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

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,
Petitioner,
v.

AURELIUS INVESTMENT, LLC, *et al.*,
Respondents.

[Caption Continued on Following Page]

On Writs of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING THE APPOINTMENTS CLAUSE RULING AND CHALLENGING THE *DE FACTO* OFFICER DOCTRINE RULING

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August 29, 2019

AURELIUS INVESTMENT, LLC, *et al.*,
Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, *et al.*,
Respondents,

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA,
Petitioner,

v.

AURELIUS INVESTMENT, LLC, *et al.*,
Respondent,

UNITED STATES OF AMERICA,
Petitioner,

v.

AURELIUS INVESTMENT, LLC, *et al.*,
Respondent,

UNION DE TRABAJADORES DE LA INDUSTRIA ELECTRICA Y RIEGO, INC.,
Petitioner,

v.

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

QUESTIONS PRESENTED

1. Whether the Appointments Clause governs the appointment of members of the Financial Oversight and Management Board for Puerto Rico; and if so, whether the members were appointed in compliance with the Appointments Clause.

The question fairly encompasses the following subsidiary question: if the members of the Board were not appointed in compliance with the Appointments Clause, does the Board possess Article III standing to invoke the jurisdiction of the federal courts?

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

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF often engages in original and *amicus* litigation to prevent the accumulation of power in any one branch of government in violation of the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Gordon v. CFPB*, *cert. denied*, 137 S. Ct. 2291 (2017); *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017).

The 2016 Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) created an organization to manage the restructuring of Puerto Rico's public debt—the Financial Oversight and Management Board. The First Circuit concluded that, under PROMESA, Board Members serve as "principal officers" of the United States, thereby requiring Board Members to be appointed in compliance with the Constitution's Appointments Clause. Because the federal government did not comply with those requirements, the court ruled that individuals named to the Board were never properly appointed. WLF agrees with that ruling and urges its affirmance.

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[1] Under Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

Yet despite finding a constitutional violation, the First Circuit declined to provide any meaningful remedy to those challenging the Board's actions. It applied the *de facto* officer doctrine to uphold every action undertaken by the Board through the date of the court's decision (February 15, 2019) and even permitted the improperly constituted Board to continue to act thereafter. WLF is concerned that by essentially giving a free pass to unconstitutional behavior, the decision below invites similar, future violations of the Constitution's structural protections. Also, by denying any relief to those challenging the behavior, the appeals court improperly removed all incentive for challenging similar lawlessness in the future.

WLF's brief focuses on two issues. First, because Board Members were never authorized to act on behalf of the federal government, they lacked Article III standing to file Title III proceedings under PROMESA—and thus the district court lacked subject-matter jurisdiction over the proceedings. Second, the *de facto* officer doctrine is inapplicable here and provides no basis for denying relief.

WLF agrees with the First Circuit's Appointments Clause ruling but does not separately address that issue.

STATEMENT OF THE CASE

PROMESA authorizes the Board to file debt adjustment proceedings for the Commonwealth of Puerto Rico and certain of its instrumentalities in federal district court. 48 U.S.C. § 2164. In 2017, Board Members authorized the filing of at least seven such

"Title III proceedings" in U.S. District Court for the District of Puerto Rico. Three of those Title III proceedings are at issue here: the Title III debt adjustment proceeding filed on behalf of the Commonwealth and those proceedings involving the Puerto Rico Highways and Transportation Authority (PRHTA) and the Puerto Rico Electric Power Authority (PREPA).

Several interested parties objected to the three filings.[2] They argued among other things that the proceedings are improper because Board Members were appointed in an unconstitutional manner. They sought a variety of relief, including dismissal of the proceedings.

