

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FINANCIAL OVERSIGHT AND MANAGEMENT,)
BOARD FOR PUERTO RICO,)
 Petitioner,)
 v.) No. 18-1334
AURELIUS INVESTMENT, LLC, ET AL.,)
 Respondents;)

 and)
AURELIUS INVESTMENT, LLC, ET AL.,)
 Petitioners,)
 v.) No. 18-1475
COMMONWEALTH OF PUERTO RICO, ET AL.,)
 Respondents;)

 and)
OFFICIAL COMMITTEE OF UNSECURED)
CREDITORS OF ALL TITLE III DEBTORS)
OTHER THAN COFINA,)
 Petitioner,)
 v.) No. 18-1496
AURELIUS INVESTMENT, LLC, ET AL.,)
 Respondents;)

 and)
UNITED STATES,)
 Petitioner,)
 v.) No. 18-1514
AURELIUS INVESTMENT, LLC, ET AL.,)
 Respondents;)

 and)
UNION DE TRABAJADORES DE LA)
INDUSTRIA ELECTRICA Y RIEGO, INC.,)
 Petitioner,)
 v.) No. 18-1521
FINANCIAL OVERSIGHT AND MANAGEMENT)
BOARD FOR PUERTO RICO, ET AL.,)
 Respondents.)

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4 BOARD FOR PUERTO RICO,)

5 Petitioner,)

6 v.) No. 18-1334

7 AURELIUS INVESTMENT, LLC, ET AL.,)

8 Respondents;)

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10 AURELIUS INVESTMENT, LLC, ET AL.,)

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1 UNITED STATES,)
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 12 BOARD FOR PUERTO RICO, ET AL.,)
 13 Respondents.)

14 - - - - -

15 Washington, D.C.
 16 Tuesday, October 15, 2019

17
 18 The above-entitled matter came on for
 19 oral argument before the Supreme Court of the
 20 United States at 10:06 a.m.

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 23
 24
 25

1 APPEARANCES:

2

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5 Management Board for Puerto Rico.

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11 JESSICA E. MENDEZ-COLBERG, ESQ., Ponce, Puerto Rico;

12 on behalf of UTIER.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument today in Case 18-1334, the Financial
5 Oversight and Management Board for Puerto Rico
6 versus Aurelius Investment, and the consolidated
7 cases.

8 Mr. Verrilli.

9 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
10 ON BEHALF OF THE FINANCIAL OVERSIGHT AND
11 MANAGEMENT BOARD FOR PUERTO RICO

12 MR. VERRILLI: Mr. Chief Justice, and
13 may it please the Court:

14 The question in this case is whether
15 members of the Financial Oversight Board are
16 officers of the United States who must be
17 selected in the manner that the Appointments
18 Clause prescribes or whether they are instead
19 territorial officers who do not have to be
20 selected in that manner.

21 The Constitution's text, structure,
22 and history, and this Court's precedents all
23 make clear that the proper focus in answering
24 that question is the nature of the authority the
25 Board exercises. It comes down to whether

1 Congress has vested the Board with the executive
2 power of the national government or, instead,
3 vested the Board with the territorial executive
4 power.

5 The statute that created the Board,
6 PROMESA, answers that question in a
7 straightforward way. It -- it sets up an entity
8 within the territorial government. It gives the
9 Board only territory-specific authority and
10 instructs the Board to pursue only
11 territory-specific objectives.

12 The Board acts on behalf of Puerto
13 Rico as its representative in judicial
14 proceedings to restructure the territory's
15 debts. It pursues only Puerto Rico's interests
16 in those proceedings. It's up to the Article
17 III court that adjudicates those proceedings to
18 balance all the competing interests.

19 Congress also instructed the Board to
20 implement a method for restoring fiscal
21 stability. That, too, is territorial authority.
22 It reaches only Puerto Rico's budgeting and
23 fiscal planning, and the Board must exercise
24 that authority in a manner that protects Puerto
25 Rico's vital -- vital interests.

1 Now Congress did build in protections
2 to guarantee the Board's independence. Congress
3 did that because it concluded that Puerto Rico's
4 staggering financial and humanitarian crisis
5 could not be solved unless the Board was
6 insulated from the political pressures that
7 caused that crisis in the first place.

8 But Congress also insulated the Board
9 from federal control. Board members can be
10 removed only for cause, which means that the
11 President cannot remove them based on
12 disagreement with the Board's policies or
13 priorities in implementing PROMESA.

14 When you put all that together, it's
15 -- the Board is in the territorial government,
16 it's been given statutory directives to advance
17 the interests of Puerto Rico, and it's insulated
18 from federal control, it's clear that Board
19 members are territorial officials --

20 JUSTICE SOTOMAYOR: So how --

21 MR. VERRILLI: -- not officers of the
22 United States.

23 JUSTICE GINSBURG: Mister --

24 JUSTICE SOTOMAYOR: -- how can that
25 be, Mr. Verrilli? It seems to me that your very

1 argument that it's independent is suggesting it
2 can't belong to the territory and that there's a
3 serious problem that the federal government is
4 creating an entity that no one can control.
5 Neither Congress nor the President can remove
6 this entity for anything but cause.

7 Tell me how this differs from a U.S.
8 attorney. A U.S. attorney is an officer of the
9 United States. I think you accept that. A U.S.
10 attorney is enforcing federal law in Puerto
11 Rico, the U.S. attorney of Puerto Rico, just the
12 way PROMESA is. And a U.S. attorney doesn't
13 have jurisdiction outside of Puerto Rico.

14 So how is the U.S. attorney different?

15 MR. VERRILLI: So let me make a
16 general point, and then I'll specifically answer
17 the U.S. attorney question.

18 The general point, I think it's
19 important to make clear, we don't say, contrary
20 to our friends on the other side, that the
21 Appointments Clause doesn't apply in Puerto
22 Rico. It applies in Puerto Rico just like it
23 applies in a state, in that federal officials,
24 officials who are part of the federal
25 government, have to be appointed in conformity

1 with the Appointments Clause --

2 JUSTICE SOTOMAYOR: Could you do this
3 -- could you pass --

4 MR. VERRILLI: -- including the U.S.
5 attorney.

6 JUSTICE SOTOMAYOR: -- could you pass
7 -- could Congress pass a law that -- like
8 PROMESA for a state?

9 MR. VERRILLI: No, I don't think so,
10 because the difference between that situation
11 and this situation is Article IV. And I really
12 think that gets to the heart of the matter,
13 Justice Sotomayor, that I think the beef that my
14 friends on the other side have is not with the
15 Appointments Clause; it's with Article IV.

16 And the difference between this
17 situation and a state is that Congress has
18 reserved authority under Article IV to alter the
19 structure of a territorial government and to
20 prescribe territorial law --

21 CHIEF JUSTICE ROBERTS: Could you --

22 MR. VERRILLI: -- its substantive
23 territorial law.

24 CHIEF JUSTICE ROBERTS: -- could you
25 give at least a quick answer --

1 MR. VERRILLI: Sure. I'd be --

2 CHIEF JUSTICE ROBERTS: -- to the
3 first part of Justice Sotomayor's question?

4 MR. VERRILLI: Yes. Of course. The
5 difference, I think, the key difference between
6 a U.S. attorney and the Board is that the U.S.
7 attorney is executing laws of nationwide
8 application, the -- the U.S. Criminal Code,
9 Title 18. And the U.S. attorney in Puerto Rico
10 in that respect is no different than the U.S.
11 attorney in New York.

12 The Board does not implement laws of
13 nationwide application. It implements as law --

14 JUSTICE SOTOMAYOR: But all laws don't
15 have nationwide application, even federal laws.
16 Some federal laws have local application as
17 opposed to national. They're still federal law
18 because they were passed by Congress and there
19 federal dictates.

20 MR. VERRILLI: But --

21 JUSTICE SOTOMAYOR: This is no
22 different for the U.S. attorney.

23 MR. VERRILLI: I do think it's
24 different in a fundamental way, Your Honor. It
25 is territory-specific. It applies only to the

1 territory of Puerto Rico. And the Board's
2 authority is to -- is to act in the interests of
3 the territory of Puerto Rico in the -- in
4 their --

5 JUSTICE KAGAN: Well, Mr. Verrilli, I
6 mean, suppose that Congress looks at Florida and
7 it says that there are a lot of hurricanes there
8 and the waters are rising, and we have a
9 terrible Florida problem. And Congress passes
10 the Florida Reclamation Act, and it's supposed
11 to deal with, you know, the Florida problem that
12 it perceives but uses federal law to do so.

13 Would you say that -- I think the --
14 your -- your phrase was the executive power of
15 the national government. Would the head of the
16 agency that the Florida Reclamation Act sets up
17 be exercising the executive power of the
18 national government?

19 MR. VERRILLI: Yes. And the
20 difference is -- I'm sorry, Your Honor.

21 JUSTICE KAGAN: No, I was just going
22 to say, what is the difference, Mr. Verrilli?

23 (Laughter.)

24 MR. VERRILLI: And the difference --
25 and the difference is -- and the difference is

1 that -- that Congress has dual authority with
2 respect to the territories to act under Article
3 I with nation -- laws of nationwide application,
4 which are enforced by federal officials. For
5 example, there's a FEMA regional administrator.
6 There's an EPA regional administrator. They're
7 all appointed in conformity with the
8 requirements of the Appointments Clause. But it
9 has dual authority. It can also act as a
10 territorial legislature, and -- and under
11 Article IV, it has plenary authority to do so.

12 JUSTICE KAGAN: Well, how do we know
13 which -- which authority it's using?

14 MR. VERRILLI: Well, you look -- I --
15 I think as -- we think *Palmore* is the relevant
16 precedent there. And I think what you do is you
17 look to two things. First, what does it -- what
18 does Congress say it's doing. Here, Congress
19 said expressly we're invoking Article IV and
20 we're creating an entity in the territorial
21 government. That's the --

22 JUSTICE GINSBURG: What -- what's --

23 MR. VERRILLI: -- language of the
24 statute, entity --

25 JUSTICE GINSBURG: -- what's the

1 argument, Mr. Verrilli -- you started with this
2 is an -- this is an entity within the Puerto
3 Rico government. The argument on the other side
4 is no, it's not within; it's above. It's above
5 the Puerto Rican government, and it's -- it's
6 above the legislature and the governor.

7 MR. VERRILLI: Yes, and that's -- and
8 that's simply an incorrect characterization. I
9 think it misinterprets independence for
10 superintendence. And I think, if you think
11 about it, it's just not right to say that what
12 you've got here is a federal overlord or a
13 federal master in the language of -- of the
14 First Circuit, because think about what Congress
15 did here.

16 First, it said that the -- that the
17 Board's authority is territory-specific, and
18 then it said that the Board is supposed to act
19 on behalf of Puerto Rico and represent Puerto
20 Rico in the restructuring proceedings. It's not
21 supposed to advance the broad interests of the
22 United States. It advances Puerto Rico's
23 interests.

24 And, similarly, with respect to its
25 budget --

1 JUSTICE KAGAN: Well, wasn't Congress
2 thinking about the broad interests of the United
3 States? I mean, here it was. It was looking at
4 this terrible financial crisis in Puerto Rico
5 and considering a wide variety of options to
6 address that crisis.

7 Now one option could have been some
8 kind of financial bailout. Congress didn't want
9 to do that. It instead chose an option that had
10 less financial cost for the American people as a
11 whole.

