No. _____

In The
Supreme Court of the United States

UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO, INC.,

Petitioner,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD OF PUERTO RICO, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After correctly determining that the members of the Financial Oversight and Management Board for Puerto Rico are principal Officers of the United States for purposes of the Appointments Clause of the United States Constitution, the court of appeals validated the Board's past, present and future actions by applying the *de facto* officer doctrine. Thus, subjecting the Petitioner, Unión de Trabajadores de la Industria Eléctrica y Riego, Inc., and the People of Puerto Rico, to the actions of unconstitutionally appointed Officers of the United States that are exercising unfettered authority that is causing an ongoing injury to the Petitioner without appropriate relief.

Thus, the question presented is whether the *de facto* officer doctrine allows for unconstitutionally appointed principal Officers of the United States to continue acting, leaving the party that challenges their appointment with an ongoing injury and without an appropriate relief.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were as follows:

Petitioner here, Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"), is a creditor and party in interest and filed an adversary complaint with assigned case No. 17-bk-0228, related to the case No. 17-bk-4780 initiated by Respondent the Financial Oversight and Management Board for Puerto Rico, in the district court for the District of Puerto Rico, on behalf of the Puerto Rico Electric Power Authority ("PREPA") and was an appellant in the court of appeals.

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

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

PARTIES TO THE PROCEEDINGS – Continued

Respondents the Commonwealth of Puerto Rico (the "Commonwealth"), the Financial Oversight and Management Board for Puerto Rico, José B. Carrión III, Andrew Biggs, Carlos M. García, Arthur J. González, Ana J. Matosantos, José R. González, and David A. Skeel, Jr. (collectively, the "Board members"), the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), the American Federation of State, County & Municipal Employees ("AFSCME"), the Official Committee of Retired Employees of the Commonwealth of Puerto Rico ("Retirees"), the Official Committee of Unsecured Creditors ("Unsecured Creditors"), the COFINA Senior Bondholders Coalition ("COFINA"), Fideicomiso Plaza, Decagon Holdings 1, LLC, Decagon Holdings 2, LLC, Decagon Holdings 3, LLC, Decagon Holdings 4, LLC, Decagon Holdings 5, LLC, Decagon Holdings 6, LLC, Decagon Holdings 7, LLC, Decagon Holdings 8, LLC, Decagon Holdings 9, LLC, Decagon Holdings 10, LLC, GoldenTree Asset Management, LP, Old Bellows Partners, LP, Scoggin Management, LP, Taconic Capital Advisors, LP, Aristeia Capital, LLC, Canyon Capital Advisors, LLC, Tilden Park Capital Management, LP, Aristeia Horizons, LP, Canery SC Master Fund, LP, Capital Management, LP, Crescent 1, LP, CRS Master Fund, LP, Cyrus Capital Partners, LP, Cyrus Opportunities Master Fund II, Ltd., Cyrus Select Opportunities Master Fund, Ltd., Cyrus Special Strategies Master Fund, LP, Merced Capital, LP, Merced Partners IV, LP, Merced Partners Limited Partnership, Merced Partners V, LP, Pandora

PARTIES TO THE PROCEEDINGS – Continued

Select Partners, LP, Puerto Rico Electric Power Authority ("PREPA"), River Canyon Fund Management, LLC, SB Special Situation Master Fund SPC, Scoggin International Fund, Ltd., Scoggin Worldwide Fund, Ltd., Segregated Portfolio D, Taconic Master Fund 1.5, LP, Taconic Opportunity Master Fund, LP, Tilden Park Investment Master Fund, LP, Varde Credit Partners Master, LP, Varde Investment Partners Offshore Master, LP, Varde Investment Partners, LP, Varde Skyway Master Fund, LP, Whitebox Asymmetric Partners, LP, Whitebox Institutional Partners, LP, Whitebox Multi-Strategy Partners, LP, Whitebox Term Credit Fund I, LP, and Whitebox Advisors, LLC, all filed oppositions to the motion to dismiss and/or were defendants or intervenors in the relevant adversary proceedings and were appellees before the court of appeals.

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

2. Counsel for petitioner certifies as follows:

Petitioner Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"), is a labor union created as a close corporation under the Laws of the Commonwealth of Puerto Rico. Its stock is not traded, and it is not a "nongovernmental corporate party" for purposes of Rule 26.1, therefore, does not require any disclosures with respect to it.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in consolidated appeals Nos. 18-1671, 18-1746, and 18-1787.[1]

OPINIONS BELOW

The opinion of the court of appeals, Aurelius Pet. App. 1a, is reported at 915 F.3d 838. The opinion of the district court in No. 17-bk-00228 (D.P.R.), Pet. App. 1a, is unreported.

JURISDICTION

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

[1] On May 24, 2019, Aurelius filed a Petition for Writ of Certiorari with similar arguments. Given that both, Aurelius and UTIER's petitions before this Court arise from the same proceedings, the reference to the Appendix in this Petition will be from Aurelius' Appendix in Case No. 18-1475 before this Honorable Court ("Aurelius Pet. App."), unless otherwise specified.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the Constitution provides, in relevant part: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Article II, § 2, cl. 2.

