

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

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

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

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

Pages: 1 through 95

Place: Washington, D.C.

Date: October 15, 2019

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3 FINANCIAL OVERSIGHT AND MANAGEMENT,)

4 BOARD FOR PUERTO RICO,)

5 Petitioner,)

6 v.) No. 18-1334

7 AURELIUS INVESTMENT, LLC, ET AL.,)

8 Respondents;)

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10 AURELIUS INVESTMENT, LLC, ET AL.,)

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12 v.) No. 18-1475

13 COMMONWEALTH OF PUERTO RICO, ET AL.,)

14 Respondents;)

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1 UNITED STATES,)
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 11 FINANCIAL OVERSIGHT AND MANAGEMENT)
 12 BOARD FOR PUERTO RICO, ET AL.,)
 13 Respondents.)

14 - - - - -

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

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

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 23
 24
 25

1 APPEARANCES:

2

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5 Management Board for Puerto Rico.

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

12 on behalf of UTIER.

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

2 (10:06 a.m.)

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

8 Mr. Verrilli.

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE SOTOMAYOR: So how --

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

23 JUSTICE GINSBURG: Mister --

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

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

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

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

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

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

1 with the Appointments Clause --

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

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Could you --

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

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

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

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

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

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

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

20 MR. VERRILLI: But --

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

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

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

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

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

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

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

23 (Laughter.)

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

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

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

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

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

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

25 JUSTICE GINSBURG: -- what's the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 What happens to your case in that
21 instance?

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

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

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

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

15 MR. VERRILLI: Absolutely --

16 JUSTICE SOTOMAYOR: -- our --

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

22 JUSTICE SOTOMAYOR: All right.

23 MR. VERRILLI: And they --

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

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

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

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

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

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

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

23 MR. VERRILLI: And I think --

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

1 Congress's choice.

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

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

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

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

14 (Laughter.)

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

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

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

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

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

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

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

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

25 JUSTICE KAVANAUGH: I -- I --

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

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

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

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

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

12 JUSTICE KAVANAUGH: And judges.

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

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

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

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

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

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

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

1 historical examples to point to.

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

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

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Well --

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

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

18 JUSTICE SOTOMAYOR: What do we do
19 about the brief -- what do we do about the brief
20 of at least there's one amicus that suggests
21 that in one of the litigations that's ongoing,
22 with respect to PROMESA, that there's all sorts
23 of evidence that the Board is taking directives
24 from federal officials?

25 MR. VERRILLI: So I -- you know, that

1 brief, you know, respectfully, Your Honor, I --
2 I think that shows the perils of relying on an
3 amicus brief that relies on extra-record
4 information.

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 General Wall.

1 ORAL ARGUMENT ON BEHALF OF
2 JEFFREY B. WALL ON BEHALF OF THE UNITED STATES

3 MR. WALL: Mr. Chief Justice, and may
4 it please the Court:

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

10 It was.

11 The Board budgets and restructures
12 debt only for Puerto Rico. It acts in the
13 territory under a territory-specific statute.

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

18 Justice Kagan, Congress could have
19 legislated directly. It could have put this in
20 the Treasury Department. If it hadn't otherwise
21 specified, the powers would have gone to the
22 assembly and the governor with respect to
23 restructuring the debt and representing the
24 Commonwealth in these Title III proceedings.

25 It didn't want that. It wanted new

1 and independent territorial officers on the
2 ground in Puerto Rico to resolve the fiscal
3 crisis as it had with the D.C. Control Board 20
4 years earlier. That's a re --

5 JUSTICE GINSBURG: And what was the
6 position the government took, the D.C. Control
7 Board?

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

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

23 So I think our position has been
24 entirely consistent. As early as 18 --

25 JUSTICE SOTOMAYOR: I don't see how.

1 I mean, you say federal power over federal
2 property. But that's what the Territory Clause,
3 read your way, would say, that Puerto Rico is
4 federal property. You can't have it both ways.

5 MR. WALL: So I --

6 JUSTICE SOTOMAYOR: Your -- you have
7 to be disposing of federal control over federal
8 property because that's what a territory is.

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

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

23 It put a Board inside the Puerto Rican
24 government. Now, yes, it wanted it independent
25 from other Puerto Rican actors that it thought

1 had played a role in this debt crisis. But
2 that's a very different thing from putting it in
3 the federal government and exercising federal
4 power. It was reorganizing the Puerto Rican
5 government. That is a quintessential exercise
6 of Article IV power.

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

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

23 JUSTICE BREYER: Well, that's a
24 question I -- I mean, you're representing the
25 federal government. If you lost, would they

1 appoint the same people?

2 MR. WALL: The President has nominated
3 the same people.

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

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

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

20 JUSTICE BREYER: Yeah.

21 MR. WALL: So you've got to give the
22 Senate time to act. Right? And then that new
23 Board would pick up where the old Board left
24 off.

25 JUSTICE BREYER: But they would be the

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

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

10 MR. WALL: Well, I --

11 JUSTICE BREYER: On that assumption?

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

16 They're almost certain to argue that
17 the nominations have expired and that even
18 though the Senate has confirmed people before to
19 expired terms, it can't do that here. Even if
20 we win that argument and even if the Senate
21 committee reports them out and even if the
22 Senate gets them through the floor during the
23 period of the stay and we get a new Board, then
24 they're going to argue that Board has to ratify
25 everything that was done during the period of

1 the stay, and they're going to challenge that
2 ratification, and, of course, that ratification
3 will extend backward in time, further and
4 further, depending on what you do with the de
5 facto officer doctrine.