12 So, you know, why shouldn't we think
13 that Congress, in enacting this piece of
14 legislation, was not thinking about it through a
15 broad national lens?

16 MR. VERRILLI: First, I think what
17 matters is what Congress did, not what the
18 motivations of individual legislatures were in
19 moving forward with what Congress did.

20 Second, the best evidence of what
21 Congress did is the statute itself, where it
22 made a choice to create an entity in Puerto Rico
23 and it instructed it to act on behalf of Puerto
24 Rico. And even with respect to its budgeting
25 authority, it said when you do your budgeting

1 and fiscal planning, you've got to ensure that
2 there's adequate funding for essential services
3 in Puerto Rico, adequate funding for the Puerto
4 Rico pension plan, adequate funding for economic
5 development in Puerto Rico.

6 It told this Board to act for Puerto
7 Rico.

8 CHIEF JUSTICE ROBERTS: Counsel, what
9 if we don't think it's an all or nothing
10 division when you look at the responsibilities
11 of the Board?

12 I mean, certainly much of it has to do
13 with territorial issues, but you can certainly
14 appreciate congressmen viewing this obviously as
15 something with nationwide significance.

16 So, to some extent, it's dealing with
17 territorial issues. To some extent, it's
18 dealing with issues of broader national
19 significance.

20 What happens to your case in that
21 instance?

22 MR. VERRILLI: I think it's -- I think
23 the answer is the same, because what matters is
24 the power that Congress chose to invoke and the
25 way in which Congress chose to act.

1 And what Congress did here was tell
2 the Board the way to address this problem is by
3 acting in the interests of Puerto Rico. And
4 then it also insulated the Board from federal
5 control through the for cause standard.

6 JUSTICE SOTOMAYOR: May I ask you, if
7 we had the original act setting up the U.S.
8 Attorney for Puerto Rico and Congress changed
9 only one label of the three Palmore factors,
10 same factual situation as exists now, except
11 that it says we're doing it under the
12 territorial clause.

13 You're suggesting that that's enough
14 reason for why --

15 MR. VERRILLI: Absolutely --

16 JUSTICE SOTOMAYOR: -- our --

17 MR. VERRILLI: -- absolutely not, Your
18 Honor. And that's why the third factor in
19 Palmore is the critical one. You have to look
20 at the nature of the authority that the office
21 is executing.

22 JUSTICE SOTOMAYOR: All right.

23 MR. VERRILLI: And they --

24 JUSTICE SOTOMAYOR: Now let me ask you
25 how you can label this a territorial officer as

1 opposed to a federal officer handling federal
2 issues -- a federal mandate when none of the
3 people of Puerto Rico have voted in any way to
4 -- on any of the directives that this agent has
5 received?

6 MR. VERRILLI: I -- I understand that
7 point, Your Honor. But, again, I don't think
8 that has anything to do with the Appointments
9 Clause.

10 There is no doubt under this Court's
11 precedence, starting two centuries ago, and as
12 recently as Sanchez Valle, that the Congress has
13 reserved authority to act at the territorial
14 level and to change the structure of --

15 JUSTICE SOTOMAYOR: Certainly.
16 There's no question.

17 MR. VERRILLI: -- territorial
18 government and to change the substance.

19 JUSTICE SOTOMAYOR: There's no fight
20 -- there's no fight there. The issue is where
21 do you draw a line between what's a federal
22 officer and what's a territorial officer.

23 MR. VERRILLI: And I think --

24 JUSTICE SOTOMAYOR: And the issue has
25 to be that when Congress chooses, it's

1 Congress's choice.

2 If the territory chooses, if it elects
3 a governor, if it elects legislature, if it
4 elects its own Attorney General, that those are
5 officers that Puerto Rico have selected.

6 But, if the federal government is
7 making the selection and imposing it on a
8 territory, it has to be a federal officer.

9 MR. VERRILLI: I -- that's -- I -- I
10 -- I think that's just not right on numerous
11 levels, Your Honor, and --

12 JUSTICE SOTOMAYOR: No, it's too
13 simplistic for you.

14 (Laughter.)

15 MR. VERRILLI: No, no, no, no. The
16 main --

17 JUSTICE SOTOMAYOR: That's -- that's
18 the problem that everybody --

19 MR. VERRILLI: -- one of the main
20 reasons which it's not right, I think, is that
21 it's not consistent with the history of this
22 country.

23 And if you start with the mayor of
24 Washington in 1802 -- now, admittedly, it's the
25 Enclave Clause, not the Territories Clause, but

1 the Court has said that there are provisions
2 that should be read in the same way -- if -- if
3 you start with that, the mayor of Washington was
4 appointed -- was -- Congress created the
5 position of mayor of Washington under a statute.

6 JUSTICE KAVANAUGH: That -- that's one
7 -- I mean, that's one example. But the other
8 side says the historical practice is otherwise
9 overwhelming in -- up until about the 1950s, of
10 saying that territorial officers had to be
11 appointed by the President with the advice and
12 consent of the Senate.

13 So how do we deal with that historical
14 practice? You do have the mayor example, so
15 it's not uniform. But how do we deal with that
16 historical practice?

17 MR. VERRILLI: Two points. First on
18 the mayor. I think the mayor of Washington is
19 an extremely significant historical marker
20 because, after all, the Presidents who made
21 those appointments every year during that period
22 were Jefferson and Madison, and if they had
23 thought that their -- that the Appointments
24 Clause applied in a situation like that --

25 JUSTICE KAVANAUGH: I -- I --

1 MR. VERRILLI: -- certainly, we would
2 have heard about that.

3 JUSTICE KAVANAUGH: -- I agree with
4 you -- I agree with you --

5 MR. VERRILLI: And now we're --

6 JUSTICE KAVANAUGH: -- it's important,
7 but assume the history is still --

8 MR. VERRILLI: But -- but with
9 respect -- the history they have essentially is
10 that territorial governors up until the 1950s
11 were appointed with advice and consent. But --

12 JUSTICE KAVANAUGH: And judges.

13 MR. VERRILLI: And territorial judges.
14 But I actually think that -- let's go right to
15 the judges point because I think that actually
16 proves our position and not theirs, because even
17 though territorial judges were always nominated
18 by the President, confirmed by the Senate, this
19 Court held starting in Cantor and then also in
20 Englebrecht and McAllister that they weren't
21 judicial officers of the United States, despite
22 the fact that the President nominated them and
23 the Senate confirmed them.

24 And then, to reinforce that, there
25 have been three times in the country's history

1 where a question arose about whether a
2 territorial judge could be impeached by
3 Congress.

4 And in each of those three instances,
5 the political branches concluded that a
6 territorial judge could not be impeached because
7 a territorial judge was not a civil officer of
8 the United States but only an officer of the
9 territory exercising territorial power.

10 Now, with respect to the governors, of
11 course, you know, the -- the Appointments Clause
12 is not an either/or proposition. If it applies
13 to the governors as principal officers, it
14 applies to the people the governor appoints as
15 inferior officers.

16 But starting with the Northwest
17 Ordinance and continuing throughout the
18 country's history, inferior officers have been
19 appointed in manners that don't comply with the
20 Appointments Clause.

21 JUSTICE KAGAN: Does it just -- does
22 it strike you as a little strange, Mr. Verrilli,
23 to use the history in this kind of case so
24 extensively? I mean, first, it's a little bit
25 all over the map and you each have your

1 historical examples to point to.

2 But, second, the position of
3 territories currently is so different from the
4 position of territories throughout much or most
5 of our history.

6 So I -- I guess it seems to me more
7 natural, rather than to look to, you know, what
8 the Northwest Ordinance did, is -- is simply to
9 use a kind of functional test and say are these
10 people doing the sorts of things that would be
11 done by state officials in states, or are they
12 doing the sorts of things that would be done by
13 federal officials?

14 MR. VERRILLI: So two things. First,
15 respectfully, we think, in interpreting the
16 meaning of the phrase "officer of the United
17 States," which is the job that has to be done in
18 this case, the history is very, very relevant.

19 But, second, even if one takes a
20 functional analysis, I think the right way to
21 look at the functional analysis is to look at
22 the -- what the Board is actually charged with
23 doing.

24 And what the Board is actually charged
25 with doing is acting in the shoes of the

1 government of Puerto Rico in the restructuring
2 proceedings and acting as an independent entity
3 insulated from political pressure within the
4 budgeting proceedings, but -- but constrained by
5 statute to act on behalf of, in the interests
6 of, for the territory. So --

7 CHIEF JUSTICE ROBERTS: Well --

8 MR. VERRILLI: -- if you're going to
9 use a functional approach, they're very much
10 like a state government, not a federal overlord.

11 And I think this would actually be
12 kind of a crazy system if what you wanted to do
13 was create a federal overlord to say: You're a
14 federal overlord. Take the national interests
15 into account, but, when you actually administer
16 the -- the authority you have, you have to only
17 focus --

18 JUSTICE SOTOMAYOR: What do we do
19 about the brief --

20 MR. VERRILLI: -- on territorial
21 interests.

22 JUSTICE SOTOMAYOR: -- what do we do
23 about the brief of at least there's one amicus
24 that suggests that in one of the litigations
25 that's ongoing, with respect to PROMESA, that

1 there's all sorts of evidence that the Board is
2 taking directives from federal officials?

3 MR. VERRILLI: So I -- you know, that
4 brief, you know, respectfully, Your Honor, I --
5 I think that shows the perils of relying on an
6 amicus brief that relies on extra-record
7 information.

8 The vast majority of those -- of the
9 -- the documents there have not been disclosed.
10 But, if I may talk about them, because I've been
11 asked about them, the -- the -- the vast
12 majority of those are communications from
13 federal government officials to the Board in the
14 wake of the disasters and the hurricanes saying
15 we need information about what's going on on the
16 ground here.

17 And so it was -- it was informational,
18 the overwhelming majority of them. Now they did
19 find one communication from a Senate staffer, I
20 think, or a House staffer, I think a Senate
21 staffer, saying we want you to resolve Issue X
22 this way. Again, I've got to be outside the
23 record to -- to answer that. But, basically,
24 the Board told them to pound sand. And so I
25 don't think there's any merit to it whatsoever.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 General Wall.

4 ORAL ARGUMENT OF JEFFREY B. WALL ON
5 BEHALF OF THE UNITED STATES

6 MR. WALL: Mr. Chief Justice, and may
7 it please the Court:

8 We know that Congress expressly
9 invoked its authority over the territories and
10 placed the Board within the Puerto Rican
11 government. So the real question here is, was
12 that choice constitutional under Article IV?

13 It was.

14 The Board budgets and restructures
15 debt only for Puerto Rico. It acts in the
16 territory under a territory-specific statute.

17 In our view, Mr. Chief Justice, the
18 Board's focus is exclusively local, but, at a
19 minimum, it's primarily local, which is the
20 appropriate test under *Palmore*.

21 Justice Kagan, Congress could have
22 legislated directly. It could have put this in
23 the Treasury Department. If it hadn't otherwise
24 specified, the powers would have gone to the
25 assembly and the governor with respect to

1 restructuring the debt and representing the
2 Commonwealth in these Title III proceedings.

