

# THE RIDDLE OF PROMESA: IS THE PUERTO RICO OVERSIGHT BOARD A FEDERAL OR TERRITORIAL ENTITY?

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## I. INTRODUCTION

Puerto Rico declared bankruptcy on May 3, 2017, becoming what will likely be the largest municipality bankruptcy in United States history.<sup>1</sup> The previous largest U.S. municipal bankruptcy was Detroit on July 18, 2013.<sup>2</sup> Puerto Rico was able to access bankruptcy through the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), a federal law passed in 2016 which established a Federal Oversight Board composed of seven members appointed to reach a deal with Puerto Rico’s creditors.<sup>3</sup> On July 13, 2018, a group of General Obligation bondholders led by Aurelius LLC filed a lawsuit alleging that the Oversight Board was not properly appointed pursuant to the Appointments Clause of the U.S. Constitution as an “Officer of the United States.”<sup>4</sup> Altair Global Credit Opportunities Fund LLC also filed a lawsuit in the U.S. Court of Federal Claims alleging that the Oversight Board is a federal entity.<sup>5</sup> Both bondholders argue that because the Oversight Board is a federal entity, not a territorial entity, it should be subject to the requirements of the Appointments Clause for “Officers of the United States.”<sup>6</sup> While the District Court of Puerto Rico held that the Oversight Board is a territorial entity not subject to the Appointments Clause,<sup>7</sup> the United States Court of Federal Claims held that the Oversight Board is a federal government entity.<sup>8</sup> The 1st Circuit likewise held on February 15, 2019 that the members of the Oversight Board are federal officers that were

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<sup>1</sup> Nick Brown, *Puerto Rico Files for Biggest Ever U.S. Local Government Bankruptcy*, REUTERS (May 3, 2017), <https://www.reuters.com/article/us-puertorico-debt-bankruptcy-idUSKBN17Z1UC>, archived at <https://perma.cc/C9SY-FBFB>.

<sup>2</sup> Nathan Bomey, Brent Snaveley & Alisa Priddle, *Detroit Becomes Largest U.S. City to Enter Bankruptcy*, U.S.A TODAY (Dec. 3, 2013), <https://www.usatoday.com/story/news/nation/2013/12/03/detroit-bankruptcy-eligibility/3849833/>, archived at <https://perma.cc/DJD2-PX47> (stating that Detroit’s Chapter 9 bankruptcy in 2013 was, at the time, the largest municipal bankruptcy in U.S. history).

<sup>3</sup> Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. §§ 2101–2241 (2018); *Puerto Rico Declares Bankruptcy at Last*, ECONOMIST (May 6, 2017), <https://www.economist.com/finance-and-economics/2017/05/06/puerto-rico-declares-bankruptcy-at-last>, archived at <https://perma.cc/TQZ5-Q2AZ>.

<sup>4</sup> *In re Fin. Oversight & Mgmt. Bd.*, 318 F.Supp.3d 537, 544–545 (D.P.R. 2018) (arguing that the appointment process established under PROMESA for members of the Oversight Board is unconstitutional under the Appointments Clause).

<sup>5</sup> *Altair Global Credit Opportunities Fund (A), LLC v. United States*, 138 Fed. Cl. 742, 752 (2018).

<sup>6</sup> *See id.* at 760–65; *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 541 (stating that the petitioner claimed that the Appointments Clause applies to PROMESA’s Oversight Board).

<sup>7</sup> *See In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 550 (holding that the Oversight Board is not subject to the Appointments Clause because it is a territorial entity appointed under Article IV of the Constitution).

<sup>8</sup> Eva Llorens Velez, *Judge Denies U.S. Gov’t Request to Dismiss Creditor Suit Over Puerto Rico Debt*, CARIBBEAN BUS. (July 16, 2018), <http://caribbeanbusiness.com/judge-denies-u-s-govt-request-to-dismiss-creditor-suit-over-puerto-rico-debt/>, archived at <https://perma.cc/2Z7A-YJ44> (summarizing the reasoning behind Judge Braden’s decision establishing the Oversight Board as a federal entity).

not appointed in compliance with the Appointments Clause.<sup>9</sup> The Supreme Court heard oral arguments for this case on October 15, 2019, and a final decision is scheduled for June 2020.<sup>10</sup>

This Comment focuses on why the Federal Oversight Board is a territorial entity that is not subject to the Appointments Clause and, as such, is constitutional. By focusing on previous cases involving the Territories Clause, this Comment discusses the discretion that courts tend to give to Congress whenever the Territories Clause is invoked.<sup>11</sup>

Part II of this Comment discusses the reasons why PROMESA was passed and what Title III of this law means to Puerto Rico. Additionally, it will discuss the ongoing cases challenging the constitutionality of the Oversight Board by Aurelius Group LLC and Altair Global Credit Opportunities Fund LLC in the District Court of Puerto Rico and United States Court of Federal Claims respectively.

Part III analyzes how under the *Lebron* test, the role of the members of the Oversight Board differs from the role of federal officers. Next, Part III analyzes cases involving the judicial treatment of Puerto Rico and other United States territories in accordance with the Territories Clause. Additionally, a legal analysis of cases involving the Territories Clause will demonstrate why the Oversight Board is constitutional under the broad and plenary powers granted to Congress pursuant to the Territories Clause. Finally, this Comment analyzes the consequences the Oversight Board's constitutionality will have on the ongoing lawsuits brought by Aurelius LLC and Altair Credit as holders of Puerto Rican bonds.

Part IV discusses why the Supreme Court should rule that the Oversight Board is constitutional under the Territories Clause and how the decision should incentivize Puerto Rico as well as creditors to seek a change in Puerto Rico's current status to obtain the rights guaranteed to states. Further, it discusses the consequences to current and potential bondholders following a decision on the constitutionality of the Oversight Board.

Part V concludes that the congressional discretion guaranteed under the Territories Clause should compel the Supreme Court to find that the Oversight Board is a territorial entity with members who are territorial officers properly appointed by Congress.

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<sup>9</sup> *Aurelius Investment LLC v. Commonwealth of Puerto Rico*, No. 18-1671, \*1, 54-55 (1st Cir. 2019).

<sup>10</sup> See *In re Fin. Oversight & Mgmt. Bd.*, No. 18-1334, 1 (2019).

<sup>11</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F.Supp.3d at 541, 547 (“Due to its unique role with respect to federal territories, Congress may act ‘in a manner that would exceed its powers. . . .’”); *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1876 (2016) (“Congress has broad latitude to develop innovative approaches to territorial governance . . .”).

## II. WHAT IS THE OVERSIGHT BOARD, WHY IS IT NEEDED, AND WHAT IS THE CONSTITUTIONAL DEBATE OVER IT?

PROMESA established the Federal Oversight Board (the “Oversight Board”) that serves as the Commonwealth’s representation during negotiations with creditors.<sup>12</sup> Puerto Rico had defaulted three times on bond payments and was on the verge of becoming the first state or territory to fail to pay its General Obligation bonds on time by the time the Oversight Board and its seven members were appointed.<sup>13</sup> The ongoing financial crisis is one of the driving factors behind the massive migration of Puerto Ricans to mainland United States, primarily Florida and New York.<sup>14</sup>

To fully grasp the relevance of the Oversight Board to Puerto Rico and its creditors, it is necessary to explain (1) PROMESA and the Oversight Board; (2) federal entities in contrast to territorial entities; (3) the Territories Clause and the scope of its powers as interpreted by the U.S. Supreme Court; (4) the judicial treatment of U.S. territories throughout history; and (5) the argument for PROMESA’s unconstitutionality.<sup>15</sup>

### A. *Intro to PROMESA, the Oversight Board, and Title III*

PROMESA<sup>16</sup> established the Oversight Board to provide a method for Puerto Rico to achieve resolve its fiscal issues and improve its reputation in the global capital markets.<sup>17</sup> Congress passed the law pursuant to the U.S. Constitution, Article IV, Section 3, also known as the Territories Clause.<sup>18</sup> This Board consists of seven members, all appointed by the president of the

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<sup>12</sup> 48 U.S.C. §§ 2101–2241 (2018); *see also* § 2124(d) (providing a list of information that entities must provide to the Oversight Board).

<sup>13</sup> Heather Long, *Puerto Rico Makes Historic Default*, CNN (July 1, 2016), <https://money.cnn.com/2016/07/01/investing/puerto-rico-defaults-general-obligation-bonds/index.html>, *archived at* <https://perma.cc/4PJD-KPJC>.

<sup>14</sup> *See* Arelis R. Hernández, *Exodus from Puerto Rico Grows as Island Struggles to Rebound From Hurricane Maria*, WASH. POST (Mar. 6, 2018) [https://www.washingtonpost.com/national/exodus-from-puerto-rico-grows-as-island-struggles-to-rebound-from-hurricane-maria/2018/03/06/b2fcb996-16c3-11e8-92c9-376b4fe57ff7\\_story.html?utm\\_term=.ea6625cb286b](https://www.washingtonpost.com/national/exodus-from-puerto-rico-grows-as-island-struggles-to-rebound-from-hurricane-maria/2018/03/06/b2fcb996-16c3-11e8-92c9-376b4fe57ff7_story.html?utm_term=.ea6625cb286b), *archived at* <https://perma.cc/ZP6K-SCFS> (discussing how Hurricane Maria has exacerbated the economic crisis and increased the Puerto Rican exodus); *see also* Patrick Sisson, *Puerto Rican Exodus to Central Florida Begs Question: Where’s the Plan?*, CURBED (Dec. 19, 2017, 10:56 AM), <https://www.curbed.com/2017/12/19/16792936/hurricane-maria-puerto-rico-florida-orlando>, *archived at* <https://perma.cc/279Y-3LAE>.