The district court denied the motions to dismiss. It held that Board Members are not officers of the United States who must be appointed in conformity with the Appointments Clause. Pet. App. 17a-20a.[3]

The appeals court disagreed. Pet. App. 32a-42a. It concluded that Board Members are "Officers of the United States" subject to the Appointments Clause

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[2] The objecting parties include Aurelius Investment, LLC and related entities, which own substantial amounts of general-obligation bonds issued or guaranteed by the Commonwealth. Other objectors include Assured Guaranty Corp., which insures general-obligation bonds issued by the Commonwealth and by PRHTA. WLF on occasion refers to these objectors collectively as "Aurelius." A labor union, UTIER, filed objections to the Title III proceedings involving PREPA.

[3] "Pet. App." refers to the Petition Appendix in No. 18-1475, *Aurelius Investment, LLC v. Commonwealth of Puerto Rico*.

because: (1) they occupy a "continuing" position; (2) they exercise significant authority; and (3) that authority is exercised pursuant to the laws of the United States. *Id.* at 39a. It further held that the Board Members are "principal officers," for whom the Appointments Clause requires appointment by the President, by and with the advice and consent of the Senate. *Id.* at 40a-42a (citing U.S. Const. Art. II, § 2, cl. 2). The Board Members' appointments were invalid because they did not satisfy those constitutional requirements, the court said. *Ibid.*

But the court declined to provide the relief sought by Aurelius and Assured: dismissal of the challenged Title III proceedings. Pet. App. 42a-46a. Instead, it limited relief to "a declaratory judgment to the effect that PROMESA's protocol for the appointment of Board Members is unconstitutional and must be severed." *Id.* at 46a.

The appeals court concluded that "application of the *de facto* officer doctrine is especially appropriate in this case," because Board Members "were acting with the color of authority" and "in good faith" when they decided to file Title III petitions. Pet. App. 45a. It noted that the doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment * * * to office is deficient." *Id.* at 44a (quoting *Ryder v. United States*, 515 U.S. 179, 180 (1995)). Without identifying any specific actions of the Board, or third parties who may have relied on those actions, the court stated, "We fear that awarding to appellants the full extent of their relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's

actions until now." *Id.* at 45a.

The court emphasized that its findings that Board Members were appointed unconstitutionally and that Aurelius/Assured filed "timely" challenges "did not affect the validity of the Commission's past acts." *Id.* at 46a (quoting *Buckley v. Valeo*, 424 U.S. 1, 142 (1976)). Indeed, the court authorized the Board to "continue to operate as now" during a stay of the mandate the court issued to allow the President and Senate to correct the constitutional deficiency. *Ibid.* So far that deficiency has not been cured.

SUMMARY OF ARGUMENT

Although the Executive Branch enjoys unique constitutional standing to bring suit in federal court, only properly vested "Officers of the United States" may exercise that authority. The Board initiated this action in May 2017, when it petitioned the district court for relief on behalf of the Commonwealth of Puerto Rico and several of its instrumentalities. But given the Board Members' fatal Appointments Clause defect, the district court lacked Article III jurisdiction over those actions.

As the First Circuit's holding tacitly reveals, *no* Board Member was vested with the constitutional power to invoke the district court's Article III jurisdiction below. Because its only members were principal officers neither nominated by the President nor confirmed by the Senate, the Board lacked the requisite authority to initiate federal-court proceedings—under PROMESA or otherwise. Jurisdiction "is lacking" in cases when, as here, the

Government lacks a properly authorized representative. *United States v. Providence Journal Co.*, 485 U.S. 693, 708 (1988).

Though no party has challenged the district court's rulings based on the Board's lack of standing, such a constitutional defect cannot be waived. This Court has consistently exercised its "special obligation" to police Article III's inflexible standing requirement. It should do so here. Indeed, "no principle is more fundamental to the Judiciary's proper role in our system of government." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (internal quotations omitted).

Although the First Circuit held that Board Members were not appointed in the manner prescribed by the Appointments Clause, it declined to provide Aurelius with any meaningful remedy—citing the *de facto* officer doctrine as its rationale for denying relief. The court's invocation of that doctrine was unwarranted. The *de facto* officer doctrine serves primarily to protect third parties who reasonably rely on the actions of individuals who hold themselves out as government officials. The doctrine is not designed to immunize Executive Branch action from challenge where, as here, the challenged action was initiated by the individuals who, it turns out, acted without authority. The Court has repeatedly refused the Government's efforts to invoke the *de facto* officer doctrine where the challenge to an official's authority is both timely and direct. *See, e.g., Ryder*, 515 U.S. at 182-83.