6 JUSTICE SOTOMAYOR: The -- the -- the
7 big question on --

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

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

18 MR. WALL: That's not true. They will
19 get prospective remedy as all of the litigants
20 did in the de facto officer cases, including
21 Buckley. It -- the second this Court's stay
22 expires, the Board can no longer act with
23 respect to Aurelius, Assured, UTIER, or anybody
24 else.

25 What the de facto officer doctrine

1 says is, even though you get meaningful
2 prospective relief, we don't invalidate
3 everything done moving backward in time that the
4 officers are alleged to have done while
5 invalidly appointed.

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

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

21 But I do want to say that I don't
22 think we get to that. I don't think the merits
23 here are -- are close. Congress did its
24 homework. It invoked Article IV. It told us
25 where it was putting it --

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

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

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

23 And then they say: Well, it's
24 executing federal law, maybe it's a special law,
25 maybe it's federal objectives, maybe it's

1 federal removal and there's a hodgepodge of
2 other factors thrown in there.

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

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

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

22 The upper-level disruption is every
23 test they've got runs smack dab into history,
24 and every test they've got would federalize some
25 number of officers who have always been thought

1 of as territorial or local, whether in D.C. or
2 in the territories.

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

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

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

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

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

13 MR. WALL: Oh, well --

14 JUSTICE SOTOMAYOR: We define it by
15 who passed the law, the state or the federal
16 government.

17 MR. WALL: Well, except that under
18 their test, and I think under Sanchez Valle,
19 you've got to look at where that power flowed
20 from, where did you get that authority. And
21 they keep saying authority under federal law.
22 Okay, well, if that's your test, all of that
23 authority, whether with respect to D.C. or the
24 territories, flows from federal law.

25 And, of course, the problem with the

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

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

15 JUSTICE SOTOMAYOR: I've not even --

16 MR. WALL: -- did it do anything under
17 Article I or Article IV that --

18 JUSTICE SOTOMAYOR: Why do you bother
19 with the third? If you give the first --
20 assuming that, as your adversary said, if
21 Congress -- all it has to do is wave a magic
22 wand, Article IV, and that that gives
23 permission? Obviously not.

24 MR. WALL: Oh, it's still got to be --
25 it's got -- first, you've got to ask where it

1 was trying to put the office. That's the first
2 step. And then you've got to ask whether it had
3 the constitutional power to do that thing. Did
4 it do something under Article I or under Article
5 IV that it couldn't do?

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

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

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

20 That under *Palmore*, I think, is the
21 end of the analysis. Congress invoked its
22 plenary power. It didn't do anything Article IV
23 didn't give it the power to do.

24 JUSTICE KAGAN: And, Mr. Wall, what is
25 your answer to the question that Justice

1 Sotomayor started off with about the difference
2 between these Board members and a U.S. Attorney?

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

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

16 MR. WALL: Yeah, I --

17 JUSTICE KAGAN: What -- what of that?

18 MR. WALL: I -- I don't think the form
19 of that matters. You're asking the same two
20 questions.

21 JUSTICE KAGAN: Because there, there
22 is a -- I -- I guess what I was suggesting was
23 that on -- on that there would be a uniform
24 national law.

25 MR. WALL: Oh, I -- I think you have

1 to ask the same two questions. Was Congress
2 doing that under the bankruptcy clause in
3 Article I or doing it under the Territory Clause
4 in Article IV to just create or extend those
5 laws to the territory?

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

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

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

22 MR. WALL: So --

23 JUSTICE KAGAN: -- what Congress said,
24 right?

25 MR. WALL: I -- I think that is

1 pressing at exactly the tough question, which
2 I'm going to say fortunately is not presented
3 here, because it's a territory-specific statute
4 and it's only acting in the territory.

5 But Palmore does say primarily local.
6 And it's a little tough to figure out exactly
7 what it means.

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

15 And we know that's true of territorial
16 judges. That's the best historical example.
17 They were hearing matters in the territory, but
18 they were adjudicating them under federal law.

19 So I think that you're asking a really
20 tough question about, well, what does local
21 mean? Does it mean you're doing only the local
22 matters or does it go to the geographic scope of
23 the statute under which you act?

24 I think it's tough. Palmore seems to
25 indicate the scope of the statute might matter.

1 History seems to indicate it might not, if what
2 you're doing is local. And, again, all I can
3 say is I think this is the easy case because
4 here we --

5 JUSTICE KAGAN: Although this case --

6 MR. WALL: -- check both boxes.

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

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

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

20 I mean, here the Board basically
21 represents the Commonwealth. It's almost like
22 the debtor. All it does is, if the Commonwealth
23 says restructure our debt, it walks in and files
24 the petition in federal court.

25 It then basically represents the

1 debtor, not different from any other state or
2 municipality, tries to work out the claims of
3 the creditor, and then ultimately Judge Swain
4 has to sort out the plan and confirm something
5 in the bankruptcy.

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

11 Everything the Board is doing, it's
12 doing in Puerto Rico, which is why I don't think
13 they have tried to claim, look, you needed any
14 Article I power. All you needed was Article IV.

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

21 Is the remedy for that problem to say
22 that that officer can't perform the more
23 national duties or is the remedy for that to say
24 that the -- the office is invalid because it's
25 appointed in violation of the Appointments

1 Clause?

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

8 It seems to leave some room to do
9 nationwide or federal things as long as you are
10 focused on the territory.

11 But if you assume that it's got to be
12 exclusive -- a test that I think we meet here --
13 I think it's a hard question what the remedy
14 would be.

15 I think you would still have the de
16 facto officer potentially going --

17 JUSTICE KAVANAUGH: Well, I'm asking a
18 --

19 MR. WALL: -- outside --

20 JUSTICE KAVANAUGH: -- different
21 question.

22 MR. WALL: -- unless it's an
23 adjudicator.

24 JUSTICE KAVANAUGH: Wouldn't --
25 wouldn't the officer still be a valid

1 territorial officer but perhaps exercising some
2 duties that he or she cannot exercise?