<sup>15</sup> *See* Dorian A. Shaw, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT’L L.J. 1006, 1011 (1994) (discussing the historic judicial treatment of Puerto Rico and the issues it faces when courts apply the Territories Clause to Puerto Rico); *see also* Velez, *supra* note 8 (discussing the decision by the United States Court of Federal Claims defining the Oversight Board as a federal entity and how the decision impacts the constitutionality of the Oversight Board).

<sup>16</sup> 48 U.S.C. §§ 2101–2241, *supra* note 12.

<sup>17</sup> *See* § 2121 (establishing a Financial Oversight and Management Board for Puerto Rico).

<sup>18</sup> U.S. CONST. art. IV, §3; *see* 48 U.S.C. § 2121 (“The Congress enacts this chapter pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.”).

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United States.<sup>19</sup> Six of the seven members are chosen from a list of individuals recommended by Congress, and the President chooses the seventh member, with the Governor of Puerto Rico acting as an eighth member of the Oversight Board with no vote on any recommendations or final decisions.<sup>20</sup> The Speaker of the House and Senate Majority Leader each choose two members, while the House and Senate Minority Leaders each choose one member.<sup>21</sup> None of these members are subject to confirmation by the Senate.<sup>22</sup>

The powers of the Oversight Board include representing Puerto Rico during creditor negotiations and approving any fiscal plan by the local government to ensure that the fiscal plan complies with the Board's objectives.<sup>23</sup> Congress authorized the Oversight Board to retain "federal employees," and to use federal property.<sup>24</sup> In addition, the Oversight Board is responsible for providing a budget for the Commonwealth.<sup>25</sup> The members of the Oversight Board are subject to removal by the President, but only for cause.<sup>26</sup> Further, the members of the Oversight Board are subject to federal ethics laws.<sup>27</sup> The Oversight Board serves the territorial government of Puerto Rico while also being subject to Congressional scrutiny, which gave rise to the issue of the Oversight Board's status as a federal or territorial entity.<sup>28</sup>

### *B. The Constitutional Debate: Federal Entity vs. Territorial Entity*

The concept of a territorial officer was never brought before a court until the recent cases by Aurelius Investment LLC in the District Court for the District of Puerto Rico and Altair in the U.S. Court of Federal Claims.<sup>29</sup> A territorial officer is an officer that is appointed pursuant to the Territories

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<sup>19</sup> See 48 U.S.C. § 2121(e)(1)(A) ("The Oversight Board shall consist of seven members appointed by the president.")

<sup>20</sup> See *id.* § 2121(e)(2) (detailing the process by which the individual members of the Oversight Board are selected and thereafter appointed by the president).

<sup>21</sup> See *id.* § 2121(e)(2)(B)(i)–(iv).

<sup>22</sup> See *id.* § 2121(e)(2)(A).

<sup>23</sup> See *id.* § 2141 (stating the method by which the Oversight Board approves fiscal plans developed by the Puerto Rican government); see also § 2124(d) (stating the process by which creditors can engage in negotiations with the Oversight Board).

<sup>24</sup> *Id.* §§ 2122–2123(b).

<sup>25</sup> *Id.* § 2127(a) (stating that for each fiscal year the Oversight Board is in operation, the members must submit a budget).

<sup>26</sup> *Id.* § 2121(e)(5)(B).

<sup>27</sup> *Id.* § 2106 (stating that the members of the Oversight Board must comply with federal laws or requirements).

<sup>28</sup> See *id.* § 2124(i)(1) (requiring the Oversight Board to certify an applicable fiscal plan passed by Puerto Rico); see also *id.* § 2121(e)(2) (stating that all but one of the members of the Oversight Board are selected by Congress and appointed by the president); *id.* § 2128(a) ("Neither the Governor nor the Legislature may exercise any control, supervision, oversight, or review over the Oversight Board or its activities[,] or enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the Oversight Board.").

<sup>29</sup> See *Altair*, 138 Fed. Cl. at 776–77; see also *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 545.

Clause of the U.S. Constitution.<sup>30</sup> A federal officer is an officer that is subject to the Appointments Clause of the U.S. Constitution.<sup>31</sup> An example of a federal entity was seen by the U.S. Supreme Court in *Humphrey's Executor v. United States*,<sup>32</sup> where the Court discussed the status and powers of the Federal Trade Commission ("FTC").<sup>33</sup> The FTC is an example of a federal entity created and controlled by the U.S. federal government to perform specific tasks delegated to it by the federal government.<sup>34</sup> Additionally, a federal statute, the FTC Act, appointed the members of the commission and clarified the type of work the agency members would be performing.<sup>35</sup> The Supreme Court held that the FTC was an administrative body created by Congress.<sup>36</sup> Consequentially, the Court found that the commission was "quasi-legislative and quasi-judicial."<sup>37</sup> All five FTC members were appointed by the President.<sup>38</sup>

The District Court of Puerto Rico held that the Oversight Board is a federal entity and that its members are all territorial officers properly appointed pursuant to the Territories Clause.<sup>39</sup> Aurelius LLC argued in *In re Financial Oversight and Management Board* that PROMESA was unconstitutional because the members of the Oversight Board are federal officers that were not appointed in accordance with the procedure set out in the Appointments Clause.<sup>40</sup> The Appointments Clause in the U.S. Constitution states that the President has "[p]ower, by and with the Advice and Consent of the Senate, to . . . nominate . . . all . . . Officers of the United States, whose

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<sup>30</sup> See U.S. CONST. art. IV, § 3, cl. 2; see also *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 545 ("[T]he Oversight Board members are territorial officers rather than 'Officers of the United States.'").

<sup>31</sup> U.S. CONST. art. II, § 2, cl. 2; see *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 393 (1995); *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 544–45 (stating that the Appointments Clause governs the appointment of federal officers but not territorial officers).

<sup>32</sup> 295 U.S. 602 (1935).

<sup>33</sup> See *id.* at 628–29 (defining the Federal Trade Commission as an administrative body free from executive control).

<sup>34</sup> See *id.* (holding that a for cause removal provision demonstrated the independence that Congress intended for the Federal Trade Commission).

<sup>35</sup> See *id.* at 619–20. See also 15 U.S.C. § 41 (2018) (establishing five commissioners to oversee the Federal Trade Commission).

<sup>36</sup> See *Humphrey's Executor*, 295 U.S. at 628 (stating that Congress created the Federal Trade Commission "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard . . . and to perform other specified duties as a legislative or judicial aid.").

<sup>37</sup> See *id.* (stating that the FTC acts as both a legislative and judicial agency because it makes both investigations and reports for Congress, while also granting the capacity of "master in chancery").

<sup>38</sup> See *id.* at 619–20. See also 15 U.S.C. § 41 ("A commission . . . composed of five Commissioners, who shall be appointed by the president, by and with the advice and consent of the Senate.").

<sup>39</sup> U.S. CONST. art. IV, § 3, cl. 2; see also *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d, at 556–57.

<sup>40</sup> U.S. CONST. art. II, § 2, cl. 2; see also *In re Fin. Oversight & Mgmt. Bd.*, *supra* note 4, at 544 (arguing that the Appointments Clause requires the Senate's advice and consent to nominate "principal officers" of the United States, or the president alone in the case of "inferior officers").

Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>41</sup> Further, the Appointments Clause also allows the president or the heads of departments to appoint inferior officers if Congress by law delegates the Senate’s advice and consent role.<sup>42</sup> Aurelius argued that the members of the Oversight Board are “Officers of the United States” that were unlawfully appointed.<sup>43</sup> Aurelius LLC is one of Puerto Rico’s creditors, holding a stake in \$558 million of Puerto Rico’s General Obligation bonds.<sup>44</sup> General Obligation bonds hold priority over other types of debt under the Puerto Rican Constitution.<sup>45</sup> However, under federal bankruptcy law, General Obligation bonds are considered unsecured debt and are therefore subject to cuts on their return, rendering irrelevant their constitutional guaranty.<sup>46</sup> Altair Global Credit Opportunities Fund (A) LLC, another holder of Puerto Rican bonds, also argued in the U.S. Court of Federal Claims that the Oversight Board is a federal entity.<sup>47</sup>

1. The District Court of Puerto Rico vs. the U.S. Court of Federal Claims

The concept of the territorial officer was introduced by Judge Swain in the District Court of Puerto Rico when she classified the Oversight Board as a territorial entity rather than a federal entity.<sup>48</sup> The District Court of Puerto Rico’s decision for *In re Financial Oversight and Management Board* defined the Oversight Board as a territorial entity consistent with Congress’s plenary power under the Territories Clause, therefore not subjecting the Oversight Board to the Appointments Clause.<sup>49</sup>

However, the decision in the U.S. Court of Federal Claims for *Altair Global Credit Opportunities LLC v. United States* found the Oversight Board to be a federal entity for constitutional purposes by applying the

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<sup>41</sup> U.S. CONST. art. II, § 2, cl. 2 (“[The president] with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.”).

<sup>42</sup> *Id.* (“[B]ut the Congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.”).

<sup>43</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d, at 541, 544; see also Brian Chappatta, *Puerto Rico’s Biggest Bond Challenge Is Yet to Come*, BLOOMBERG (Aug. 9, 2018), <https://www.bloomberg.com/opinion/articles/2018-08-09/puerto-rico-s-biggest-bond-challenge-awaits>, archived at <https://perma.cc/KNY6-3Q43>.

<sup>44</sup> See Chappatta, *supra* note 43.

<sup>45</sup> See P.R. CONST. art. VI, § 8.

<sup>46</sup> See Chappatta, *supra* note 43.

<sup>47</sup> See *Altair*, 138 Fed. Cl. at 765 (finding that the Oversight Board is a federal entity and, therefore, they are entitled to “restoration or restitution of the Pledged Property that served as collateral for the ERS bonds owned by [Altair].”).

<sup>48</sup> *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 557.