Nor is it appropriate to apply the First Circuit's constitutional ruling prospectively only and to

effectively refuse to apply it to the parties before the Court. It is well established that a rule of federal law announced in a case "is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate announcement of the rule." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). The First Circuit's refusal to provide a meaningful remedy to Aurelius and Assured cannot be squared with *Harper*.

ARGUMENT

I. BECAUSE THE BOARD COULD NOT PROPERLY INVOKE THE JUDICIARY'S JURISDICTION UNDER ARTICLE III, THE DISTRICT COURT'S RULINGS MUST BE VACATED.

The bedrock requirement that a plaintiff have standing—both at the time an action is filed and "throughout all stages of litigation," *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)—is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). Because "Article III standing is built on a single basic idea—the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984)—those who invoke the jurisdiction of the federal courts must have the constitutional authority to do so. Article III's case-or-controversy requirement is thus a non-negotiable prerequisite to the exercise of judicial power. The district court lacked such power in this case.

The lack of a justiciable case or controversy may be raised "at any time in the same civil action, even

initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Because the principles of waiver, consent, and estoppel do not apply to such jurisdictional defects, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), litigants' conduct cannot vest a district court with jurisdiction beyond the limits the Constitution imposes. That is why this Court has an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). Here, the district court's jurisdictional defect is "open to direct review." *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940).

A. Because the *Ultra Vires* Board Lacked Constitutional Authority to Bring Suit, the District Court Lacked Jurisdiction.

Litigants cannot invoke the judicial power of the federal courts without a "case or controversy" that affects their concrete, particularlized interests. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). One implication of this standing requirement is that litigants cannot bring suit merely to vindicate a generalized interest in seeing federal law obeyed. *See, e.g., FEC v. Akins*, 524 U.S. 11, 24 (1998) (collecting cases); *Allen*, 468 U.S. at 754 ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). Simply put, "a private citizen lacks a judicially cognizable interest in" carrying out federal law. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

True, given its Article II duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, the Executive stands in a unique position to enforce federal law through the courts. So when the Executive sues to enforce public rights, "the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts." *In re Debs*, 158 U.S. 564, 586 (1895). But "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (quotation and citation omitted). And the "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights * * * may be discharged *only* by persons who are 'Officers of the United States' within the language of [the Appointments Clause]." *Id*. at 140 (emphasis added).

What's more, this Court's standing jurisprudence "derives from Article III and not Article II." *Steel Co.*, 523 U.S. at 102 n.4. In the mine-run case, a congressionally created board has Article III standing because its members have been properly vested with executive authority under Article II. But when, as here, the plaintiff is nothing more than a nascent, faceless entity whose principals have no constitutional authority to act, "Article III cannot confer on the Executive a power that Article II denies." Tara Leigh Grove, *Standing Outside of Article III*, 162 U. Pa. L. Rev. 1311, 1334 (2014). Because they were appointed in violation of the Appointments Clause, the Board Members were not "Officers of the United States" and thus lacked the unique attributes of executive standing required to lawfully invoke the jurisdiction of the federal courts.

That is no mere procedural technicality. This Court has never created a standing exception for "apparent" or "*de-facto*" federal officers. *United States v. Providence Journal Co.* illustrates the point. In that case, a special prosecutor filed a petition for certiorari "without the authorization of the Solicitor General, and thus without authorization to appear on behalf of the United States." 485 U.S. at 708. Although the "United States" was named as the petitioner in the suit, the Court dismissed the petition, concluding that "[a]bsent a proper representative of the Government" as a litigant in the suit, "jurisdiction is lacking." *Ibid.* So too here, because the Board and its Members engaged in litigation without constitutional authorization, the district court lacked jurisdiction.