3 MR. WALL: I think that's a potential
4 remedy. We haven't looked at that here. We
5 haven't briefed it. I do think that it kind of
6 -- it highlights the oddity of the other side's
7 claim.

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

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

15 And I'm not sure how we're supposed to
16 figure that out.

17 MR. WALL: Justice Kavanaugh, I think
18 you need it there. We've known since Cantor in
19 1826 that territorial judges are not federal
20 officers. And yet they are adjudicating cases
21 under federal law. They had general federal
22 jurisdiction, just like state courts. It -- it
23 was exclusive until 1875.

24 So I think you've got to have some
25 primary test in there. I think you're going to

1 have difficult cases at the margins. And all I
2 can fall back on is this is not a difficult case
3 because here there's nothing in PROMESA that
4 needed to be an exercise of Article I. By its
5 terms it is limited to the territory.

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

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

19 If they had created the Title III
20 proceeding, but not otherwise specified that the
21 Board would play a role, and the governor had
22 filed this petition, I don't think anyone
23 believes that would have converted the governor
24 into a federal officer, any more than the mayor
25 of Detroit or anybody else.

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

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

21 You've got to get them out of
22 committee. You've got to get them through the
23 floor. They are going to have to do some amount
24 of ratification. And then they are going to
25 have to act going forward.

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

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

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 General.

17 Mr. Olson.

18 ORAL ARGUMENT ON BEHALF OF.

19 THEODORE B. OLSON ON BEHALF OF AURELIUS
20 INVESTMENT, LLC, ET AL.

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

23 In Federalist 48, James Madison
24 anticipated what Congress attempted to do with
25 the PROMESA oversight board, masking under

1 complicated and indirect measures its
2 encroachment on coordinate departments. Drawing
3 all power into its impetuous vortex, he urged
4 all precautions against the enterprising
5 ambition of this department.

6 PROMESA was a response to a national
7 financial crisis affecting millions of American
8 citizens, including three million citizens,
9 American citizens in Puerto Rico.

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

17 It presides over the largest municipal
18 bankruptcy proceeding in United States history,
19 managing over 100 billion dollars in
20 indebtedness, 165,000 claims, including over 200
21 claw-back actions, lawsuits against major
22 financial institutions, in a proceeding in an
23 Article III district court designated by the
24 Chief Justice of the United States.

25 The Board was effectively chosen --

1 these are the words of the congressional
2 committee -- effectively chosen by members of
3 Congress, all without the advice and consent of
4 the Senate.

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

11 JUSTICE KAVANAUGH: If the Board were
12 elected, would it be constitutional?

13 MR. OLSON: No, it would not be
14 constitutional because -- how -- and -- and --

15 JUSTICE KAVANAUGH: Doesn't that mean
16 the Puerto Rico governor election is
17 unconstitutional as well then?

18 MR. OLSON: No, because the Puerto
19 Rican authorities that are given to the Puerto
20 Rican governor and under the Puerto Rican
21 legislature are primarily local activities. I
22 just described what the PROMESA's Board powers
23 are. They are national in scope. They bring
24 cases in federal court against U.S. citizens.
25 They conduct an extensive investigation of the

1 oversight -- over the underwriting practices,
2 the bond rating situation with respect to
3 this --

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

9 MR. OLSON: Justice Ginsburg, it is
10 not on behalf of Puerto Rico. It is not an
11 internal Puerto Rican operation. It is an
12 oversight board.

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

21 CHIEF JUSTICE ROBERTS: Well, but its
22 oversight concerns -- every sentence you just
23 said there, it's of Puerto Rico, of Puerto Rico.
24 Its focus is on Puerto Rico.

25 Yes, the activities, as things in any

1 of the territories often do, has broader impact.
2 I get -- I'll get back to the question I asked
3 your friend, Mr. Verrilli.

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

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

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

21 The concern of the United States --
22 this is in a sense a little bit like the Lebron
23 case or other cases where this Court has said
24 the Congress is dealing with a significant
25 federal problem. It has come up with a federal

1 solution and has given this Board powers over
2 citizens all over the United States.

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

10 So is that wrong that they've taken
11 the powers from the governor and legislature and
12 given them to the Board?

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

20 JUSTICE GORSUCH: But, Mr. Olson, I --
21 I think the question is --

22 JUSTICE ALITO: Mr. Olson --

23 JUSTICE GORSUCH: -- if, but for this
24 statute --

25 JUSTICE KAVANAUGH: Right.

1 JUSTICE GORSUCH: -- who would -- who
2 would be doing these activities? And if it
3 would be the governor of Puerto Rico --

4 MR. OLSON: The governor --

5 JUSTICE GORSUCH: -- then doesn't that
6 tell us something?

7 MR. OLSON: The governor of Puerto
8 Rico does not have the power to do these
9 activities.

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

13 MR. OLSON: No.

14 JUSTICE GORSUCH: -- that's what your
15 colleague --

16 MR. OLSON: But for the statute, this
17 authority to do --

18 JUSTICE GORSUCH: That's what your
19 colleagues suggest.

20 MR. OLSON: Well --

21 JUSTICE GORSUCH: And is -- if that's
22 erroneous, could you direct us to what -- who
23 would do it but for the statute?

24 MR. OLSON: The statute was created
25 because the -- the governor of Puerto Rico --

1 and there was no authority for officials in
2 Puerto Rico to do these responsibilities, to
3 bring these actions, these actions against
4 financial institutions in the mainland, to bring
5 -- to overturn the budget, to do these various
6 things, to bring suit against the governor
7 himself.