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

Relevant statutory provisions of the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 *et seq*. ("PROMESA"), are reproduced at Aurelius Pet. App. 133a.

STATEMENT

With the enactment of PROMESA in 2016, came the imposition on UTIER's members and the People of Puerto Rico of the Financial Oversight and

Management Board for Puerto Rico ("Oversight Board" or "Board"). Its objective is for Puerto Rico to gain access to capital markets at a reasonable cost, but all at the expense of the Puerto Rican People. One of the first actions of the Oversight Board was the imposition of a fiscal plan for UTIER's employer, PREPA, that impaired labor rights and benefits – product of a collective bargaining agreement – such as sick leave, vacation days and health plan insurance coverage.[2]

The Board members were appointed by the President of the United States through a list mechanism, as provided in PROMESA, without the advice and consent of the Senate. The seven members of the Oversight Board were vested with such significant authority that allows them to surpass the local government's policies, laws, rules and regulations in order to fulfill PROMESA's purpose. None of the residents of Puerto Rico, who are directly affected by the Board's actions, were able to cast their vote for the members of the Oversight Board; nor could they vote for the members of Congress who prepared the lists from which the Board members were chosen and were also not able to vote for the President of the United States who appointed them. Yet, it is the Oversight Board the entity

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[2] UTIER filed an adversary complaint claiming violations to the collective bargaining agreement with assigned case No. 17-bk-0229, related to the case No. 17-bk-4780 initiated by Respondent the Financial Oversight and Management Board for Puerto Rico on behalf of Puerto Rico Electric Power Authority ("PREPA"), in the district court for the District of Puerto Rico, that is pending for adjudication.

that, at its sole discretion, promulges public policy in Puerto Rico since the enactment of PROMESA.

UTIER challenged the appointment of the Oversight Board members through an adversary complaint in the Title III proceedings of PREPA on the grounds that the Board members are principal officers who exercise significant federal authority that renders them "Officers of the United States" within the meaning of the Appointments Clause. Thus, the advice and consent of the Senate was mandatory in the appointment process. The district court sided with the respondents and concluded that the Oversight Board members are territorial officers and, therefore, their appointments are not bound by the Appointments Clause. The court of appeals, on the other hand, applied the corresponding "significant authority" test and made a thorough analysis of the powers and responsibilities vested on the Oversight Board through PROMESA. As such, the court concluded that the Board members, in fact, exercise significant authority pursuant to the laws of the United States. Therefore, the court below correctly determined that the Oversight Board members are Officers of the United States subject to the Appointments Clause.

However, the court of appeals validated the Board's previous and future actions by applying the *de facto* officer doctrine. Consequently, UTIER was left with no appropriate and effective remedy, despite that it requested an order declaring void *ab initio* all prior acts and barring all further actions of the Oversight Board until it is constitutionally appointed.

1. On June 30, 2016, President Obama signed PROMESA into law. The statute responds to Puerto Rico's financial meltdown in the municipal bond market. Unfortunately, Congress' perceived solution to Puerto Rico's current dire financial situation was the stripping of power from its democratic institutions and instead reallocating that power into a group of seven supra-governmental and non-elected private citizens who form the Oversight Board. The Board members are vested with all powers necessary to purportedly provide a method for Puerto Rico to achieve fiscal responsibility and access to the capital markets. 48 U.S.C. § 2121(b)(1). Congress enacted the law pursuant to Article IV, Section 3 of the United States Constitution, which provides Congress the power to dispose of and make all needful rules and regulations for territories. *Id*. at § 2121(b)(2).

In order to accomplish PROMESA's purpose, the Oversight Board was bestowed with such significant authority over the government of Puerto Rico and the People of Puerto Rico that it empowers the Board to initiate and prosecute, at its sole discretion, the largest bankruptcy in the history of the United States municipal bond market,[3] which is in itself an exclusive federal power. *See Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938 (2016). PROMESA allows the Oversight Board to file on behalf of a territory for the protection of Title III, and to be able to submit, at its sole discretion, a plan of adjustment of debt; thus,

[3] *See* Aurelius Pet. App. 33a.

impairing the obligations to bondholders, hedge funds, insurers and other creditors that are based, and do business globally.

Moreover, the Oversight Board has the authority to rescind laws enacted by the Commonwealth that "alter[ed] pre-existing priorities of creditors." 48 U.S.C. § 2144(c)(3)(B)(ii). No law can be enacted in Puerto Rico without the Oversight Board's approval. 48 U.S.C. § 2144(a)(1). The Board can even formulate public policy binding for the government of Puerto Rico. 48 U.S.C. § 2144(b)(2).

Also, PROMESA states that the Governor of Puerto Rico shall submit to the Oversight Board any proposed Fiscal Plan *as required* by it, but it is the Oversight Board that will determine *in its sole discretion* if the proposed Fiscal Plan complies or not with the requirements of PROMESA.[4] If the Board determines *in its sole discretion* that it does not comply, it shall submit *its own* fiscal plan which, according to PROMESA "shall be deemed approved by the Governor."[5] The exact same happens when submitting budgets to the Oversight Board.[6] Thus, the democratic form of government conferred by the Commonwealth's Constitution was left totally useless.