Without constitutionally vested authority to execute the laws of the United States, the Board's *ultra vires* Members were essentially private litigants. A plaintiff "seeking relief that no more directly and tangibly benefits him than it does the public at large" fails to "state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see Lance v. California*, 549 U.S. 437, 439 (2007) (per curiam) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."). As a result, the Board "must assert [its] own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Hollingsworth*, 570 U.S. at 708 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Yet neither the Board nor its Members could possibly satisfy Article III's traditional standing requirements for private citizens bringing suit in federal court. Under that exacting test, the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant,

and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61).

No one can plausibly contend that the Board and its Members sought "a remedy for a personal and tangible harm" in the district court. *Hollingsworth*, 570 U.S. at 704. On the contrary, Congress ensured under PROMESA that all eligible Board Members lacked any financial interest in Puerto Rico's financial solvency. *See* 48 U.S.C. § 2129(a) (imposing strict conflict-of-interest requirements on all Board Members and staff). So neither the Board nor its Members has a "direct stake" in the outcome of this action. *Lujan*, 504 U.S. at 560. And without the Board, as this Court knows well, Puerto Rico and its instrumentalities are unable to proceed independently under federal bankruptcy law. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (holding that Puerto Rico is not a "State" capable of deciding who may be a debtor under Chapter 9's gateway provision).

Even if the Board ultimately were to cure its Appointments Clause defect, it could not retroactively cure the district court's jurisdictional defect in the proceedings below. A court's lack of Article III jurisdiction can never be cured by a change in circumstances after the fact. Instead, Article III standing is measured at the time "when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008); *see Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824) ("[T]he jurisdiction of the court depends upon the state of things at the time of the action brought."). Put differently, standing is required "throughout all stages of litigation." *Hollingsworth*, 570 U.S. at 705. Here, the

Board never had standing at any stage of the litigation.

Only one way exists for a litigant to obtain the Executive's unique Article III standing to enforce public rights in federal court: it must be constitutionally vested with executive authority. When such authority is lacking, so too is Article III standing. In this case, the district court lacked jurisdiction, *ab initio*, over the Board's petition. "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). Such a constitutional defect "goes to the validity of the * * * proceeding," *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879 (1991), and the Court should vacate the district court's rulings in this case.

B. Allowing Federal Courts to Adjudicate Suits Brought by Litigants Who Lack Article III Standing Violates the Separation of Powers.

The Board's lack of standing below injects yet another constitutional defect into this case. The Constitution's narrow limits on federal-court jurisdiction are "founded in concern about the proper—and properly limited—role of courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The case or controversy requirement thus "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Article III's limits on judicial review reinforce the Framers'

view that "neither department may invade the province of the other and neither may control, direct, or restrain the action of the other." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

The federal courts "must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches." *Steel Co.*, 523 U.S. at 102 n.4. Because Article III's standing requirements limit the accumulation of power by the Judiciary, this Court has consistently refused to allow district courts to exercise jurisdiction in cases where the "irreducible constitutional minimum" of standing is lacking. *Lujan*, 504 U.S. at 560. This case is no different.

Above all, federal courts "may exercise power 'only in the last resort,'" and only "when adjudication is 'consistent with a system of separated powers.'" *Allen*, 468 U.S. at 752 (citation omitted). Though "each branch has traditionally respected the prerogatives of the other two," this court has not hesitated to enforce the Constitution's structural limits when necessary. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). "Time and again" the Court has "reaffirmed the importance in our congressional scheme of the separation of governmental powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

The district court's exercise of jurisdiction below is sharply at odds with this Court's historic understanding of Article III. No matter how unwitting, the district court's arrogation of power comes at the expense of the people and their elected representatives.

Failure to enforce Article III's core standing requirements invariably leads to "an overjudiciali-zation of the processes of self-governance." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983). By preventing an unelected, life-tenured Judiciary from exercising executive or legislative powers, Article III's case-or-controversy requirement cabins the federal courts to their proper, adjudicatory role—redressing "actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009).