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

12 MR. OLSON: They -- they would not
13 have the power to have the reach that this
14 PROMESA --

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

20 MR. OLSON: Well --

21 JUSTICE BREYER: They would -- they
22 would take care of the problem.

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

25 JUSTICE BREYER: Right.

1 MR. OLSON: The -- the case involving
2 whether or not Puerto Rico could use the
3 bankruptcy statutes to do --

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

11 MR. OLSON: I submit --

12 JUSTICE BREYER: Which one couldn't
13 it?

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

19 JUSTICE BREYER: You know, I
20 understand that, but I don't want to repeat my
21 question. You see what my question was?

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

23 JUSTICE SOTOMAYOR: Mr. Olson, I think
24 the basic question, if I can simplify it, I
25 believe, is couldn't the governor of Puerto Rico

1 and the legislature have created their own
2 fiscal rescue plan? Yes. Correct?

3 MR. OLSON: No, I don't believe so. I
4 think --

5 JUSTICE SOTOMAYOR: Why?

6 MR. OLSON: -- that was the case that
7 would give the authority to adjust debts, to
8 accommodate the various different creditors,
9 to -- to --

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

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

15 JUSTICE SOTOMAYOR: -- to file --

16 MR. OLSON: -- it would not.

17 JUSTICE SOTOMAYOR: -- its action --

18 MR. OLSON: And this statute --

19 JUSTICE SOTOMAYOR: -- so --

20 MR. OLSON: -- went far beyond the
21 bankruptcy powers. The powers that are given to
22 this Board are vastly greater than powers that
23 are available on the --

24 JUSTICE ALITO: Mr. Olson --

25 JUSTICE SOTOMAYOR: So what you're

1 saying is, without this federal law creating the
2 structure, the structure itself couldn't exist
3 under existing law?

4 MR. OLSON: That's correct.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE SOTOMAYOR: So the legislature
7 couldn't do it?

8 MR. OLSON: That's correct.

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

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

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

21 MR. OLSON: The process is not
22 complete, Justice Alito. The process is
23 ongoing. My client is being subjected to a
24 process that is governed by officials that were
25 appointed in violation of the separation of

1 powers.

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

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

13 (Laughter.)

14 MR. OLSON: Of course, there -- of
15 course, there --

16 JUSTICE ALITO: Well, what is it?

17 MR. OLSON: There's over --

18 JUSTICE ALITO: I'd just like to know
19 what -- this is a real case. I'd like to know
20 what's really going on here.

21 MR. OLSON: Well, there's -- there's
22 over 100 billion dollars of indebtedness being
23 adjudicated in various procedures, a lot of
24 which is --

25 JUSTICE ALITO: Right, and your client

1 wants more of it and somebody else you think is
2 getting too much. So what is it exactly? If
3 you want to answer. If not --

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

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

15 JUSTICE GINSBURG: Didn't your client
16 acquiesce in some settlement?

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

22 There was a small settlement with
23 respect to a taxing authority where the sales
24 tax went into an agency. And that part of it
25 has been resolved. And we've agreed not to

1 challenge -- my clients have agreed not to
2 challenge that settlement in any way.

3 So that's a bit of a --

4 JUSTICE KAGAN: Mr. Olson --

5 JUSTICE GINSBURG: But this one you
6 have agreed to challenge, and why, you are
7 challenging?

8 MR. OLSON: Pardon?

9 JUSTICE GINSBURG: What is the
10 difference between what you agreed to and you're
11 not challenging and now what you're challenging?

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

19 But in no way did my client relinquish
20 its constitutional rights to an appointment
21 under the Appointments Clause.

22 JUSTICE KAGAN: Mr. Olson --

23 JUSTICE BREYER: I see that, and I
24 wanted to ask you a question.

25 JUSTICE GINSBURG: One thing -- one

1 thing that --

2 CHIEF JUSTICE ROBERTS: I'm sorry.
3 Justice Ginsburg?

4 JUSTICE GINSBURG: -- that -- that
5 confuses me about your presentation, because you
6 start out very strongly that the evil here is
7 Congress aggrandizing itself, Congress
8 aggrandizing itself at the executive's expense.

9 How about the member of the Board
10 that's appointed by the President alone? There
11 can't be any question of Congress aggrandizing
12 itself. Congress has given the President alone
13 that authority.

14 So would it be unconstitutional in
15 your view if all of the members were appointed
16 by the President and not subject to the advice
17 and consent?

18 I don't get how that --

19 MR. OLSON: They would -- they --
20 these are principal officers of the United
21 States, not inferior officers. Therefore,
22 principal officers under the Constitution must
23 be appointed, nominated by the President --

24 JUSTICE GINSBURG: But what does that
25 have to do with Congress aggrandizing itself at

1 the executive's expense?

2 MR. OLSON: Well, the -- the -- they
3 -- the President appointed one without advice
4 and consent of the Senate. That violates the
5 Appointments Clause. The other were pursuant to
6 lists --

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

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

10 JUSTICE GINSBURG: -- by the
11 President?

12 MR. OLSON: -- that has never been
13 adjudicated. The government itself in
14 connection with the D.C. Control Board took the
15 position in an Office of Legal Counsel opinion
16 that that was a federal agency.

17 There has never been a resolution of
18 that. The D.C. Control Board has vastly more
19 limited powers with respect to local matters.

