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Supreme Court Report

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This *Report* summarizes opinions issued on June 17 and 20, 2019 (Part I); and cases granted review on June 20, 2019 (Part II).

I. Opinions

● *Gamble v. United States,* 17-646. In a 7-2 vote, the Court upheld the dual-sovereignty (or separate-sovereigns) doctrine, under which "a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign" within the meaning of the Double Jeopardy Clause. Terance Gamble was convicted in Alabama state court of violating an Alabama law prohibiting convicted felons from possessing a firearm. Federal prosecutors then indicted Gamble for the same instance of possession under the federal felon-in-possession law. Gamble moved to dismiss on the ground that the federal prosecution violated the Double Jeopardy Clause because it was for the same offense as his prior state prosecution. The district court denied the motion based on the dual-sovereignty doctrine. Gamble pleaded guilty and appealed to the Eleventh Circuit, which affirmed on the same basis. In an opinion by Justice Alito, the Court affirmed.

The Court started with the text of the Fifth Amendment, which protects people from being twice put in jeopardy for "the same offence"—a term the Court said was commonly understood in 1791 to mean transgression or violation of a law. Because "an 'offence' is defined by a law, and each law is defined by a sovereign," the Court concluded that "where there are two sovereigns, there are two laws, and two 'offences.'" The Court found this reading "honors the substantive differences between the interests that two sovereigns can have in punishing the same act." The Court acknowledged that the first Congress, when "working on an earlier draft that would have banned 'more than one trial or one punishment for the same offence,' voted down a proposal to add 'by any law of the United States.'" But the Court rejected the inference that the first Congress intended to bar successive prosecutions regardless of the sovereign bringing the charge because "[t]he private intent behind a drafter's rejection of one version of a text is shoddy evidence of the public meaning of an altogether different text." The Court doubted that "the same Founders who quite literally *revolted* against the use of acquittals abroad to bar criminal prosecutions here would soon give us an Amendment allowing foreign acquittals to spare domestic criminals."

The Court rejected as "based on a non sequitur" the dissents' arguments that the dual-sovereigns doctrine is erroneous because the people are the sovereign, not state and federal governments. Although the Court recognized that the people are sovereign, "that does not mean that they have conferred all the attributes of sovereignty on a single government." The Court noted that Chief Justice Marshall, "in terms so directly relevant as to seem presciently tailored to answer this very objection," distinguished between "the sovereignty which the people of a single state possess" and the sovereign powers "conferred by the people of the United States on the government of the Union"; he thus distinguished between "the action of a part" and "the action of the whole." *McCulloch v. Maryland*, 4 Wheat. 316 (1819). The Court also rejected the dissents' argument that "because the division of federal and state power was meant to promote liberty, it cannot support a rule that exposes Gamble to a second sentence." The Court stated that "[t]his argument fundamentally misunderstands the governmental structure established by our Constitution," which "does not always maximize individual liberty at the expense of other interests." For example, the Constitution allows regulation and taxation

at both the state and federal level; allows one sovereign to prohibit conduct the other permits; and allows one sovereign to legalize conduct the other prohibits.

The Court held that Gamble's challenge to the dual-sovereignty doctrine failed to overcome the obstacle of *stare decisis*. The Court had embraced the dual-sovereignty doctrine as far back as 1847, expressly upheld a federal prosecution that followed a state prosecution in 1922, and applied that precedent numerous times for decades thereafter. The Court noted that, "[o]f course, it is also important to be right, especially on constitutional matters where Congress cannot override our errors by ordinary legislation." But the Court concluded that that the ambiguous historical evidence offered by Gamble was no "better than middling": it "does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years." The Court reviewed the historical evidence at length and found (among other things) that (1) Gamble's argument relied heavily on an unreported 1677 English case whose true holding has been lost to history; (2) there were no preratification cases "in which a foreign acquittal or conviction barred a later prosecution for the same act in either Britain or America"; (3) neither Blackstone nor other treatise writers opposed the dual-sovereignty rule preratification; and (4) 19th-century cases were split on the issue. The Court rejected Gamble's argument that the theoretical basis of the dual-sovereignty doctrine was invalidated by the incorporation of the Double Jeopardy Clause against the states as "trad[ing] on a false analogy." Incorporation of the Fifth Amendment simply "meant that the States were now required to abide by [the Supreme Court's] interpretation of the Double Jeopardy Clause," which by that point had "long included the dual-sovereignty doctrine."