By entertaining suit at the behest of a Board whose Members lacked any executive authority and who suffered no cognizable injury under federal law, the district court's proceedings, if allowed to stand, will severely erode the Constitution's carefully calibrated separation of powers. However desirable prompt resolution of Puerto Rico's financial affairs may be, "it is not as important as observing the constitutional limits set upon courts in our system of separated powers." *Steel Co.*, 523 U.S. at 109-110.

II. THE FIRST CIRCUIT'S JUDGMENT PROVIDES AN INSUFFICIENT REMEDY FOR INJURIES INFLICTED BY UNCONSTITUTIONALLY APPOINTED OFFICERS.

A. The *De Facto* Officer Doctrine Does Not Apply to Timely, Direct Challenges to an Alleged Officer's Authority.

Although it held that Board Members were not properly appointed to the Board, the First Circuit validated all of the Board's actions. The court cited the *de facto* officer doctrine as its rationale for denying relief to Aurelius and Assured.

The appeals court's reliance on the *de facto* officer doctrine was misplaced. The doctrine's primary purpose is to protect the interests of third parties who reasonably relied on the actions of individuals who, by all available evidence, were government officers duly authorized to act as they did. *See, e.g., Waite v. City of Santa Cruz*, 184 U.S. 302, 322-23 (1902). The doctrine is not a shield for the very individuals who, it turns out, acted without authority.

For example, *Waite* invoked the *de facto* officer doctrine to protect bondholders when the issuer (a city in California) refused to redeem its bonds because they had been signed by an official who, although openly acknowledged as the city's mayor, allegedly left office

several hours before the signing.[4] In rejecting that defense, the Court explained:

> The rule that the acts of a *de facto* officer are valid as to the public and third persons is firmly established. * * * A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer.

Waite, 184 U.S. at 322-23. The Court upheld the bondholders' right to repayment, ruling that the actions of the *de facto* mayor and city council should be deemed

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[4] The city council authorized the bonds in question. Following a municipal election, the mayor remained in office without challenge for 30 days until his successor was sworn in. During that 30-day period, the mayor signed the bonds. The city used the proceeds from sale of the bonds to build a waterworks. In defending against a suit demanding payment of the bonds, the city's attorneys argued that the bonds were invalid because the term of the new mayor officially began seven days after the election and several hours before the old mayor signed the bonds.

the actions of a *de jure* mayor and council "so far as concerns the public and third persons having an interest in what was done by them." *Id.* at 322.

The Court has repeatedly refused to apply the *de facto* officer doctrine when its application is sought by the government whose officers' authority is being challenged. In *Ryder*, the Court held that the *de facto* officer doctrine could not be invoked to block a Coast Guard enlisted man's challenge to the authority of the Coast Guard Court of Military Review to affirm his criminal conviction, where two members of that court "had not been appointed in accordance with the dictates of the Appointments Clause." 515 U.S. at 179. Noting that the enlisted man raised his challenge on direct review of his conviction, the Court held, "We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Id.* at 182-83.

Similarly, *Nguyen v. United States*, 539 U.S. 69 (2003), declined to apply the *de facto* officer doctrine to salvage the judgment of a Ninth Circuit panel, one of whose members was not an Article III judge. Even though the defendant did not object to the inclusion of the unauthorized judge until after the panel ruled against him, the Court ruled that a defendant's objection is sufficiently timely (to bar application of the

de facto officer doctrine) so long as it is raised "on direct review" of the challenged decision. 539 U.S. at 78.[5]

Nor has the Court limited its rejection of government-sponsored *de facto* officer claims to cases in which the challenged officer is part of the Judiciary. In *Lucia*, the Court overturned civil sanctions imposed by the SEC for securities-law infractions because the SEC official who adjudicated the defendant's alleged securities-law infractions was serving as an officer of the United States yet had not been appointed in accord with the Appointments Clause. 138 S. Ct. at 2055 (quoting *Ryder*'s holding that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief"). Although the SEC official and similarly situated Administrative Law Judges had held themselves out as federal officials for many years (and were publicly accepted as such), *Lucia* never suggested that their actions (when challenged on direct appeal) could be upheld under the *de facto* officer doctrine.