20 And our -- our opponents bring up and
21 rely on the Palmore case, which had nothing to
22 do with the Appointments Clause. It wasn't an
23 adjudication or wasn't --

24 JUSTICE KAVANAUGH: They bring up --

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

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

9 How, if you were to prevail here,
10 would the line be drawn so that it does not
11 affect home rule?

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

19 But the outcome in favor of my clients
20 in this case would simply mean that the same
21 officials would be appointed pursuant to the
22 Constitution. It wouldn't change home rule.
23 All of the cases that we've relied upon --

24 JUSTICE KAVANAUGH: But wouldn't it
25 require that similar officials -- maybe I'm not

1 understanding -- in the territories who exercise
2 territorial power, but also affect national
3 power?

4 MR. OLSON: What -- what -- I think
5 the issue might be primarily federal power or
6 versus primarily local.

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

14 And this Court has repeatedly likened
15 the power that can be exercised in the
16 territories under the territorial clause or
17 under the clause that gives power over the
18 District of Columbia local territorial matters,
19 the type of authority that may be given by a
20 state to a local municipality.

21 JUSTICE GINSBURG: Congress enacts the
22 D.C. code, right? The D.C. code is enacted by
23 Congress?

24 MR. OLSON: Yes, although -- well,
25 there is -- it's changed over time. But -- but

1 at -- at a certain point in time, yes. But --
2 but the fact is that there is a difference
3 between primarily local authority, and that's
4 discussed in the -- in the Palmore case. The
5 reason that those --

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

10 And I guess what I'd like, what is
11 your test?

12 MR. OLSON: The test -- my test is
13 this Court's test, which was articulated in the
14 Buckley case, again in the -- in the --

15 JUSTICE KAGAN: But you know what --
16 what struck me --

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

18 JUSTICE KAGAN: -- what struck me when
19 I read that, when I read your brief, the Buckley
20 test is significant authority pursuant to the
21 laws of the United States. I guess what struck
22 me was that in many -- on many occasions you
23 modified that test in your brief.

24 You said significant federal authority
25 pursuant to the laws of the United States. And

1 when you do that, it strikes me that you're
2 coming actually pretty close, I mean, and if you
3 agree on a test, that seems not a bad thing. It
4 seems as though, when you say significant
5 federal authority, you're coming pretty close to
6 what Mr. Wall and Mr. Verrilli have proposed.

7 MR. OLSON: Well, we looked at each of
8 the cases that are cited both in our briefs and
9 our opponents' briefs, including the United
10 States' briefs.

11 The -- it is -- it is -- and it's the
12 test of this Court, not just in the Buckley
13 case, but as -- as recently -- as recently as a
14 couple years ago in the Lucia case. It's the
15 same case.

16 JUSTICE KAGAN: Right, but always --
17 always to distinguish between officers and
18 employees. And what I'm suggesting is that when
19 you apply it to this situation, your own briefs
20 modify the test by talking about federal
21 authority and implicitly comparing federal
22 authority to local authority.

23 MR. OLSON: And we acknowledge that,
24 that with respect to the test that this Court
25 articulated, repeatedly, Lucia was just the last

1 time it did, that authority under the laws of
2 the United States has always accepted the -- the
3 purely local authority that's been exercised in
4 the territories.

5 JUSTICE KAVANAUGH: So if it's --

6 MR. OLSON: There's also exceptions
7 for transitional governments. The Philippines,
8 for example. There was a local government and
9 then it was replaced --

10 JUSTICE GORSUCH: Mr. Olson, I'm --
11 I'm confused. I honestly don't understand what
12 the difference between your test and the
13 government's test is in this case.

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

16 MR. OLSON: The test is --

17 JUSTICE GORSUCH: The difference
18 between the two tests.

19 MR. OLSON: Well, the difference
20 between the two is that we believe, and what --
21 what this Court has taught us, that if you're
22 exercising significant authority under the laws
23 of the United States, the laws enacted by
24 Congress with respect to the government, affairs
25 of the federal government, as opposed to purely

1 local municipal, the -- the speed limits, the
2 zoning --

3 JUSTICE GORSUCH: I understand -- I
4 understand the test. My question is what's the
5 difference between that and the question asking
6 whether the individual or the Board is acting
7 primarily locally or primarily nationally?

8 MR. OLSON: It --

9 JUSTICE GORSUCH: What's the
10 difference? What's the delta?

11 MR. OLSON: The -- the delta is, is
12 something that is a municipal matter, is it --
13 have to do with local affairs, speed limits,
14 zoning, and things of that nature, as opposed to
15 federal statutes that deal with a national
16 crisis.

17 This was a national crisis, a national
18 --

19 JUSTICE GORSUCH: Could I rephrase
20 that as asking whether the Board was acting
21 primarily locally or primarily nationally?

22 MR. OLSON: It is -- the Board is
23 acting primarily nationally.

24 JUSTICE GORSUCH: Okay. So we do
25 agree on a test then?

1 MR. OLSON: Pardon me?

2 JUSTICE GORSUCH: So then we do agree
3 on the test, right, whether the Board was acting
4 primarily locally or primarily nationally?

5 MR. OLSON: Well, that part of it,
6 yes.

7 JUSTICE GORSUCH: Okay.

8 MR. OLSON: Because those -- what this
9 Court has said repeatedly is that, where there
10 is local municipal authority, Congress has the
11 power under Article IV to give government and --
12 and regulate the affairs in municipalities.

13 JUSTICE KAVANAUGH: So if it's
14 primarily --

15 JUSTICE SOTOMAYOR: Mr. Olson --

16 MR. OLSON: As --

17 JUSTICE SOTOMAYOR: -- I don't want
18 you to ignore the de facto officer. But just to
19 finish this, there's this nuance between you and
20 your adversaries on are you dealing primarily
21 with a local matter?

22 And they would say dealing with a
23 budget, dealing with running the government,
24 that's all local.

25 You are attempting to say something

1 different, but I'm not sure what that difference
2 is, because, when they use the words primarily
3 local matters, that's the way I understand them
4 to be using it.