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[4] 48 U.S.C. §§ 2141(c)(2) and (3).

[5] *Id.* § 2141(e)(2).

[6] *Id.* §§ 2142(e)(3) and (4).

The Board can enter into contracts of its own,[7] and its authorization is required to allow the Commonwealth to issue or guarantee new debt, or to exchange, modify, repurchase, redeem, or enter into any similar transactions with respect to its debt.[8] Additionally, the Board has investigatory and enforcement powers, it can receive evidence at hearings and administer oaths, among other functions at its sole discretion.

In the end, the sole discretion and full authority remains in the Oversight Board, over the elected officials of the Government of Puerto Rico. PROMESA leaves no room for doubt as to the magnitude of the federal powers vested on the Oversight Board.

Even though Congress vested on the Oversight Board with such broad and significant powers, it created a unique mechanism to impose the way not only the selection process of the Board members should take place, but also on how the lists of possible candidates to conform the Oversight Board should be assembled. Through a secret list mechanism, the seven members of the Oversight Board were appointed and none of their appointments required the advice and consent of the Senate confirmation, according to PROMESA.

2. In May 2017, the Oversight Board authorized the filing of a Title III petition for the Commonwealth of Puerto Rico in the U.S. District Court for the District

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[7] 48 U.S.C. § 2124(g).

[8] *Id*. § 2147.

of Puerto Rico.[9] A few weeks later, on July 2, 2017, the Board filed a Title III petition for PREPA, employer of UTIER's members.[10] On August 6, 2017, UTIER filed an adversary complaint.[11] UTIER sought a judgment stating that the Oversight Board members are invalidly appointed given that PROMESA does not comply with the Appointments Clause of the United States Constitution. Also, **UTIER requested an order declaring void *ab initio* all prior acts and barring all further actions of the Oversight Board until it is constitutionally appointed**.

Of PREPA's 6,200 employees, approximately 3,600 are affiliated to UTIER. UTIER was founded in the 1940's, and now it is the main labor union that represents PREPA's employees. Its members are responsible for the operation and conservation aspect of PREPA. They are responsible for the repairs, renovations, and improvements of PREPA's property. UTIER's mission is to protect and defend PREPA's

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[9] No. 17-bk-3283 (D.P.R.).

[10] No. 17-bk-4780 (D.P.R.).

[11] On November 10, 2017, UTIER filed an amended adversary complaint. On August 7, 2017, Aurelius sought to dismiss the Oversight Board's Title III Petition for the Commonwealth of Puerto Rico with somewhat the same argument that the Board members' appointments violated the Appointments Clause and the separation of powers. On July 23, 2018, Assured filed a similar adversary complaint against the Board, seeking a declaration that the Board members' appointments violated the Appointments Clause and the separation of powers, dismissal of the Commonwealth and PRHTA Title III cases, and an injunction against the Board's continued operation until its members were properly appointed. *See* No. 18-1475 before this Honorable Court.

workers, as well as negotiate collective bargaining agreements on their behalf. PREPA is the sole distributor of electric power for the Commonwealth, thus making it an essential public service. If PREPA were unable to continue operating, the whole island would be left without electric power. The loss of capital productivity has left PREPA essentially depending on the UTIER employees' labor production in order to be able to continue rendering such an essential service.[12]

After UTIER's filing, the Board, the United States and other five interested parties, moved the district court to dismiss the adversary complaint on the grounds that pursuant to PROMESA, the Board members are territorial officers and not Officers of the United States, thus, they are not subject to the Appointments Clause. They argued that when Congress acts upon the powers vested by the Territories Clause, it is not bound by separation of powers principles such as the Appointments Clause.

The district court provided essentially a two-pronged analysis for rejecting the Appointments Clause challenge, to wit: 1) the Oversight Board is an entity of the Commonwealth's government and therefore its members are not "principal federal officers" under the scope of the constitutional provision at issue; and 2) Congress could devise the challenged appointment scheme under its broad, plenary authority over

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[12] Section 201(b)(1)(B) of PROMESA, requires that any fiscal plan must: "(B) ensure the funding of essential public services." 48 U.S.C. § 2141(b)(1)(B).

territories. Aurelius Pet. App. 65a. The court concluded that Congress "was acting pursuant to its Article IV" authority in enacting PROMESA, and that assertion "is entitled to substantial deference." Aurelius Pet. App. 93a.[13] Thus, even though the district court emphasized that UTIER had standing to sue seeking the unconstitutionality of PROMESA in PREPA's Title III proceedings, it dismissed the complaint. Pet. App. 1a.

UTIER timely appealed the district court's *Opinion and Order* under 48 U.S.C. § 2166(e)(2) and 28 U.S.C. § 1291. Respondents, Aurelius and Assured also timely appealed. The court of appeals allowed the certified appeal and consolidated all appeals. Aurelius Pet. App. 121a-122a.