<sup>49</sup> U.S. CONST. art. II, § 2, cl. 2 (requiring “Officers of the United States” to be appointed with the “Advice and Consent of the Senate”); see also *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d, at 550–51 (finding that Congress created the Oversight Board by invoking the Territories Clause).

*Lebron* test, which determines whether an entity is a federal entity.<sup>50</sup> The three-factor test in *Lebron v. National Railroad Passenger Corp.* to define a federal entity are: “(1) whether the entity was created by special law, (2) whether the entity was established for the furtherance of governmental objectives, and (3) whether the federal government retained for itself permanent authority to appoint a majority of the [entity’s] directors.”<sup>51</sup> Although the U.S. Court of Federal Claims stayed the decision—which placed judicial proceedings on hold and maintained all of the Oversight Board’s actions intact—until the resolution of the Aurelius case in the District of Puerto Rico, these two cases present conflicting views by the District Court of Puerto Rico and the U.S. Court of Federal Claims concerning the status of the Oversight Board.<sup>52</sup> As a result, the decision was appealed because the determination of the Oversight Board as a federal or territorial entity is directly related to its constitutionality under the Appointments Clause.<sup>53</sup> As a territorial entity, it would not have “Officer[s] of the United States” subject to the Appointments Clause and would be constitutional.<sup>54</sup> The following section will explain the reasoning behind the decisions of each court.

a. *Judge Braden’s Decision in the United States Court of Federal Claims: the Oversight Board is a Federal Entity*

The United States Court of Federal Claims held that the Oversight Board is a federal entity created by Congress.<sup>55</sup> The court applied the *Lebron* test, where the court applies three factors to determine whether an entity is a federal entity under a constitutional analysis.<sup>56</sup> In *Lebron*, the court held that Amtrak is a corporation part of the U.S. government for purposes of the First Amendment because Amtrak was a corporation created by

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<sup>50</sup> *Altair*, 138 Fed. Cl. at 742 (holding that the Federal Oversight Board is a federal entity); see also *Lebron*, 513 U.S. at 400; Robert Slavin, *How a Judge’s Opinion Shakes up Puerto Rico’s Debt Restructuring*, BOND BUYER (July 18, 2018) <https://www.bondbuyer.com/news/federal-responsibility-for-puerto-rico-debt-would-have-wide-ramifications>, archived at <https://perma.cc/X6YP-EHFK>.

<sup>51</sup> See *Altair*, 138 Fed. Cl. at 761 (internal quotations omitted); *Lebron*, 513 U.S. at 400 (establishing a three-factor test to determine whether an entity is a federal entity pursuant to the United States Constitution).

<sup>52</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 550–51 (defining the Oversight Board as a territorial entity); *Altair*, 138 Fed. Cl. at 764 (staying the case pending resolution of Aurelius LLC’s lawsuit concerning whether the Oversight Board members’ manner of appointment violated the Appointments Clause).

<sup>53</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 550–51; *Altair*, 138 Fed. Cl. at 775–776.

<sup>54</sup> U.S. CONST. art. II, § II, cl. 2.

<sup>55</sup> See *Altair*, 138 Fed. Cl. at 760–63 (defining the Oversight Board as a federal entity of Congress).

<sup>56</sup> See *Lebron*, 513 U.S. at 400 (“[W]here . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”); see also *Altair*, 138 Fed. Cl. at 761–64.



the United States government.<sup>57</sup> Furthermore, Amtrak was required to submit three different annual reports to the President and Congress, along with any legislative recommendations.<sup>58</sup> Applying the first factor of the *Lebron* test, whether the Oversight Board was formed from a “special law,” the court determined that because PROMESA was drafted to establish an Oversight Board that would provide a method for the Commonwealth to achieve “fiscal responsibility and access to the capital markets,” PROMESA demonstrates the characteristics of a “special law.”<sup>59</sup> For the second factor, whether the Board was created to develop a government purpose, the court held that there was “furtherance of a governmental objective” and that the objective was providing “‘a method for a covered territory to achieve fiscal responsibility and access to the capital markets’ by approving a fiscal plan and budget for the Commonwealth.”<sup>60</sup> The furtherance of governmental objectives in *Lebron* was evidenced by “the long history of corporations created and participated in by the United States for the achievement of governmental objectives.”<sup>61</sup> The Oversight Board was also accountable for ensuring that Puerto Rico abided by the certified fiscal plan in addition to making recommendations for Puerto Rico’s “financial stability and management responsibility.”<sup>62</sup> Finally, for the third factor, whether Congress held the authority to designate the majority of the Board members, the court held that the Congress kept the authority to appoint all but one of the members by requiring the President to pick the candidates from lists approved by Congress.<sup>63</sup>

*b. Judge Swain’s Decision in the District Court of Puerto Rico: the Oversight Board as a Territorial Entity*

The United States District Court for the District of Puerto Rico held that the Federal Oversight Board is a territorial entity.<sup>64</sup> The court reasoned that The Territories Clause of Article IV of the Constitution vests Congress with the “[p]ower to dispose of and make all needful Rules and Regulations

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<sup>57</sup> See *Lebron*, 513 U.S. at 381–83, 400 (holding that “where the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the government for purposes of the First Amendment.”).

<sup>58</sup> See *id.* at 386.

<sup>59</sup> See 48 U.S.C. § 2121(a) (2018) (establishing the purpose of the Oversight Board as “to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets”); *Altair*, 138 Fed. Cl. at 761.

<sup>60</sup> *Altair*, 138 Fed. Cl. at 761 (citing 48 U.S.C. § 2121(a) (2018)).

<sup>61</sup> See *id.*; see also *Lebron*, 513 U.S. at 386–91 (noting the historical establishment of government corporations throughout history).

<sup>62</sup> See *Altair*, 138 Fed. Cl. at 762.

<sup>63</sup> See 48 U.S.C. § 2121(e)(2) (enumerating the process by which the president appoints the members of the Oversight Board); *Altair*, 138 Fed. Cl. at 762.

<sup>64</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 557.

respecting the Territory or other Property belonging to the United States” and that Congress’s power under this clause is both “general and plenary.”<sup>65</sup>

Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if [these powers] pertained to the governance of the United States.<sup>66</sup>

Further, Congress has typically used this power to “structure and define governmental entities for the island,” such as the Puerto Rican citizens’ right to elect their own governor and have their own constitution.<sup>67</sup>

The court found that because Congress invoked the Territories Clause when creating the Federal Oversight Board under PROMESA, the creation of the Oversight Board over Puerto Rico without Senate approval is a proper exercise of congressional authority.<sup>68</sup> The court also found that Congress has “general and plenary power” when acting under the Territories Clause to create an entity run by officials appointed by the federal government, yet still be considered a territorial entity.<sup>69</sup> Citing *Puerto Rico v. Sánchez Valle*,<sup>70</sup> the court stated that territorial officers receive their authority from Congress, unlike publicly elected officials.<sup>71</sup>

c. *Scope of the Territories Clause: The Insular Cases and Puerto Rico v. Sánchez Valle*

The Supreme Court held in *Cincinnati Soap Co. v. United States*<sup>72</sup> that Congress’s plenary power when dealing with U.S. territories is not as limited as if it were legislating for a state.<sup>73</sup> Because Congress occupies the role of the general government over U.S. territories, Congress assumes the authority of a state government legislating for a local municipality when acting to-

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<sup>65</sup> U.S. CONST. art. IV, § 3, cl. 2; see *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 557; see also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890) (reasoning that the people of the United States became the “sovereign owners” of the territory of Utah upon its acquisition).

<sup>66</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 549 (stating that Congress has greater powers when governing territories than when governing states).

<sup>67</sup> See *id.* at 548–49 (addressing the rights of the people of Puerto Rico to form an elected self-government and adopt a constitution approved by Congress).

<sup>68</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 550.

<sup>69</sup> U.S. CONST. art. IV, § 3, cl. 2; see *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551–52 (holding that Congress is granted substantial deference when acting pursuant to the Territories Clause and that “the creation of . . . the Oversight Board through popular election would not change Board’s ultimate source of authority from a constitutional perspective”).

<sup>70</sup> 136 S. Ct. 1863 (2016).

<sup>71</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 553 (citing *Sánchez Valle*, 136 S. Ct. 1863; *id.* (citing *United States v. Sanchez*, 992 F.2d 1143, 1152 (11th Cir. 1993) (stating that the “ultimate source” of Puerto Rico’s authority remains Congress)).

<sup>72</sup> 301 U.S. 308 (1937).

<sup>73</sup> See *id.* at 322–23 (holding that the non-delegation doctrine did not preclude Congress from delegating its legislative authority to a territorial government).

wards a territory.<sup>74</sup> Congress, when legislating for U.S. territories, acts as both “the national Congress of the United States, and as the local legislature of the territory.”<sup>75</sup>

Unlike traditional territories, Puerto Rico benefits from an improved relationship with the United States as a “free associated territory, which allows Puerto Rico to maintain a healthy fiscal relationship with the US while also permitting a degree of self-governance such as electing local government officials.”<sup>76</sup> Further, residents of Puerto Rico, unlike residents of Guam or the Philippines when they were a U.S. territory, are granted U.S. citizenship.<sup>77</sup> Although Puerto Rico is considered a self-governing territory under its free associated territory status, Supreme Court decisions have tended to move away from this definition and treat Puerto Rico as a US territory subject to congressional power.<sup>78</sup> The Supreme Court struggled to describe Puerto Rico’s relationship with the U.S. in *Puerto Rico v. Sánchez Valle*, when the Supreme Court held that Puerto Rico, as a territory of the United States, is not a sovereign entity separate from the U.S.<sup>79</sup> A few days after *Sánchez Valle*, the Court held in *Puerto Rico v. Franklin California Tax-Free Trust*<sup>80</sup> that Puerto Rico is a state for purposes of the Chapter 9 bankruptcy Preemption Clause but not a state for the purpose of accessing Chapter 9 bankruptcy.<sup>81</sup> Rather than excluding Puerto Rico from Chapter 9 by defining it as a territory, the Court adopted a perplexing reasoning by holding that Puerto Rico is a state for one clause of Chapter 9 and not a state for another clause of Chapter 9.<sup>82</sup>

The Supreme Court in both *Sánchez Valle* and *Franklin California Tax-Free Trust* struggled to determine the extent of Puerto Rico’s political auton-

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<sup>74</sup> *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 546 (citing *First Nat’l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879)).