Justice Thomas concurred. He agreed that the historical record does not establish that the dual-sovereign doctrine is incorrect, but wrote separately "to address the proper role of the doctrine of *stare decisis*." In Justice Thomas's view, the Court's *stare decisis* standard, which turns on factors such as workability, antiquity, and reliance, "does not comport with [the Court's] judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law." In Justice Thomas's view, "if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent," because "a demonstrably incorrect judicial decision . . . is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of legislative power."

Justice Ginsburg dissented. She rejected "[t]he notion that the Federal Government and the States are separate sovereigns" because it "overlooks a basic tenet of our federal system"—that the people, not governments, are sovereign. Justice Ginsburg noted that "States may be separate, but their populations are part of the people composing the United States." In her view, the United States and its constituent states are not separate sovereigns, but parts of one whole; a prosecution by the people under a state law therefore precludes prosecution by the people under a separate federal law. She also maintained that the dual-sovereignty doctrine is contrary to federalism's liberty-enhancing objective because "it invokes federalism to withhold liberty." Justice Ginsburg rejected the meaning that the Court gave the Double Jeopardy Clause as "the very meaning the First Congress refrained from adopting" when it rejected an amendment "that would have permitted the Federal Government

to reprosecute a defendant initially tried by a State." And she disagreed with the Court on the historical record, insisting that "the Court relied on dicta from 19th-century opinions," which suffered from "dubious reasoning" and "gave short shrift to contrary authority": "Most of the early state decisions cited by the parties regarded successive federal-state prosecutions as unacceptable." Nor, she said, would eliminating the separate-sovereigns doctrine implicate the reliance interests of private parties or affect large numbers of cases, such as to warrant preservation on *stare decisis* grounds.

Justice Gorsuch also dissented. He stated that the separate-sovereigns doctrine had "no meaningful support in the text of the Constitution, its original public meaning, structure, or history"; and he considered "the major premise" of the Court's holding—that when two sovereigns create two laws, there are two offenses—to be "mistaken." Justice Gorsuch pointed to Blackstone's Commentaries and other period treatises' "taxonomies of 'offences' that are not sovereign specific," as well as the Continental Congress' use the word "offence," as proof that the drafters "recognized that transgressions of state and federal law could constitute the "same offence." Justice Gorsuch further saw the 18th-century English cases—which the Court dismissed as "muddled"—as forming a "uniform body of common law" that prohibited prosecution for an offense already prosecuted by a foreign sovereign. Like Justice Ginsburg, Justice Gorsuch pointed to the First Congress' rejection of language that would have explicitly enacted the separate-sovereigns doctrine and emphasized that "the federal and state governments are but two expressions of a single and sovereign people." Justice Gorsuch also shared Justice Ginsburg's criticism that the Court "invokes federalism not to protect individual liberty but to threaten it, allowing two governments to achieve together an objective denied to each." Taking into account that the cases establishing the separate-sovereigns doctrine were closely decided and "did not consult the original meaning of the Double Jeopardy Clause or consult virtually any of the relevant historical sources," and given the limited reliance interests, Justice Gorsuch would have rejected the separate-sovereigns doctrine in spite of *stare decisis*.

● *Virginia House of Delegates v. Bethune-Hill*, 18-281. By a 5-4 vote, the Court dismissed for lack of standing an appeal by Virginia's House of Delegates of a ruling striking down 11 of the House's legislative districts as an unconstitutional racial gerrymander. Following the 2010 Census, Virginia redrew its legislative districts. Voters in 12 House of Delegates districts filed suit, alleging that the districts were racially gerrymandered in violation of the Equal Protection Clause. The House intervened "and carried the laboring oar in urging the constitutionality of the challenged districts." After a first trial and an appeal to the Court, a three-judge district court ruled following a second trial that in 11 of the challenged districts the state had unconstitutionally "sorted voters . . . based on the color of their skin." Virginia's Attorney General announced that the state would not appeal this ruling, but the House of Delegates filed an appeal to the Court which the state moved to dismiss. In an opinion by Justice Ginsburg, the Court held that the House of Delegates lacked standing to appeal.