It is undisputed that, in challenging the Board's actions in the Commonwealth and PRHTA Title III proceedings, Aurelius and Assured are asserting their

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[5] *Nguyen* relied on *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), which stated that federal court judgments could not stand if issued by judges not appointed in accord with Article III of the Constitution. The Government argued that even if the challenged judges were improperly serving in Article III federal courts, the judgments should be upheld under the *de facto* officer doctrine. Writing for the Court, Justice Harlan rejected that argument, stating that the doctrine is inapplicable "at least" where the constitutional challenge is raised "on direct review." 370 U.S. at 535-37.

challenges *directly*. And the First Circuit expressly acknowledged those challenges are "timely." Pet. App. at 46a. Under these circumstances, the *de facto* officer doctrine does not apply.

Indeed, the Court has suggested that the *de facto* officer doctrine *never* applies to claimed authority that contravenes constitutional norms. *Nguyen* stated that although the *de facto* officer doctrine can be invoked as a basis for overlooking "mere technical defects" in the qualifications of a presiding officer, 539 U.S. at 77, the seating of a non-Article III judge on an Article III court was not a mere technical defect: "Congress' decision to preserve the Article III character of the courts of appeals is more than a trivial concern." 539 U.S. at 80. *See Ryder*, 515 U.S. at 182; *Glidden*, 370 U.S. at 536; *see also, SW General, Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015) (stating that the *de facto* officer doctrine does not apply to review of Appointments Clause challenges, citing *Ryder*), *aff'd*, 137 S. Ct. 929 (2017).

The First Circuit showed its basic misunderstanding of the *de facto* officer doctrine by its decision to grant *some* (albeit very limited) relief to Aurelius and Assured. Pet. App. at 46a.[6] As *Waite* explains, the *de facto* officer doctrine does not merely cabin available remedies. Rather, if the doctrine applies, the actions of the *de facto* officers are unimpeachable. *Waite*, 184 U.S. at 322 (stating that if the individuals approving and signing the bonds were *de facto* officers, then their

[6] The First Circuit "direct[ed] the district court to enter a declaratory judgment to the effect that PROMESA's protocol for the appointment of Board Members is unconstitutional and must be severed." *Ibid.*

actions "are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the *de jure* mayor and common council of the city"). In other words, if the *de facto* officer applied here (which it does not), Aurelius and Assured would have been entitled to no remedy whatsoever.

Importantly, the relief Aurelius and Assured seek ensures that the reliance interests of third parties will not be upset. They seeks dismissal of the Commonwealth and PRHTA Title III proceedings. Dismissal undoubtedly will delay the Board's efforts to complete the Commonwealth's and PRHTA's debt adjustment. But because that adjustment is a work-in-progress, third parties have not relied on final decisions of the district court in those two proceedings.

One of the Board's *amici* states that Aurelius/ Assured's challenge threatens to unravel debt restructuring undertaken and completed by the GDB Debt Recovery Authority ("DRA"), activities that are separate from the Title III proceedings at issue here. Brief of the DRA Entities as *Amici Curiae*, at 2-3. DRA's fears are overblown; any challenges to completed (and Board-approved) restructuring agreements that might be filed in response to a decision in this case would be untimely. Creditors who received partial payments on their claims could legitimately assert that they reasonably relied on the Board's *de facto* authority to approve their restructuring agreements. As DRA notes, no one filed a timely appeal from the district court's order approving the restructuring agreements at issue in the DRA proceedings. *Id.* at 19 n.4. Under those circumstances, there is no possibility that creditors who

received payments under those agreements could be ordered to refund payments.