3 It didn't want that. It wanted new
4 and independent territorial officers on the
5 ground in Puerto Rico to resolve the fiscal
6 crisis as it had with the D.C. Control Board 20
7 years earlier. That's a re --

8 JUSTICE GINSBURG: And what was the
9 position the government took, the D.C. Control
10 Board?

11 MR. WALL: So they point to a D.C.
12 Circuit brief in the second set of proceedings.
13 We said in that brief, after this Court had held
14 it's exercising federal power with respect to
15 federal property, we said, sure, it's federal,
16 but I -- I'd urge the Court to look at the
17 brief.

18 We said if it had been acting with
19 respect to D.C., it would have been different
20 because that would have been local power. I
21 think the same is true with respect to the
22 territories. We drew a distinction in that very
23 brief between federal power over federal
24 property and local power with respect to the
25 District or, here, the territories.

1 So I think our position has been
2 entirely consistent. As early as 18 --

3 JUSTICE SOTOMAYOR: I don't see how.
4 I mean, you say federal power over federal
5 property. But that's what the Territory Clause,
6 read your way, would say, that Puerto Rico is
7 federal property. You can't have it both ways.

8 MR. WALL: So I --

9 JUSTICE SOTOMAYOR: Your -- you have
10 to be disposing of federal control over federal
11 property, because that's what a territory is.

12 MR. WALL: So I -- I don't think so,
13 Justice Sotomayor, but I don't know that much
14 turns on that here. Article IV says both
15 property and the territory. And this Court's
16 cases have treated them differently. So there
17 it was Dulles and Reagan National airports.
18 Those have a different status under the
19 Constitution from the territories.

20 But I think my point was just that
21 where Congress is acting with respect to
22 something federal, it's exercising national
23 legislative power and it's creating national
24 executive offices. That's not what it's doing
25 here.

1 It put a Board inside the Puerto Rican
2 government. Now, yes, it wanted it independent
3 from other Puerto Rican actors that it thought
4 had played a role in this debt crisis. But
5 that's a very different thing from putting it in
6 the federal government and exercising federal
7 power. It was reorganizing the Puerto Rican
8 government. That is a quintessential exercise
9 of Article IV power.

10 And I don't think, by the way, Justice
11 Kagan and Kavanaugh, that the history is a wash.
12 It's not just the early Washington mayors.
13 Territorial judges were federally appointed,
14 never treated as federal officers. Early
15 territorial upper houses, the -- the D.C.
16 Control Board. D.C. judges, to this day, are
17 appointed by the President and confirmed by the
18 Senate. They've never been treated as federal
19 officers. They do not have lifetime tenure and
20 a guaranteed salary.

21 Federal appointment has never been the
22 hallmark of whether you are federal or
23 territorial. The hallmark has always been, as
24 Mr. Verrilli said, what kind of power are you
25 exercising?

1 JUSTICE BREYER: Well, that's a
2 question I -- I mean, you're representing the
3 federal government. If you lost, would they
4 appoint the same people?

5 MR. WALL: The President has nominated
6 the same people.

7 JUSTICE BREYER: Okay. Now, if that's
8 so and if you lose, but if we were to follow
9 Judge Terrea and say the de facto officer
10 doctrine, what difference would it make?

11 MR. WALL: So there are two separate
12 things with respect to the -- to the remedy,
13 Justice Breyer. If the Court agrees with us on
14 the de facto officer doctrine, that takes care
15 of the Board's acts running up through the
16 Court's decision.

17 Going forward, I think all the parties
18 now agree we still need a stay of the mandate
19 because you'd have to give Congress the
20 opportunity to confirm a new Board. Otherwise,
21 the Board would shut down over night. You
22 wouldn't have a Board.

23 JUSTICE BREYER: Yeah.

24 MR. WALL: So you've got to give the
25 Senate time to act. Right? And then that new

1 Board would pick up where the old Board left
2 off.

3 JUSTICE BREYER: But they would be the
4 same people. And so what you're talking about
5 is a delay of possibly days while the Senate
6 gets its act together to confirm the people that
7 they already recommended to the President with
8 one exception. I mean, are we talking -- is
9 that what we're talking about?

10 You win, and there's no delay; you
11 lose, assuming Judge Terrea's right, and there's
12 a slight delay? That's what this case is about?

13 MR. WALL: Well, I --

14 JUSTICE BREYER: On that assumption?

15 MR. WALL: I hope we're not in a world
16 where we lose, and I would love to tell you that
17 it won't be a big deal in that world, but it's
18 going to be a little more complicated that.

19 They're almost certain to argue that
20 the nominations have expired and that even
21 though the Senate has confirmed people before to
22 expired terms, it can't do that here. Even if
23 we win that argument and even if the Senate
24 committee reports them out and even if the
25 Senate gets them through the floor during the

1 period of the stay and we get a new Board, then
2 they're going to argue that Board has to ratify
3 everything that was done during the period of
4 the stay, and they're going to challenge that
5 ratification, and, of course, that ratification
6 will extend backward in time, further and
7 further, depending on what you do with the de
8 facto officer doctrine.

9 JUSTICE SOTOMAYOR: The -- the -- the
10 big question on --

11 MR. WALL: So, I mean, we're
12 litigating for years on that view. It's just a
13 question of how much we're going to have to
14 litigate with them if we -- if -- if the Court
15 decides we're wrong on the merits.

16 JUSTICE SOTOMAYOR: Mr. -- Mr. Wall,
17 do you have to still litigate that here? You're
18 making an assumption that the de facto doctrine
19 does go as far as you say, which is to deprive a
20 winning party of no remedy whatsoever.

21 MR. WALL: That's not true. They will
22 get prospective remedy as all of the litigants
23 did in the de facto officer cases, including
24 Buckley. It -- the second this Court's stay
25 expires, the Board can no longer act with

1 respect to Aurelius, Assured, UTIER, or anybody
2 else.

3 What the de facto officer doctrine
4 says is, even though you get meaningful
5 prospective relief, we don't invalidate
6 everything done moving backward in time that the
7 officers are alleged to have done while
8 invalidly appointed.

9 And so -- and I think that's critical
10 here because the Board's been acting for three
11 years. We have, you know, nearly 100 adversary
12 proceedings, hundreds of thousands of claims,
13 hundreds of millions of dollars collected or
14 paid out, 12 billion dollars in bonds issued in
15 the COFINA Title III proceeding that have been
16 traded on the secondary -- on the market
17 something like 85,000 times.

18 I mean, I have no idea how one unwinds
19 this, and I don't think that -- that Aurelius
20 and UTIER have given any real way to do it. And
21 that's exactly what the de facto officer
22 doctrine is for. We don't wipe everything out
23 in the past.

24 But I do want to say that I don't
25 think we get to that. I don't think the merits

1 here are -- are close. Congress did its
2 homework. It invoked Article IV. It told us
3 where it was putting it --

4 JUSTICE KAVANAUGH: I thought your
5 argument would be that if you lost, there would
6 also be a lot of legal ramifications in terms of
7 calling into question the status of elected
8 governors, judges, territorial judges, and the
9 like. Is that not the case?

10 MR. WALL: Well, I think it depends on
11 which of their four or maybe five tests you
12 pick. They start with Buckley. If they're
13 serious about that, which has significant
14 authority under federal law, that's the D.C.
15 mayor, city council, the Guam and Virgin Island
16 governors, and all territorial legislators and
17 judges. All of that authority flows directly
18 from federal law, whether an organic act or the
19 D.C. Home Rule Act.

20 So then they tweak Buckley to say:
21 Well, not if you're elected. And then I say:
22 Well, but you still don't solve D.C. judges,
23 territorial judges, Washington mayors, early
24 territorial upper houses, or the D.C. Control
25 Board.

1 And then they say: Well, it's
2 executing federal law, maybe it's a special law,
3 maybe it's federal objectives, maybe it's
4 federal removal and there's a hodgepodge of
5 other factors thrown in there.

6 If the Court accepts those,
7 notwithstanding that there are historical
8 counter-examples to every one of those tests,
9 then I suppose you could try to carve out the
10 test in just the way as to pick this up. But I
11 don't think there's any principled way to do it.
12 All of the federal authority that these
13 territorial officers and D.C. officers exercise
14 flows from federal law.

15 And if you take their test seriously,
16 yes, Justice Kavanaugh, it will threaten to
17 undermine, indeed I think it would condemn in
18 its entirety, home rule.

19 I mean -- and -- and that just points
20 out -- I mean, there's both an upper-level and a
21 lower-level disruption here. The lower-level
22 disruption is undoing three years of what the
23 Board has done to try to stabilize the condition
24 in Puerto Rico.

25 The upper-level disruption is every

1 test they've got runs smack dab into history,
2 and every test they've got would federalize some
3 number of officers who have always been thought
4 of as territorial or local, whether in D.C. or
5 in the territories.

6 And like I say, I mean, from 1802 to
7 now, I mean, if -- if -- if Mr. Olson is serious
8 that significant authority under federal law
9 makes you a federal officer, well, then, so too
10 the D.C. judges who --

11 JUSTICE SOTOMAYOR: That's assuming
12 that the immediate -- that you're looking at the
13 ultimate source, which is a double jeopardy
14 idea. And our -- and our opinion in Sanchez
15 Valle made it very clear that it was limited to
16 that. A much different result if you limit it
17 to what's the immediate source.

18 MR. WALL: Oh, yes, I don't disagree
19 that that's kind of an -- an ad hoc limitation
20 that they've thrown on to try to avoid the
21 consequences of their view. But just to refine
22 what you said a little bit, Justice Sotomayor,
23 what -- what I took Justice Kagan's opinion to
24 be saying in Sanchez Valle is, look, there are
25 other ways you could have defined sovereignty or

1 you could have looked at sovereignty, but, if
2 we're looking at source of authority, the source
3 of authority here flows from federal law.

4 Well, their test is a source test.
5 Their test is Buckley. Did you get significant
6 authority from federal law? So maybe there are
7 other tests they could have tried to come up
8 with, but theirs is a source test.

9 JUSTICE SOTOMAYOR: But you could say
10 that about the states. The Constitution is the
11 source of their power because the compact with
12 the United States -- with -- their very
13 existence is dependent on that. But we don't
14 define what a state act is or a federal act by
15 their original source.

16 MR. WALL: Oh, well --

17 JUSTICE SOTOMAYOR: We define it by
18 who passed the law, the state or the federal
19 government.

20 MR. WALL: Well, except that under
21 their test, and I think under Sanchez Valle,
22 you've got to look at where that power flowed
23 from, where did you get that authority. And
24 they keep saying authority under federal law.
25 Okay, well, if that's your test, all of that

1 authority, whether with respect to D.C. or the
2 territories, flows from federal law.

3 And, of course, the problem with the
4 test, Justice Sotomayor, is Buckley is a
5 significance test. It takes an officer who's
6 got concededly federal power and says how
7 significant is their power? Are they an
8 employee or are they an officer? It's not
9 designed to answer the predicate question of,
10 well, are they exercising federal power or
11 territorial power?

12 That's the question that Palmore gets
13 at. Is it a D.C. court or is it an Article III
14 court? And the only way you know that is by
15 asking two questions: One, did Congress invoke
16 Article I or did it invoke Article IV? And
17 then, two --

18 JUSTICE SOTOMAYOR: I've not even --

19 MR. WALL: -- did it do anything under
20 Article I or Article IV that --

21 JUSTICE SOTOMAYOR: Why do you bother
22 with the third? If you give the first --
23 assuming that, as your adversary said, if
24 Congress -- all it has to do is wave a magic
25 wand, Article IV, and that that gives

1 permission? Obviously not.