3. On February 15, 2019, the United States Court of Appeals for the First Circuit issued a unanimous Opinion and Order reversing the district court's ruling. The court of appeals correctly determined that the appointment of the members of the Oversight Board are unconstitutional for lack of compliance with the Appointments Clause of the Constitution of the United States. The court assertively reasoned, first, the applicability of the Appointments Clause even though Congress has plenary power when acting pursuant to Article IV of the United States Constitution. After determining that Congress is bound by the Appointments Clause even when acting upon the

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[13] The district court issued the judgment towards UTIER by referring to the Opinion and Order of Aurelius case. Aurelius Pet. App. 65a.

Territories Clause, the court then turned to determine if the Oversight Board members were "Officers of the United States" as opposed to mere territorial officers. Such analysis requires the applicability of the *only* test available, which is the "significant authority" test.[14] As such, the court analyzed the issue to determine, based on the authority and powers vested on the Oversight Board by PROMESA, the real nature of their appointments.

In determining that the Oversight Board members are "Officers of the United States," the court made the most fit comparison:

> 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* Aurelius Pet. App. 35a.

However, the court of appeals permitted the Oversight Board to continue operating for an additional 90 days after the judgment in order "to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause." [citations omitted] During the 90-day stay period, "the Board may continue to operate as until now." Aurelius Pet. App. 46a. On May 6th, 2019, the court of appeals issued and order further extending the stay of the mandate for an

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[14] *Lucia v. SEC*, 138 S.Ct. 2044 (2018); *Freytag v. Comm'r*, 501 U.S. 868 (1991); *Buckley v. Valeo*, 424 U.S. 1 (1976).

additional 60 days, until July 15, 2019. Aurelius Pet. App. 56a.

To sustain its ruling, the Court relied on the *de facto* officer doctrine upon the claim that the Oversight Board members acted without the appearance of being an intruder or usurper and in good faith, and that "the Board Members' titles to office were never in question until our resolution of this appeal." Aurelius Pet. App. 45a. The court also "fear[ed] that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now." Aurelius Pet. App. 45a. Such ruling was issued even though UTIER specifically requested the annulment of the Oversight Board's acts and a stay of its operations as a remedy to their claim, based on the fundamental law principle that what is null does not produce valid rights and obligations. The court went even further and validated the Board's actions prospectively by allowing it to continue operating for 150 days (and probably more) after it determined that the Board members were unconstitutionally appointed. Aurelius Pet. App. 1a and 56a.

This Honorable Court's review is warranted since the court of appeals misconstrued the *de facto* officer doctrine and applied it to an Appointments Clause challenge, contrary to this Court's precedents. Also, this doctrine was incorrectly applied by the court of appeals because the Oversight Board members do not comply with the basic requirement of holding an office in good faith, as they knew of the defects in their

appointments, especially after the filing of UTIER's adversary complaint and with complete certainty after the judgment of the court below. By allowing the Oversight Board to continue operating despite their unconstitutional appointments, UTIER was left with no appropriate remedy. Furthermore, UTIER members were left subject to the broad and unfettered powers of an unconstitutional Oversight Board exposing them to ongoing injuries and impairments to their labor rights as well as the obliteration of the democratic governance of the People of Puerto Rico. Not warranting this Court's review will allow Congress and the United States government to enact laws with constitutional defects in violation of a fundamental principle of separation of powers without any consequences as there would be no effective remedy for a challenging party.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. The Court of Appeals misconstrued the *de facto* officer doctrine

The court of appeals applied the *de facto officer* doctrine incorrectly as this Court has expressly refused its application with respect to Appointments Clause challenges. *See Ryder v. U.S.*, 515 U.S. 177, 183-84 (1995). The court below aggravated its mistake when it also allowed the Oversight Board to continue operating for 150 days or probably more, after it concluded that the appointments were defective. The remedy UTIER seeks, should be granted. *See id.* at 183-84,

186, 188. Thus, all the actions of the Board should be declared null and void as they represent an injury to the Petitioner and the People of Puerto Rico. *Canning v. NLRB*, 705 F.3d 490, 514 (2013), *aff'd NLRB v. Canning*, 573 U.S. 513 (2014).

To validate the Oversight Board's previous actions according to the *de facto* officer doctrine, the court of appeals interpreted this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), "which involved an Appointments Clause challenge to the then recently constituted Federal Election Commission." *Id*. In *Buckley*, this Court established that the provisions of the Federal Election Campaign Act vested the Federal Election Commission with responsibilities and duties that were exclusive of Officers of the United States. *Id.* at 140. Therefore, the Act violated the Appointments Clause of the United States Constitution. *Id.* Notwithstanding, this Court allowed "*de facto* validity" to the past *administrative* actions and determinations of the Federal Election Commission and sanctioned it to operate *de facto* for 30 days "in accordance with the substantive provisions of the Act," until Congress reconstituted the Commission, in compliance with the Appointments Clause. *Id.* at 142-43. Nonetheless, in *Buckley*, "the constitutional challenge raised by the plaintiffs was decided in their favor, and the declaratory and injunctive relief they sought was awarded to them." *Ryder*, 515 U.S. at 183.

