithstanding any contractual provision to the contrary and so long as a stay under this section is in effect, a counterparty to a contract with the Government of Puerto Rico for the provision of goods and services shall, unless the Government of Puerto Rico agrees to the contrary in writing, continue to perform all obligations under, and comply with the terms of, such contract, provided that the Government of Puerto Rico is not in default under such contract other than as a result of a condition specified in paragraph (3).

(k) Effect

This section does not discharge an obligation of the Government of Puerto Rico or release, invalidate, or impair any security interest or lien securing such obligation. This section does not impair or affect the implementation of any restructuring support agreement executed by the Government of Puerto Rico to be implemented pursuant to Puerto Rico law specifically enacted for that purpose prior to the enactment of this chapter or the obligation of the Government of Puerto Rico to proceed in good faith as set forth in any such agreement.

(*l*) Payments on Liabilities

Nothing in this section shall be construed to prohibit the Government of Puerto Rico from making any payment on any Liability when such payment becomes due during the term of the stay, and to the extent the Oversight Board, in its sole discretion, determines it is feasible, the Government of Puerto Rico shall make interest

payments on outstanding indebtedness when such payments become due during the length of the stay.

(m) Findings

Congress finds the following:

(1) A combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing has created a fiscal emergency in Puerto Rico.

(2) As a result of its fiscal emergency, the Government of Puerto Rico has been unable to provide its citizens with effective services.

(3) The current fiscal emergency has also affected the long-term economic stability of Puerto Rico by contributing to the accelerated outmigration of residents and businesses.

(4) A comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico is necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.

(5) Additionally, an immediate—but temporary—stay is essential to stabilize the region for the purposes of resolving this territorial crisis.

(A) The stay advances the best interests common to all stakeholders, including but not limited to a functioning independent Oversight Board created pursuant to this chapter to determine whether

to appear or intervene on behalf of the Government of Puerto Rico in any litigation that may have been commenced prior to the effectiveness or upon expiration of the stay.

(B) The stay is limited in nature and narrowly tailored to achieve the purposes of this chapter, including to ensure all creditors have a fair opportunity to consensually renegotiate terms of repayment based on accurate financial information that is reviewed by an independent authority or, at a minimum, receive a recovery from the Government of Puerto Rico equal to their best possible outcome absent the provisions of this chapter.

(6) Finally, the ability of the Government of Puerto Rico to obtain funds from capital markets in the future will be severely diminished without congressional action to restore its financial accountability and stability.

(n) Purposes

The purposes of this section are to—

(1) provide the Government of Puerto Rico with the resources and the tools it needs to address an immediate existing and imminent crisis;

(2) allow the Government of Puerto Rico a limited period of time during which it can focus its resources on negotiating a voluntary resolution with its creditors instead of defending numerous, costly creditor lawsuits;

(3) provide an oversight mechanism to assist the Government of Puerto Rico in reforming its fiscal governance and support the implementation of potential debt restructuring;

(4) make available a Federal restructuring authority, if necessary, to allow for an orderly adjustment of all of the Government of Puerto Rico's liabilities; and

(5) benefit the lives of 3.5 million American citizens living in Puerto Rico by encouraging the Government of Puerto Rico to resolve its longstanding fiscal governance issues and return to economic growth.

(*o*) Voting on voluntary agreements not stayed

Notwithstanding any provision in this section to the contrary, nothing in this section shall prevent the holder of a Liability Claim from voting on or consenting to a proposed modification of such Liability Claim under subchapter VI of this chapter.