2 MR. WALL: Oh, it's still got to be --
3 it's got -- first, you've got to ask where it
4 was trying to put the office. That's the first
5 step. And then you've got to ask whether it had
6 the constitutional power to do that thing. Did
7 it do something under Article I or under Article
8 IV that it couldn't do?

9 And the very first sentence of the
10 court of appeals discussion is no one here has
11 claimed that anything in PROMESA extends beyond
12 Congress's reach under Article IV.

13 And that's true. There's not a word
14 in these briefs from Aurelius or UTIER claiming
15 that there is any power vested in the Board that
16 is not among Congress's plenary power under
17 Article IV. That's the end of the analysis, I
18 think, correctly understood.

19 What was Congress doing? It was
20 putting it in the territorial government. Did
21 it give it any power it didn't have under
22 Article IV? They haven't claimed that it did.

23 That under Palmore, I think, is the
24 end of the analysis. Congress invoked its
25 plenary power. It didn't do anything Article IV

1 didn't give it the power to do.

2 JUSTICE KAGAN: And, Mr. Wall, what is
3 your answer to the question that Justice
4 Sotomayor started off with about the difference
5 between these Board members and a U.S. attorney?

6 MR. WALL: It's the same one that
7 Mr. Verrilli gave, which is where you have
8 executive officers who are acting under statutes
9 of nationwide application, we think that that's
10 best understood to be exercising federal --

11 JUSTICE KAGAN: How about --

12 MR. WALL: -- executive power.

13 JUSTICE KAGAN: -- if PROMESA had,
14 instead of setting it up the way it did, had
15 just -- had amended Chapter 9 of the federal
16 bankruptcy laws and said Puerto Rico
17 instrumentalities get to use Chapter 9 the way
18 everybody else does, then creates the Board to
19 do that.

20 MR. WALL: Yeah, I --

21 JUSTICE KAGAN: What -- what of that?

22 MR. WALL: I -- I don't think the form
23 of that matters. You're asking the same two
24 questions.

25 JUSTICE KAGAN: Because there, there

1 is a -- I -- I guess what I was suggesting was
2 that on -- on that there would be a uniform
3 national law.

4 MR. WALL: Oh, I -- I think you'd have
5 to ask the same two questions. Was Congress
6 doing that under the bankruptcy clause in
7 Article I or doing it under the Territory Clause
8 in Article IV to just create or extend those
9 laws to the territory?

10 And then did it do -- did it put any
11 powers in that office that it couldn't have
12 under Article IV. So I think it'd be the same
13 answer if, when extending the bankruptcy
14 statute, it had said we're extending a similar
15 system to Puerto Rico. We're invoking Article
16 IV. We are creating this new board to oversee
17 these new bankruptcy proceedings. And we are
18 putting that in the Puerto Rican government.

19 JUSTICE KAGAN: Well, then it doesn't
20 seem to have much to do with whether the law is
21 nationwide or not, because my hypothetical was
22 nationwide law, and you're saying it wouldn't
23 matter because Congress said it was using
24 Article IV.

25 But it's got to be more than --

1 MR. WALL: So --

2 JUSTICE KAGAN: -- what Congress said,
3 right?

4 MR. WALL: -- so I -- I think that is
5 pressing at exactly the tough question, which
6 I'm going to say fortunately is not presented
7 here, because it's a territory-specific statute
8 and it's only acting in the territory.

9 But Palmore does say primarily local.
10 And it's a little tough to figure out exactly
11 what it means.

12 It seems to think that, if you're
13 doing the D.C. code most of the time, rather
14 than federal statutes most of the time,
15 adjudicating, you're local, which seems to point
16 up that you can do a little bit of the
17 nationwide thing without converting into a
18 federal officer.

19 And we know that's true of territorial
20 judges. That's the best historical example.
21 They were hearing matters in the territory, but
22 they were adjudicating them under federal law.

23 So I think that you're asking a really
24 tough question about, well, what does local
25 mean? Does it mean you're doing only the local

1 matters, or does it go to the geographic scope
2 of the statute under which you act?

3 I think it's tough. Palmore seems to
4 indicate the scope of the statute might matter.
5 History seems to indicate it might not if what
6 you're doing is local. And, again, all I can
7 say is I think this is the easy case because
8 here we --

9 JUSTICE KAGAN: Although this case --

10 MR. WALL: -- check both boxes.

11 JUSTICE KAGAN: -- isn't all that
12 different from my hypothetical, right, because
13 essentially what PROMESA does is it replicates
14 all the procedures of Chapter 9. I mean, it's
15 not coming up with a new thing.

16 MR. WALL: I mean, it -- it's similar
17 in most respects, but I actually don't think
18 that changes the analysis.

19 I mean, when the Detroit mayor walks
20 in under Chapter 9 and files for municipal
21 bankruptcy, we don't think that simply because
22 he has invoked some power granted to him by
23 federal law that he becomes a federal officer.

24 I mean, here, the Board basically
25 represents the Commonwealth. It's almost like

1 the debtor. All it does is, if the Commonwealth
2 says restructure our debt, it walks in and files
3 the petition in federal court.

4 It then basically represents the
5 debtor, not different from any other state or
6 municipality, tries to work out the claims with
7 the creditor, and then ultimately Judge Swain
8 has to sort out the plan and confirm something
9 in the bankruptcy.

10 So I don't think in that respect it's
11 acting any differently from any state or
12 locality that declares under Chapter 9. It's
13 still -- under Palmore, it's still focused on
14 local matters.

15 Everything the Board is doing, it's
16 doing in Puerto Rico, which is why I don't think
17 they've tried to claim, look, you needed any
18 Article I power. All you needed was Article IV.

19 JUSTICE KAVANAUGH: Suppose Congress
20 invokes Article IV and puts it in the
21 territorial government, as it's done here, but
22 assigns some matters that -- to pick up on
23 Justice Kagan's questions -- are more national
24 than local.

25 Is the remedy for that problem to say

1 that that officer can't perform the more
2 national duties, or is the remedy for that to
3 say that the -- the office is invalid because
4 it's appointed in violation of the Appointments
5 Clause?

6 MR. WALL: Well, first, Justice
7 Kavanaugh, I don't want to -- to grant that that
8 office would be unconstitutional. It's
9 pressing. It's a tough question Justice Kagan
10 was getting at. So what does Palmore mean by
11 primarily?

12 It seems to leave some room to do
13 nationwide or federal things as long as you are
14 focused on the territory.

15 But if you assume that it's got to be
16 exclusive -- a test that I think we meet here --
17 I think it's a hard question what the remedy
18 would be.

19 I think you'd still have the de facto
20 officer potentially going --

21 JUSTICE KAVANAUGH: Well, I'm asking a
22 --

23 MR. WALL: -- outside --

24 JUSTICE KAVANAUGH: -- different
25 question.

1 MR. WALL: -- unless it's an
2 adjudicator.

3 JUSTICE KAVANAUGH: Wouldn't --
4 wouldn't the officer still be a valid
5 territorial officer but perhaps exercising some
6 duties that he or she cannot exercise?

7 MR. WALL: I think that's a potential
8 remedy. We haven't looked at that here. We
9 haven't briefed it. I do think that it kind of
10 -- it highlights the oddity of the other side's
11 claim.

12 It's not as if they're pointing to
13 some federal power provision that --

14 JUSTICE KAVANAUGH: Well, I think it
15 highlights the difficulty, as Justice Kagan
16 said, at the primarily local, because the word
17 "primarily," you were very careful in your brief
18 to have that each time you articulate the test.

19 And I'm not sure how we're supposed to
20 figure that out.

21 MR. WALL: Justice Kavanaugh, I think
22 you need it there. We've known since Cantor in
23 1826 that territorial judges are not federal
24 officers. And yet they are adjudicating cases
25 under federal law. They had general federal

1 jurisdiction, just like state courts. It -- it
2 was exclusive until 1875.

3 So I think you've got to have some
4 primary test in there. I think you're going to
5 have difficult cases at the margins. And all I
6 can fall back on is this is not a difficult case
7 because, here, there's nothing in PROMESA that
8 needed to be an exercise of Article I. By its
9 terms, it is limited to the territory.

10 It's not as if they can point you to
11 some federal provisions of PROMESA that grant
12 the federal power that you could just excise.
13 It says represent the Commonwealth in the
14 following ways. And -- and I do -- I do -- and
15 I think this is the best way to capture it.

16 Congress could have given these powers
17 to the governor and the legislature. They'd
18 already -- they already had many of them. They
19 could adjust debt. They could propose budgets
20 and fiscal plans. The governor otherwise would
21 have represented the Commonwealth in the Title
22 III proceedings.

23 If they had created the Title III
24 proceeding but not otherwise specified that the
25 Board would play a role, and the governor had

1 filed this petition, I don't think anyone
2 believes that would have converted the governor
3 into a federal officer, any more than the mayor
4 of Detroit or anybody else.

5 To say just a quick word on the -- on
6 the -- on the remedy. As we tried to say, I
7 think there are two things at play, the de facto
8 officer doctrine, to ensure you have not applied
9 it to adjudicators, that's Ryder, but you have
10 more than a dozen cases applying it to
11 legislative and executive bodies, that's
12 Buckley.

13 This is an executive body that's not
14 doing adjudication. Right? So I think it falls
15 squarely within that -- it -- that set of cases.
16 And, indeed, I think it's sort of the classic
17 case for that, given the immense reliance
18 interests that have been built up on the Board
19 over the next three years, going forward,
20 everybody agrees we need a stay in order to
21 confirm a new Board, if you decide we're wrong
22 on the merits. I think the right model there is
23 Northern Pipeline. That was six months. Same
24 thing here.

25 You've got to get them out of

1 committee. You've got to get them through the
2 floor. They're going to have to do some amount
3 of ratification. And then they're going to have
4 to act going forward.

5 At a minimum, though, I'd say we need
6 three months with the ability to come back and
7 report progress just like what we did in the
8 First Circuit, because we've got to allow
9 Congress and then the Board some time to -- to
10 act.

11 If the Board is shut down in Puerto
12 Rico, I do think it imperils a process on which
13 we have made really substantial gains in the
14 last three years in trying to stabilize the
15 island's finances. And I can't stress to the
16 Court how important it is that the Board be
17 allowed to continue to do that work.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 General.

21 Mr. Olson.

22 ORAL ARGUMENT OF THEODORE B. OLSON
23 ON BEHALF OF AURELIUS INVESTMENT, LLC, ET AL.

24 MR. OLSON: Thank you, Mr. Chief
25 Justice, and may it please the Court:

1 In Federalist 48, James Madison
2 anticipated what Congress attempted to do with
3 the PROMESA oversight board, masking under
4 complicated and indirect measures its
5 encroachment on coordinate departments. Drawing
6 all power into its impetuous vortex, he urged
7 all precautions against the enterprising
8 ambition of this department.

9 PROMESA was a response to a national
10 financial crisis affecting millions of American
11 citizens, including 3 million citizens, American
12 citizens, in Puerto Rico.

13 The PROMESA Board is appointed,
14 supervised, and removable by the President of
15 the United States, reports regularly on its
16 budget and decisions to federal officials, and
17 makes recommendations -- it's required to do so
18 under the statute -- for changes in PROMESA and
19 other federal laws -- other federal laws.