However, since *Ryder*, this Court has abandoned the practice of validating past acts of an unconstitutionally constituted entity or office and has declined to

extend the "of-forgotten" *de facto* officer doctrine that has "feudal origins dating back to the 15th century," to an Appointments Clause Challenge. *See SW General Inc. v. NLRB*, 796 F.3d 67, 81 (2015), *aff'd* 137 S.Ct. 929 (2017).

Historically, this Court has limited the *de facto* officer doctrine to limit relief following "merely technical" statutory defects in an officer's appointment. *Nguyen v. United States*, 539 U.S. 69, 77 (2003). Also, to excuse defects in an officer's appointment that are raised in a "collateral[ ] attack[ ]" on a judgment, such as in a *habeas corpus* petition. *See Ex parte Ward*, 173 U.S. 452, 456 (1899). In *Ryder*, this Court explained that, in these limited circumstances, the doctrine "protect[s] the public by insuring the orderly functioning of the government despite technical defects in title to office," *Ryder*, 515 U.S. at 180. However, the Appointments Clause is not a mere technical matter of "etiquette or protocol." *Edmond v. United States*, 520 U.S. 651, 659 (1997). It "is among the significant structural safeguards of the constitutional scheme." *Id.* It "preserves . . . the Constitution's structural integrity," standing as "a bulwark against one branch aggrandizing its power at the expense of another branch. . . . " *Ryder*, 515 U.S. at 182 (quotation marks omitted). But it is more: " 'it preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointments power'." *Id. (citing Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)).

In *Ryder*, "the petitioner challenged the composition of the Coast Guard Court of Military Review while

his case was pending before that court on direct review." *Id.* at 182. This Court emphasized that a claim that is based on the Appointments Clause, is a claim that there has been a "trespass upon the executive power of appointment, rather than a misapplication of a statute. . . ." *Id.* (*citing McDowell v. U.S.*, 159 U.S. 596, 598 (1895)).

In *Ryder*, this Court expressly rejected the application of the *de facto* officer doctrine to Appointments Clause challenges. This Court manifested that although in *Buckley* the doctrine of the *de facto* officer was applied to the past actions of an unconstitutional appointment of the Federal Elections Commission, the doctrine is not to be extended beyond the facts of that case. *Id.* at 184.

The reason the doctrine is inapplicable to constitutional defects like Appointments Clause violations is because those errors are "structural," *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991), and therefore, "subject to automatic reversal." *See Neder v. United States*, 527 U.S. 1, 8 (1999). Thus, when a proceeding is "tainted with an appointments violation," the challenger "is entitled" to an entirely "new" proceeding. *Lucia v. SEC*, 138 S.Ct. 2044, 2055 (2018).

Moreover, the *de facto officer* doctrine should not be invoked on cases that involve " 'basic constitutional protections designed in part for the benefit of litigants'." *Ryder*, 515 U.S. at 182 (*citing Glidden Co. v. Zdanok*, 370 U.S. 530 (1962)). As a matter of fact, this Court established in *Ryder* that "one who makes a

timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits and whatever relief may be appropriate if a violation indeed occurred." *Id.* Also, acknowledging the importance and purpose of the Appointments Clause, this Court expressed that "providing relief to a claimant raising an Appointments Clause challenge . . . invalidates actions taken pursuant to a defective title." *Id.* at 185. Thus, in *Ryder* this Court reversed the judgment of the Court of Military Appeals which granted *de facto validity* to the actions of the civilian judges of the Coast Guard Court of Military Review. *Id.* at 188. Also, this Court held that petitioner was entitled to the remedy of a hearing before a properly appointed panel of the Coast Guard Court of Military Review. *Id.* "Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable . . . appointments." *Id.* at 182-83.

Therefore, according to *Ryder*, this Court should reverse the court of appeals' determination, grant UTIER's remedy and forbid an unconstitutional Board from operating and making decisions and determinations that are irreparably affecting UTIER's members and the People of Puerto Rico.

After *Ryder*, in other cases before this Court where the plaintiffs have brought Appointments Clause challenges, the *de facto* officer doctrine has not applied or even been mentioned. In those cases, the past actions by the unconstitutionally appointed "Officers of the United States" have been declared void and null *ab*

initio, and the remedies sought by the aggrieved person, granted. For example, in *NLRB v. Canning*, 573 U.S. 513 (2014), this Court did not even mention the *de facto* officer doctrine as to an Appointments Clause challenge. In this case, the Court affirmed the court of appeals' decision which declared that the National Labor Relations Board's determination that the plaintiff violated the National Relations Act, was null and void *ab initio* because three members of the Board were appointed in violation of the Recess Appointments Clause. *Id.*