The Court rejected the two different theories for standing offered by the House. First, the Court held that the "House . . . lacks authority to displace Virginia's Attorney General as representative of the State." And second, the Court held "that the House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." The Court began its analysis by setting forth the constitutional requirements for standing. It noted that the House's past participation in the case, both as an intervening defendant and as an appellee, did not "entail[] invoking a court's jurisdiction" and thus "it was not previously

incumbent on the House to demonstrate its standing." But once the House sought to appeal from the district court's order, it needed to independently demonstrate standing. The Court then rejected the House's "claimed authority to litigate on the State's behalf." Although a state has standing to defend the constitutionality of its laws and may delegate that authority to its agents, the Court concluded that Virginia had not done so here. Rather, "[a]uthority and responsibility for representing the State's interests in civil litigation, Virginia law prescribes, rest exclusively with the State's Attorney General." The Court noted that states can authorize a legislative body to litigate on the state's behalf, but that Virginia (unlike some other states) had not done so. The Court distinguished *Karcher v. May*, 484 U.S. 72 (1987), in which the Court concluded that the New Jersey Legislature had authority to represent the state, because New Jersey had no law like Virginia's vesting control of litigation with the Attorney General. Finally, the Court observed that "[t]hroughout this litigation, the House has purported to represent its own interests" and did not "suggest it was intervening as an agent of the State." But "a party may not wear on appeal a hat different from the one it wore at trial."

The Court also rejected the House's argument that it had standing to appeal "in its own right." It observed that it "has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." Even though Virginia's Legislature has the duty under state law to establish legislative districts, the Virginia Constitution "allocates redistricting authority to the 'General Assembly,' of which the House is only a part." Thus, the Court distinguished *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ___ (2015), in which the Court recognized the standing of Arizona's Legislature to challenge a referendum that gave its redistricting authority to an independent commission. Not only was that action brought by the legislature as a whole, but the referendum "*permanently* deprived the legislative plaintiffs of their role in the redistricting process. Here, by contrast, the challenged order does not alter the General Assembly's dominant initiating and ongoing role in redistricting." The Court also distinguished *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972) (*per curiam*), in which it had permitted the Minnesota State Senate to challenge a law reducing the Senate's size from 67 to 35 members. *Beens*, according to the Court, may not have "established law on the question of standing, as distinct to intervention." But even if it did, "the order there . . . injured the Minnesota Senate in a way the order challenged here does not injure the Virginia House." While cutting the size of a legislative chamber "would necessarily alter its day-to-day operations," the House had not shown how redistricting would do so. And "although redrawing district lines indeed may affect the membership of the chamber, the House as an institution has no cognizable interest in the identity of its members." Rejecting the dissent's analogies to other institutions and groups that have an interest in the composition of their membership, the Court noted that "the House . . . is a representative body composed of members chosen by the people," who bring about any changes to its membership.

Justice Alito wrote a dissenting opinion, which Chief Justice Roberts and Justices Breyer and Kavanaugh joined. He declined to address whether the House of Delegates has authority to represent the State of Virginia. Instead, Justice Alito would hold that the House has standing because it has suffered a constitutional injury as the result of "the imposition of the District Court's districting plan." "It is clear," in his judgment, "that the new districting plan ordered by the lower court will harm the House" because changing members' constituencies "is likely to change the way in which the district's

representative does his or her work." Rejecting the Court's conclusion that "the House as an institution has no cognizable interest in the identity of its members," the dissent analogized to other groups like string quartets and basketball teams that have an interest in how their members are selected and who those members are. The dissent also maintained that *Sixty-seventh Minnesota State Senate v. Beens* supported the House's standing. "[E]ven if the effect of the court order was greater in *Beens* than it is here," the dissent said, the case establishes the proposition that orders reapportioning a legislative body's seats "directly affect" that body and therefore create the injury needed for standing.