20 It presides over the largest municipal
21 bankruptcy proceeding in United States history,
22 managing over 100 billion dollars in
23 indebtedness, 165,000 claims, including over 200
24 claw-back actions, lawsuits against major
25 financial institutions, in a proceeding in an

1 Article III district court designated by the
2 Chief Justice of the United States.

3 The Board was effectively chosen --
4 these are the words of the congressional
5 committee -- effectively chosen by members of
6 Congress, all without the advice and consent of
7 the Senate.

8 The Appointments Clause is central to
9 the separation of powers, without which, in the
10 words of the framers, we have the very
11 definition of tyranny. It was a response to the
12 most insidious and powerful weapon of
13 18th-century despots.

14 JUSTICE KAVANAUGH: If the Board were
15 elected, would it be constitutional?

16 MR. OLSON: No, it would not be
17 constitutional because -- how -- and -- and --

18 JUSTICE KAVANAUGH: Doesn't that mean
19 the Puerto Rico governor election is
20 unconstitutional as well then?

21 MR. OLSON: No, because the Puerto
22 Rican authorities that are given to the Puerto
23 Rican governor and under the Puerto Rican
24 legislature are primarily local activities. I
25 just described what the PROMESA's Board powers

1 are. They are national in scope. They bring
2 cases in federal court against U.S. citizens.
3 They conduct an extensive investigation of the
4 oversight -- over the underwriting practices,
5 the bond rating situation with respect to
6 this --

7 JUSTICE GINSBURG: All on behalf of
8 Puerto Rico and its people and its agencies.
9 The Board is instructed to act not on behalf of
10 the United States but on behalf of Puerto Rico
11 in pressing these claims?

12 MR. OLSON: Justice Ginsburg, it is
13 not on behalf of Puerto Rico. It is not an
14 internal Puerto Rican operation. It is an
15 oversight board.

16 This Board has the power to prescribe
17 a budget for Puerto Rico. It has the power to
18 veto decisions of the governor of Puerto Rico
19 and the legislature of Puerto Rico. It has the
20 power and has sued the governor of Puerto Rico
21 and government -- Puerto Rican officials. It's
22 called an oversight board because it is not
23 internal to Puerto Rico. It --

24 CHIEF JUSTICE ROBERTS: Well, but its
25 oversight concerns -- every sentence you just

1 said there, it's of Puerto Rico, of Puerto Rico.
2 Its focus is on Puerto Rico.

3 Yes, the activities, as things in any
4 of the territories often do, has broader impact.
5 I get -- I'll get back to the question I asked
6 your friend, Mr. Verrilli.

7 What if we -- I mean, I think it's
8 very artificial to look at this and say, is this
9 local or is this national? It obviously is some
10 of each, or even the local aspects certainly
11 have national implications.

12 So, again, I mean, where -- where do
13 we -- I know what your answer is, but you could
14 explain it. What do you do with -- what -- what
15 do I do if I view it as some of each?

16 MR. OLSON: Well, it is overwhelmingly
17 a federal problem dealing with a federal issue.
18 In the -- in the Limtiaco case just in 2007,
19 with an issue involving insolvency or potential
20 insolvency of Guam, this Court said this is not
21 a local problem. This is the -- the insolvency
22 of a territory is a national -- is a national
23 issue. It's a federal issue.

24 The concern of the United States --
25 this is in a sense a little bit like the Lebron

1 case or other cases where this Court has said
2 the Congress is dealing with a significant
3 federal problem. It has come up with a federal
4 solution and has given this Board powers over
5 citizens all over the United States.

6 JUSTICE KAVANAUGH: But I think the
7 response on the other side is that they've taken
8 some of the powers and responsibilities that
9 belonged to the governor and to the legislature
10 and given them to the Board, and the governor,
11 as you acknowledged, is elected, not appointed
12 consistent with the Appointments Clause.

13 So is that wrong that they've taken
14 the powers from the governor and legislature and
15 given them to the Board?

16 MR. OLSON: They've taken all of the
17 powers with respect to the financial situation
18 in Puerto Rico and given it to the
19 federal-created Board, which is appointed by the
20 President, removable by the President, and has
21 supervisory authorities under the -- the very
22 statute --

23 JUSTICE GORSUCH: But, Mr. Olson, I --
24 I think the question is --

25 JUSTICE ALITO: Mr. Olson --

1 JUSTICE GORSUCH: -- if, but for this
2 statute --

3 JUSTICE KAVANAUGH: Right.

4 JUSTICE GORSUCH: -- who would -- who
5 would be doing these activities? And if it
6 would be the governor of Puerto Rico --

7 MR. OLSON: The governor --

8 JUSTICE GORSUCH: -- then doesn't that
9 tell us something?

10 MR. OLSON: The governor of Puerto
11 Rico does not have the power to do these
12 activities.

13 JUSTICE GORSUCH: I understand that.
14 But for this statute, who would? Wouldn't it be
15 the governor? That's what --

16 MR. OLSON: No.

17 JUSTICE GORSUCH: -- that's what your
18 colleagues --

19 MR. OLSON: But for the statute, this
20 authority to do --

21 JUSTICE GORSUCH: That's what your
22 colleagues suggest.

23 MR. OLSON: Well --

24 JUSTICE GORSUCH: And is -- if that's
25 erroneous, could you direct us to what -- who

1 would do it but for the statute?

2 MR. OLSON: The statute was created
3 because the -- the governor of Puerto Rico --
4 and there was no authority for officials in
5 Puerto Rico to do these responsibilities, to
6 bring these actions -- these actions against
7 financial institutions in the mainland, to bring
8 -- to overturn the budget, to do these various
9 things, to bring suit against the governor
10 himself.

11 JUSTICE BREYER: Why couldn't they?
12 Why couldn't they? They'd pass a law, a Puerto
13 Rican law, which would give them authority to do
14 it.

15 MR. OLSON: They -- they would not
16 have the power to have the reach that this
17 PROMESA --

18 JUSTICE BREYER: What? Give me an
19 example. I mean, if the legislature and
20 governor wanted to do it, they would pass a law.
21 They would represent Puerto Rico in the
22 bankruptcy proceeding.

23 MR. OLSON: Well --

24 JUSTICE BREYER: They would -- they
25 would take care of the problem.

1 MR. OLSON: That case was before this
2 Court just a couple of years ago.

3 JUSTICE BREYER: Right.

4 MR. OLSON: The -- the case involving
5 whether or not Puerto Rico could use the
6 bankruptcy statutes to do --

7 JUSTICE BREYER: No, no, no, I'm
8 saying we set up a -- what I think you're being
9 asked by several of us is: Look at all the
10 powers that the -- that the Board has. Aren't
11 they powers that the Puerto Rican government
12 could exercise if it had the legislative and
13 gubernatorial will?

14 MR. OLSON: I submit --

15 JUSTICE BREYER: Which one couldn't
16 it?

17 MR. OLSON: I think virtually all of
18 them, Justice Breyer. This is a long statute
19 prescribing an enormous range of powers, given
20 the ability to overturn decisions of the
21 governor, to reverse --

22 JUSTICE BREYER: You know, I
23 understand that, but I don't want to repeat my
24 question. You see what my question was?

25 MR. OLSON: I do see what your --

1 JUSTICE SOTOMAYOR: Mr. Olson, I think
2 the basic question, if I can simplify it, I
3 believe, is couldn't the governor of Puerto Rico
4 and the legislature have created their own
5 fiscal rescue plan? Yes. Correct?

6 MR. OLSON: No, I don't believe so. I
7 think --

8 JUSTICE SOTOMAYOR: Why?

9 MR. OLSON: -- that was the case that
10 would give the authority to adjust debts, to
11 accommodate the various different creditors,
12 to -- to --

13 JUSTICE SOTOMAYOR: Oh, you're talking
14 about -- we are -- okay. I guess your intention
15 is that without PROMESA, the bankruptcy law
16 wouldn't have changed to permit Puerto Rico --

17 MR. OLSON: It -- it would --

18 JUSTICE SOTOMAYOR: -- to file --

19 MR. OLSON: -- it would not.

20 JUSTICE SOTOMAYOR: -- its action --

21 MR. OLSON: And this statute --

22 JUSTICE SOTOMAYOR: -- so --

23 MR. OLSON: -- went far beyond the
24 bankruptcy powers. The powers that are given to
25 this Board are vastly greater than powers that

1 are available on the --

2 JUSTICE ALITO: Mr. Olson --

3 JUSTICE SOTOMAYOR: So what you're
4 basically saying is, without this federal law
5 creating the structure, the structure itself
6 couldn't exist under existing law?

7 MR. OLSON: That's correct.

8 CHIEF JUSTICE ROBERTS: Justice Alito.

9 JUSTICE SOTOMAYOR: So the legislature
10 couldn't do it?

11 MR. OLSON: That's correct.

12 JUSTICE ALITO: Mr. Olson, are you and
13 your client here just to defend the integrity of
14 the Constitution, or would one be excessively
15 cynical to think that something else is involved
16 here involving money? And, if so, what is it?
17 What did the Board do that hurt your client?

18 MR. OLSON: Well, with -- my -- aside
19 from the constitutional right to an officer --

20 JUSTICE ALITO: Well, I mean, are you
21 -- are you and Aurelius here just as -- as amici
22 to defend the Constitution, or do you have some
23 kind of a concrete grievance?

24 MR. OLSON: The process is not
25 complete, Justice Alito. The process is

1 ongoing. My client is being subjected to a
2 process that is governed by officials that were
3 appointed in violation of the separation of
4 powers.

5 So that sense, it isn't complete. We
6 can't describe the degree to which someone might
7 have been hurt. But the Court's -- this Court's
8 said over and over again that it's fundamental
9 that an officer of the United States must be
10 appointed pursuant to the Appointments Clause.
11 That is fundamental to the separation of powers,
12 which is fundamental to the Constitution --

13 JUSTICE ALITO: I mean, you don't have
14 to answer this if you don't want to, but there
15 is no money issue involved here?

16 (Laughter.)

17 MR. OLSON: Of course, there -- of
18 course, there --

19 JUSTICE ALITO: Well, what is it?

20 MR. OLSON: There's over --

21 JUSTICE ALITO: I'd just like to know
22 what -- this is a real case. I'd like to know
23 what's really going on here.

24 MR. OLSON: Well, there's -- there's
25 over 100 billion dollars of indebtedness being

1 adjudicated in various procedures, a lot of
2 which is --

3 JUSTICE ALITO: Right, and your client
4 wants more of it and somebody else you think is
5 getting too much. So what is it exactly? If
6 you want to answer. If not --

7 MR. OLSON: We can't -- we can't
8 possibly answer that. There are these
9 extraordinarily large claims which the governor
10 -- which the agencies of Puerto Rico have
11 defaulted on, have not been able to pay these
12 claims.

13 So, yes, you're right. Of course, it
14 involves a lot of money. And the money is in a
15 process that's being adjudicated by a federal
16 district judge appointed by the Chief Justice of
17 the United States.

18 JUSTICE GINSBURG: Didn't your client
19 acquiesce in some settlement?

20 MR. OLSON: There was a settlement of
21 one small piece of it that was -- that had
22 nothing to do with -- at no time did my clients
23 relinquish their constitutional claims or recede
24 from them in any way.

25 There was a small settlement with

1 respect to a taxing authority where the sales
2 tax went into an agency. And that part of it
3 has been resolved. And we've agreed not to
4 challenge -- my clients have agreed not to
5 challenge that settlement in any way.

