Nos. 18-1334, -1475, -1496, -1514, -1521

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents.*

AURELIUS INVESTMENT, LLC, ET AL., *Petitioners*,

v.

COMMONWEALTH OF PUERTO RICO, *Respondent*.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents.*

UNITED STATES, *Petitioner*,

v.

AURELIUS INVESTMENT, LLC, ET AL., *Respondents.*

UTIER, *Petitioner*,

v.

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PUERTO RICO FISCAL AGENCY AND FINANCIAL ADVISORY AUTHORITY

WALTER DELLINGER
Counsel of Record
PETER FRIEDMAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
wdellinger@omm.com

JOHN J. RAPISARDI
WILLIAM J. SUSHON
YAIRA DUBIN
O'MELVENY & MYERS LLP
7 Times Square
New York, N.Y. 10036
(212) 326-2000
jrapisardi@omm.com

(Additional Counsel Listed on Inside Cover)

NEIL KINKOPF
PROFESSOR OF LAW
GEORGIA STATE UNIVERSITY
COLLEGE OF LAW
85 Park Place
Atlanta, GA 30303

QUESTION PRESENTED

Whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF AAFAF

The Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. § 2101 *et seq*., maintains critical aspects of Puerto Rico's framework of self-government and preserves many of Puerto Rico's powers. The elected government continues to play an active governing role, including in restructuring cases. As relevant here, the government of Puerto Rico has been recognized as a "party in interest" in the Title III case from which this appeal arises and was permitted to intervene in the adversary proceeding related to this appeal.[1]

The Puerto Rico Fiscal Agency and Financial Advisory Authority (AAFAF) represents the elected government of Puerto Rico on all matters related to PROMESA, including restructuring matters. Specifically, under paragraph 5(a) of the Puerto Rico Fiscal Agency and Financial Advisory Authority Enabling Act, AAFAF is authorized to act "as fiscal agent, financial advisor, and reporting agent of all entities of the Government of Puerto Rico . . . [and] shall be the government entity responsible for the collaboration, communication, and cooperation between the Government of Puerto Rico and the Fiscal Oversight Board, created under PROMESA." Act 2-2017 § 5(a). Furthermore, section 5(d) of the Enabling Act includes a non-exhaustive list of 14

---

[1] *See* Order, *In Re Fin. Oversight & Mgmt. Bd. For P.R.*, No. 17-03283 (D.P.R. Nov. 3, 2017), ECF No. 1612; *see also* Order, *Union de Trabajadores de la Industria Electrica y Riego de P.R., Inc. v. P.R. Elec. Power Auth.*, Adv. P. No. 17-228 (Bankr. D.P.R. Nov. 21, 2017), ECF No. 92.

separate actions AAFAF has authority to undertake, including the broad authority to "take any action or measure necessary or convenient to exercise the powers conferred by [the Enabling Act] or by any other law of the Legislative Assembly of Puerto Rico or of the United States Congress." *Id.* § 5(d)(xiv).

AAFAF respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 915 F.3d 838. The opinion of the district court (Pet. App. 46a-82a) is reported at 318 F. Supp. 3d 537.

JURISDICTION

The First Circuit entered its judgment on February 15, 2019. A petition for rehearing en banc filed by respondent Union de Trabajadores de la Industria Electrica y Riego de Puerto Rico, Inc. was denied on March 7, 2019. This Court granted certiorari on June 20, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

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

Article II of the Constitution provides, in relevant part: "[The President] shall nominate, and by and

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

INTRODUCTION

Puerto Rico is an unincorporated territory of the United States. Puerto Rico's relationship with the federal government, accordingly, is subject to the provisions of the Territorial Clause. *See Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1945 (2016). Although Congress has created a framework of self-government for Puerto Rico, Puerto Rico's ultimate sovereignty remains in Congress's hands. As such, under this Court's precedents, Congress is free to unilaterally alter Puerto Rico's internal government structure. *See Sanchez Valle*, 136 S. Ct. at 1875-76. Such is among the chief indignities of Puerto Rico's territorial status under the U.S. Constitution.

By June 2016, Puerto Rico faced a grave economic crisis. To assist Puerto Rico in "achiev[ing] fiscal responsibility and access to the capital markets," Congress enacted PROMESA to, among other things, alter the manner of budget adoption for the Commonwealth and other territorial

instrumentalities. 48 U.S.C. § 2121(b)(2). Just as Congress had previously established the District of Columbia's Financial Responsibility and Management Assistance Authority "as an entity within the government of the District of Columbia" and not "a department, agency, establishment, or instrumentality of the United States Government," Pub. L. No. 104-8, 109 Stat. 97, 101 (1995), PROMESA created a Financial Oversight and Management Board (the "Oversight Board" or the "Board") as "an entity within the territorial government" of Puerto Rico. 48 U.S.C. § 2121(c)(1).

The Oversight Board established by PROMESA is an entity within the Government of Puerto Rico that functions independently from the federal government and is not subject to federal control. The Board does not reside in any agency of the federal government. The Board has no role in federal-Puerto Rico relations on either the federal side or the Puerto Rico side. Members of the Board receive no pay from the federal government. *Id.* § 2121(g). Board expenses, which total hundreds of millions of dollars, are funded wholly by the Commonwealth of Puerto Rico. *Id.* § 2127(b). While PROMESA imposes significant reciprocal reporting obligations between the Oversight Board and other Puerto Rico governmental entities, the Board must report to the President and Congress only once annually unless the Board determines that the Commonwealth is out of compliance with its budget, *id.* §§ 2143(c)(1), 2148(a).

Indeed, the Board's most significant interactions are with other entities within the Puerto Rico

government, including the executive branch of the Commonwealth government, the Commonwealth's legislature, its public corporations and instrumentalities, and Puerto Rico's municipalities. The Board performs each of its core functions—certifying and monitoring compliance with Commonwealth and instrumentality budgets and fiscal plans, and serving as the debtor's representative in restructuring proceedings—in conjunction with Puerto Rican officials, agencies, and public corporations.

Critically, the Board has no role at all in exercising any federal powers—*i.e.*, powers that an officer of the United States might have over Puerto Rico. The Board has no say in appropriating or administering federal funds. At most, the Board can make recommendations about "actions of the Federal Government that would assist" Puerto Rico in complying with a Fiscal Plan. 48 U.S.C. § 2148(a)(3). But the Board cannot actually implement any actions of the federal government, or promulgate any federal rules or regulations. Absent PROMESA, moreover, full budgeting power would belong to Puerto Rico's Governor and Legislature, not any federal agency. Further, the Board is not accountable to either the electorate of Puerto Rico or to the federal government.

In keeping with the urgency surrounding PROMESA's swift enactment, the statute provided for an expedited appointment process for the seven members of the Oversight Board. The President could simply nominate candidates and all but one (which was to be selected in the President's "sole discretion")

would be offered to the Senate for confirmation. *See* 48 U.S.C. § 2121(e)(1)-(2). Alternatively, he could rely on candidates included on lists submitted by the Speaker of the House of Representatives, the House Minority Leader, the Senate Majority Leader, and the Senate Minority Leader—in which case formal confirmation hearings were unnecessary. *Id.* If Board appointments were not complete by September 1, 2016, the President was to make selections from the Congressional lists no later than September 15. *Id.* § 2121(e)(2)(G). Even if the President opted to employ the lists, he could reject the candidates initially included on a given list, prompting the specified members of Congress to supplement the list until it was acceptable. *Id.* § 2121(e)(2)(C). Members serve for a fixed term of three years and may be removed only for cause. *Id.* § 2121(e)(5)(A)-(B) .