● *Virginia Uranium, Inc. v. Warren*, 16-1275. In a 6-3 ruling, the Court held that Virginia's ban on uranium mining was not preempted by the Atomic Energy Act (AEA), 42 U.S.C. §2011 *et seq*. Virginia Uranium wanted to mine uranium ore from a site near Coles Hill, Virginia. Shortly after the ore was discovered, however, Virginia imposed a moratorium on uranium mining. Virginia Uranium eventually filed an action alleging that "the AEA preempts state uranium laws like Virginia's and ensconces the [Nuclear Regulatory Commission (NRC)] as the lone regulator in the field." Virginia Uranium argued that because the purpose of the mining ban was to protect the public against radiation hazards it fell within the preemptive ambit of the AEA, which gives the NRC exclusive regulatory authority over post-extraction milling of uranium ore and storage of the radioactive leftover "tailings." Both the district court and the Fourth Circuit rejected the company's argument, holding that the AEA left in place states' traditional power to regulate the mining itself. The Court affirmed through two three-Justice opinions, one by Justice Gorsuch (joined by Justices Thomas and Kavanaugh), the other by Justice Ginsburg (joined by Justices Sotomayor and Kagan).

Justice Gorsuch noted that, although "the AEA gives the [NRC] significant authority over the milling, transfer, use, and disposal of uranium, as well as the construction and operation of nuclear power plants[,] . . . Congress conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders." He then emphasized that federal preemption must have a textual basis: "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law."

Justice Gorsuch then addressed Virginia Uranium's contention that the mining ban was barred under field preemption principles because the AEA reserves nuclear safety concerns to the NRC alone. This argument runs into problems, he reasoned, because "[u]nlike many federal statutes, the AEA contains no provision preempting state law in so many words." And while the AEA provides for extensive authority for the NRC to regulate other aspects of the nuclear fuel cycle, it omits uranium mining. He then turned to provision upon which Virginia Uranium relied, 42 U.S.C. §2021(k). Section 2021 allowed the NRC to give some of its regulatory powers to states; subsection (k) then provided that "Nothing in this section [that is, §2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." Virginia Uranium insisted that subsection (k) revealed that states may not regulate mining (or anything else) to protect the public from "radiation hazards." Justice Gorsuch disagreed, reading the provision as merely clarifying that nothing in the new §2021 "should be construed to curtail the States' ability to regulate the activities discussed in that *same section* for purposes other than protecting against radiation hazards." He noted that Virginia Uranium's reading would leave uranium

mining unregulated, as "the NRC has long believed, and still maintains, that the AEA affords it no authority to regulate uranium mining on private land." Justice Gorsuch distinguished *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), which (according to Virginia Uranium) based its preemption analysis on a state law's purpose in preventing radiation hazards. Justice Gorsuch explained that *Pacific Gas* involved nuclear power plants, which are heavily regulated, and still ultimately found that state laws were not preempted. Plus, "[j]ust because *Pacific Gas* may have made more of state legislative purposes than the terms of the AEA allow does not mean we must make more of them yet. . . . Being in for a dime doesn't mean we have to be in for a dollar."

Justice Gorsuch continued by explicating upon his reasons for not considering legislative purpose in preemption analysis, noting that "this Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it." Inquiring into legislative purpose "would be to stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge." Justice Gorsuch also critiqued the consideration of legislative purpose as risking "subjecting similarly situated persons to radically different legal rules" where different states' legislatures had different purposes for enacting similar laws. Lastly, he described the practical difficulties of "trying to peer inside legislators' skulls." Justice Gorsuch closed his opinion by rejecting Virginia Uranium's conflict preemption argument—that the mining ban "stands as an impermissible 'obstacle'" to the purposes and objectives of Congress in passing the AEA. He denounced preemption based on "unenacted purposes and objectives" that are not present in a federal statute's text. The Supremacy Clause does not "elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect." Continuing, he stated that "[t]rying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product. . . . In disregarding these legislative compromises, we may only wind up displacing perfectly legitimate state laws on the strength of 'purposes' that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme."

Justice Ginsburg wrote an opinion concurring in the judgment, which Justices Sotomayor and Kagan joined. Although reaching the "same bottom-line judgment" as Justice Gorsuch, she criticized "his discussion of the perils of inquiring into legislative motive" as sweeping "well beyond the confines of the case, and therefore . . . inappropriate in an opinion speaking for the Court." She also viewed as unnecessary Justice Gorsuch's questioning of whether the doctrine of obstacle preemption should be retained, because "Virginia Uranium's . . . arguments fail under existing doctrine." She concluded that Virginia Uranium's field-preemption argument fails because "[e]very indication . . . is that Congress left private conventional mining unregulated." Although §2021(k) mentions purpose in describing the preemptive scope of the AEA, that provision concerns only "activities regulated by the NRC," which do not include uranium mining. Justice Ginsburg also was not persuaded by the United States' argument that the mining ban is preempted because it is a pretext for regulating milling and tailings storage. Unlike in *National Meat Association v. Harris*, 565 U.S. 452 (2012), no express preemption provision is involved and the regulated activity is "at a remove" from the federally occupied field. That