6 So that's a bit of a --

7 JUSTICE KAGAN: Mr. Olson --

8 JUSTICE GINSBURG: But this one you
9 have agreed to challenge, and why, you are
10 challenging?

11 MR. OLSON: Pardon?

12 JUSTICE GINSBURG: What is the
13 difference between what you agreed to and you're
14 not challenging and now what you're challenging?

15 MR. OLSON: What we're challenging is
16 the remaining part of the procedure, which is
17 the giant part of it. This is a small piece of
18 it that was settled in some way and -- and there
19 was really basically no choice because the Board
20 was ongoing and a settlement was reached with
21 respect to a small segment of the resources.

22 But in no way did my clients
23 relinquish its constitutional rights to an
24 appointment under the Appointments Clause.

25 JUSTICE KAGAN: Mr. Olson --

1 JUSTICE BREYER: I see that, and I
2 wanted to ask you a question --

3 JUSTICE GINSBURG: One thing -- there
4 was one thing that --

5 JUSTICE BREYER: -- that I think you
6 may --

7 CHIEF JUSTICE ROBERTS: I'm sorry.
8 Justice Ginsburg?

9 JUSTICE GINSBURG: -- that -- that
10 confuses me about your presentation, because you
11 start out very strongly that the evil here is
12 Congress aggrandizing itself, Congress
13 aggrandizing itself at the executive's expense.

14 How about the member of the Board
15 that's appointed by the President alone? There
16 can't be any question of Congress aggrandizing
17 itself. Congress has given the President alone
18 that authority.

19 So would it be unconstitutional in
20 your view if all of the members were appointed
21 by the President and not subject to the advice
22 and consent?

23 I don't get how that --

24 MR. OLSON: They would -- they --
25 these are principal officers of the United

1 States, not inferior officers. Therefore,
2 principal officers under the Constitution must
3 be appointed, nominated by the President --

4 JUSTICE GINSBURG: But what does that
5 have to do with Congress aggrandizing itself at
6 the executive's expense?

7 MR. OLSON: Well, the -- the -- they
8 -- the President appointed one without advice
9 and consent of the Senate. That violates the
10 Appointments Clause. The other were pursuant to
11 lists --

12 JUSTICE GINSBURG: How about the D.C.
13 Control Board, where they're all appointed --

14 MR. OLSON: Well, there's --

15 JUSTICE GINSBURG: -- by the
16 President?

17 MR. OLSON: -- that has never been
18 adjudicated. The government itself in
19 connection with the D.C. Control Board took the
20 position in an Office of Legal Counsel opinion
21 that that was a federal agency.

22 There has never been a resolution of
23 that. The D.C. Control Board has vastly more
24 limited powers with respect to local matters.

25 And our -- our opponents bring up and

1 rely on the Palmore case, which had nothing to
2 do with the Appointments Clause. It wasn't an
3 adjudication or wasn't --

4 JUSTICE KAVANAUGH: They bring up --

5 MR. OLSON: -- a discussion of --

6 JUSTICE KAVANAUGH: Excuse me. They
7 bring up home rule more generally. And that's
8 of serious concern here, is if you were to
9 prevail here, what would that do for home rule
10 and the territories with elected governors?
11 What would it do for the District of Columbia
12 with the elected mayor, city council, the
13 judges' appointments?

14 How, if you were to prevail here,
15 would the line be drawn so that it does not
16 affect home rule?

17 MR. OLSON: It would not affect home
18 rule at all. Now people might make the argument
19 that PROMESA itself affected in some way because
20 it took over the responsibility of the -- of the
21 Puerto Rican officials to set financial
22 conditions, establish a budget -- budget, and
23 all of those things.

24 But the outcome in favor of my clients
25 in this case would simply mean that the same

1 officials would be appointed pursuant to the
2 Constitution. It wouldn't change home rule.
3 All of the cases that we've relied upon --

4 JUSTICE KAVANAUGH: But wouldn't it
5 require that similar officials -- maybe I'm not
6 understanding -- in the territories who exercise
7 territorial power, but also affect national
8 power?

9 MR. OLSON: What -- what -- I think
10 the issue might be primarily federal power or
11 versus primarily local.

12 The Palmore case itself, which our
13 opponents rely on repeatedly, says in that
14 opinion those were primarily or exclusively or
15 largely -- there are various different
16 adjectives used in that opinion -- local D.C.
17 criminal proceedings, criminal law under the
18 laws of the District of Columbia.

19 And this Court has repeatedly likened
20 the power that can be exercised in the
21 territories under the territorial clause or
22 under the clause that gives power over the
23 District of Columbia local territorial matters,
24 the type of authority that may be given by a
25 state to a local municipality.

1 JUSTICE GINSBURG: Congress enacts the
2 D.C. code, right? The D.C. code is enacted by
3 Congress?

4 MR. OLSON: Yes, although -- well,
5 there is -- it's changed over time. But -- but
6 at -- at a certain point in time, yes. But --
7 but the fact is that there is a difference
8 between primarily local authority, and that's
9 discussed in the -- in the Palmore case. The
10 reason that those --

11 JUSTICE KAGAN: So -- so that does
12 sound like the test that is being used by Mr.
13 Verrilli and Mr. Wall. I mean, they've said
14 that your test is kind of malleable.

15 And I guess what I'd like, what is
16 your test?

17 MR. OLSON: The test -- my test is
18 this Court's test, which was articulated in the
19 Buckley case, again in the -- in the --

20 JUSTICE KAGAN: But you know what --
21 what struck me --

22 MR. OLSON: -- in the Lucia case.

23 JUSTICE KAGAN: -- what struck me when
24 I read that, when I read your brief, the Buckley
25 test is significant authority pursuant to the

1 laws of the United States. I guess what struck
2 me was that in many -- on many occasions you
3 modified that test in your brief.

4 You said significant federal authority
5 pursuant to the laws of the United States. And
6 when you do that, it strikes me that you're
7 coming actually pretty close, I mean, and if you
8 agree on a test, that seems not a bad thing. It
9 seems as though, when you say significant
10 federal authority, you're coming pretty close to
11 what Mr. Wall and Mr. Verrilli have proposed.

12 MR. OLSON: Well, we looked at each of
13 the cases that are cited both in our briefs and
14 our opponents' briefs, including the United
15 States' briefs.

16 The -- it is -- it is -- and it's the
17 test of this Court, not just in the Buckley
18 case, but as -- as recently -- as recently as a
19 couple years ago in the Lucia case. It's the
20 same case.

21 JUSTICE KAGAN: Right, but always --
22 always to distinguish between officers and
23 employees. And what I'm suggesting is that when
24 you apply it to this situation, your own briefs
25 modify the test by talking about federal

1 authority and implicitly comparing federal
2 authority to local authority.

3 MR. OLSON: And we acknowledge that,
4 that with respect to the test that this Court
5 articulated, repeatedly, Lucia was just the last
6 time it did, that authority under the laws of
7 the United States has always accepted the -- the
8 purely local authority that's been exercised in
9 the territories.

10 JUSTICE KAVANAUGH: So if it's --

11 MR. OLSON: There's also exceptions
12 for transitional governments. The Philippines,
13 for example. There was a local government and
14 then it was replaced --

15 JUSTICE GORSUCH: Mr. Olson, I'm --
16 I'm confused. I honestly don't understand what
17 the difference between your test and the
18 government's test is in this case.

19 If you could articulate that in a few
20 sentences, I'd be grateful.

21 MR. OLSON: The test is --

22 JUSTICE GORSUCH: The difference
23 between the two tests.

24 MR. OLSON: Well, the difference
25 between the two is that we believe, and what --

1 what this Court has taught us, that if you're
2 exercising significant authority under the laws
3 of the United States, the laws enacted by
4 Congress with respect to the government, affairs
5 of the federal government, as opposed to purely
6 local municipal, the -- the speed limits, the
7 zoning --

8 JUSTICE GORSUCH: I understand -- I
9 understand the test. My question is, what's the
10 difference between that and the question asking
11 whether the individual or the Board is acting
12 primarily locally or primarily nationally?

13 MR. OLSON: It --

14 JUSTICE GORSUCH: What's the
15 difference? What's the delta?

16 MR. OLSON: The -- the delta is, is
17 something that is a municipal matter, is it --
18 have to do with local affairs, speed limits,
19 zoning, and things of that nature, as opposed to
20 federal statutes that deal with a national
21 crisis.

22 This was a national crisis, a national
23 --

24 JUSTICE GORSUCH: Could I rephrase
25 that as asking whether the Board was acting

1 primarily locally or primarily nationally?

2 MR. OLSON: It is -- the Board is
3 acting primarily nationally.

4 JUSTICE GORSUCH: Okay. So we do
5 agree on a test then?

6 MR. OLSON: Pardon me?

7 JUSTICE GORSUCH: So then we do agree
8 on the test, right, whether the Board was acting
9 primarily locally or primarily nationally?

10 MR. OLSON: Well, that part of it,
11 yes.

12 JUSTICE GORSUCH: Okay.

13 MR. OLSON: Because those -- what this
14 Court has said repeatedly is that, where there
15 is local municipal authority, Congress has the
16 power under Article IV to give government and --
17 and regulate the affairs in municipalities.

18 JUSTICE KAVANAUGH: So if it's
19 primarily --

20 JUSTICE SOTOMAYOR: Mr. Olson --

21 MR. OLSON: As --

22 JUSTICE SOTOMAYOR: -- I don't want
23 you to ignore the de facto officer. But just to
24 finish this, there's this nuance between you and
25 your adversaries on are you dealing primarily

1 with a local matter?

2 And they would say dealing with a
3 budget, dealing with running the government,
4 that's all local.

5 You are attempting to say something
6 different, but I'm not sure what that difference
7 is, because, when they use the words primarily
8 local matters, that's the way I understand them
9 to be using it.

10 MR. OLSON: The -- the test --

11 JUSTICE SOTOMAYOR: They -- they can
12 obviously correct me if I'm wrong.

13 MR. OLSON: Well --

14 JUSTICE SOTOMAYOR: But they're saying
15 this Board is dealing with primarily local
16 matters because it's dealing primarily with a
17 budget and with --

18 MR. OLSON: And that's not --

19 JUSTICE SOTOMAYOR: That -- that --
20 that's -- okay.

21 MR. OLSON: With all due respect, you
22 cannot say that at the same time that you've
23 read the PROMESA statute itself. And this Court
24 --

25 JUSTICE SOTOMAYOR: Well, I -- I've

1 read it, but that doesn't mean I know what
2 you're referring to.

3 Could you succinctly make the -- the
4 difference between how you view primarily
5 dealing with --

6 MR. OLSON: Well --

7 JUSTICE SOTOMAYOR: -- in your way and
8 the way the other side does?

9 MR. OLSON: -- the insolvency of a
10 territory of the United States is not a local
11 matter. That's what this Court said in the
12 Limtiaco case in 2007. The -- and -- and that's
13 what Congress was saying when it was dealing
14 with the enactment of this statute.