<sup>75</sup> *See id.* (citing *Cincinnati Soap*, 301 U.S. at 317).

<sup>76</sup> Shaw, *supra* note 15, at 1009–10 (Arthur J. Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOK. J. INT’L. L. 179, 182 (1981)) (recognizing Puerto Rico as a “free associated territory”, a determination of Puerto Rico’s status acknowledged by the United Nations Decolonizing Committee) (defining “free association” as a political status that maintains political relations between the members while granting greater sovereignty and autonomy to the territory that allows them to have “their own international legal personality.”).

<sup>77</sup> Shaw, *supra* note 15, at 1018–19 (citing *Balzac v. Porto Rico*, 258 U.S. 298 (1922)) (holding that the Organic Act of Porto Rico of 1917 did not constitute an expression of Congress’s intent to incorporate Puerto Rico as a state despite referencing Puerto Rico in a federal law).

<sup>78</sup> *Id.* at 1043–44 (“Commentators who do not view Puerto Rico as a self-governing territory find support in federal judicial decisions”).

<sup>79</sup> *See Sánchez Valle*, 136 S. Ct. at 1873–75 (stating that Congress is the original source of power for Puerto Rico’s authority and Puerto Rico has no local autonomy such as those that of sovereign States).

<sup>80</sup> 136 S. Ct. 1938 (2016).

<sup>81</sup> *See id.* at 1947–48 (holding that Puerto Rico is not exempt from the Preemption Clause and is not a state for purposes of deciding which municipalities are permitted file for Chapter 9 bankruptcy).

<sup>82</sup> *See id.* at 1946 (holding that Puerto Rico is not considered a “State” concerning the application of the Gateway Provision but is still considered a ‘State’ concerning application of the Preemption Clause of Chapter 9 bankruptcy).

omy and chose to defer to Congress, without clearly defining Puerto Rico's relationship with the U.S. federal government, nor Puerto Rico's rights.<sup>83</sup> These cases demonstrate how Puerto Rico's special status as a "free associated territory" does not protect it from the Territories Clause.<sup>84</sup>

In a series of 1901 cases known as the Insular Cases, the Supreme Court found in various cases that Congress has much greater authority under the Territories Clause to govern territories, and it has continued to follow that decision in subsequent cases.<sup>85</sup> *Downes v. Bidwell* classified Puerto Rico's status as an unincorporated territory.<sup>86</sup> Congress has been able to circumvent constitutional limitations when managing territories, such as imposing tariffs on Puerto Rico and the Philippines that could not be constitutionally imposed on states.<sup>87</sup>

Congress, when acting under the Territories Clause of the U.S. Constitution, is entitled to rational basis review when managing residents of Puerto Rico.<sup>88</sup> Under rational basis review, a court only requires that the law passed by Congress be rationally related to a legitimate government interest.<sup>89</sup>

*d. The Decision of the 1st Circuit*

The 1st Circuit held on February 15, 2019 that the members of the Oversight Board are federal officers that were not appointed pursuant with the Appointments Clause.<sup>90</sup> The court found that that the Territories Clause does not supersede the application of the Appointments Clause and that the Territories Clause does not mention the process for appointing federal of-

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<sup>83</sup> See *id.* ("Puerto Rico is no less a 'State' for purposes of the pre-emption provision than the other 'State[s]' . . . ."); *Sánchez Valle*, 136 S. Ct. at 1876 (citing *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976)) ("Puerto Rico boasts 'a relationship to the United States that has no parallel in our history.'").

<sup>84</sup> See *Franklin California Tax-Free Trust*, 136 S. Ct. at 1946; *Sánchez Valle*, 136 S. Ct. at 1876; Shaw, *supra* note 15, at 1009–10.

<sup>85</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–69 (1990) (stating that "only fundamental constitutional rights" apply in unincorporated territories); *Downes v. Bidwell*, 182 U.S. 244, 276–77, 341 (1901) ("[Puerto] Rico is not to be incorporated into the United States") establishing the doctrine of territorial incorporation and defining Puerto Rico as an unincorporated territory; Edward G. White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 30 (1999).

<sup>86</sup> *Downes*, 182 U.S. at 287 (defining Puerto Rico as a "territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution.").

<sup>87</sup> White, *supra* note 85, at 30.

<sup>88</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 550–51 (stating that Congress's authority under the Territories Clause is granted "substantial deference" and thus meriting rational basis review); Shaw, *supra* note 15, at 1044–45 (citing *Harris v. Rosario*, 446 U.S. 651 (1980) (holding that the Territories Clause allows Congress to discriminate against Puerto Rican residents if there is a rational basis for its actions)).

<sup>89</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) (defining rational basis).

<sup>90</sup> *Aurelius Investment*, No. 18-1671, at \*54–55.

ficers.<sup>91</sup> The court also found that the insular cases did not “impede the application of the Appointments Clause in an unincorporated territory.”<sup>92</sup> Additionally, the court developed a test for determining whether an appointee qualifies as a federal officer based on an analysis of prior Supreme Court cases: *Lucia v. SEC*,<sup>93</sup> *Freitag v. Commissioner*,<sup>94</sup> and *Buckley v. Valeo*.<sup>95</sup> As such, the 1st Circuit held that the process of appointment for the Oversight Board members was unconstitutional, but did not eliminate any of the Board’s decisions throughout its existence.<sup>96</sup>

### III. WHY THE FEDERAL OVERSIGHT BOARD SHOULD BE CLASSIFIED AS A TERRITORIAL ENTITY AND ITS MEMBERS AS TERRITORIAL OFFICERS

Puerto Rico’s Oversight Board should be classified as a territorial entity, and therefore constitutional, because Congress is granted deference when acting under the Territories Clause.<sup>97</sup> The substantial deference that Congress is entitled to under its Territories Clause power will most likely result in a finding that Congress’s creation of the Oversight Board as a territorial entity was well within its powers.<sup>98</sup> As a result of the Oversight Board’s constitutionality, Aurelius LLC and Altair Credit will most likely lose their respective cases because a territorial entity is not an “Officer of the United States.”<sup>99</sup> Further, if the Oversight Board is deemed constitutional, Puerto Rico’s access to Title III Bankruptcy will be maintained and therefore creditors such as Aurelius and Altair will be compelled to suffer significant cuts on their returns.<sup>100</sup>

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<sup>91</sup> *See id.* at \*24-26 (“Nowhere does the Territorial Clause reference the subject matter of federal appointments or the process to effectuate them. On the other hand, federal officer appointment is, of course, the *raison d’être* of the Appointments Clause.”).

<sup>92</sup> *See id.* at \*36 (citing *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (“[I]t is our judgment that neither the [Insular] cases nor their reasoning should be given any further expansion.”)).

<sup>93</sup> 138 S. Ct. 2044 (2018).

<sup>94</sup> 501 U.S. 868 (1993).

<sup>95</sup> 424 U.S. 1 (1976). *See Aurelius Investment*, No. 18-1671, at \*37 (developing a test from prior Supreme Court cases).

<sup>96</sup> *See Aurelius Investment*, No. 18-1671, at \*49-50, 53-54 (“Our ruling, as such, does not eliminate any otherwise valid actions of the Board prior to the issuance of our mandate in this case”).

<sup>97</sup> *See In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 550-51 stating that Congress is given rational basis review when acting pursuant to the Territories Clause.

<sup>98</sup> *See id.* (holding that Congress’s determinations pursuant to Article IV are entitled to “substantial deference”).

<sup>99</sup> *See id.*

<sup>100</sup> *See Altair*, 138 Fed. Cl. at 750-51 (discussing how the Oversight Board restructures and planned to restructure Puerto Rico’s debt).

A. *Distinguishing the Role of the Federal Oversight Board from the Role of a Federal Officer*

Like the Federal Trade Commissioner in *Humphrey's Executor*, the members of the Federal Oversight Board were appointed by federal statute, and the nature of their work arises from the requirements stated in federal statute.<sup>101</sup> Furthermore, members of the Federal Oversight Board may only be removed by the president for cause, similar to the commissioners in *Humphrey's Executor*.<sup>102</sup> However, the Board serves to assist the officials of Puerto Rico in developing fiscal stability for Puerto Rico by approving the fiscal plan passed by the Governor of the Commonwealth.<sup>103</sup> Unlike the members of the Oversight Board, the Federal Trade Commissioners in *Humphrey's Executor* worked directly for a federal agency created by Congress.<sup>104</sup> On the other hand, the members of the Oversight Board work for the territory of Puerto Rico and does not act on behalf of the federal government in the way the FTC does.<sup>105</sup> Although the Oversight Board is subject to federal law, Puerto Rico's territorial government must also comply with federal law and the Oversight Board does not replace Puerto Rico's mandatory compliance requirement.<sup>106</sup> The fact that the Oversight Board is subject to federal law does not make it a federal entity as much as being subject to federal law defines Puerto Rico as a state.<sup>107</sup> Unlike the FTC in *Humphrey's Executor*, the Oversight Board was not formed to perform specific tasks delegated to it by the U.S. federal government.<sup>108</sup> Rather, the Oversight Board's tasks are focused toward improving fiscal policy in Puerto Rico and working with the territorial government to certify a fiscal plan for Puerto Rico.<sup>109</sup>

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<sup>101</sup> See *Humphrey's Ex'r*, 295 U.S. at 628; see also *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 555 (stating that the Board's powers arise solely from the federal statute that created it, PROMESA).