President Obama appointed the seven members of the Board on August 31, 2017—sixty-two days after PROMESA was enacted.

STATEMENT OF THE CASE

AAFAF hereby incorporates by reference the relevant factual and procedural history from the brief filed on behalf of the Oversight Board.

SUMMARY OF ARGUMENT

Congress's creation of the Oversight Board represents an expansive use of its powers under the Territorial Clause. In so acting, Congress unilaterally altered Puerto Rico's government, thus severely affecting the framework of self-government previously granted to the people of Puerto Rico.

Regrettably, this impingement and insult to the people of Puerto Rico is an affront that the Constitution of the United States permits by virtue of the Territorial Clause. The Constitution authorizes the federal government to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Congress thus retains ultimate sovereignty over the territories and may organize their internal governance as it sees fit. As Justice Scalia put it, "Congress may endow territorial governments with a plural executive; it may allow the executive to legislate; it may dispense with the legislature or judiciary altogether." *Freytag v. Comm'r*, 501 U.S. 868, 914 (1991) (Scalia, J., concurring).

Justice Story explained:

> As the general government possesses the right to acquire territory, either by conquest, or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired …. Until [such time as a territory is admitted to the Union as a state], the territory remains subject to be governed in such manner, as congress shall direct, under [Article IV].

Joseph Story, 3 Commentaries on the Constitution, § 1318 (1833). Said otherwise, a territory is subject to be administered under whatever structure the federal government chooses to establish, unless and until that territory achieves statehood.

Such are the ramifications and indignities of Puerto Rico's current territorial status. Were Puerto Rico a state, rather than a territory, it would receive the full range of constitutional protections that follow from statehood, such as the Equal Footing Doctrine, the Anti-Commandeering Doctrine, the Joinder Clause, equal representation in the Senate, and full representation in the House of Representatives. Congress would not be able to unilaterally alter the governance structure chosen by the people of Puerto Rico. And Congress could not refer to Puerto Rico using offensive terms such as a "possession[] of the United States." PROMESA § 701. Let there be no doubt: the current relationship of Puerto Rico to the United States is a relic of colonial status and a vestige of a long-gone era. It is the unequivocal position of the Government of Puerto Rico that Puerto Rico should be admitted to the United States as a state.

But notwithstanding these indignities, Puerto Ricans are fully entitled to Constitutional protections that are not inextricably entwined with statehood. The U.S. Constitution applies within Puerto Rico and to the Puerto Rican people. Accordingly, the Appointments Clause—which governs the appointment of "all other Officers of the United States, whose Appointments are not herein otherwise provided for," U.S. Const. art. II, § 2, cl. 2—applies fully within Puerto Rico.

The relevant question, accordingly, is not whether the Appointments Clause applies to officers of the United States who have governing power over Puerto Rico. If a position constitutes an office of the United

States, that position must be filled by the procedures set forth in the Appointments Clause no matter where the position is geographically located. In other words, if officers of the United States govern Puerto Rico, then the Appointments Clause applies to their appointment. Puerto Ricans are fully entitled to that constitutional protection. If, however, the position is not an office of the United States—whether because it does not carry significant federal authority or because it is a territorial office—then the position is not governed by the Appointments Clause, regardless of where the position is located.

Here, the Appointments Clause does not govern the appointment of members of the Oversight Board because of the territorial nature of the powers Congress granted the Oversight Board. Under PROMESA, members of the Oversight Board are not officers of the United States; they are officers of the territorial government of Puerto Rico.

Specifically, Congress modeled the Oversight Board on a control board established approximately twenty years earlier in response to an economic crisis in the District of Columbia. Although Congress did not vest the Oversight Board with many of the sweeping powers it gave the D.C. control board, PROMESA specifically designated, like the predecessor statute for the District of Columbia, the Oversight Board as "an entity within the territorial government for which it is established," 48 U.S.C. § 2121(c)(1), that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government," *id.* §

2121(c)(2). This formal denomination is fully manifested in the statutory powers granted the Oversight Board, all of which are powers that a territorial governmental entity would have.

The First Circuit thus erred in holding—for the first time in history—that territorial officers are subject to the provisions of the Appointments Clause that govern appointment of federal officials. Specifically, the court held that members of the Oversight Board must be appointed in conformity with the Appointments Clause because Board membership represents a "continuing position established by federal law" that carries "significant authority … pursuant to the laws of the United States." Pet. App. 30a (quotations omitted). But the First Circuit's formulation cannot be squared with the Constitution's text, the long line of precedents upholding territorial self-government, or the centuries-long practice of Congress and the Executive Branch. And the First Circuit's holding flies in the face of Congress's express instruction that the Oversight Board is "an entity within the territorial government for which it is established" that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government," 48 U.S.C. § 2121(c), as well as any faithful analysis of the actual responsibilities that Congress granted the Oversight Board.

The text of the Appointments Clause applies only to "Officers of the United States." Yet the First Circuit ignores that textual limit, seeking to apply the Appointments Clause to officers of Puerto Rico.

Indeed, the First Circuit's interpretation of the Appointments Clause to cover all "continuing" positions "established by federal law" that carry "significant authority … pursuant to the laws of the United States" would extend the Clause's coverage to encompass the vast range of *non-federal* offices that are established by federal law.

Thus, the First Circuit's test would encompass offices such as the Governor of Puerto Rico and all officers of all the territories, as well as the District of Columbia. Each of these territorial officers occupies a position that necessarily is established by or under the authority of a federal statute, as is the significant authority the officer exercises. Likewise, many other federal laws vest significant authority in non-federal officials, including the government of the District of Columbia, and administrative bodies that effectuate interstate compacts, treaties, and other similar international agreements. Should the First Circuit's ruling be upheld, all those offices would be subject to Appointments Clause challenges, significantly intruding on federal power to provide for innovative administrative structures—particularly, for the governance of territories.

That result is directly contrary to the centuries-long practice of Congress and the Executive Branch. In exercising their Article IV power, Congress and the President have, throughout our nation's history, established territorial offices that have been filled by numerous methods other than appointment by the President by and with the advice and consent of the Senate. In other words, territorial officials have never

been regarded by either Congress or the President as "Officers *of the United States*" within the meaning of the Appointments Clause. Yet the First Circuit's sweeping formulation of the Appointments Clause test would call into question that unbroken practice.

The First Circuit's characterization of the Board as a federal entity,[2] Pet. App. 30a-38a, underscores its analytical error. In fact, under PROMESA, the Board does not reside in any agency of the U.S. Government; rather, the Board operates as an independent agency of the government of the Commonwealth of Puerto Rico, whose duties pertain to Puerto Rico's governance and restructuring.

In keeping with that statutory role, the Board does not exercise or administer any powers of the United States; to the contrary, the Board's duties pertain exclusively to Puerto Rico's internal governance. The Board has the right to budget Puerto Rico's funds, but the Board has no say in appropriating or administering federal funds. The Board may not obligate the federal treasury, its members receive no federal compensation, and the financial burdens of paying for the Oversight Board (which have reached into the hundreds of millions of dollars) fall exclusively on Puerto Rico. The Board can neither implement any actions of the federal government, nor

---

[2] Judge Torruella opined that "Board Members are, in short, more like Roman proconsuls picked in Rome to enforce Roman law and oversee territorial leaders." Pet. App. 33a. Whatever this incorrect description of the Oversight Board's powers implies, it wholly fails to appreciate Justice Story's observation that the appropriate remedy for the current situation is statehood.

promulgate any federal rules or regulations. Further, all of the Board's core duties—certifying and monitoring compliance with Commonwealth and instrumentality fiscal plans and budgets, issuing restructuring certifications to the Commonwealth and its instrumentalities, and serving as the debtor's representatives for those entities in restructuring proceedings—are accomplished in coordination with Puerto Rico's government.