This Court has repeatedly barred untimely challenges to actions taken by government officials, even when it is acknowledged that the actions were unauthorized. For example, *Chicot County* involved an effort by bondholders to recover the face value of bonds issued by a local government in Arkansas. In earlier proceedings, a court invoked a 1934 federal bankruptcy statute to give a substantial "haircut" to all bondholders. This Court later held, in *Ashton v. Cameron County Water Imp. Dist.*, 298 U.S. 513 (1936), that the 1934 statute was unconstitutional, a decision that induced bondholders to renew their collection efforts. *Chicot County* rejected those efforts; it held that even though the "haircut" had been administered under an invalid statute, the renewed action was barred because the bondholders failed to raise their constitutional challenge to the statute in the original proceeding. 308 U.S. at 375-76.

In sum, the First Circuit erred when it invoked the *de facto* officer doctrine to deny all meaningful relief to Aurelius and Assured.

B. The Court's Rulings on Federal Questions Should Be Applied Retrospectively.

The First Circuit largely refused to apply its constitutional ruling to the parties before the court. That ruling is unprecedented and conflicts with the rulings of this Court.

In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993), the Court held that a rule of federal law announced in a case "is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate announcement of the rule." As the Court explained:

> "[B]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson v. Neil*, 409 U.S. 505, 507 (1973). Nothing in the Constitution alters the fundamental rule of "retrospective operation" that has governed "[j]udicial decisions * * * for nearly a thousand years."

Harper, 509 U.S. at 94 (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

The First Circuit sought to justify its decision to uphold the actions of Board Members—despite conceding that they were not constitutionally authorized to act on behalf of the United States—by asserting that they were acting on a good-faith belief that their actions were authorized. Pet. App. 45a.

The good faith of government agents likely immunizes them from liability claims. But it has never been grounds to uphold actions later determined to be unauthorized. And it certainly does not explain the First Circuit's decision to permit these unauthorized individuals to continue to act on behalf of the federal

government, even after the courts have determined that they lack any authority for such action. Once the court ruled in February 2019, the Board Members no longer could believe in good faith that their actions were constitutionally sanctioned.

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), does not support the First Circuit's effective refusal to apply its constitutional ruling to the parties before the court. That decision declined to give full retrospective effect to its federal-law ruling—that the Bankruptcy Act of 1978's broad grant of jurisdiction to non-Article III bankruptcy judges violated Article III. 458 U.S. at 88 (plurality); *id.* at 92 (Rehnquist, J., concurring in the judgment). But unlike the court below, *Northern Pipeline* held that its decision applied to the parties before the Court. 458 U.S. at 87 n.40 ("It is clear that, *at the least,* the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against [Respondent] Marathon.") (emphasis added); *id.* at 92 (Rehnquist, J., concurring in the judgment). Moreover, *Northern Pipeline* was decided 11 years before *Harper* firmly established that the rule of "full retrospective effect" applies to civil cases as well as criminal cases.

There may be cases in which equitable considerations warrant imposing some limits on the remedies available to a prevailing plaintiff. But equity is not a proper reason for denying retrospective application of the federal-law rulings of a federal court. As Justice Harlan explained 50 years ago:

> To the extent that equitable considerations, for example, "reliance," are relevant, I would take this into account in the determination of what relief is appropriate in any given case. * * * The essential point is that while there is flexibility in the law of remedies, this does not affect the underlying substantive principle that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them.

United States v. Estate of Donnelly, 397 U.S. 286, 295-97 (1970) (Harlan, J., concurring).

C. Equitable Considerations Do Not Justify Depriving Aurelius and Assured of a Meaningful Remedy.

As noted above, equitable considerations may on occasion justify limiting the relief otherwise available to a prevailing plaintiff. *See Harper*, 509 U.S. at 100-101 (noting that while plaintiffs are entitled to retrospective application of constitutional rulings to all pending cases, the appropriate scope of the remedy for proven constitutional violations requires a separate analysis). Equitable considerations could come into play in at least some cases in which a plaintiff can show that a federal official was improperly appointed and thus lacks authority to act on behalf of the federal government. To take an extreme example, if a plaintiff were to prevail on a claim that an Army general was improperly appointed, equitable considerations would weigh heavily against awarding injunctive relief that would interfere

with the general's continued ability to command troops in an active war zone.