<sup>102</sup> See 48 U.S.C. § 2121(e)(5)(B) (2018); see also *Humphrey's Ex'r*, 295 U.S. at 631-632 (upholding a for cause removal provision in the context of the Federal Trade Commission); *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 555.

<sup>103</sup> 48 U.S.C. § 2141(a).

<sup>104</sup> See *Humphrey's Ex'r*, 295 U.S. at 628, 632 (finding that the Federal Trade Commissioners worked directly for the Federal Trade Commission, which was a federal agency established by Congress).

<sup>105</sup> Compare *Humphrey's Ex'r*, 295 U.S. at 628 (making investigations and reports for Congress by acting as a legislative agency), with 48 U.S.C. § 2121(c) (establishing that the Oversight Board is not to be considered a "department, agency, establishment, or instrumentality of the Federal Government").

<sup>106</sup> 48 U.S.C. § 2106 ("[N]othing in this chapter shall be construed as impairing or in any manner relieving a territorial government, or any territorial instrumentality thereof, from compliance with Federal laws . . .").

<sup>107</sup> Carlos A. Rodriguez Vidal, *A Tale of Two "Municipalities" (Detroit and Puerto Rico): Legal and Practical Issues Facing a Financially Distressed "Municipality"*, A.B.A. Sec. of State & Local Gov., 1, 3 (2016) (explaining that the Foraker Act states that federal laws "not locally inapplicable" in Puerto Rico carry the same weight as they do in the United States).

<sup>108</sup> See 48 U.S.C. §§ 2141(c); *Humphrey's Ex'r*, 295 U.S. at 628, 630.

<sup>109</sup> Compare *Humphrey's Ex'r*, 295 U.S. at 628, 630 (stating that the FTC acts as an agency working for Congress) with 48 U.S.C. § 2141(c) (establishing the approval process for the fiscal plan where the Governor of Puerto Rico submits the fiscal plan to the Oversight Board for certification).

Puerto Rico, as a territory of the United States, acquired its authority through Congress and maintains its dependence on Congress for such authority.<sup>110</sup> Because Congress assumes the role of a general government over territories, the establishment of the Oversight Board over Puerto Rico is well within its powers for territories, similar to the powers a State has over its municipal organizations.<sup>111</sup> Similar to how Congress has created the governance structure and the Constitution of Puerto Rico, it can also create a territorial board as a part of its territorial governance authority.<sup>112</sup>

*B. Applying the Lebron Test: Is the Oversight Board a Federal Entity?*

The *Lebron* test was a three part test established in *Lebron v. Nat'l R.R. Passenger Corp.* for the purpose of determining whether an entity is a federal entity.<sup>113</sup> The test, which analyzes whether (1) the entity was established by a “special law”; (2) whether the entity was created “for the furtherance of governmental objectives”; and (3) Congress maintains “permanent authority” to designate the entity’s directors, demonstrates that the Oversight Board established by PROMESA is a federal entity when applied.<sup>114</sup>

The Oversight Board imposed on Puerto Rico also passes the three factors outlined in *Lebron* to determine whether an entity is federal for purposes of a constitutional claim.<sup>115</sup> Similar to how Amtrak was a “special law” in *Lebron* because the Federal Trade Commission (FTC) Act, a United States federal statute determined the “incorporation, structure, powers, and procedures for Amtrak to achieve [its] purpose,” PROMESA is also a “special law.”<sup>116</sup> PROMESA, a United States federal statute, established the Oversight Board and decided the Board’s incorporation, structure, powers, and procedures for the Oversight Board to achieve its purpose.<sup>117</sup> Further, whereas the president appointed six of the nine members of the Board of

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<sup>110</sup> See *Sánchez Valle*, 136 S. Ct. 1873 (holding that territorial and federal laws both arise from Congress).

<sup>111</sup> *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 546.

<sup>112</sup> See *id.* at 549 (“In creating these governance structures for Puerto Rico, Congress delegated its direct territorial governance authority to institutions it established for Puerto Rico in a manner that would not have been permissible in the context of the exercise of its powers within the federal government.”).

<sup>113</sup> *Lebron*, 513 U.S. at 374.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* at 400; *Altair*, 138 Fed. Cl. at 761 (applying the *Lebron* test to the Oversight Board to determine whether it is a federal entity).

<sup>116</sup> See *id.* at 397; *Altair*, 138 Fed. Cl. at 761.

<sup>117</sup> See 48 U.S.C. § 2121(e) (2018) (stating the appointment process of Oversight Board members); § 2121(h) (stating the process for adoption of bylaws for conducting business of the Oversight Board); § 2123 (establishing an Executive Director and staff); § 2124 (establishing the powers of the Oversight Board); §§ 2141–2152 (enumerating the responsibilities of the Oversight Board); § 2175 (establishing the role and capacity of the Oversight Board).

Directors of Amtrak, all seven members of the Oversight Board were appointed by the president.<sup>118</sup>

Second, the Oversight Board was established for the “furtherance of governmental objectives.”<sup>119</sup> Congress passed PROMESA to establish the Oversight Board to create “a method for a covered territory to achieve fiscal responsibility and access to the capital markets by approving a fiscal plan and budget for the Commonwealth.”<sup>120</sup> The Puerto Rico Oversight Board can also reject budgets by the government that do not meet the criteria of the fiscal plan and submit its own budget, albeit with some restrictions.<sup>121</sup> Because the ongoing financial crisis is the driving factor behind the massive exodus of Puerto Ricans to the U.S. mainland, improving Puerto Rico’s financial instability to avoid long-term demographic shifts in U.S. states might be an important governmental objective.<sup>122</sup>

Finally, the United States must have retained for itself indefinite power to designate the Oversight Board members.<sup>123</sup> In *Lebron*, the president retained the authority to appoint six of the nine members of the Amtrak Board.<sup>124</sup> All seven members of the Oversight Board are appointed by the president from a list of candidates recommended by Congress, just like the appointing power exercised by the president over six of the nine Board members in *Lebron*.<sup>125</sup> Additionally, the president can remove the members of the Oversight Board and Congress retains the right to terminate the Oversight Board if certain conditions are satisfied.<sup>126</sup> So not only does the U.S. government maintain authority to appoint the members of the Board, the Executive Branch also maintains the authority to remove the members of the Board, adding an additional layer of authority that the U.S. government has over the members of the Oversight Board.<sup>127</sup>

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<sup>118</sup> See 48 U.S.C. § 2121(e) (listing how the president appoints all seven directors of Amtrak, six from a list of members chosen by Congress); see also *Lebron*, 513 U.S. at 397 (summarizing how the Amtrak board members were appointed).

<sup>119</sup> See 48 U.S.C. § 2121(a) (enumerating the government interest of fiscal responsibility and market access); *Lebron*, 513 U.S. at 397 (finding that Amtrak was a federal entity because it was established for the “furtherance of federal governmental goals”).

<sup>120</sup> See 48 U.S.C. § 2121(a) (indicating the purpose of the Board as outlined in the statute); see also *Altair*, 138 Fed. Cl. at 761 (internal quotations removed).

<sup>121</sup> See Opinion and Order Granting in Part Defendants’ Motion to Dismiss the Complaint at 25, *Nevarés v. Fin. Oversight and Mgmt. Bd. for Puerto Rico*, No. 17-BK-3283-LTS (D.P.R. Aug. 7, 2018) (holding that the Governor must have had “a formal opportunity to make his objections public and . . . to communicate any such objections to Congress and to the President”).

<sup>122</sup> See *Sisson*, *supra* note 14 (stating that over 239,000 Puerto Ricans have moved to Florida since October 3, 2017, and that this accelerated exodus will result in substantial demographic changes in Orlando and Central Florida).

<sup>123</sup> See *Lebron*, 513 U.S. at 400.

<sup>124</sup> See *id.* at 397–98 (clarifying that any restrictions in the appointment process do not suggest lack of government control over Amtrak).

<sup>125</sup> See 48 U.S.C. § 2121(e)(2); *Lebron*, 513 U.S. at 397–98.

<sup>126</sup> *Id.* § 2121(e)(5)(B) (“The President may remove any member of the Oversight Board only for cause”); § 2149 (stating that the Oversight Board is terminated once Puerto Rico has a balanced budget for at least four consecutive years).

<sup>127</sup> *Id.* §§ 2121(e)(5)(B), 2149.



Under the *Lebron* three-factor test, PROMESA is a federal entity and would be subject to the Appointments Clause.<sup>128</sup> PROMESA is a special law, created in furtherance of a governmental objective, and the U.S. has retained for itself permanent authority to appoint a majority of the directors of the Oversight Board.<sup>129</sup> However, *Lebron* was about a corporation in the U.S. created by the government, whereas the Oversight Board was created for a territory of the United States and passed pursuant to the Territories Clause.<sup>130</sup> The standard of review granted to Congress under the Territories Clause is more deferential to Congress than in *Lebron* due to Congress's general and plenary powers over its Territories.<sup>131</sup>

C. *Cincinnati Soap Co., Sánchez Valle, and the other Cases that Demonstrate the Judicial Treatment of Territories*

In a series of 1901 cases known as the Insular Cases, the Supreme Court found that Congress was not bound to follow all of the Constitution's requirements when governing U.S. territories, and it has maintained its tradition of *stare decisis* in subsequent cases.<sup>132</sup> Congress has been able to circumvent constitutional limitations when managing territories, such as imposing tariffs on Puerto Rico and the Philippines in the 20th century that could not be imposed on states, and the Puerto Rican Oversight Board is another example of the constitutional deference afforded to Congress when managing territories.<sup>133</sup>

While the imposition of a similar Oversight Board on a state would most likely be unconstitutional, the U.S. federal government has greater authority when dealing with its territories.<sup>134</sup> Further, similar to the Philippines in *Cincinnati Soap Co.*, Puerto Rico is an unincorporated territory; therefore Congress's plenary power is not subject to the same restrictions imposed for laws which apply to states of the union.<sup>135</sup> Puerto Rico is, as the Philippines was in 1937 in *Cincinnati Soap Co.*, a territory of the United States, and as such is likely to be subject to the same congressional deference afforded to

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<sup>128</sup> See *Lebron*, 513 U.S. at 400; see also *Altair*, 138 Fed. Cl. at 763 (2018).