In short, the Board is neither formally nor functionally a federal agency. As such, members of the Oversight Board are territorial officers, not officers of the United States. Their appointment need not conform to the process set out in the Appointments Clause for the appointment of "Officers of the United States."

Never before has a court held the Appointments Clause applicable to an office outside the federal government. Respondents and the court below hold out their unprecedented reading of the Appointments Clause as a safeguard for the autonomy and dignity of the people of Puerto Rico. It is not; only statehood is. Were this Court, for the first time in our nation's history, to apply the Appointments Clause to a territorial office, it would call into question the legitimacy of the election of the Governor and the legislature of Puerto Rico as well as the composition of its government, for no Puerto Rican officer is appointed under the procedures of the Appointments Clause. Respondents and the court below would sacrifice Puerto Rican self-governance on the altar of

the Appointments Clause. AAFAF prays this Court will not heed their siren call.

ARGUMENT

I. Puerto Ricans Are Entitled To The Constitutional Protection Of The Appointments Clause.

It is the position of the elected Government of Puerto Rico that, contrary to the claim of the First Circuit and the United States,[3] the U.S. Constitution applies within Puerto Rico and to its people without qualification. Inasmuch as the *Insular Cases*[4] are

---

[3] The First Circuit understood the Commonwealth to be asserting that "the Territorial Clause … trump[s] the Appointments Clause." Pet. App. 20a. That is not AAFAF's position. AAFAF argues that the scope of the Appointments Clause does not reach territorial officers. The Necessary and Proper Clause is illustrative; it authorizes Congress to enact the civil service system, which among other things establishes the mechanism by which federal employees are to be hired. No one would argue that the Necessary and Proper Clause "trumps" the Appointments Clause. Rather, the Appointments Clause is inapplicable to these positions because, lacking significant authority, they are not officers of the United States. *See Myers v. United States*, 272 U.S. 52, 174 (1926) ("The extension of the merit system rests with Congress."); Civil-Service Commission, 13 Op. Att'y Gen. 516, 521 (1871) (accepting the validity of appointment of employees by means not prescribed in the Appointments Clause because they "were not officers in the constitutional sense of the term"). Likewise, the Appointments Clause is simply inapplicable to the Oversight Board members because they are not officers within the meaning of the Appointments Clause.

[4] *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes*

premised on the understanding that due to differences in culture, language, and race of the inhabitants of some territories, only some constitutional provisions apply within the territories, the First Circuit's criticism of them is well-founded. The *Insular Cases* were wrong when decided and giving them continued vitality today impermissibly discriminates against the people of Puerto Rico and all the territories. They must be overruled.

In fact, this Court has been hesitant to expand the *Insular Cases* in many other contexts. For almost a century, the Court has refused to accept arguments that rely on the *Insular Cases* to defend a refusal to apply a constitutional provision. For example, in *Reid v. Covert*, 354 U.S. 1 (1957), the Court held that the Fifth and Sixth Amendments protect the rights of United States citizens while abroad. Likewise, in *Torres v. Puerto Rico*, 442 U.S. 465 (1979), this Court held that the Fourth Amendment's protections against unreasonable searches and seizures apply in full force within the territory of Puerto Rico.

Finally, in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court held that the writ of *habeas corpus* is available to enemy combatants, even if held in an extraterritorial facility. Importantly, the *Boumediene* Court underscored the danger of relying on the *Insular Cases* to sustain arguments that some parts of the Constitution can be ignored by virtue of the Territorial Clause:

---

v. Bidwell, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply … To hold the political branches have the power to switch the Constitution on or off at will … would … lead[] to a regime in which Congress and the President, not this Court, say what the law is.

Id. at 765 (quotations omitted).

Accordingly, like other constitutional protections, the Appointments Clause applies to the same extent within Puerto Rico as elsewhere in the United States—namely, to officers *of the United States*. If a position is an office of the United States, that position must be filled by the procedures set forth in the Appointments Clause no matter where the position is geographically located. If, however, the position is not an office of the United States—whether because it does not carry significant authority or because it is an office of a state or a territory—then the position does not fall within the Appointments Clause, regardless of where the position is located.

Indeed, it is astonishing to read arguments that the Appointments Clause does not apply to officers of the United States due to the mere fact that their federal powers will be executed in a territory. If the Territorial Clause is interpreted to allow for the creation of a political on/off switch, by which Congress can dictate which parts of the Constitution apply to a territory, the very notion of separation of powers

would be compromised. In fact, absurd results would follow. For example, could Congress pass bills of attainder in Puerto Rico? Approve *ex post facto* bills in the U.S. Virgin Islands? Grant titles of nobility in Guam? Each of these acts is prohibited by Article I, the same Article in which the Appointments Clause is found. The argument that Puerto Rico, by virtue of its territorial status, is not entitled to the protection of the Appointments Clause must be categorically rejected.

II. The Appointments Clause Applies Only To "Officers Of The United States," *i.e.*, To Offices Established Within The Federal Government, Whose Officers Exercise Or Administer Federal Powers.

A. By Its Text, The Appointments Clause Applies Only To Officers Of The United States And Not To Officers Of The Territories.

By its terms, the Appointments Clause governs the appointment of "all other Officers of the United States, whose Appointments are not herein otherwise provided for ...." U.S. Const. art. II, § 2, cl. 2. In considering the ambit of the Appointments Clause, this Court has highlighted two important limitations: the position (1) must be one of continuing employment (2) that carries significant authority pursuant to the laws of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018); *United States v. Germaine*, 99 U.S. 508, 511 (1878); *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

But the First Circuit erred in relying on just these limitations in formulating its Appointment Clause test. *See* Pet. App. 30a (The Appointments Clause applies if "(1) the appointee occupies a continuing position established by federal law; (2) the appointee exercis[es] significant authority; and (3) the significant authority is exercised pursuant to the laws of the United States.") (quotations omitted). Critically, these are necessary but not sufficient conditions. For the Appointments Clause to apply, a much more basic textual condition must be satisfied: the officer must also be an Officer *of the United States*. That is, the office in question must be established within the federal government, and the officers in question must exercise or administer federal power. Indeed, this Court has *never* applied the Appointments Clause to an office that is not established within the federal government, or to officers that do not wield federal power.

B. The Constitution's Structure Confirms That The Appointments Clause Applies Only To Officers Within The Federal Government And Not To Territorial Officers.

The Constitution authorizes Congress to establish and structure local government for the territories and the District of Columbia. Article IV provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

The sweeping nature of this authority was universally accepted at the time of the Founding. As

Chief Justice John Marshall explained, when considering the Orleans Territory:

> The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares that 'congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans.

Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336-37 (1810).

The leading early commentators on the Constitution are in accord. In addition to Justice Story, quoted *supra* at 7, Chancellor Kent observed: "It would seem from these various congressional regulations of the territories belonging to the United States, that congress have supreme power in the government of them, depending on the exercise of their sound discretion." James Kent, 1 Commentaries 360 (1826).