But such considerations have little, if any, relevance here. Aurelius and Assured are *not* plaintiffs and did not initiate any part of this litigation. Instead, they resisted suits initiated by the Board. Granting Aurelius and Assured the relief they seeks would delay efforts to restructure Puerto Rico's debts until such time as the federal government appoints Board Members in accordance with the Appointments Clause. But the First Circuit failed to explain how simply dismissing two Title III actions would interfere with the ability of the Puerto Rican government to continue functioning effectively.

To the extent that dismissal of an action filed by improperly appointed officials could *ever* create public chaos, courts are empowered to stay proceedings long enough to allow the Executive and Legislative Branches to undertake corrective measures. A stay of these proceedings, for example, can prevent creditors from seizing such Puerto Rican government assets as the electric power grid before the Board can be reconstituted.

In *Lemon v. Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"), the Court supplied a list of factors for determining appropriate equitable remedies for

plaintiffs who prevail on constitutional claims.[7] Those factors include:

- Whether denying complete relief would "substantially undermine" the constitutional interests at stake;
- Whether injunctive relief would upset third parties' reasonable reliance interests;
- Whether the plaintiff delayed before seeking injunctive relief.

411 U.S. at 201-05 (plurality).

Even if one assumes that such considerations are relevant to cases (as here) in which the prevailing party is not a plaintiff, each of the *Lemon II* factors tips the equitable scales decidedly in Aurelius/Assured's favor. The First Circuit did not identify any third-party reliance interests that would be upset if the Court were to dismiss the Title III proceedings, and it conceded that Aurelius's challenge was timely. Most importantly, failing to provide Aurelius and Assured with meaningful

[7] The *Lemon II* plaintiffs established that Pennsylvania violated the First Amendment's Establishment Clause by reimbursing religious schools for certain secular educational services; the federal courts enjoined continuation of the reimbursement program. At issue in *Lemon II* was whether Pennsylvania should be permitted to make one final payment to religious schools, to reimburse them for expenditures made in reasonable reliance on Pennsylvania's promise that they would be reimbursed for the expenditures.

relief "substantially undermine[s]" the constitutional interests implicated by this Appointments Clause challenge. By denying Aurelius and Assured any meaningful relief, the First Circuit signaled would-be Appointments Clause challengers that there is little to be gained from such challenges, even when (as here) a court determines that the challenges are meritorious. The First Circuit's ruling thereby removed all incentive for challenging similar lawlessness in the future.

The removal of such incentives is particularly inappropriate when effective enforcement of the Appointments Clause is at stake. This Court has repeatedly emphasized the need to structure relief in Appointments Clause cases to avoid "creat[ing] a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Ryder*, 515 U.S. at 183. Similarly, to remedy the Appointments Clause violation in *Lucia*, the Court ordered that any future proceedings be conducted by a new Administrative Law Judge, regardless whether the initial ALJ was re-appointed in accordance with Appointments Clause procedures. *Lucia*, 138 S. Ct. at 2055 n.5. The Court explained that awarding the Petitioner the right to a hearing before a different ALJ was an appropriate remedy because it "create[d] incentives to raise Appointments Clause challenges." *Ibid.*

In sum, to the extent that equitable considerations are at all relevant to determining the relief to which Aurelius and Assured are entitled, those considerations do not justify limiting the relief to which they would otherwise be entitled.

CONCLUSION

The Court should affirm the appeals court's findings that PROMESA's protocol for the appointment of Board Members is unconstitutional and that the Board Members were not appointed in compliance with the Appointments Clause. The Court should reverse the remedial portion of the appeals court's judgment and order dismissal of the Board's Title III petitions.

Respectfully submitted,

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