15 We have a fiscal catastrophe, a
16 humanitarian crisis involving millions of
17 citizens, 3 million American citizens in Puerto
18 Rico, but citizens all over the United States
19 who are owed money by the government of Puerto
20 Rico or agencies of the government of Puerto --

21 JUSTICE SOTOMAYOR: So, Mr. Olson --

22 MR. OLSON: -- Rico.

23 CHIEF JUSTICE ROBERTS: Counsel, it's
24 just then -- it -- it's just a question of size.
25 I mean, if the same thing, we're talking about

1 not Puerto Rico, but Ponce -- see, I don't know
2 the pronunciation -- Puerto Rico, your position
3 would be different? Or a county in Puerto Rico?

4 MR. OLSON: I think that it's possible
5 that you could find a fiscal insolvency
6 situation of a small enough unit of a -- of a
7 portion of Puerto Rico where you wouldn't be
8 talking about this, but Guam, which is what this
9 Court talked about in that case, Limtiaco case,
10 was 1/400th the size of Puerto Rico, involving
11 that tiny fraction of the significance of Puerto
12 Rico.

13 We're talking here about not just the
14 size but the dimension of the problem, the
15 number of citizens that are involved, the number
16 of creditors' claims, over 200 claw-back claims
17 against financial institutions throughout the
18 United States that are being pursued in federal
19 court.

20 This is a --

21 JUSTICE KAGAN: So would it be right
22 to say, Mr. Olson, that you view this statute as
23 essentially a statute about debt restructuring?
24 I mean, it has other aspects and the Board does
25 other things and oversees Puerto Rican budgets

1 going forward, but you're saying that what we
2 should do is look at the statute and say it's
3 about restructuring a bankrupt territory's debt
4 and that that has to be viewed as national? Is
5 that the theory?

6 MR. OLSON: Well, that is part of the
7 theory. And as -- as the United States
8 repeatedly said with respect to, in the Freytag
9 case, the deputy solicitor general was asked a
10 question about what if the governor of Puerto
11 Rico was appointed by Congress or a federal
12 official? And the response from the federal
13 government was that would invoke in every case
14 the Appointments Clause.

15 CHIEF JUSTICE ROBERTS: Did that
16 deputy solicitor general prevail on that
17 position?

18 (Laughter.)

19 MR. OLSON: That deputy solicitor
20 general made a beautiful argument, Mr. Chief
21 Justice.

22 (Laughter.)

23 MR. OLSON: And -- and fortunately for
24 him --

25 CHIEF JUSTICE ROBERTS: A beautiful

1 losing argument.

2 MR. OLSON: -- the Court did not
3 decide that precise case. But that -- but that
4 argument that was made is the same argument that
5 the United States has made in 22 OLC in 1978,
6 when it was talking about Guam, in 31 OLC in the
7 brief in the Hechinger case, which was the
8 follow-on to the Metropolitan Washington
9 Authority's case, that was a very, very
10 important case.

11 JUSTICE KAVANAUGH: If we conclude
12 that the powers and duties here are primarily
13 local -- and I know you disagree -- but, if we
14 conclude that, do you lose?

15 MR. OLSON: The -- I suspect that if
16 there's -- if there's an agency in Puerto Rico
17 that's dealing with purely local problems, like
18 the --

19 JUSTICE KAVANAUGH: You keep --

20 MR. OLSON: -- like the article --

21 JUSTICE KAVANAUGH: -- you keep saying
22 -- I'm sorry to interrupt. You keep saying
23 "purely local."

24 MR. OLSON: Well, primarily, I'll --

25 JUSTICE KAVANAUGH: Okay.

1 MR. OLSON: -- accept that, primarily.

2 JUSTICE KAVANAUGH: There's a big
3 difference between --

4 MR. OLSON: Well, there's a big -- it
5 may be a big difference and it may be important
6 in this case. Palmore case was talking about
7 relative -- it wasn't purely local, but it was
8 primarily local. The Court used exclusively,
9 but I think the Court meant in the Palmore case
10 those courts that were dealing with problems in
11 the District of Columbia involving District of
12 Columbia criminal laws.

13 So if your -- the focus is on that, of
14 course, there are state officials that can
15 enforce federal law. That's always been the
16 case from the beginning of the Constitution. So
17 it is primarily what's being involved here.

18 This is the -- the Congressional
19 Budget Office itself looked at this particular
20 statute and said this is a federal office. The
21 Lebron case that looked at Amtrak --

22 JUSTICE KAVANAUGH: Can I just try the
23 question again? If we conclude it's primarily
24 local, do you have an alternative argument or do
25 you lose?

1 MR. OLSON: Well, I don't -- I don't
2 -- I think that it can't conceivably be thought
3 of as primarily local given the scope of the
4 authority, but I'm imagining a hypothetical
5 situation where you might have a small unit of
6 -- of government, a subdivision of Puerto Rico
7 that was purely a municipal problem, yes, that
8 could be a -- that could not invoke the
9 Appointments Clause, but --

10 JUSTICE SOTOMAYOR: Mr. Olson, don't
11 lose the de facto officer argument.

12 MR. OLSON: Yes. The de facto -- this
13 Court decided 24 years ago unanimously, in an
14 opinion by -- written by the then Chief Justice,
15 that when there is a decision, a challenge, a
16 timely challenge to an Appointments Clause
17 violation, one who makes -- to use the words of
18 that Court -- one who makes a timely challenge
19 to the constitutional validity of the
20 appointment of an officer who adjudicates his
21 case and, legislative or adjudicative -- these
22 are Article I issues, so there really isn't any
23 difference there -- is entitled to a decision on
24 the merits and whatever relief may be
25 appropriate.

1 I heard the government say just a few
2 minutes ago that we've done all these things,
3 we've made all those decisions, so put the
4 Constitution aside, let us continue to do it.
5 Let us have the fruits of the decisions that we
6 made with unconstitutional officers who could
7 never have even filed --

8 JUSTICE SOTOMAYOR: I think that they
9 are making a distinction between adjudicatory
10 and legislative decisions.

11 MR. OLSON: I don't think that --

12 JUSTICE SOTOMAYOR: They seem to be
13 saying that when it comes to legislative
14 officers, that we have applied the de facto
15 officer status. In more recent times, you're
16 absolutely right, with adjudicatory officers, we
17 have said no, you have to give people a new
18 hearing.

19 So deal with that distinction --

20 MR. OLSON: Well --

21 JUSTICE SOTOMAYOR: -- and deal with
22 why that's wrong.

23 MR. OLSON: -- I don't think that
24 there is a valid distinction in -- in a vacuum
25 between an adjudicatory process. Look at the

1 Lucia case, was an Administrative Law Judge that
2 was exercising what the Court perceived as
3 partially adjudicative problems, but also
4 conducting Article I activities, enforcing the
5 laws of the United States.

6 And this agency has that same
7 authority. It overlaps both.

8 JUSTICE GINSBURG: But the Ryder case,
9 on which you placed such reliance, it -- it was
10 qualified. It said the defendant could object
11 to the mode of appointment of a judge who
12 adjudicates his case. And this Board is not
13 adjudicating any cases. The -- the federal
14 district court is.

15 MR. OLSON: Justice Ginsburg, I would
16 submit that the -- this Board is both
17 adjudicating and enforcing the laws in the same
18 sense, and has many of the same powers that the
19 administrative law judge had in the Lucia case,
20 and so that that distinction simply doesn't hold
21 up.

22 JUSTICE GINSBURG: It was acting on
23 behalf of the debtor agency in Puerto Rico.
24 They -- it's acting as a kind of a petitioner.
25 It's not an adjudicator.

1 MR. OLSON: That's one of the -- one
2 small part of what PROMESA does. That has to do
3 with 165,000 claims. It doesn't have to do with
4 overturning the -- the budget, changing the
5 financial structure of Puerto Rico, suing in --
6 in federal courts citizens of the United States
7 outside of Puerto Rico in connection with
8 financial claims, claw-back claims, they call
9 them in the financial insolvency concept.

10 If one were to look at all of the
11 authorities, and I was -- have to finish with
12 the point that these officials are appointed by
13 the President of the United States, an officer
14 of the United States, removable by the
15 President, and that what this Court said in the
16 Bowsher case, that means that that's the
17 official that they must fear and therefore obey,
18 and is supervised in Section 2148, 2121, 2127,
19 2143.

20 These are reports, recommendations,
21 responsibilities that the oversight board must
22 constantly give to officials of the United
23 States and, therefore, supervision.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Ms. Mendez-Colberg.

2 ORAL ARGUMENT OF JESSICA E.

3 MENDEZ-COLBERG ON BEHALF OF UTIER

4 MS. MENDEZ-COLBERG: Mr. Chief

5 Justice, and may it please the Court:

6 I would like to address the issue of
7 the Insular Cases, the remedy, and also some of
8 the questions -- the questions of the Court.

9 If we stand in front of this building,
10 we will see the words "equal justice under law."
11 The Insular Cases stretch that tenet into its
12 breaking point. The court-made doctrine of
13 territorial incorporation means that when my
14 client, and even myself, return to Puerto Rico,
15 we will have a lesser set of constitutional
16 rights than what we have standing here today.

17 On the other hand, the First Circuit
18 decided that my clients suffered a
19 constitutional injury, but still they were left
20 without a remedy. Equal justice under law
21 should mean the same thing here in D.C. than in
22 Puerto Rico.

23 It should reject ideas grounded on
24 class -- it should reject classifications
25 grounded in ideas of alien races and savage

1 people. It should also mean that when there is
2 a constitutional injury, justice requires a
3 remedy.

4 Now, in this case, the -- the First
5 Circuit stated correctly that the Insular Cases
6 hover like a dark cloud over this case. And it
7 is true, because the opposing parties have been
8 relying on the Insular Cases since the beginning
9 of the proceedings to establish that even the
10 structural provisions of the Constitution don't
11 apply to the people of Puerto Rico because --

12 JUSTICE BREYER: I think here --

13 CHIEF JUSTICE ROBERTS: I understood
14 --

15 JUSTICE BREYER: -- everybody was --
16 everybody was agreeing that the Article I --
17 Article II does apply. And so whether you have
18 the Insular Cases or not, and I agree they're a
19 dark cloud, but the -- the -- the -- it doesn't
20 matter here because the provision of the
21 Constitution does apply.

22 And I thought what was more, which
23 I've been trying to work out, and you may have
24 looked into this, is what about the Federal
25 Relations Act?

1 You see, if -- if, in fact, you -- you
2 would be the one who might have thought of this.
3 But it does give these powers to deal, and the
4 deal is the legislature of Puerto Rico and the
5 governor do this. But there was a reservation.
6 There was a reservation for the indebtedness.

7 And that reservation was eventually
8 repealed in '61. And when it was repealed, the
9 legislature passed a -- they passed a
10 constitutional amendment in Puerto Rico
11 promising that they would pay creditors and that
12 they had some priorities and so forth.

13 Now is that relevant? I've begun to
14 think that the partnership, the Estado Libre
15 Asociado, is -- is -- is more served by
16 considering this a local law than considering it
17 a federal law, because if a -- if it's a federal
18 law, it really is hard to reconcile with the
19 FRA, but not so hard if it's a local law.

20 Have you thought about it at all? If
21 you haven't thought of it, forget it.

22 (Laughter.)

23 JUSTICE BREYER: I'm just -- I'm --
24 I'm -- I'm -- I'm -- I have a tough problem in
25 my mind on that. And if you have thought of it,

1 I'd appreciate what you think.

2 MS. MENDEZ-COLBERG: Well, Your Honor,
3 we would forget about it, but the problem here
4 is that, actually, what Congress did was to,
5 yes, say that this -- that this are territorial
6 officers, but it actually gave this -- the
7 oversight board powers that are not necessarily
8 what power -- what the powers of a -- of a
9 territorial officer are considered to be.