Reading the Appointments Clause to apply to officers whose powers make them territorial officers would effect a significant intrusion on the federal power to effectively establish the governance frameworks for particular territories. The notion that prominent early commentators would not have

mentioned such a significant limitation strains credulity. Reading the Appointments Clause in harmony with the Territorial Clause requires that the Appointments Clause be read to mean what it says—that it governs the appointment of "Officers of the United States" and not the appointment of officers established outside the federal government.

C. Historical Practice Confirms That The Appointments Clause Applies Only To Offices Within The Federal Government And Not To Territorial Officers.

i. Puerto Rico

As the Court has repeatedly emphasized, a "longstanding 'practice of government' …. can inform our determination of 'what the law is,'" particularly when interpreting provisions regulating the relationship between Congress and the President. *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also Zivotofsky v. Kerry*, 135 U.S. 2076, 2091 (2015); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

The history of Puerto Rico's territorial governance confirms the error in the First Circuit's interpretation of the Appointments Clause. Throughout Puerto Rico's history, Congress has *never* regarded Puerto Rican officials as "Officers of the United States" within the meaning of the Appointments Clause. Far from it: In structuring the appointment of Puerto Rico officials who wield territorial powers, the federal

government has consistently responded to evolving territorial need and demand for self-governance.

In the Foraker Act, the first of two organic acts establishing the territorial government of Puerto Rico, Congress provided for an executive branch comprising a Governor and an executive council, including a secretary, an attorney-general, a treasurer, an auditor, a commissioner of the interior, a commissioner of education, and five additional members. All of these officers were to be appointed by the President of the United States, with the advice and consent of the Senate. *See* An Act Temporarily To Provide Revenues And A Civil Government For Puerto Rico ("Foraker Act"), ch. 191, §§ 17-26, 31 Stat. 77, 81-82 (1900). The executive council also served as the upper house of a legislative assembly whose lower house was popularly elected, *id.* § 27, 31 Stat. at 82, blurring the line between the executive and the legislative branches. The chief justice, associate justices, and marshal of the Puerto Rican Supreme Court were to be appointed by the President and confirmed by the Senate, but judges of the district courts were appointed by the Governor of Puerto Rico with the advice and consent of the executive council. *Id.* § 33, 31 Stat. at 84.

The Appointments Clause allows Congress to vest the appointment of "inferior Officers" in the "Heads of Departments." U.S. Const. art. II, § 2, cl. 3. But in *Freytag v. Commissioner*, the Supreme Court held that the Appointments Clause's reference to Departments embraces only major divisions of the Executive Branch such as cabinet agencies, noting

that "[t]his Court for more than a century has held that the term 'Departmen[t]' refers only to 'a part or division of the executive government, as the Department of State, or of the Treasury,' expressly 'creat[ed]' and 'giv[en] . . . the name of a department' by Congress." 501 U.S. at 886 (quoting *Germaine*, 99 U.S. at 510-11). Under this long-standing line of authority, the Governor of Puerto Rico can never have qualified as a "Head[] of Department[]" within the meaning of the Appointments Clause. Consequently, the Foraker Act—in providing for the Governor's appointment of judges—reflected the judgment of Congress and the President that territorial officers, such as territorial judges, are not "Officers of the United States" subject to the strictures of the Appointments Clause.

The Foraker Act also includes a more straightforward deviation from the Appointments Clause. The Act established a lower house of the legislature elected directly by the people of Puerto Rico. The lower house's rulemaking authority is analogous to the power that the Supreme Court has regarded as significant authority for purposes of the Appointments Clause. *See Buckley*, 424 U.S. at 140-41 (rulemaking authority is the sort of administrative function that must be performed within the federal government by "Officers of the United States"). The Foraker Act thus necessarily embodied the judgment of Congress and the President that officials of Puerto Rico's government are territorial officials and not "Officers of the United States" within the meaning of the Appointments Clause.

Seventeen years later, a second organic act, the "Jones Act," revised Puerto Rico's governmental structure. Pub. L. No. 64-368, 39 Stat. 951 (1917). While the Governor, attorney general and commissioner of education were still to be appointed by the President with the advice and consent of the Senate, the treasurer and commissioners of agriculture and labor, the interior, and health were to be appointed by Puerto Rico's Governor with the advice and consent of the Puerto Rican Senate. *Id.* §§ 12-13, 39 Stat. at 955-56. Federal law established these latter officials' positions and they exercised significant authority under that law. Again, however, the appointment procedures for these positions did not comport with the procedures outlined in the Appointments Clause. And the requirement that the Governor obtain the advice and consent of the Puerto Rican Senate again imposed an additional restriction inconsistent with that Clause.

Still later, Congress amended the Jones Act to turn over the selection of Puerto Rico's Governor to the people of Puerto Rico. *See* An Act To Amend The Organic Act Of Puerto Rico ("1947 Act"), ch. 490, § 1, Pub. L. No. 362, 61 Stat. 770 (1947). The 1947 Act does not in any other respect alter the duties of the Governor, who was still charged with execution of the laws of the United States "applicable in Puerto Rico" and required to report the "transactions of the government of Puerto Rico" to a designated department of the "Government of the United States." Jones Act, § 12, 39 Stat. at 955. Puerto Rico's governorship remained a federal government creation, granted significant responsibilities under

federal law—despite no longer being an appointed office. In addition to providing for the Governor's election, the 1947 Act also amended the Jones Act to require appointment of the attorney general and commissioner of education by the Governor, with advice and consent of the Puerto Rican Senate, rather than by the President with advice and consent of the U.S. Senate. *See* Jones Act, § 13, 39 Stat. at 955-56; 1947 Act, § 3, 61 Stat. at 771. Again, these officials' statutory duties were unaltered. Thus, three officers in the Puerto Rican executive branch, mandated by federal statute and previously appointed by the President with consent of the Senate, were now either elected or appointed by the territorial Governor, without any other change in the authorization, status, or duties of the positions.

This history conclusively demonstrates that neither Congress nor the President regarded the Appointments Clause as directly applicable to the establishment of territorial governments, nor have they ever regarded Puerto Rico's executive officials as "Officers of the United States." Respondents can offer no coherent explanation for the 1917 or 1947 revisions to Puerto Rican governance consistent with its position here. If the Appointments Clause applied to territorial officials, significant portions of the Foraker and Jones Act and amendments thereto would have been invalid. Indeed, if all territorial executive officials are "Officers of the United States" that must be appointed in conformity with the Appointments Clause, all of those territorial governments for which Congress has established elected offices would be unconstitutional.

ii. Northwest Territory

The history of the Northwest Territory, the first organized territory of the United States, further confirms the wrongness of the First Circuit's interpretation of the Appointments Clause.

While still operating under the Articles of Confederation, the Continental Congress adopted the Northwest Ordinance, which provided for a government for the territory northwest of the Ohio River. Under the Ordinance, the Continental Congress would appoint the Governor of the territory, there being no federal executive under the Articles. Once the territory achieved a population of 5,000 free white males, a bicameral territorial legislature would be selected. The lower chamber, styled the House of Representatives, would have twenty members elected by eligible inhabitants of the territory. The upper chamber, the Legislative Council, would have five members appointed by the Continental Congress from a list of ten nominees submitted by the territorial House of Representatives.

After the U.S. Constitution was ratified, the First Congress passed a law to conform the Northwest Ordinance to the new federal government's structure. This law specifically shifted the appointment power that had resided in the Continental Congress to the new President of the United States by and with the advice and consent of the Senate. But if the Appointments Clause governs the mechanism by which territorial officers are selected, the Northwest Territory government would still have violated the Appointments Clause in two ways.