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

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

8 MR. OLSON: Well --

9 JUSTICE SOTOMAYOR: But they're saying
10 this Board is dealing with primarily local
11 matters because it's dealing primarily with a
12 budget, and with --

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

14 JUSTICE SOTOMAYOR: That -- that --
15 that's -- okay.

16 MR. OLSON: With all due respect, you
17 cannot say that at the same time that you've
18 read the PROMESA statute itself. And this Court
19 --

20 JUSTICE SOTOMAYOR: Well, I -- I've
21 read it, but that doesn't mean I know what
22 you're referring to.

23 Could you succinctly make the -- the
24 difference between how you view primarily
25 dealing with --

1 MR. OLSON: Well --

2 JUSTICE SOTOMAYOR: -- in your way and
3 the way the other side does?

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

10 We have a fiscal catastrophe, a
11 humanitarian crisis involving millions of
12 citizens, three million American citizens in
13 Puerto Rico, but citizens all over the United
14 States who are owed money by the government of
15 Puerto Rico or agencies of the government of
16 Puerto --

17 JUSTICE SOTOMAYOR: So, Mr. Olson --

18 MR. OLSON: -- Rico.

19 CHIEF JUSTICE ROBERTS: Counsel, it's
20 just then -- it -- it's just a question of size.
21 I mean, if the same thing, we're talking about
22 not Puerto Rico, but Ponce -- see, I don't know
23 the pronunciation -- Puerto Rico, your position
24 would be different? Or a county in Puerto Rico?

25 MR. OLSON: I think that it's possible

1 that you could find a fiscal insolvency
2 situation of a small enough unit of a -- of a
3 portion of Puerto Rico where you wouldn't be
4 talking about this, but Guam, which is what this
5 Court talked about in that case, Limtiaco case,
6 was 1/400th the size of Puerto Rico, involving
7 that tiny fraction of the significance of Puerto
8 Rico.

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

16 This is a --

17 JUSTICE KAGAN: So would it be right
18 to say, Mr. Olson, that you view this statute as
19 essentially a statute about debt restructuring?
20 I mean, it has other aspects and the Board does
21 other things and oversees Puerto Rican budgets
22 going forward, but you're saying that what we
23 should do is look at the statute and say it's
24 about restructuring a bankrupt territory's debt
25 and that that has to be viewed as national? Is

1 that the theory?

2 MR. OLSON: Well, that is part of the
3 theory. And as -- as the United States
4 repeatedly said with respect to, in the Freytag
5 case, the deputy solicitor general was asked a
6 question about what if the governor of Puerto
7 Rico was appointed by Congress or a federal
8 official?

9 And the response from the federal
10 government was that would invoke in every case
11 the Appointments Clause.

12 CHIEF JUSTICE ROBERTS: Did that
13 deputy solicitor general prevail on that
14 position?

15 (Laughter.)

16 MR. OLSON: That deputy solicitor
17 general made a beautiful argument.

18 (Laughter.)

19 MR. OLSON: And -- and fortunately --

20 CHIEF JUSTICE ROBERTS: A beautiful
21 losing argument.

22 MR. OLSON: -- the Court did not
23 decide that precise case. But that argument
24 that was made is the same argument that the
25 United States has made in 22 OLC in 1978, when

1 it was talking about Guam, in 31 OLC in the
2 brief in the Hechinger case, which was the
3 follow-on to the Metropolitan Washington
4 Authority's case, that was a very, very
5 important case.

6 JUSTICE KAVANAUGH: If we conclude
7 that the powers and duties here are primarily
8 local -- and I know you disagree -- but if we
9 conclude that, do you lose?

10 MR. OLSON: The -- I suspect that if
11 there's -- if there's an agency in Puerto Rico
12 that's dealing with purely local problems, like
13 the --

14 JUSTICE KAVANAUGH: You keep --

15 MR. OLSON: Like the article --

16 JUSTICE KAVANAUGH: You keep saying --
17 I'm sorry to interrupt. You keep saying "purely
18 local."

19 MR. OLSON: Well, primarily, I will --

20 JUSTICE KAVANAUGH: Okay.

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

22 JUSTICE KAVANAUGH: It's a big
23 difference between --

24 MR. OLSON: Well, it may be a big
25 difference and it may be important in this case.

1 Palmore case was talking about relative -- it
2 wasn't purely local, but it was primarily local.
3 The court used exclusively, but I think the
4 court meant in the Palmore case those courts
5 that were dealing with problems in the District
6 of Columbia involving District of Columbia
7 criminal laws.

8 So if your -- the focus is on that, of
9 course there are state officials that can
10 enforce federal law. That's always been the
11 case from the beginning of the constitution. So
12 it is primarily what's being involved here.

13 This is the -- the Congressional
14 Budget Office itself looked at this particular
15 statute and said this is a federal office. The
16 Lebron case that looked at Amtrak --

17 JUSTICE KAVANAUGH: Can I just try the
18 question again? If we conclude it is primarily
19 local, do you have an alternative argument or do
20 you lose?

21 MR. OLSON: Well, I don't -- I don't
22 -- I think that it can't conceivably be thought
23 of as primarily local given the scope of the
24 authority, but I'm imagining a hypothetical
25 situation where you might have a small unit of

1 -- of government, a subdivision of Puerto Rico
2 that was purely a municipal problem, yes, that
3 could be a -- that could not invoke the
4 Appointments Clause, but --

5 JUSTICE SOTOMAYOR: In other words,
6 don't lose the de facto officer argument?

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

21 I heard the government say just a few
22 minutes ago that we've done all these things,
23 we've made all those decisions, so put the
24 Constitution aside, let us continue to do it.
25 Let us have the fruits of the decisions that we

1 made with unconstitutional officers who could
2 never have even filed --

3 JUSTICE SOTOMAYOR: I think that they
4 are making a distinction between adjudicatory
5 and legislative decisions.

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

7 JUSTICE SOTOMAYOR: They seem to be
8 saying that when it comes to legislative
9 officers, that we have applied the de facto
10 officer status. In more recent times, you are
11 absolutely right, with adjudicatory officers, we
12 have said no, you have to give people a new
13 hearing.