Another example of this Court's silence and thus, denial of application of the *de facto* officer doctrine to an Appointments Clause challenge, is *Lucia v. SEC*, 138 S.Ct. 2044 (2018). In this case, this Court concluded that the Securities and Exchange Commission's Administrative Law Judges are "Officers of the United States" within the meaning of the Appointments Clause of the United States Constitution. *Id.* at 2055. Relying on *Ryder*, this Court granted plaintiff the " 'appropriate remedy' for an adjudication tainted with an appointments violation: a new 'hearing before a properly appointed' official." *Id*. As a matter of fact, this Court determined that the administrative judge who would conduct the hearing could not be the same as the one who was unconstitutionally appointed which issued the tainted decision, even if he received or will receive in the future a constitutional appointment. *Id.* In *Lucia*, the unconstitutionally appointed administrative judge affected the life of the plaintiff with its decision. In the present case, the Oversight Board is not

affecting the life of just one person. Rather, it is affecting the lives of a labor union comprised of 3,600 members and the People of Puerto Rico as a whole. Therefore, in compliance with *Lucia*, this Court must reverse the decision of the court of appeals and not let the same unconstitutional Board continue operating in Puerto Rico, even though in the future, the same Board could be validated according to the Appointments Clause. Also, according to *Canning*, this Court should declare null and void *ab initio* all the previous actions and determinations of the Oversight Board that affected the Petitioner and the People of Puerto Rico.

2. The *de facto* officer doctrine and the requirement of good faith

The court of appeals application of the *de facto* officer doctrine is incorrect as this Court has expressly refused its application as to Appointments Clause challenges. *See Ryder v. U.S.*, 515 U.S. 177, 183-84 (1995). Moreover, this Court established in *Ryder* that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits and whatever relief may be appropriate if a violation indeed occurred." *Id.* at 182.

But even if the *de facto* officer doctrine was relevant to this case, it is not applicable for lack of good faith from the members of the Oversight Board. They knew about the constitutional defects of their

appointments since the debate in the United States Senate when senators publicly acknowledged that the Board's appointment mechanism was unconstitutional, or at least dubious. *See* 162 Cong. Rec. S4687 (daily ed. June 29, 2016) (Senator Cantwell) ("The appointments clause requires that these officers . . . be appointed by the President and confirmed by the Senate," and the law therefore "is going to be challenged constitutionally."); *Id.* at S4685 (Senator Reid) ("I take issue with the oversight board and their excessive powers and appointment structure."). PROMESA's unconstitutionality, thus, was clear from the beginning, but certainly since August 6, 2017, when UTIER filed the adversary complaint questioning the validity of their appointments and requesting the annulment of all previous and future actions and determinations of the Oversight Board.

Generally, an official must meet different requirements to be able to exercise his governmental functions and make the decisions that his position establishes. However, there are occasions when constitutional or legal requirements are not satisfied.[15] Obviously, this situation can create uncertainty about the validity of the determinations that the officer has taken. The ancient courts have developed the *de facto* officer doctrine, to "prevent such uncertainty by

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[15] KATHRYN A. CLOKEY, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1121 (1985).

precluding challenges to official actions on the ground of defective title in the acting official".[16]

The "*de facto*" concept is a judicial creation "based on considerations of public policy . . . ". *Jersey City v. Dep't of Civil Serv.*, 153 A.2d 757, 765 (1959). In *Waite v. Santa Cruz*, this Court defined the *de facto* officer

> as 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. 184 U.S. 302, 323 (1902).

In addition, the Court in *Ryder*, noted that this doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995) (*citing Norton v. Shelby County*, 118 U.S. 425 (1886)).

When applicable, the doctrine validates "certain acts of those in apparent, though not lawful, authority".[17] Due to this apparent authority that the official has, this doctrine is based on the reliance that the citizens have in that officer, with respect to the fact that he or she exercises that power legitimately.[18] "The

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[16] *Id*. at 1121.

[17] CLIFFORD L. PANNAM, *Unconstitutional Status and De Facto Officers*, 2 FEDERAL LAW REVIEW 37, 40 (1966).

[18] *Id*. at 40.

focus is on the appearance to the public of legitimate title in the official performing governmental duties".[19]

However, there is an important requirement, regarding the *de facto* officer doctrine, that the courts have taken into consideration: the good faith of the officer. Good faith means honesty; a sincere intention to deal fairly with others.[20] As mentioned, the official must avoid the appearance of being a usurper and for that "the official must have made a good faith effort to comply with legal prerequisite to title."[21]

In the instant case, the court of appeals ruled that the appointments of the Oversight Board members are unconstitutional. However, based on the *de facto* officer doctrine, the court declined to order the dismissal of the PREPA Title III proceedings and to void the Oversight Board's past decisions. The court below determined that, "the Board Members were acting with the color of authority . . . when, as an entity, they decided to file the Title III petitions on the Commonwealth's behalf . . . And *there is no indication but that the Board Members acted in good faith* in moving to initiate such proceedings". (Emphasis added). Aurelius Pet. App. 45a.

Since the Senate debate regarding PROMESA, the appointment through the list mechanism was

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[19] CLOKEY, *supra*, pg. 1123.