First, as explained above, *supra* at 17, *Buckley* held that the exercise of rulemaking authority is "significant authority" and an appointee who exercises significant authority must be appointed in conformity with the Appointments Clause. *See* 424 U.S. at 126. Thus, the election of the members of the Northwest Territory's House of Representatives was constitutionally invalid—unless of course territorial officers are not officers of the United States within the meaning of the Appointments Clause.

Second, the appointment of members of the Legislative Council would have likewise violated the Appointments Clause. The Act of the First Congress transferred to the President the same appointment authority that had been held by the Continental Congress. It thus required the President to make appointments, by and with the Senate's advice and consent, from a list of ten nominees supplied by the territorial House of Representatives.

A leading history of the Northwest Territory's governance offers the following description of how the legislature was composed: "[T]he general assembly, under the ordinance of 1787, must consist of a House of Representative, together with a Legislative council of five members to be appointed by the President of the United States, from a list of ten names to be submitted to him by the House of Representatives when so elected." Elliot Howard Gilkey & William Alexander Taylor, The Ohio Hundred Year Book: A Handbook of the Public Men and Public Institutions

of Ohio from the Formation of the North-West Territory to July 1, 1901, at 131 (rev. ed. 1901).[5]

---

[5] The correspondence of territorial Governor Arthur St. Clair, U.S. Secretary of State Timothy Pickering, and President John Adams confirms their collective understanding that the President was required to appoint the Legislative Council from the list submitted by the territorial House of Representatives.

After St. Clair certified and transmitted that list to Pickering, he reported his action to President Adams: "I have this day transmitted to the Secretary of State, to be laid before you, a Certificate of the nomination of ten persons whom they have nominated for the legislative Council, conformably to the Ordinance of Congress for the Government of the this Territory, five of whom are to receive your Commission." Letter from A. St. Clair to J. Adams (Feb. 6, 1799), https://founders.archives.gov/?q=St%20Clair&s=1511311113&r=46.

Pickering's letter to President Adams expressed the same understanding: "I have the honor to inclose Governor St. Clair's letter … inclosing the nomination of persons from whom five are to be selected for the Legislative Council of the Territory northwest of the River Ohio. The ordinance in Volo. II. page 562 of the Acts of Congress regulates this choice …." Letter from T. Pickering to J. Adams (Mar. 1, 1799), https://founders.archives.gov/?q=Pickering&s=1511311113&r=334.

President Adams's letter conveying his nominations to the Senate for their advice and consent likewise makes clear that he understood himself legally bound to select five nominees from the list, and that he made his selections accordingly:

> I inclose the copy of a letter of the 6th ult. from Governor St. Clair, and the copy of the certificate therein mentioned, of the nomination of ten persons, of whom five are to be selected to constitute the Legislative Council for the Territory Northwest of the River Ohio. I have accordingly selected, and now nominate … the members of the

Respondents assert that PROMESA violates the Appointments Clause because it requires the President to make appointments from a list. But that is the very same mechanism the First Congress imposed on the President with respect to the nation's first territory. And John Adams, the first President to make appointments under that, law understood himself to be legally bound to so make the appointments.

It is the longstanding position of the Executive Branch that the Appointments Clause, where it applies, does not allow Congress to require the President to make an appointment from a list. *See, e.g.*, Civil-Service Commission, 13 Op. Att'y Gen. 516 (1871). Accordingly, the list requirement that the First Congress imposed, President Washington signed, and President Adams obeyed can only have been valid if the Appointments Clause did not apply to the territorial offices that Congress authorized the President to fill.

iii. Other Early Territories

In establishing governments for territories added after the Northwest Territory, Congress followed the model of the Northwest Ordinance. In fact, the earliest statutes on the subject expressly adopted the model of the Northwest Territory. *See, e.g.*, An Act For The Government Of The Territory Of The United

---

Legislative Council of the Territory of the United States Northwest of the River Ohio.

Letter from J. Adams to the Senate (Mar. 2, 1799), https://founders.archives.gov/documents/Adams/99-02-02-3364.

States, South Of The River Ohio, 1st Cong., 2d sess. 23, 123 (May 26, 1790) ("And the government of the said territory … shall be similar to that which is now exercised in the territory northwest of the Ohio."); An Act For An Amicable Settlement Of Limits With The State Of Georgia, And Authorizing The Establishment Of A Government In The Mississippi Territory, 5th Cong., 2d Sess. 536, 550 (Apr. 7, 1798) ("[T]he President of the United States is hereby authorized to establish therein a government in all respects similar to that now exercised in the territory northwest of the river Ohio."); An Act To Divide The Territory Of The United States Northwest Of The Ohio Into Two Separate Governments, 6th Cong., 1st sess. 58, 59 (May 7, 1800) (creating the Indiana Territory and providing that "there shall be established within the said territory a government in all respects similar to that provided by the ordinance of Congress … for the government of the territory of the United States northwest of the river Ohio").

The organic laws of each of these territories thus provided for a popularly elected legislature, once each territory's population included 5,000 white males. This method of composing territorial legislatures, as discussed above, *see supra* at 22, in no way conforms to the procedures of the Appointments Clause.

D. Prior Executive and Judicial Decisions Hold That The Appointments Clause Applies Only To Offices Within The Federal Government.

Respondents' theory in this case is so novel that no case in the history of this Court has even presented the question of whether the Appointments Clause

applies to territorial offices or to any other office that is not established within the federal government.

For good reason: The consistent position of the Executive Branch as well as rulings of lower court concur in the view that the Appointments Clause does not apply to offices established outside the federal government.

The Executive Branch has taken the position that territorial officers are not officers in the constitutional sense since at least 1839, when the Attorney General opined that territorial judges are not subject to impeachment under the U.S. Constitution because they are not civil officers within the meaning of the Impeachment Clause, but are "merely Territorial officers." Territorial Judges Not Liable To Impeachment, 3 Op. Att'y Gen. 409, 411 (1839). The Executive Branch has applied the same reasoning in considering the Appointments Clause itself, concluding that "[t]he Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors." The Constitutional Separation Of Powers Between The President And Congress, 20 Op. O.L.C. 124, 145 (1996); *see also* Communications Satellite Corporation, 42 Op. Att'y Gen. 165 (1962).

Likewise, when faced with an Appointments Clause challenge to the significant authority wielded by the Mayor and City Council of the District of Columbia, the U.S. District Court for the District of Columbia rejected the challenge out of hand. Federal law authorized the District of Columbia to close city streets, even streets owned by and titled to the United

States. The Mayor and City Council authorized the closure of a street for the construction of an international hotel. A historic preservation group challenged this action on the grounds that it represented the exercise of significant federal authority by officers who were not appointed in conformity with the Appointments Clause. The District Court rejected the challenge concluding that "[b]y authorizing the City Council to close city streets, Congress does not make the councilmen 'Officers of the United States.' ... The Appointments Clause … is inapplicable to this case." *Techworld Dev. Corp. v. D.C. Preservation League*, 648 F. Supp. 106, 117 (D.D.C. 1986).

This Court has itself rejected an Article III challenge to the composition of District of Columbia courts analogous to the Appointments Clause claim raised here. *Palmore v. United States*, 411 U.S. 389 (1973), involved a defendant convicted in the Superior Court of the District of Columbia for violating the District of Columbia Code. Palmore challenged his conviction on the grounds that the Superior Court was not constituted in conformity with Article III. This Court upheld Palmore's conviction, holding that municipal judges for the District of Columbia do not exercise the judicial power of the United States within the meaning of Article III, and so need not be appointed to office with the attributes of an Article III judgeship, including life tenure and salary protection. *See id.* at 400-04. Further, the Court expressly included the establishment of territorial courts within its reasoning. *See id.* at 402-403. That territorial judges do not exercise the judicial power of the United

States—although they interpret and apply federal statutory law—further confirms that territorial officers are not officers of the United States.