is, "[a] state law regulating an upstream activity within the State's authority is not preempted simply because a downstream activity falls within a federally occupied field." Lastly, Justice Ginsburg rejected a suite of arguments as to why Virginia's mining ban was barred by obstacle preemption, finding that the law did not conflict with the promotion of nuclear power, national security, or milling and tailings regulation.

Chief Justice Roberts dissented, joined by Justices Breyer and Alito. He viewed the case as addressing "whether a State can purport to regulate a field that is *not* preempted (uranium mining safety) as an indirect means of regulating other fields that *are* preempted (safety concerns about uranium milling and tailings)." In the Chief Justice's view, the answer is no: "The AEA prohibits state laws that have the purpose and effect of regulating preempted fields." He noted that the mining ban "was motivated by Virginia's desire to ban the more hazardous steps that come after mining." And citing to *Pacific Gas & Electric*, he explained that "a state law is preempted not only when it 'conflicts with federal law,' but also when its *purpose* is to regulate within a preempted field." Chief Justice Roberts described Justices Gorsuch and Ginsburg's opinions as "invit[ing] evasion" of federal law: "Under the rule adopted . . . so long as the State is not boneheaded enough to express its real purpose in the statute, the State will have free rein to subvert Congress's judgment on nuclear safety."

● *American Legion v. American Humanist Ass'n*, 17-1717. By a 7-2 vote, the Court held that the presence and maintenance of a 32-foot Latin cross on public land in a Bladensburg, Maryland traffic circle does not violate the Establishment Clause. Following World War I, residents of Prince George's County, Maryland, formed a committee to erect a memorial for the county's soldiers who perished in the war. The committee planned the monument to be constructed in the shape of a cross, and it was completed by the American Legion in 1925. A Maryland state agency acquired the cross in 1961 and has maintained it since. The American Humanist Association and several individuals brought an action claiming that the presence of the cross on public land and its maintenance by the state violates the Establishment Clause of the First Amendment. After the American Legion intervened to defend the constitutionality of the cross, the district court granted summary judgment in the defendants' favor. The Fourth Circuit reversed, concluding that the Bladensburg Cross violates the Establishment Clause. In an opinion by Justice Alito, the Court reversed and remanded.

The Court began its opinion by discussing the history and meaning of the Latin cross erected in Bladensburg. It explained that while the cross is "a symbol of Christianity . . . there are many contexts in which the symbol has also taken on a secular meaning." In particular, the Court noted that "a plain Latin cross . . . took on new meaning after World War I" because the army marked graves in Europe with temporary wooden crosses or Stars of David, and the cross had "widespread resonance as a symbol of sacrifice in the war." The Court then detailed the history of the Bladensburg Cross, noting that although "we do not know precisely why the committee chose the cross, it is unsurprising that the committee . . . adopted a symbol so widely associated" with World War I.

The Court then identified four considerations that grant longstanding monuments, symbols, or practices "a strong presumption of constitutionality." First, they were "established long ago, and . . . identifying their original purpose or purposes may be especially difficult." Yet "it would be inappropriate for courts to compel their removal or termination based on supposition." Second, "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply."

"Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment." The Court observed that communities may wish to preserve monuments, symbols, and practices "for the sake of their historical significance or their place in a common cultural heritage." Third, the message conveyed by a monument, symbol, or practice may change over time. Pointing to Notre Dame in Paris and cities bearing religious names, the Court explained that "religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity" that can be valued "without necessarily embracing their religious roots." And fourth, "when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral" and would instead "strike many as aggressively hostile to religion."