[20] West's Encyclopedia of American Law, ed. 2 (2008). Retrieved February 26, 2019, from https://legal-dictionary.thefreedictionary.com/good+faith.

[21] CLOKEY, *supra*, pg. 1123.

questioned as unconstitutional. But just for the sake of the argument, we could say that for some time the Oversight Board members might have acted "with the color of authority and in good faith." However, their "good faith" ended at the time UTIER's complaint was filed and the constitutionality of their appointments was formally questioned. It is at that moment, when the already existing red flag was confirmed regarding the possible illegality of their appointments. Furthermore, when the court of appeals issued its decision, the Board members definitely stopped fulfilling the different requirements that the courts have developed with respect to the *de facto* officer doctrine.

The honesty and sincere intentions that are inherent to the "good faith" concept totally faded away on August 6, 2017, when UTIER filed the complaint with a thorough explanation of why the Oversight Board's appointments were invalid. This previous knowledge of the Board members transformed into a reality with the judgment of the court of appeals. Absent the good faith requirement, this Court cannot allow the anomaly of having an unconstitutionally appointed Board, with specific knowledge of their illegality, acting upon an entire country without any controls, at their sole discretion and without the possibility of judicial review.

As mentioned, in *Waite v. Santa Cruz*, 184 U.S. 302 (1902), the Court determined that the *de facto* officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office." *Id.* at 323. With the filing of UTIER's complaint and

subsequently, with the decision of the court of appeals, it cannot be concluded that the Oversight Board members are "in the unobstructed possession of an office", since their appointments have been questioned and already declared unconstitutional. On the other hand, another factor that the courts have considered in defining and developing the *de facto* officer doctrine is that the *de facto* officer does not "present the appearance of being an intruder or usurper". *Id.* Likewise, the Oversight Board members no longer meet this requirement because they do not have an appearance of legality or have an apparent authority. On the contrary, there is actually a ruling of the unconstitutionality of their appointment from the court of appeals that is of public knowledge and concern.

Moreover, the *de facto* officer doctrine is based on the reliance that citizens have in that officer. That is, citizens must believe that this officer exercises his power legitimately.[22] It is evident that, due to the court of appeals determination, citizens no longer believe that the Oversight Board members are occupying their positions legally and legitimately. Also, the actions taken by said officer "must be within the power of that office".[23] Once the court of appeals determined that their appointments are unconstitutional, the Oversight Board members are not acting within the power of their office because, simply, there is no such office or power.

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[22] PANNAM, *supra*, pg. 40.

[23] CLOKEY, *supra*, pg. 1123.

3. UTIER prayed and is entitled to a meaningful relief

The court of appeals granted *de facto* validity to the Oversight Board because, presumably, its members comported in "good faith" while acting with the color of authority. On top of that, against this Court's determination in *Ryder*, the court of appeals did not grant UTIER any remedy at all. Such determination is the same as the "practice of denying criminal defendants an exclusionary remedy from Fourth Amendment violations when those errors occur despite the good faith of the government actors." *Ryder*, 515 U.S. at 185. When a litigant raises a "constitutional challenge as a defense to an enforcement action," courts may not "declare the Commission's structure unconstitutional without providing relief to the [challengers]. . . ." *Accord FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). By not awarding any meaningful remedy, the court of appeals' determination is just an advisory opinion. When a court makes a new constitutional ruling, it "ha[s] to give [the challenger] the benefit of that new rule"; this is "an unavoidable consequence" of Article III's prohibition against "advisory opinions". *Teague v. Lane*, 489 U.S. 288, 315 (1989) (*citing Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987)).

It is evident that if a federal officer holds a position without legal authority, his previous and future actions are void until the legal or constitutional defect is corrected. *See Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection;

it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.").

The proposition that the court of appeals can rule for UTIER and still somehow allow the Oversight Board to continue unimpeded, largely relies on a misconstruction of the remedies granted in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In those cases, the prevailing challenger received relief. *Ryder v. United States*, 515 U.S. 177, 182-84 n.3 (1995). In *Buckley*, although this Court blessed "the 'past acts of the [FEC],'" it still awarded plaintiffs "the declaratory and injunctive relief they sought." *Id.* at 183. And in *Northern Pipeline*, the court held that the bankruptcy courts were unconstitutional "and applied its decision prospectively only," but "affirmed the judgment of the District Court, which had dismissed petitioner's bankruptcy action and afforded respondent the relief requested pursuant to its constitutional challenge." *Id*. at 184 n.3.[24] There is no precedent of a violation of the Appointments Clause that failed to grant the requested relief. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("[W]e are aware of no theory that would permit us to declare the [FEC's] structure unconstitutional without providing relief to the appellants in this case."). If the Oversight Board is unconstitutional, UTIER "is entitled to a

[24] *Ryder* expressly noted that "[t]o the extent these civil cases may be thought to have implicitly applied a form of the *De facto officer* doctrine, we are not inclined to extend them beyond their facts." 515 U.S. at 184.

decision on the merits of the question and whatever relief may be appropriate. . . ." *Ryder v. United States*, 515 U.S. 177, 182-83 (1995). Therefore, UTIER respectfully requests this Court to order that all the Oversight Board's acts and determinations taken since its inception are unconstitutional and void *ab initio*, since they are in open violation of the Appointments Clause and the separation of powers of the United States Constitution.