14 So deal with that distinction --

15 MR. OLSON: Well --

16 JUSTICE SOTOMAYOR: -- and deal with
17 why that's wrong.

18 MR. OLSON: I don't think that there
19 is a valid distinction in -- in a vacuum between
20 an adjudicatory process. Look at the Lucia
21 case, was an Administrative Law Judge that was
22 exercising what the court perceived as partially
23 adjudicative problems, but also conducting
24 Article I activities, enforcing the laws of the
25 United States.

1 And this agency has that same
2 authority. It overlaps both.

3 JUSTICE GINSBURG: But the Ryder case,
4 on which you placed such reliance, it was
5 qualified. It said the defendant could object
6 to the mode of appointment of a judge who
7 adjudicates his case, and this Board is not
8 adjudicating any cases. The -- the federal
9 district court is.

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

17 JUSTICE GINSBURG: It was acting on
18 behalf of the debtor agency in Puerto Rico.
19 They -- it's acting as a kind of a Petitioner.
20 It's not an adjudicator.

21 MR. OLSON: That's one of the -- one
22 small part of what PROMESA does. That has to do
23 with 165,000 claims. It doesn't have to do with
24 overturning the -- the budget, changing the
25 financial structure of Puerto Rico, suing in

1 federal courts citizens of the United States
2 outside of Puerto Rico in connection with
3 financial claims, claw-back claims, they call
4 them in the financial insolvency concept.

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

15 These are reports, recommendations,
16 responsibilities that the Oversight Board must
17 constantly give to officials of the United
18 States and, therefore, supervision.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Mendez-Coldberg.

22 ORAL ARGUMENT OF JESSICA E.

23 MENDEZ-COLBERG ON BEHALF OF UTIER

24 MS. MENDEZ-COLBERG: Mr. Chief Justice
25 and may it please the Court:

1 I would like to address the issue of
2 the Insular Cases, the remedy, and also some of
3 the questions -- the questions of the Court.

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

12 On the other hand, the First Circuit
13 decided that my clients suffered a
14 constitutional injury, but still they were left
15 without a remedy. Equal justice under law
16 should mean the same thing here in D.C. than in
17 Puerto Rico.

18 It should reject ideas grounded on
19 class -- it should reject classifications
20 grounded in ideas of alien races and savage
21 people. It should also mean that when there is
22 a constitutional injury, justice requires a
23 remedy.

24 Now, in this case, the -- the First
25 Circuit stated correctly that the insular cases

1 hover like a dark cloud over this case. And it
2 is true, because the opposing parties have been
3 relying on the insular cases since the beginning
4 of the proceedings to establish that even the
5 structural provisions of the Constitution don't
6 apply to the people of Puerto Rico because --

7 JUSTICE BREYER: I think here --

8 CHIEF JUSTICE ROBERTS: I understood
9 --

10 JUSTICE BREYER: -- everybody was --
11 everybody was agreeing that the Article I --
12 Article II does apply. And so whether you have
13 the insular cases or not, and I agree they're a
14 dark cloud, but the -- the -- the -- it doesn't
15 matter here because the provision of the
16 Constitution does apply.

17 And I thought what was more, which
18 I've been trying to work out, and you may have
19 looked into this, is what about the Federal
20 Relations Act?

21 You see, if -- if, in fact, you -- you
22 would be the one who might have thought of this.
23 But it does give these powers to deal, and the
24 deal is the legislature of Puerto Rico and the
25 governor do this. But there was a reservation.

1 There was a reservation for the indebtedness.

2 And that reservation was eventually
3 repealed in '61. And when it was repealed, the
4 legislature passed a -- they passed a
5 constitutional amendment in Puerto Rico
6 promising that they would pay creditors and that
7 they had some priorities and so forth.

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

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

17 (Laughter.)

18 JUSTICE BREYER: I'm just -- I'm --
19 I'm -- I'm -- I'm -- I have a tough problem in
20 my mind on that. And if you have thought of it,
21 I'd appreciate what you think.

22 MS. MENDEZ-COLBERG: Well, Your Honor,
23 we would forget about it, but the problem here
24 is that, actually, what Congress did was to,
25 yes, say that this -- that this are territorial

1 officers, but it actually gave this -- the
2 oversight board powers that are not necessarily
3 what power -- what the powers of a -- of a
4 territorial officer are considered to be.

5 They -- the oversight board has the
6 authority, and as Mr. Olson mentioned, has the
7 authority to file this bankruptcy proceedings,
8 which is a federal power, on behalf of the
9 government.

10 But also we see that they have the
11 authority to impair contracts -- which is
12 something that wasn't mentioned before -- impair
13 contracts even outside of the -- of the scope of
14 the bankruptcy proceedings, which is in the
15 Title II -- II of PROMESA.

16 If the Board understands that a
17 contract may -- that the government -- by the
18 government of Puerto Rico with other parties is
19 inconsistent with the provisions of PROMESA, it
20 can -- it can -- it can even prevent the
21 execution of those -- of those contracts.

22 So that is a very significant power
23 among the other powers that the oversight board
24 has that not even the -- the government, the
25 local government of Puerto Rico, has.