E. The First Circuit's Contrary Holding Would Work An Unprecedented Expansion Of The Appointments Clause To Cover A Vast Range Of Non-Federal Offices Established Pursuant To Federal Law.

As described above, the First Circuit held that the Appointments Clause applies so long as "(1) the appointee occupies a continuing position established by federal law; (2) the appointee exercis[es] significant authority; and (3) the significant authority is exercised pursuant to the laws of the United States." Pet. App. 30a (quotations omitted). If upheld, that sweeping and unprecedented expansion of the Appointments Clause would call into question the legitimacy of innumerable non-federal offices.

On its face, the First Circuit's test encompasses not only the Governor of Puerto Rico, but all officers of all the territories, as well as the District of Columbia. Each of these officers occupies a continuing position that necessarily is established by or under the authority of a federal statute, as is the significant authority the officer exercises. The First Circuit's formulation, if correct, would also encompass offices established by federal statutes enacted under Congress's Article IV power to authorize states to enter into interstate compacts, as well as those offices

established under the treaty power and the various alternative forms of international agreement.[6]

Yet no office within the territorial government of Puerto Rico is filled by the procedure set forth in the Appointments Clause. No office in the government of the District of Columbia, Guam, the U.S. Virgin Islands, or any other United States territory is appointed by the procedure set forth in the Appointments Clause. To uphold the First Circuit's decision threatens to wreak havoc on these existing governing structures, calling into serious question the validity of every territorial government as well as the validity of every action those governments have taken. And as explained above, it would likewise contravene the Constitution's design for the government of the territories, the longstanding interpretation of the Appointments Clause by both this Court and the Executive Branch, and the consistent practice dating to the Founding of federal enactments for the governance of the territories. *See* Parts II.A-D, *supra*.

Seemingly aware of this obvious and fatal flaw in its test, the First Circuit attempted to distinguish

---

[6] Federal laws, treaties ratified by the Senate, and executive agreements authorize and provide administrative structures for interstate compacts and international administrative bodies. *See, e.g.*, 19 U.S.C. § 3511 (approving the World Trade Organization for the Uruguay Round Agreements); 22 U.S.C. § 6701 et seq. (approving the Organization for the Prohibition of Chemical Weapons).

territorial offices (other than the Oversight Board), asserting:

> They do not 'exercise significant authority pursuant to the laws of the United States.' Rather, they exercise authority pursuant to the laws of the territory. Thus, in Puerto Rico, for example, the Governor is elected by the citizens of Puerto Rico, his position and power are products of the Commonwealth's Constitution, and he takes an oath similar to that taken by the governor of a state.
>
> It is true that the Commonwealth laws are themselves the product of authority Congress has delegated by statute. So the elected Governor's power ultimately depends on the continuation of a federal grant. But that fact alone does not make the laws of Puerto Rico the laws of the United States ….

Pet. App. 37a (quotations omitted).

This distinction cannot withstand scrutiny. First, the fact that "the Governor's power ultimately depends on the continuation of a federal grant" means that the Governor, as *Buckley* explained, "exercis[es] significant authority *pursuant to* the laws of the United States." 424 U.S. at 126 (emphasis added). Absent the delegation by federal law, the Governor of Puerto Rico would hold no authority whatsoever. Second, the First Circuit's description of the source of the Governor's authority is incomplete. The Governor

of Puerto Rico's powers and obligations flow from many sources, including PROMESA.[7]

For example, the Governor must submit fiscal plans and budgets to the Oversight Board for consideration and approval. 48 U.S.C. §§ 2141, 2142. After the Oversight Board certifies a fiscal plan, the Governor "shall" provide certifications to the Oversight Board regarding the fiscal impact of newly enacted legislation, and if the Governor certifies new legislation that is "significantly inconsistent" with a certified fiscal plan, the Oversight Board can take action with respect to the newly enacted statute. 48 U.S.C. § 2144(a). And, at the end of each fiscal quarter, the Governor "shall" provide certain budget reports to the Oversight Board. 48 U.S.C. § 2143(a).

It simply cannot be the case that these provisions in PROMESA directing the Governor to take specific actions in response to the powers that Congress gave to the Oversight Board grant *territorial* power to the Governor of Puerto Rico but *federal* power to the Oversight Board.

III. Because The Oversight Board Is A Territorial Authority Whose Members Are Territorial Officers, Not Officers Of The United States, The Appointments Clause Does Not Govern Their Appointment.

PROMESA specifically designates the Board as "an entity within the territorial government for which

---

[7] The Governor of Puerto Rico also exercises powers under other federal statutes, such as 16 U.S.C. § 669g-1; *id.* § 1852; 19 U.S.C. § 1319a; 32 U.S.C. § 304; 42 U.S.C. § 410.

it is established," 48 U.S.C. § 2121(c)(1), that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." *Id.* § 2121(c)(2).

Of course, Congress may not by mere *ipse dixit* transform what is truly a federal instrumentality into a territorial one. *Cf. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267 (1991). But here, Congress meant what it said: per PROMESA, the Oversight Board in fact functions as a territorial agency. The Board has the power to act in specific statutorily authorized ways on behalf of Puerto Rico, its activities are integrated within the structures of Puerto Rico's government, and its functions all relate directly to Puerto Rico's internal governance or its restructuring. Accordingly, the Appointments Clause is inapplicable to the Board.

A. Oversight Board Members Do Not Exercise Significant Federal Powers.

By enacting PROMESA, Congress and the President did not create offices within the federal government, but instead unilaterally altered the existing territorial government established by Puerto Rico's Constitution to add an "oversight" layer. In so doing, Congress did not write on an entirely blank slate. Instead, Congress modeled the Puerto Rico Board on the District of Columbia Financial Responsibility and Management Assistance Act of 1995 ("FRMAA"), Pub. L. No. 104-8, 109 Stat. 97, passed decades earlier to deal with Washington, D.C.'s own fiscal emergency

PROMESA resembles the earlier D.C. legislation in a number of respects. Notably, Congress conferred on the District's Financial Responsibility and Management Assistance Authority (the "Control Board") many of the same powers and responsibilities that the court below catalogued in arguing that the Oversight Board exercises the "significant authority" that would make its members federal officers. *See* Pet. App. 31a-33a. Congress authorized the Control Board to approve the District's financial plan or budget, FRMAA, § 202; conduct investigations by taking testimony and evidence and issuing subpoenas, *id.* § 103(a), (e)(1), (g); and contract with third parties, *id.* § 103(g), as is the Oversight Board. But Congress bestowed even greater powers on the Control Board that do not exist under PROMESA, such as the right to consent to the appointment of certain District of Columbia personnel.

Indeed, as one member of Congress noted at hearings on the PROMESA legislation, the powers afforded the Control Board in FRMAA were considerably *more* "potent" than those assigned to the Oversight Board. 162 Cong. Rec. H3583 (2016). The District Court overseeing Puerto Rico's bankruptcy-like restructuring proceeding has likewise noted that Congress granted the D.C. Control Board more powers than the Puerto Rico Oversight Board, and has further recognized the important operational and other powers retained by the elected government of Puerto Rico. *See In Re Fin. Oversight & Mgmt. Bd. For P.R.*, 583 B.R. 626, 633 (D.P.R. 2017) (denying Oversight Board right to appoint a chief

transformation officer for a Puerto Rico government agency).