Also, UTIER is entitled to injunctive relief as the Oversight Board should be enjoined and stayed from pursuing this and any Title III cases, certifying fiscal plans and budgets, holding hearings or sessions, obtaining official data or creditor information, issuing subpoenas, entering into contracts, enforcing any laws of the covered territory, recurring to judicial civil actions to enforce powers, conducting investigations or any other power or authority provided by PROMESA, until a new Board is constitutionally appointed.

Allowing an unconstitutional Oversight Board to continue to operate has been particularly destructive here because the Board evidently intends to argue that its actions in the Title III proceedings during this interim period render the cases "equitably moot." This course of conduct seems designed to position the Board to invoke "equitable mootness" before the constitutional issue can be adjudicated by this Court.[25] If that

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

maneuver were successful, it would completely deprive UTIER and the People of Puerto Rico of their right to a debt-restructuring process conducted in conformity with the Appointments Clause. Moreover, the continuation of the Board's operations – despite their appointments being unconstitutional – has aggravated (and will continue to aggravate) Petitioner's injuries, as well as for the People of Puerto Rico. It would be entirely incongruous for equitable mootness to, in the end, preclude this Court from adjudicating the important constitutional issues in this appeal.

4. The broad and unfettered powers of the Oversight Board that are impairing UTIER's labor rights and the democratic governance of the People of Puerto Rico compels an immediate stay of the Oversight Board's actions and determinations

As described by the court of appeals, "[t]he 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." Aurelius Pet. App. 35a. At this moment, even when they were unconstitutionally appointed, the members of the Board exercise all the colonial powers of public policy through the certification of fiscal plans and budgets. Neither the governor nor the legislature of Puerto Rico can supervise the Oversight Board. All legislation and governmental regulatory actions must also be submitted to the Oversight Board to determine

whether they comply with the corresponding certified fiscal plan and related budgets. Therefore, PROMESA disenfranchised the People of Puerto Rico intensifying the colonialism control of the United States over Puerto Rico. This unsustainable control is unconstitutional and a gross violation of international law. Under the despotic rule of the Oversight Board, Puerto Rico is a colony inhabited by 3.3 million second class American citizens who do not have political or economic rights as do the resident citizens of the other States and are unable to manage their political and economic destiny to get out of this swamp in which they have stumbled because they do not have the most basic right to elect the representatives that control all the fundamental aspects of their lives. Consequently, it is impossible to compare the Oversight Board with any other federal administrative agency that is illegally constituted and that by acting may affect a specific aspect of the life of citizens within a narrow administrative framework delegated by Congress. In this case, the delegation of powers is so broad and unchecked, that it affects the daily life of an entire Caribbean nation. Therefore, allowing the Oversight Board to act freely over Puerto Rico despite having been declared unconstitutional is an act of exceptional importance that must be addressed and corrected so that justice is duly served.

5. The remedy requested does not invalidate PROMESA and it is necessary to avoid serious violations to the separation of powers doctrine

The remedy requested by UTIER does not nullify PROMESA in its entirety, nor does it deny Puerto Rico of the protection of Title III. On the contrary, it protects the Petitioner and the People of Puerto Rico from ongoing damages caused by an unconstitutionally appointed Board. The remedy sought merely gives the opportunity to the President to nominate, and the Senate to confirm, a new Oversight Board compliant with the Appointments Clause of the United States Constitution.

This newly constituted Board has the duty and authority to determine whether it ratifies the previous actions of the unconstitutional Board. Respectfully, validating the previous actions of the Board is not of the authority of this Court. The Court cannot assume the powers that PROMESA vested on the Oversight Board. This, by itself, would be a violation of the separation of powers doctrine because it is a *political question* that this Court must abstain to address. *Baker v. Carr*, 369 U.S. 186, 217 (1962).[26]

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[26] This Court expressed:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or

Sanctioning as *de facto* valid the previous actions and determinations of the Oversight Board will submerge this Court in a universe of executive policy considerations that would be unwise to address.

The new Board will have the power to determine what it will ratify and what not. It can choose to ratify everything, partially or even nothing at all. However, that power belongs to the newly appointed Oversight Board and not to the Court. That is why the remedy requested here is appropriate. UTIER has timely and properly raised the constitutional challenge of the Oversight Board members' appointment. If a constitutional violation occurred, UTIER must be afforded a full and non *pro forma* relief in the instant controversy.

CONCLUSION

This Court must determine that the actions taken by the Oversight Board members since its inception are null and void. Also, it must overrule the court of appeals' decision that allowed the Board members to continue exercising its powers up to this date. This Court must not allow, based on the inapplicable

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the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. at. 217.

de facto officer doctrine, an unconstitutionally appointed Oversight Board with unprecedented and unlimited powers, to make vital decisions for an entire country that is going through one of its worst economic, political and social crises.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5th, 2019