10 They -- the oversight board has the
11 authority, and as Mr. Olson mentioned, has the
12 authority to file this bankruptcy proceedings,
13 which is a federal power, on behalf of the
14 government.

15 But, also, we see that they have the
16 authority to impair contracts -- which is
17 something that wasn't mentioned before -- impair
18 contracts even outside of the -- of the scope of
19 the bankruptcy proceedings, which is in the
20 Title II -- II of PROMESA.

21 If the Board understands that a
22 contract may -- that the government -- by the
23 government of Puerto Rico with other parties is
24 inconsistent with the provisions of PROMESA, it
25 can -- it can -- it can even prevent the

1 execution of those -- of those contracts.

2 So that is a very significant power
3 among the other powers that the oversight board
4 has that not even the -- the government, the
5 local government of Puerto Rico, has.

6 Now I do want to -- to -- to -- to
7 stress on the issue of the Insular Cases,
8 because it is important for the people of Puerto
9 Rico and for my clients. This is a -- a
10 doctrine that has been, well, 118 years, that it
11 -- that has been -- that has been good law.

12 And, here, I want to stress that it is
13 a -- it is a matter of overruling the Insular
14 Cases, and the Doctrine of Territorial
15 Incorporation, it is a matter of constitutional
16 and law, but also a matter of who the United
17 States is as a nation.

18 CHIEF JUSTICE ROBERTS: Well, but
19 Justice -- as Justice Breyer has pointed out,
20 none of the other parties rely on the Insular
21 Cases in any way. So it would be very unusual
22 for us to address them in this case, wouldn't
23 it?

24 MS. MENDEZ-COLBERG: Well, Your Honor,
25 they relied on the Insular Cases since the

1 beginning of the proceedings. Actually, the --
2 the unsecured creditor -- creditors are still
3 relying on the Insular Cases at this point.

4 Now it is very convenient for the
5 other parties to not -- to rely on the Insular
6 Cases in the lower courts, where there is no
7 authority to overrule those cases, but that --
8 but then when we come before this Court to say
9 that they are not relevant.

10 Still, as I -- as I was about to
11 mention, the Insular Cases comply with all of
12 the factors that this -- that this Court
13 established in -- in Janus, especially the
14 quality of the reasoning, because it is based
15 purely on racial considerations, to say that
16 some provisions of the Constitution don't apply
17 to the unincorporated territories because they
18 are of a different race. That's the -- that's
19 the root of that doctrine.

20 Now, here --

21 CHIEF JUSTICE ROBERTS: I thought the
22 argument was that the Appointments Clause does
23 apply to Puerto Rico, and the question is simply
24 whether it's implicated on these particular
25 facts with respect to this particular agency?

1 MS. MENDEZ-COLBERG: Yes, Your Honor.

2 CHIEF JUSTICE ROBERTS: So I -- I
3 guess, again, I just don't see the pertinence of
4 the -- of the Insular Cases.

5 MS. MENDEZ-COLBERG: Well, as I -- as
6 I mentioned, and also -- also, last term, this
7 Court went ahead and overruled the Korematsu
8 case. In the Trump versus Hawaii case, the
9 Court said that the case had nothing to do with
10 the Trump versus Hawaii case. But still it was
11 a morally repugnant doctrine that was purely on
12 the basis -- considering the basis of race, and,
13 therefore, it was overruled.

14 The same here with the Insular Cases.
15 And I cannot stress enough that the parties have
16 relied on the Insular Cases in this -- in this
17 case. That is why it's the -- the perfect
18 opportunity to address them.

19 Now --

20 JUSTICE KAVANAUGH: Can I ask you a
21 question about the duties of the Board? If the
22 duties of the Board and responsibilities are
23 considered primarily local -- I'll ask the same
24 question I asked Mr. Olson -- do you lose or do
25 you have an alternative argument?

1 MS. MENDEZ-COLBERG: Your Honor, I --
2 I don't think that we -- that the -- the -- the
3 authority of the Board can -- can -- can be
4 considered purely local.

5 JUSTICE KAVANAUGH: I understand that.
6 But, if -- if we conclude otherwise, is there an
7 alternative argument, or is that the end of the
8 case?

9 MS. MENDEZ-COLBERG: Well, I -- I
10 believe that there is the example of -- of D.C.
11 judges who were still considered to be officers
12 of the United States in the -- in the Weiss
13 case. So there is -- there are a couple other
14 examples that this Court could -- could take.

15 Now I would like --

16 JUSTICE GINSBURG: Which D.C. -- which
17 D.C. judges are you talking about? I thought
18 the judges of the D.C. Superior Court and of the
19 D.C. Court of Appeals are not -- are not federal
20 judges.

21 MS. MENDEZ-COLBERG: Well, Your Honor,
22 I'm -- I'm talking about the -- the Weiss case.
23 And -- but still the -- the -- the -- the issue
24 of -- of the purely local affairs of -- of -- of
25 the oversight board cannot stand if we look at

1 the -- the authority that it was vested on these
2 officers through PROMESA.

3 Now I would like to address the remedy
4 because I think that it is very important for --
5 for us to address that.

6 My friends on the other side have
7 mentioned the consequences of -- of this -- of
8 this case in terms of millions of dollars. But
9 they have forgot about the impact to the people.

10 What the -- what the opposing parties
11 are asking this Court to validate through the de
12 facto officer doctrine is a certification of the
13 fiscal plan, which is not subject to judicial
14 review, that imposes austerity measures on the
15 people that has impaired contractual
16 obligations, including the collective bargaining
17 agreement of my clients, stripping them of -- of
18 workers' rights like salaries, overpaying --
19 overpayment, and -- and medical -- medical
20 benefits.

21 But also we are talking about
22 agreements with bondholders, with Dapapa, which
23 is the UTIER's employers, that provides for the
24 payment of the bond -- of the bonds ahead of the
25 salaries, ahead of the -- of the contributions

1 to the retirement system, and that it threatens
2 the mere -- the mere feasibility of such an
3 instrumentality.

4 We are talking about 7,000 labor
5 claims that were stayed because of the Title III
6 proceedings, proceedings that were filed at the
7 sole discretion of the oversight board, and that
8 were -- that were left without a remedy.

9 So -- and -- and -- and like I
10 mentioned, the -- the budgets that establish the
11 policy for the government of Puerto Rico, that
12 it is done at the sole discretion of the
13 oversight board because we cannot say that the
14 government of Puerto Rico has participation.

15 The -- if -- if the Board --

16 CHIEF JUSTICE ROBERTS: You can finish
17 your sentence.

18 MS. MENDEZ-COLBERG: Yes, thank you.

19 If the Board understands that the --
20 that the fiscal plan, which is the blueprint for
21 all of these proceedings, or the budgets, are
22 inconsistent with PROMESA, the Board can
23 substitute for its own at its sole discretion.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Three minutes, Mr. Verrilli.

3 REBUTTAL ARGUMENT OF DONALD B.

4 VERRILLI, JR., ON BEHALF OF THE FINANCIAL

5 OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO

6 MR. VERRILLI: Thank you, Mr. Chief

7 Justice.

8 I want to make one overarching point
9 on the merits and one point on remedy. On the
10 merits, I want to go at the sum of each
11 question.

12 I think, if you think the sum of each,
13 I don't think you can resolve it based on
14 effects. I mean, if you think about it, the
15 effects we're talking about here are not the
16 Board's actions. It was the issuance of the
17 bonds and then the default by the government of
18 Puerto Rico, the elected representatives of
19 Puerto Rico. So, if its effect is then they're
20 officers of the United States, that can't be
21 right and it's just not an administrable test.
22 It can't be whether they are enforcing federal
23 law.

24 Mr. Olson raised the Limtiaco case.

25 That case proves our point. The statute he's

1 talking about in that case requiring fiscal
2 solvency was enforced by the governor and the
3 legislature, who are not appointed in conformity
4 with the Appointments Clause but elected. So,
5 if he's right about that, Guam's government is
6 unconstitutional. And it also would mean that
7 the D.C. government, from the -- from the
8 beginning until home rule, was unconstitutional
9 because they were enforcing federal statutes.
10 So that can't be right.

11 It can't be based on the source of
12 authority. They're really not arguing that
13 anymore. And even if you wanted to accept the
14 intermediate authority point, you -- and try to
15 carve out Puerto Rico that way, you can't save
16 Guam, you can't save the Virgin Islands, you
17 can't save home rule in D.C. You basically blow
18 everything else up if you adopt that standard,
19 which is why they don't really advocate for it.
20 So really it needs to be our test.

21 Our test is one that's faithful to the
22 text, it's faithful to the history, it rests on
23 principle, it avoids threats to home rule, and
24 it's administrable. Maybe there are going to be
25 hard questions on the margin and we discussed

1 those today. This is not a hard case. This is
2 exclusively territorial authority.

3 Now, on remedy, I think Mr. Olson's
4 answer to Justice Alito's question tells you all
5 you need to know about what's going to happen
6 next. They brought this suit because they want
7 a different Board. They're perfectly entitled
8 to do that. They've every right to do that.
9 But that's what they want because they don't
10 like the way this Board is working out the debt
11 problems.

12 And so what you can be sure of, if
13 we're in the remedies phase and I hope that we
14 are not, but what you can be sure of if we are
15 is that they are going to fight ratification by
16 the Board tooth and nail for years and years and
17 do everything possible to keep this thing in a
18 situation in which they -- they -- they have the
19 hope to get a different Board that will
20 accomplish their objectives.

21 So that's what will happen if we go
22 down that path. And I would strongly urge the
23 Court not to do that. If you do reach the
24 remedial issue, then I think the de facto
25 officer doctrine, a perfectly reasonable

1 judgment, but more fundamentally, there is no
2 reason to reach the remedial issue --

3 JUSTICE KAGAN: Mr. -- Mr. Verrilli --

4 MR. VERRILLI: -- to support as --

5 JUSTICE KAGAN: -- let --

6 MR. VERRILLI: -- constitutional --

7 JUSTICE KAGAN: -- let's say it is
8 your test. But let's also say that the crux of
9 this statute -- there are some other things in
10 it, but the crux of the statute is that it sets
11 up a scheme for restructuring the debt of a
12 bankrupt territory and -- on -- with the
13 backdrop that that could not have been done
14 under pre-PROMESA federal law by local officials
15 themselves. Why is it primarily local?

16 MR. VERRILLI: May I answer, Mr. Chief
17 Justice?

18 CHIEF JUSTICE ROBERTS: Yes.

19 MR. VERRILLI: Two things. First, you
20 wouldn't think that the mayor of Detroit was
21 converted into a federal official because he
22 took Detroit into bankruptcy under Chapter 9.
23 He's still exercising his local power. Same
24 with the Board.

25 And, second, again, the question I

1 think has to be whose interests is -- is the
2 Board advancing in that process? It's the
3 court, the Article III court, that engages in
4 the broad adjustment of interests here to
5 achieve a -- a nationwide result.

6 The Board's job, as the statute
7 expressly says, is to act on behalf of the
8 people of Puerto Rico and the government of
9 Puerto Rico as its representative. It's an
10 advocate for Puerto Rico, and that's why it's
11 territorial authority. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:27 a.m., the case
15 was submitted.)

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