1 Now I do want to -- to -- to -- to
2 stress on the issue of the insular cases,
3 because it is important for the people of Puerto
4 Rico and for my clients. This is a -- a
5 doctrine that has been, well, 118 years, that it
6 -- that has been -- that has been good law.

7 And here I want to stress that it is
8 -- it is a matter of overruling the insular
9 cases, and the Doctrine of Territorial
10 Incorporation, it is a matter of constitutional
11 and law, but also a matter of who the United
12 States is as a nation.

13 CHIEF JUSTICE ROBERTS: Well, as
14 Justice -- as Justice Breyer has pointed out,
15 none of the other parties rely on the insular
16 cases in any way. So it would be very unusual
17 for us to address them in this case, wouldn't
18 it?

19 MS. MENDEZ-COLBERG: Well, Your Honor,
20 they relied on the insular cases since the
21 beginning of the proceedings. Actually, the --
22 the unsecured creditor -- creditors are still
23 relying on the insular cases at this point.

24 Now it is very convenient for the
25 other parties to not -- to rely on the insular

1 cases in the lower courts where there is no
2 authority to overrule those cases, but that --
3 but then when we come before this Court to say
4 that they are not relevant.

5 Still, as I -- as I was about to
6 mention, the insular cases comply with all of
7 the factors that this -- that this Court
8 established in -- in Janus, especially the
9 quality of the reasoning, because it is based
10 purely on racial considerations, to say that
11 some provisions of the Constitution don't apply
12 to the unincorporated territories because they
13 are of a different race.

14 That's the -- that's the root of that
15 doctrine.

16 Now, here --

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

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

23 CHIEF JUSTICE ROBERTS: So I -- I
24 guess, again, I just don't see the pertinence of
25 the -- of the insular cases.

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

10 The same here with the insular cases.
11 And I cannot stress enough that the parties have
12 relied on the insular cases in this -- in this
13 case. That is why it's the -- the perfect
14 opportunity to address them.

15 Now --

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

22 MS. MENDEZ-COLBERG: Your Honor, I --
23 I don't think that we -- that the -- the -- the
24 authority of the Board can -- can -- can be
25 considered purely local.

1 JUSTICE KAVANAUGH: I understand that.
2 But, if -- if we conclude otherwise, is there an
3 alternative argument, or is that the end of the
4 case?

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

11 Now I would like --

12 JUSTICE GINSBURG: Which D.C. -- which
13 D.C. judges are you talking about? I thought
14 the judges of the D.C. Superior Court and of the
15 D.C. Court of Appeals are not -- are not federal
16 judges.

17 MS. MENDEZ-COLBERG: Well, Your Honor,
18 I'm -- I'm talking about the -- the Weiss case.
19 And -- but still the -- the -- the -- the issue
20 of -- of the purely local affairs of -- of -- of
21 the oversight board cannot stand if we look at
22 the -- the authority that it was vested on these
23 officers through PROMESA.

24 Now I would like to address the remedy
25 because I think that it is very important for --

1 for us to address that.

2 My friends on the other side have
3 mentioned the consequences of -- of this -- of
4 this case in terms of millions of dollars. But
5 they have forgot about the impact to the people.

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

17 But also we are talking about
18 agreements with bondholders, with Dapapa, which
19 is the UTIER's employers, that provides for the
20 payment of the bond -- of the bonds ahead of the
21 salaries, ahead of the -- of the contributions
22 to the retirement system, and that it threatens
23 the mere -- the mere feasibility of such an
24 instrumentality.

25 We are talking about 7,000 labor

1 claims that were stayed because of the Title III
2 proceedings, proceedings that were filed at the
3 sole discretion of the oversight board, and that
4 were -- that were left without a remedy.

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

11 The -- if -- if the Board --

12 CHIEF JUSTICE ROBERTS: You can finish
13 your sentence.

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

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

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Three minutes, Mr. Verrilli.

24

25

1 REBUTTAL ARGUMENT OF DONALD B.
2 VERRILLI, JR., ON BEHALF OF THE FINANCIAL
3 OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO
4 MR. VERRILLI: Thank you, Mr. Chief
5 Justice.

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

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

22 Mr. Olson raised Limtiaco case. That
23 case proves our point. The statute he's talking
24 about in that case requiring fiscal solvency was
25 enforced by the governor and the legislature,

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

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

19 Our test is one that's faithful to the
20 text, it's faithful to the history, it rests on
21 principle, it avoids threats to home rule, and
22 it's administrable. Maybe there are going to be
23 hard questions on the margin and we discussed
24 those today. This is not a hard case. This is
25 exclusively territorial authority.

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

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

19 So that's what will happen if we go
20 down that path. And I would strongly urge the
21 Court not to do that. If you do reach the
22 remedial issue, then I think the de facto
23 officer doctrine perfectly reasonable judgment,
24 but more fundamentally there is no reason to
25 reach the remedial issue --

1 JUSTICE KAGAN: Mr. -- Mr. Verrilli --

2 MR. VERRILLI: -- to support as

3 JUSTICE KAGAN: Let --

4 MR. VERRILLI: -- constitutional --

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

14 MR. VERRILLI: May I answer, Mr. Chief
15 Justice?

16 CHIEF JUSTICE ROBERTS: Yes.

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

23 And, second, again, the question I
24 think has to be whose interest is -- is the
25 Board advancing in that process? It's the

1 court, the Article III court, that engages in
2 the broad adjustment of interests here to
3 achieve a -- a nationwide result.

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

10 CHIEF JUSTICE ROBERTS: Thank you.
11 Counsel. The case is submitted.

12 (Whereupon, at 11:27 a.m., the case
13 was submitted.)

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Official - Subject to Final Review

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