Nevertheless, in creating and imbuing the D.C. Control Board with broad-ranging powers, Congress did not create a federal office. Congress enacted FRMAA under its plenary authority over the District. FRMAA, § 101(a) (citing U.S. Const., art. I, § 8, cl. 17). This authority, like that conferred by the Territorial Clause, authorizes Congress to legislate local governance structures distinct from "federal appointments of common national significance." *Techworld Dev. Corp.*, 648 F. Supp. at 116-17 (discussing Congress's "dual authority" over the District in the context of the Appointments Clause); *see Palmore*, 411 U.S. at 397 ("Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes."); *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) ("In legislating for [territories], Congress exercises the combined powers of the general, and of a state government."). Employing the same language later used in PROMESA, Congress thus established the Control Board "as an entity within the government of the District of Columbia," and expressly not as "a department, agency, establishment, or instrumentality of the United States Government." 48 U.S.C. § 2121(c)(2).

Many decades later, Congress likewise established the Puerto Rico Oversight Board as "an entity within the territorial government for which it is established" 48 U.S.C. § 2121(c)(1), that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." *Id.* § 2121(c)(2). The Board employs its express powers—to certify fiscal plans and budgets, investigate, and make recommendations concerning fiscal stability and management—on behalf of the Commonwealth and in concert with existing territorial offices, such as the Governor and the Legislature. *See, e.g.*, 48 U.S.C. §§ 2141(a), (c), (d), (e), (f), 2142, 2144(a)(3), (b)(1), 2145.

The Board thus functions independently from the federal government. The Board does not reside in any agency of the U.S. Government. The Board has no role in federal-Puerto Rico relations on either the federal side or the Puerto Rico side. Members of the Board receive no pay from the federal government. *Id.* § 2121(g). Board expenses, which total hundreds of millions of dollars, are funded wholly through the Commonwealth's budget. *Id.* § 2127(b).[8] While

[8] The Oversight Board receives its funding through appropriations from the Commonwealth's general fund. *See* FY20 Certified Budget for the Commonwealth, dated June 30, 2019, https://drive.google.com/file/d/1Vimuz7I_bW0U--FugS3Vc-fL1b5dNHa-/view (appropriating $57,625,000 from the Commonwealth's general fund for the Oversight Board's "operating expenses"). For fiscal year 2019, the Oversight Board's budget forecasted revenue derived only from the territorial government and interest income and did not account for any sources of federal funding. *See* Fin. Oversight & Mgmt. Bd. for P.R. Forecasted Statement of Revenues, Expenditures

PROMESA imposes significant reciprocal reporting obligations on the Oversight Board and other Commonwealth departments, the Board must report to the President and Congress only once annually unless the Board determines that the Commonwealth government is out of compliance with its budget, *id.* §§ 2143(c)(1), 2148(a).

PROMESA is likewise careful to withhold from the Oversight Board any authority to implement federal programs. In a section entitled "Implementation of Federal programs," PROMESA expressly provides:

> In taking actions under this chapter, the Oversight Board shall not exercise applicable authorities to impede territorial actions taken to—
>
> (1) comply with a court-issued consent decree or injunction, or an administrative order or settlement with a Federal agency, with respect to Federal programs;
>
> (2) implement a federally authorized or federally delegated program;

---

and Changes in Fund Balance for Year Ending June 30, 2019 (the "Board's FY19 Budget"), https://drive.google.com/file/d/1FhlS5RTKptfzG8MeJLvV_0rORZ7TQ7b3/view (revenues are derived solely from "[c]ontributions from territorial government" and interest income). According to the Board's FY19 Budget, the massive contribution from the territorial government was to be expended to cover the Board's payroll and other related costs ($4,154,896), the Board's professional services ($53,462,109) and even the Board's rent, transportation and travel costs. *Id.*

> (3) implement territorial laws, which are consistent with a certified Fiscal Plan, that execute Federal requirements and standards; or
>
> (4) preserve and maintain federally funded mass transportation assets.

48 U.S.C. § 2144(d).

Indeed, the Board has no role at all in exercising any federal powers—*i.e.*, powers that an officer of the United States might have over Puerto Rico. The Board does not contract on behalf of the United States, draw on the federal fisc, or file suit on behalf of the United States government. The Board has no say in appropriating or administering federal funds. At most, the Board can make recommendations about "actions of the Federal Government[] that would assist" Puerto Rico in complying with a fiscal plan. 48 U.S.C. § 2148(a)(3). But the Board cannot actually implement any actions of the federal government or promulgate any federal rules or regulations. Likewise, a Board-overseen revitalization coordinator can apply for expedited permitting of critical projects to the federal government, but the deadlines proposed by the revitalization coordinator will in no way be binding on any federal agency. *See* 48 U.S.C. § 2215(c).[9]

---

[9] To the extent that the Oversight Board may be understood to enforce certain federal statutory provisions, that does not distinguish its members from state officials, who regularly assist in implementing federal law, as the Founders anticipated. *See* The Federalist No. 45 (predicting that "the eventual collection [of internal revenue] under the immediate authority of the

B. The Oversight Board Is An Independent Agency Within The Government Of Puerto Rico And Is Not Subject To Federal Control.

The federal government, in fact, exercises no control over the Oversight Board. It is true that the Board reports annually to the President and Congress—but the same provision that imposes this requirement likewise requires the Board to report to the Commonwealth Governor and Legislature. *See* 48 U.S.C. § 2148(a). And under the Jones Act, the Puerto Rican Governor was required annually to report to Congress and the President even after he became a popularly elected office and therefore, in Respondents' own telling, a territorial official. Jones Act, § 12, 39 Stat. at 955. Even under PROMESA, the Governor or Legislature of Puerto Rico must report to the President of the United States and Congress if it rejects recommendations made by the Oversight Board, 48 U.S.C. § 2145(b)(3).

The only potential mechanism by which federal control might be asserted is the President's ability to

---

Union, will generally be made by the officers, and according to the rules, appointed by the several States"); *FERC v. Mississippi,* 456 U.S. 742 (1982) (upholding requirement that states implement federal regulatory scheme pertaining to electrical utilities); *but see Printz v. United States*, 521 U.S. 898 (1997) (such state enforcement of federal law must be voluntary). The power to enforce certain federal laws does not by itself render a state officer a federal officer such that the Appointments Clause would apply. *See* Officers Of The United States Within The Meaning Of The Appointments Clause, 31 Op. O.L.C. 73, 99 (2007)(State officials ordinarily "do not possess delegated sovereign authority of the federal government, even when they assist in the administration of federal law.").

remove Board members "for cause." 48 U.S.C. § 2121(e)(5)(B). But courts routinely regard such a narrow removal power as a measure of an agency's independence, not control. *See, e.g.*, *Mistretta v. United States,* 488 U.S. 361, 411 (1989) (Congress "insulated" members of the Sentencing Commission from Presidential removal except for good cause "precisely to ensure that they would not be subject to coercion."); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (In specifying that a President may remove an agency official only "for cause," Congress enables the officials "to act in discharge of their duties independently of executive control."). The federal government, moreover, does not provide any salary to Board members, 48 U.S.C. § 2121(g), although "emoluments" are among the customary indicia of federal officers. *See United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867). And Puerto Rico, not the United States, funds the Board's expenses. 48 U.S.C. § 2127(b); *see supra* at 39 & n.8.