<sup>129</sup> See *Lebron*, 513 U.S. at 400.

<sup>130</sup> See *id.* at 381–83; 48 U.S.C. § 2121(b)(2).

<sup>131</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551 (“Congress is entitled to substantial deference when acting pursuant to its plenary Article IV powers”).

<sup>132</sup> See *Downes*, 182 U.S. at 341 (establishing the doctrine of territorial incorporation and defining Puerto Rico as an unincorporated territory); *Verdugo-Urquidez*, 494 U.S. at 268–69 (stating that only fundamental constitutional rights apply in unincorporated territories); White, *supra* note 85, at 30.

<sup>133</sup> See White, *supra* note 85, at 30 (“[T]he exercise of the power of managing newly acquired territories [is] not invariably subject to constitutional limitations”).

<sup>134</sup> See *Cincinnati Soap*, 301 U.S. at 323 (citing *Dorr v. United States*, 195 U.S. 138, 140, 142) (“In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union.”).

<sup>135</sup> See *id.* at 322–23; (clarifying that Puerto Rico is an unincorporated territory).

Congress in *Cincinnati Soap Co.*<sup>136</sup> Puerto Rico is provided with less constitutional protection than States, therefore the constitutional challenges brought by Aurelius LLC and Altair Credit are unlikely to succeed due to Puerto Rico's status as an unincorporated territory.<sup>137</sup> Courts tend to defer to Congress when acting pursuant to the Territories Clause, therefore it is unlikely that the Oversight Board will be found to be an overreach of Congress's power over its territories.<sup>138</sup> Such a finding would go against Congress's general and plenary powers over U.S territories and would limit Congress's historically broad authority.<sup>139</sup>

The Court's reasoning in *Puerto Rico v. Franklin California Tax-Free Trust* also shows the judicial complexity behind Puerto Rico's status.<sup>140</sup> In *Franklin California Tax-Free Trust*, the Court held that Puerto Rico was a state for purposes of Chapter 9 bankruptcy's Preemption Clause but not a state for the purpose of accessing Chapter 9 bankruptcy.<sup>141</sup> When analyzing the broad and plenary powers authorized to Congress under the Territories Clause, the Court's deference to Congress in *Franklin California Tax-Free Trust* is similar to the deference given to Congress by the District Court of Puerto Rico in *In re Financial Oversight and Management Board*.<sup>142</sup> The Court in *Franklin California Tax-Free Trust* held that if Congress wanted to exclude Puerto Rico from Chapter 9, they would have included it in the text of the Bankruptcy Code, and the District Court of Puerto Rico in *In re Financial Oversight and Management Board* held that the members of the Oversight Board were territorial officers by focusing on Congress's intent to create a territorial entity under Article IV of the U.S. Constitution.<sup>143</sup> Both

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<sup>136</sup> See *Cincinnati Soap*, 301 U.S. at 323 (recognizing that Congress has broader constitutional authority when governing territories in contrast to states).

<sup>137</sup> See *Verdugo-Urquidez*, 494 U.S. at 268–69 (stating that only “fundamental constitutional rights” apply in unincorporated territories). See also *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 549–557; *Altair*, 138 Fed. Cl. at 742.

<sup>138</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551 (recognizing the congressional deference the Supreme Court grants to Congress whenever Congress invokes the Territories Clause).

<sup>139</sup> See *id.* at 548 (acknowledging Supreme Court precedent permitting Congress to form governmental institutions for Puerto Rico while acting pursuant to the Territories Clause).

<sup>140</sup> See *Franklin California Tax-Free Trust*, 136 S. Ct. at 1946 (holding that Puerto Rico is a state for the Preemption Clause of Chapter 9, but not a state for the Gateway Provision of Chapter 9).

<sup>141</sup> See *id.* at 1947–48 (2016) (holding that Puerto Rico is not exempt from the Preemption Clause and is not a state for purposes of defining who is a debtor because it cannot authorize municipalities to seek Chapter 9 relief).

<sup>142</sup> Compare *Franklin California Tax-Free Trust*, 136 S. Ct. at 1948 (“[I]f it were Congress's intent to also exclude Puerto Rico as a ‘State’ for purposes of the pre-emption provision, it would have said so.”), with *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 549 (implying that “Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States.”).

<sup>143</sup> See *Franklin California Tax-Free Trust*, 136 S. Ct. at 1947 (“Had Congress intended to alter this fundamental detail of municipal bankruptcy, we would expect the text of the amended definition to say so.”); *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 553

cases focused on congressional intent in their decisions rather than analyzing case law or undergoing a textual analysis.<sup>144</sup>

Likewise, the Court's reasoning in *Puerto Rico v. Sánchez Valle* is another example of the deference given to Congress when dealing with territories of the United States.<sup>145</sup> The Supreme Court in *Sánchez Valle*, like in *Franklin California Tax-Free Trust*, struggled to determine the extent of Puerto Rico's political autonomy and chose to defer to Congress without clearly defining the relationship of Puerto Rico with the federal government or the rights of Puerto Rico.<sup>146</sup> Rather than deciding to exclude Puerto Rico from Chapter 9 entirely as a U.S. territory, the Court held that Puerto Rico is a state for purposes of the Preemption Clause, yet not a state for purposes of the Gateway Provision, arriving at a perplexing conclusion regarding what Puerto Rico's status actually entails.<sup>147</sup> How can Puerto Rico be a state for one clause and not a state for another clause?

Although Puerto Rico does enjoy a stronger relationship with the United States than other territories as a "free associated territory," the Supreme Court continues to decide cases involving Puerto Rico by defining it as a territory and deferring to Congressional wisdom.<sup>148</sup> Puerto Rico is a self-governing territory with full control over local, executive, and judicial matters, unlike traditional territories such as Guam, American Samoa, and the Philippines in the 20th Century.<sup>149</sup> Puerto Rico, even as a self-governing territory however, is still subject to congressional dominance through the Territories Clause.<sup>150</sup> As such, the ongoing cases by Aurelius LLC and Altair Credit will likely also be decided by congressional deference, with the Supreme Court deciding that the Oversight Board is a valid exercise of Congress's power over its territories.<sup>151</sup>

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("Any time Congress exercises its Article IV power it does so by means of a federal statute, and all local governance in Puerto Rico traces back to Congress.").

<sup>144</sup> See *Franklin California Tax-Free Trust*, 136 S. Ct. at 1946; *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 553 ("Congress's express intention establish[es] that Congress can and has created a territorial entity in this case.").

<sup>145</sup> See *Sánchez Valle*, 136 S. Ct. 1873–75 (finding that Congress is the "ultimate source" of authority for Puerto Rico).

<sup>146</sup> See *Franklin California Tax-Free Trust*, 136 S. Ct. at 1946–47; see also *Sánchez Valle*, 136 S. Ct. at 1874 ("Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the [Federal] Constitution").

<sup>147</sup> See *Franklin California Tax-Free Trust*, 136 S. Ct. at 1947–48 (holding that Puerto Rico is "no less a state" for purposes of the Preemption Clause but is not a state for purposes of authorizing which municipalities may file for bankruptcy under the Gateway Provision).

<sup>148</sup> See *Sánchez Valle*, 136 S. Ct. at 1874 (stating that although Puerto Rico has autonomous control similar to a State, its "ultimate" authority is derived from the federal government); Shaw, *supra* note 15, at 1012 (discussing the complexity of Puerto Rico's status as a "free associated territory," and as a self-governing territory with increased local autonomy).

<sup>149</sup> Shaw, *supra* note 15, at 1021–22 (discussing the history of Puerto Rico's constitution and the process of organizing its local government).

<sup>150</sup> See *id.* at 1042–44 (questioning how Puerto Rico can be considered "self-governing" while being subject to congressional discretion through the Territories Clause).

<sup>151</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551; see also *Altair*, 138 Fed. Cl. at 753; *Downes*, 182 U.S. at 268 ("The power of Congress over the territories of the United States is general and plenary") (citing *Late Corp. of the Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 44).

Courts tend to apply rational basis review when Congress implements a law pursuant to the Territories Clause.<sup>152</sup> This standard tends to be significantly deferential to Congress, and under this standard of review, PROMESA will most likely be found to be constitutional.<sup>153</sup> By passing the law under the Territories Clause, Congress is protected by the plenary power afforded to it under the Territories Clause to make all necessary laws and rules governing the Territories of the United States.<sup>154</sup> Following the pattern of recent cases by the Supreme Court concerning constitutional guarantees to territories, it is likely that the Supreme Court will rule that Congress intended to pass PROMESA under the Territories Clause.<sup>155</sup>

*D. The Consequences of the Oversight Board as a Territorial Entity on the Aurelius LLC and Altair Credit Lawsuits*

The ongoing lawsuits by Aurelius LLC and Altair Credit depend upon a finding that the Oversight Board is a federal entity and is unconstitutional because it is an “Officer of the United States” that was not appointed pursuant to the Appointments Clause of the United States Constitution.<sup>156</sup> Unfortunately for the bondholders, Puerto Rico’s judicial treatment as a territory provides Congress with more discretion when acting in accordance with its authority under the Territories Clause.<sup>157</sup> As shown in previous cases involving territories, the congressional deference given to Congress when acting against territories is much greater than what it would be when acting against states, and courts have repeatedly interpreted the scope of the Territories Clause to include Puerto Rico.<sup>158</sup> Therefore, in accordance with the judicial treatment given to territories, SCOTUS will most likely find that the Oversight Board is consistent with the authority Congress has under the Territories Clause.<sup>159</sup> This decision would affirm the decision made by the District

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<sup>152</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551 (citing *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991)) (stating that Congress’s power under the Territories Clause merits rational basis review).