C. The Oversight Board's Authority Relates Entirely To Puerto Rico And Does Not Extend Beyond Local Matters.

The Board's most significant interactions are all with the Puerto Rico government. PROMESA charges the Oversight Board with three core functions: (1) certifying and monitoring compliance with Commonwealth and instrumentality fiscal plans; (2) certifying Commonwealth and instrumentality budgets; and (3) issuing restructuring certifications to the Commonwealth and its instrumentalities and serving as the debtor's representatives for those

entities in restructuring proceedings. *See* 48 U.S.C. §§ 2141-44, 2146. As an entity within the Puerto Rican government, the Board performs each of these functions in conjunction with other Puerto Rican officials and departments. For instance, Puerto Rico's Governor is charged with developing a fiscal plan in compliance with specified criteria, which is then submitted to the Oversight Board for review and approval, with opportunities for revision if the Oversight Board finds the proposed plan fails to satisfy any of the requirements. *Id.* § 2141(a)-(e). PROMESA also outlines a process of budget development and approval that entails the successive proposal of budgets by the Governor and Legislature, with the Oversight Board responsible for determining if the budgets comply with the applicable fiscal plan and requesting certain revisions to achieve such compliance. *Id.*

The Oversight Board is thus statutorily assigned to assist, augment, monitor, and—in the case of restructuring proceedings—assume certain powers as the representative of the Commonwealth, its entities and its municipalities as debtors, *id.* § 2175. The other powers conferred on the Board—to investigate, subpoena, review, monitor compliance, and enforce the provisions of PROMESA—are designed to enable it to perform these specified functions.

The Oversight Board exercises these powers independently. It is not accountable to either the electorate of Puerto Rico or to the federal government. In this sense, its relationship to Puerto Rico resembles that of independent authorities that exist

in many states, as well as independent agencies that exist within the federal government.[10] Much as the Board of Governors of the Federal Reserve System and the Federal Open Market Committee are independent instrumentalities exercising control over federal monetary policy, the Oversight Board exercises authority relating to Puerto Rico's fiscal policy independently of the federal government or the popular will of Puerto Ricans.

The Oversight Board's functions concern the internal management of the Commonwealth—its fiscal planning, budgets, and restructuring of debt. The scope of its subpoena power is governed by Puerto Rico's own statutes. *See* 48 U.S.C. § 2121(f)(1). When the Board terminates, its budgetary and planning responsibilities will devolve to the Commonwealth government pursuant to its own constitution. Even the Board's ability to investigate "the disclosure and selling practices" of Commonwealth and instrumentality bonds, *id.* § 2124(o), does not extend its "regulatory scope" beyond Puerto Rico's borders, because this provision does not confer on the Board itself any capacity to regulate, only to investigate compliance with "applicable laws and regulations." *Id.*

---

[10] Indeed, the Oversight Board's independence *exceeds* that of independent agencies. Federal agencies, such as the Federal Reserve System, may well be independent, but they were created by a Congress elected by the people of the States. Accordingly, these agencies' authority emanates from the People. Puerto Rico, by contrast, lacks congressional representation. The Oversight Board's authority thus in no sense emanates from the people of Puerto Rico.

The First Circuit suggested that merely because PROMESA is a federal statute, any Board action under PROMESA constitutes an exercise of federal authority. The court explained, for example, that the Board wields significant federal authority in the context of Title III restructuring proceedings because "the bankruptcy power [is] a quintessentially federal subject matter." Pet. App. 31a.

But if the First Circuit were correct, then the mayor of every municipality that has ever filed a petition for bankruptcy under chapter 9 of the United States bankruptcy code is exercising significant federal authority. That is not the law.

PROMESA makes clear that in terms of restructuring, the Board inhabits a role akin to that of both a state and a municipality. For example, in making certain provisions of the Bankruptcy Code applicable to Title III proceedings, PROMESA broadens the Bankruptcy Code's defined term "State" to mean "State or territory" for specified purposes. 48 U.S.C. § 2161(c)(6). The Oversight Board's state-like role is exemplified by the requirement that the Board provide an entity a restructuring certification prior to the entity filing a petition. *Id.* §§ 2146, 2164(a). This responsibility mirrors that of a state in regard to a municipality under the Bankruptcy Code. *See* 11 U.S.C. § 109(c)(2) (municipality may be debtor if "specifically authorized … by State law or by a governmental officer or organization empowered by State law to [so] authorize."). And in acting as the "representative of the debtor," 48 U.S.C. § 2175(b), filing a petition, id. § 2164(a), and filing a plan of

adjustment, *id.* § 2172(a), the Board serves as an agent of "the territory or covered territorial instrumentality" for which Title III proceedings are being conducted, *see id.* § 2161(c)(2) (defining "debtor"), (although nothing in Titles II or III permits the Board to exercise political or governmental control over a debtor or consent to a Title III filing on behalf of an entity that does not wish to restructure its debts through a plan of adjustment). In so doing, the Board exercises rights as the Commonwealth's representative that any municipality would be entitled to exercise if it filed for a chapter 9 bankruptcy under the bankruptcy code.

That PROMESA grants only territorial power to the Board is confirmed by the many obligations it places on the Governor of Puerto Rico to interact with and respond to the Board's exercise of its powers. No one doubts that the Governor is acting as a territorial officer exercising territorial power under PROMESA when he responds to an Oversight Board action. It follows, then, that the Oversight Board members are likewise exercising territorial powers in the first instance.

* * *

Respondents argue that "the Appointments Clause applies to federal officials that oversee territories." Br. 23. The Commonwealth agrees that since Congress retains ultimate sovereignty over territories, it *could* exercise its powers under the Territorial Clause to impose federal rule over a territory through a federal official. If Congress were to establish an Assistant Secretary of the Department

of the Interior for Puerto Rico to act as governor and legislature for the Commonwealth, such an officer would hold a position of continuing employment within the federal government that carries significant authority pursuant to the laws of the United States, and therefore would be within the ambit of the Appointments Clause. But Congress did not do so here. Rather, Congress established the Board as an entity within the government of Puerto Rico, and as an entity that exercises no federal powers. The Appointments Clause is thus inapplicable.

CONCLUSION

The Appointments Clause does not apply to officers of the territories; rather, it applies only to "officers of the United States." Accordingly, because Congress granted the Oversight Board members only territorial powers and structured the Board to operate as a territorial instrumentality, the Appointments Clause does not govern the appointment of the Board members. Members of the Oversight Board are not officers of the United States; they are officers of Puerto Rico, unilaterally imposed by Congress by virtue of the Territorial Clause. If upheld, the First Circuit's contrary ruling and unprecedented expansion of the Appointments Clause would undermine the legitimacy of the governmental framework for Puerto Rico as well as the other territories and the District of Columbia.

To be sure, the Oversight Board has operated in a manner that often disrespects the democratically adopted policies and priorities of the people of Puerto Rico. Applying the Appointments Clause to these

territorial offices would not, however, remedy this ill. Rather, because doing so would call the legitimacy of the government of Puerto Rico itself into question, the cure would be far worse than the disease.

Respectfully submitted,

WALTER DELLINGER
Counsel of Record
PETER FRIEDMAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
wdellinger@omm.com

JOHN J. RAPISARDI
WILLIAM J. SUSHON
YAIRA DUBIN
O'MELVENY & MYERS LLP
7 Times Square
New York, N.Y. 10036
(212) 326-2000
jrapisardi@omm.com

NEIL KINKOPF
PROFESSOR OF LAW
GEORGIA STATE UNIVERSITY
COLLEGE OF LAW
85 Park Place
Atlanta, GA 30303

July 25, 2019