<sup>153</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551; Shaw, *supra* note 15, at 1008-09.

<sup>154</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 545-46; *Late Corp. of the Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 42.

<sup>155</sup> See *Sánchez Valle*, 136 S. Ct. at 1863; see also *Franklin California Tax-Free Trust*, 136 S. Ct. 1938.

<sup>156</sup> See *Altair*, 138 Fed. Cl. at 750; *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 557.

<sup>157</sup> See *Cincinnati Soap*, 301 U.S. at 323 (holding that Congress can establish local legislatures for territorial governments but does not have that authority over states); *Downes*, 182 U.S. at 268 (determining that Congress has plenary power to rule over territories through the Territorial Clause of the U.S. Constitution).

<sup>158</sup> See *Cincinnati Soap*, 301 U.S. at 323; *Downes*, 182 U.S. at 340 (defining Puerto Rico as an unincorporated territory); *Sánchez Valle*, 136 S. Ct. at 1873-75 (finding the United States federal government to be the ultimate source of authority for Puerto Rico).

<sup>159</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 549-50 (“Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not

Court of Puerto Rico, which held that the Oversight Board was a proper exercise of Congress's authority under the Territories Clause.<sup>160</sup> The District Court cited *Cincinnati Soap Co.* when stating that Congress's plenary power over U.S. territories is not subject to the constitutional limitations faced when regulating state actions.<sup>161</sup> All cases that have involved Puerto Rico have continued to uphold the standard set by *Cincinnati*, and it is unlikely that SCOTUS will rule against this standard for the lawsuits by Aurelius LLC and Altair Credit.<sup>162</sup> As such, Puerto Rico's treatment as a territory will subject the bondholders' claims to congressional deference, where the Oversight Board will likely be held as a proper exercise of Congress's power over its territories.<sup>163</sup>

Judge Braden's analysis of the Oversight Board as a federal entity in the United States Court of Federal Claims will most likely be overruled due to the historic judicial treatment of territories.<sup>164</sup> Although the Oversight Board does pass the three-part test established by *Lebron*, these factors have never been analyzed in a case involving an entity created by Congress to oversee a territory of the United States.<sup>165</sup> With the inclusion of a territory in this analysis, SCOTUS will likely find that the *Lebron* test does not apply to entities that are imposed on territories because the powers given to Congress in dealing with its territories fall solely under the broad and plenary powers given to Congress under the Territories Clause.<sup>166</sup> This decision is in accordance with the congressional deference and judicial treatment of United States territories as analyzed in this Comment.<sup>167</sup>

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comport with the requirements of the Constitution if they pertained to the governance of the United States.”).

<sup>160</sup> See *id.* at 551.

<sup>161</sup> See *id.* at 549 (citing *Cincinnati Soap*, 301 U.S. at 308).

<sup>162</sup> See *Altair*, 138 Fed. Cl. at 750; *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 557; *Downes*, 182 U.S. at 268 (determining that Congress's authority over its territories has no established limits); *Sánchez Valle*, 136 S. Ct. at 1873–75; *Franklin California Tax-Free Trust*, 136 S. Ct. at 1947–48 (defining Puerto Rico as not a state for determining who can be a debtor for purposes of Chapter 9 bankruptcy proceedings); Shaw, *supra* note 15, at 1042–47 (elaborating on historical judicial decisions that demonstrate congressional dominance over Puerto Rico through the Territories Clause).

<sup>163</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551.

<sup>164</sup> See *Altair*, 138 Fed. Cl. at 750 (holding that the Oversight Board is a federal entity); see also *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551 (citing *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991)) (stating that Congress does not have to comply with “the most exacting standard of review” when governing pursuant to the Territories Clause.).

<sup>165</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 549 (analyzing the case using the *Lebron* test).

<sup>166</sup> Compare *id.* at 392 (“it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions”), with *Cincinnati Soap*, 301 U.S. at 323 (holding that Congress does not have the same constitutional restrictions when dealing when territories). See *Lebron*, 513 U.S. at 391–92.

<sup>167</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 549 (“Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States.”); *Cincinnati Soap*, 301 U.S. at 323; *Downes*, 182 U.S. at 268 (determining that Con-

*E. How the 1st Circuit Erred in its Analysis*

While the 1st Circuit held that the Oversight Board members were not appointed pursuant to the Appointments Clause, the court did not bring up the issue of a federal officer versus a territorial officer.<sup>168</sup> Further, the court did not use the *Lebron* test to determine whether the members of the Oversight Board qualify as federal officers, instead developing its own three-prong test.<sup>169</sup> Under the test developed by the 1st Circuit, an appointee qualifies as an “Officer of the United States” if: (1) the appointee holds a “continuing position established by federal law”; (2) the appointee holds “significant authority”; and (3) such authority is exercised “pursuant to the laws of the United States.”<sup>170</sup> Of these three points, it is the second prong that this Comment contends.<sup>171</sup> The 1st Circuit found that the members of the Oversight Board exercised “significant authority.”<sup>172</sup> While the Oversight Board does have numerous powers such as vetoing and revising Puerto Rico’s laws and rejecting any nonconforming budgets, it does not have unilateral authority over Puerto Rico.<sup>173</sup> Further, the Oversight Board may submit recommendations to Puerto Rico’s governor or legislature to ensure that the approved Fiscal Plan is being met; it cannot unilaterally impose those actions on Puerto Rico using its authority.<sup>174</sup>

The 1st Circuit did not raise the district court’s holding that the members of the Oversight Board are territorial officer rather than federal officer, instead suggesting that the Appointments Clause still applies in conjunction with the Territories Clause.<sup>175</sup> If the Board members are territorial officers, then the Appointments Clause would not apply.<sup>176</sup>

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gress has “general and plenary power” over Puerto Rico); *Sánchez Valle*, 136 S. Ct. at 1873–75 (2016).

<sup>168</sup> *Aurelius Investment*, No. 18-1671, at \*1, 54-55.

<sup>169</sup> *See id.* at \*37.

<sup>170</sup> *See id.* at \*37 (citing *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Freytag v. Comm’r*, 501 U.S. 868 (1991); and *Buckley v. Valeo*, 424 U.S. 1 (1976)).

<sup>171</sup> *See Aurelius Investment*, No. 18-1671, at \*37-38 (finding that the members of the Oversight Board occupy a “continuing position” because their terms last for a minimum of three years); *Id.* at \*40 (finding that the authority for the members of the Board arises directly from the federal law PROMESA).

<sup>172</sup> *See Aurelius Investment*, No. 18-1671 at \*38 (finding the bankruptcy authorization to constitute “significant authority”).

<sup>173</sup> *See* 48 U.S.C. § 2142(2016); *Aurelius Investment*, No. 18-1671, at \*38-39.

<sup>174</sup> *See* 48 U.S.C. § 2141-2152, 2175 (2016).

<sup>175</sup> *See Aurelius Investment*, No. 18-1671, at \*24-31.

<sup>176</sup> *See* U.S. CONST. ART. II, § II, CL. 2; *see Downes*, 182 U.S. at 249-58 (holding that the revenue clauses of the Constitution do not apply to territories); *Dorr*, 195 U.S. at 813 (holding that the right to a jury trial does not apply to the territory of the Philippines); *Balzac*, 258 U.S. at 309 (holding that the Constitutional right to a jury trial does not apply to territorial citizens); *see also In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 551-53; *Altair*, 138 Fed. Cl. at 752.

*F. The Oversight Board at SCOTUS*

The Supreme Court heard oral arguments on this case on October 15, 2019.<sup>177</sup> The Oversight Board argued that was a territorial entity because it enforces laws that apply only to Puerto Rico.<sup>178</sup> Further, they also focused on Congress's intent in addressing Puerto Rico's debt problem when passing this law.<sup>179</sup> The U.S. government argued that the Oversight Board did not exercise federal power nor was it a part of the federal government.<sup>180</sup> Justice Kavanaugh raised an interesting analysis that the legal consequences of finding that the Oversight Board is a federal entity could raise uncertainty on the status of other territorial officers.<sup>181</sup> On the other side, Justice Sotomayor consistently expressed her concerns on this reasoning.<sup>182</sup>

Aurelius also focused on the nature of the Oversight Board's powers, arguing that the Board did not exercise the same local powers granted to Puerto Rico's governor and legislature.<sup>183</sup> Justices Breyer and Gorsuch questioned Aurelius on whether established territorial officers would have similar powers to that of the Oversight Board if given the authority.<sup>184</sup> The Court seemed to find that the proper test for determining the Oversight Board's status was whether it was acting "primarily locally" or "primarily nationally."<sup>185</sup> The Court also rejected the possibility of overturning the insular cases, instead focusing on the application of the Appointments Clause to territorial officers.<sup>186</sup>

It seems likely that the Supreme Court will likely use the "primarily local" test in determining whether the Oversight Board's actions classify it as a territorial entity or federal entity.<sup>187</sup> Under this test, the Court will likely find that the Oversight Board is a territorial entity properly appointed under the Territories Clause because the Oversight Board's primary purpose is to assist Puerto Rico in achieving fiscal stability and reobtaining access to capi-

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<sup>177</sup> See *In re Fin. Oversight & Mgmt. Bd.*, Case No. 18-1334, 10.

<sup>178</sup> See *id.* at 10-11.

<sup>179</sup> See *id.* at 15-16.

<sup>180</sup> See *id.* at 26-28 (stating that the Oversight Board is an independent territorial entity that does not exercise federal authority).

<sup>181</sup> See *id.* at 33-34 (J. Kavanaugh) (concerning the uncertainty over the status of Article IV judges, Puerto Rico's governor, DC's mayor, and other territorial officers whose authority is ultimately derived from federal law).

<sup>182</sup> See *id.* at 36-37 (J. Sotomayor) (countering what constitutes a state or federal act does not derive from their original source of authority).

<sup>183</sup> See *id.* at 50 (arguing that the Oversight Board's authority is "national in scope" and are not "primarily local activities").

<sup>184</sup> See *id.* at 54-56 (J. Breyer) (asking if the governor himself could represent Puerto Rico in bankruptcy proceedings if provided the authority to do so); see also *id.* at 56 (J. Gorsuch) (inquiring into whether the governor would have similar authority to the Oversight Board if the statute creating the Oversight Board was not passed).

<sup>185</sup> See *id.* at 68-70 (finding that the argument by Aurelius applied a similar test as to the one applied by counsel for the U.S. government); see also *id.* at 75 (J. Kavanaugh) ("If we conclude that the powers and duties here are primarily local . . . do you lose?").

<sup>186</sup> See *id.* at 85-86 (C.J. Roberts) ("I just don't see the pertinence of the insular cases").

<sup>187</sup> See *id.* at 45, 65-66, 69-70.

tal markets.<sup>188</sup> It is unlikely that the Court will consider the “original source” of the Oversight Board’s authority given the concerns raised by Justice Kavanaugh over the legal ramifications such a test would likely impose.<sup>189</sup>

#### IV. WHY PUERTO RICO’S STATUS POSES A RISK TO CREDITORS AND SHOULD BE CHANGED

An Oversight Board appointed by the federal government would likely be found unconstitutional under the Appointments Clause for any State; however Congress does not have to answer that issue as long as it can continue invoking the Territories Clause for Puerto Rico. As such, Aurelius LLC and Altair Global Credit will most likely lose their respective cases alleging the unconstitutionality of the Oversight Board because of the vast deference given to Congress when acting pursuant to the Territories Clause.<sup>190</sup> This is concerning for creditors seeking to invest in Puerto Rican bonds, because the congressional deference given to Congress as a consequence of Puerto Rico’s status will drive off investors concerned about the instability of Puerto Rico’s status. For creditors, Puerto Rico’s complicated status poses a risk to their investments, therefore a change in Puerto Rico’s status would be beneficial for creditors as well.<sup>191</sup> Investors are less likely to freely invest in a troubled economy whose debt is not protected by the full faith and credit of the U.S. government.

The Supreme Court has ruled against Puerto Rico on many occasions, stating that it does not have the same rights afforded to states due to its status as an unincorporated territory.<sup>192</sup> *Sánchez Valle* held that the federal government is the “ultimate source of authority for Puerto Rico.”<sup>193</sup> The Supreme

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<sup>188</sup> See 48 U.S.C §2121(a) (2017).

<sup>189</sup> See *Financial Oversight & Mgm’t Board for Puerto Rico v. Aurelius*, Case No. 18-1334, 1, 33, 36 (2019) (J. Kavanaugh) (questioning the consequences that a decision against the Oversight Board would have on the status of other territorial officers).

<sup>190</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 548–49 (stating that Congress has used the Territories Clause to establish governmental institutions for Puerto Rico since its acquisition); Shaw, *supra* note 15, at 1043–44 (“Commentators who question Puerto Rico’s self-governing status cite recent judicial decisions that reaffirm U.S. Congressional dominance over Puerto Rico through application of the Territorial Clause.”); *Altair*, 138 Fed. Cl. at 752.

<sup>191</sup> See Tim Worstall, *Creditors Of Puerto Rico Have A Problem – The Population Can Go And Leave The Debts Behind*, FORBES (May 4, 2017, 08:52 AM), <https://www.forbes.com/sites/timworstall/2017/05/04/creditors-of-puerto-rico-have-a-problem-the-population-can-go-and-leave-the-debts-behind/>, archived at <https://perma.cc/24KB-9GQR> (discussing how Puerto Rico’s status prohibits it from declaring bankruptcy via U.S. law, but its limited sovereignty prevents it from seeking assistance from the IMF as a sovereign entity).

<sup>192</sup> See *Cincinnati Soap*, 301 U.S. at 323 (“In dealing with the territories . . . Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union.”); Shaw, *supra* note 15, at 1043–44.

<sup>193</sup> *Sánchez Valle*, 136 S. Ct. at 1876–77.



Court stated in *Sánchez Valle*: “Puerto Rico boasts a relationship to the United States that has no parallel in our history.”<sup>194</sup>

Meanwhile, as Puerto Rico is treated as a territory, courts will continue to rule against Puerto Rico and deny the Commonwealth the rights afforded to States and other United States citizens.<sup>195</sup> This legal analysis implicates the classic question of statehood for Puerto Rico.<sup>196</sup> Putting aside the personal preferences for independence or statehood for Puerto Rico, recent cases decided by the Supreme Court concerning Puerto Rico imply that the issues need to be resolved with a change in status.<sup>197</sup> While the 1st Circuit did hold the appointment process for members of the Oversight Board to be unconstitutional, the court acknowledged the broad authority Congress holds over its territories.<sup>198</sup> This “general and plenary power” has exceeded over other constitutional protections guaranteed to States such as the double jeopardy clause, revenue clauses, the right to a jury trial, and federal bankruptcy laws.<sup>199</sup> Therefore the Supreme Court should find that the Territories Clause also grants Congress the authority to appoint territorial officers that are not subject to the Appointments Clause.

## V. CONCLUSION

To conclude, the Supreme Court will most likely find that, because Congress has the established authority under the Territories Clause to apply all necessary rules to territories, the Oversight Board and its members are constitutional under the Territories Clause. Additionally, under the “prima-

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<sup>194</sup> See *Sánchez Valle*, 136 S. Ct. at 1875–76 (finding that Congress granted Puerto Rico the right to ratify its own Constitution and that Congress has the authority to amend Puerto Rico’s Constitution).

<sup>195</sup> See *In re Fin. Oversight & Mgmt. Bd.*, 318 F. Supp. 3d at 549 (“Congress has plenary power under the Territories Clause to establish governmental institutions for territories . . . [and] [i]t has exercised this power with respect to Puerto Rico over the course of nearly 120 years”); Shaw, *supra* note 15, at 1045–46 (explaining how Supreme Court precedent underscores the inequitable judicial treatment received by Puerto Rican citizens compared to state citizens).

<sup>196</sup> Shaw, *supra* note 15, 1053–55 (discussing the recent plebiscites in Puerto Rico evidencing the desire of the people of Puerto Rico to change its current status. . . “[T]he people of Puerto Rico have clearly expressed a desire to change the status of the island . . . [and] all three of the major political parties [in Puerto Rico] have called for change. . . The U.S. Congress has denied all requests for change in Puerto Rico’s current political status.”).

<sup>197</sup> Shaw, *supra* note 15, 1042–44 (finding that judicial decisions concerning Puerto Rico disregard the concept of Puerto Rico as a self-governing territory and instead rely on the Territories Clause); see also Jaime Farrant, *4 Reasons Why Puerto Rico’s ‘Bankruptcy’ Process Matters to U.S. Residents*, NBC NEWS (June 5, 2017, 8:39 AM), <https://www.nbcnews.com/news/latino/4-reasons-why-puerto-rico-s-bankruptcy-process-matters-u-n766991>, archived at <https://perma.cc/WC3U-85EG> (discussing the repercussions that Puerto Rico’s bankruptcy could have on U.S. investment companies and other states with high debts seeking a similar remedy).

<sup>198</sup> See *Aurelius Investment*, No. 18-1671, at \*24-26, 54-55.

<sup>199</sup> U.S. CONST. AMEND. V; see *Downes*, 182 U.S. at 249-58; *Dorr*, 195 U.S. at 813; *Balzac*, 258 U.S. at 309; *Sánchez Valle*, 136 S. Ct. at 1875 (holding that Puerto Rico is not entitled to the double jeopardy clause because it is not a “separate sovereign”); *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1938.

rily local” test the Supreme Court considered in oral arguments, the Oversight Board will likely be considered a territorial entity because its activities are more along the lines of assisting Puerto Rico in achieving fiscal stability rather than achieving a national objective. The District Court of Puerto Rico, in its decision declaring the Oversight Board as a territorial entity and its members as territorial officers, cited multiple cases presenting the discretion that courts tend to give to Congress whenever Congress invokes the Territories Clause. The Supreme Court has consistently ruled against Puerto Rico by finding that, as a territory, Puerto Rico is not guaranteed the same rights afforded to citizens residing in states. Following this analysis, the Supreme Court will likely continue this trend by finding that the Oversight Board is a territorial entity that is a proper exercise of Congress’s powers over its territories. By finding that the Oversight Board is constitutional under the Territories Clause, Puerto Rico will maintain its access to bankruptcy under Title III of PROMESA, and the lawsuits by Aurelius LLC and Altair Credit will be unlikely to succeed. It will also avoid any subsequent legal disputes over the status of other territorial figures that have been appointed pursuant to Congress’s Article IV power. Additionally, it will be another case presenting the extensive authority Congress has over the Commonwealth of Puerto Rico. In the short term, this will provide Puerto Rico time to restructure its debt and negotiate with its creditors. In the long term, however, it will be interesting to see how the judicial deference afforded to Congress when acting pursuant to the Territories Clause will influence Congress’s actions toward Puerto Rico and how it will affect the relationship between the United States and the 3,500 square mile island.