Applying these principles, the Court concluded that the Bladensburg Cross does not violate the Establishment Clause. It noted that although "the cross originated as a Christian symbol and retains that meaning in many contexts," that "does not change the fact that the symbol took on an added secular meaning when used in World War I memorials." The Court also explained that the Cross "has acquired historical importance" and "become part of the community" over time. And it observed that there is no evidence that the names of any Jewish soldiers were left off the memorial or included on the Cross against their wishes. Finally, the Court explained that "it is surely relevant that the monument commemorates the death of particular individuals"; it is "natural and appropriate . . . to invoke the symbols that signify what death meant to those who are memorialized." Therefore, the Court concluded that although the "cross is undoubtedly a Christian symbol," the Bladensburg Cross has come to represent many other meanings. To destroy or deface the Cross, the Court determined, "would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."

In sections of Justice Alito's opinion joined by only four Justices, Justice Alito criticized the test for Establishment Clause challenges articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Although *Lemon* ambitiously attempted to craft "a test that would bring order and predictability to Establishment Clause decisionmaking," this "expectation has not been met." Justice Alito noted that "the *Lemon* test presents particularly daunting problems in cases" like this one, "that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." He observed that in later cases, the Court has "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance," using the example of opinions concerning legislative prayer.

Justice Breyer wrote a concurrence, which Justice Kagan joined. He expressed his view that there is "no single formula for Establishment Clause challenges and that each case must be considered in light of the basic purposes of the Religion Clauses: assuring religious liberty, avoiding religiously based social conflict, and maintaining the separation of church and state." Determining that the Bladensburg Cross did not threaten these ends, Justice Breyer wrote that "[t]he case would be different . . . if there were evidence that the organizers had 'deliberately disrespected' members of minority faiths or if the Cross had been erected only recently." Justice Kavanaugh wrote a separate concurrence "to emphasize two points." First, he observed that the Court has not followed the *Lemon* test in any of five categories of Establishment Clause cases, thus "demonstrat[ing] that the *Lemon* test is not good law." Second, Justice Kavanaugh wrote that he "fully understand[s] the religious

nature of the cross" and has "great respect" for its objectors. Stating the "bedrock constitutional principle" that "[a]ll citizens are equally American, no matter what religion they are, or if they have no religion at all," he invited those who objected to the cross to pursue other avenues to stop Maryland from maintaining the cross on public land. Justice Kagan also wrote a separate opinion. She complimented Justice Alito's opinion but noted her concurrence in part, because she believes that the *Lemon* test's "focus on purposes and effects is crucial in evaluating government action in this sphere" and because she prefers to look to history for guidance "case-by-case, rather than to sign on to any broader statements about history's role in Establishment Clause analysis."

Justice Thomas concurred in the judgment. He reiterated his belief that "the Establishment Clause resists incorporation against the States." Rather, in Justice Thomas's view, the Clause seeks to protect state establishments of religion. He added that the "mere presence" of the cross "involves no coercion"; rather, the "*sine qua non* of an establishment of religion is 'actual legal coercion,'" such as forced religious orthodoxy or financial support. And "requiring that religious expressions be nonsectarian would force the courts 'to act as supervisors and censors of religious speech.'" Lastly, Justice Thomas stated that he would "overrule the *Lemon* test in all contexts." Justice Gorsuch also wrote an opinion concurring in the judgment, in which he was joined by Justice Thomas. In his opinion, "suits like this one should be dismissed for lack of standing." Justice Gorsuch explained that the "'offended observer' theory of standing has no basis in law." He reasoned that constitutional standing requires a "concrete and particularized injury," which an observer of a monument does not suffer. He traced the "offended observer" theory to *Lemon* and described the case as a "misadventure." Instead of the *Lemon* test, Justice Gorsuch would consider "whether the challenged practice fits 'within the tradition' of this country." This test should not turn on a "monument, symbol, or practice['s] age but its compliance with ageless principles."

Justice Ginsburg authored a dissent, which Justice Sotomayor joined. She wrote that the Establishment Clause "demands governmental neutrality among religious faiths, and between religion and nonreligion." In her view, the Court's decision "erodes that neutrality commitment" by creating a "presumption of constitutionality for longstanding monuments, symbols, and practices." Justice Ginsburg described the Latin cross as "the foremost symbol of the Christian faith" that is not transformed into a secular symbol when used as a war memorial. By maintaining the cross on a public highway, she believes Maryland has "elevate[d] Christianity over other faiths, and religion over nonreligion." This violates the Establishment Clause because the inquiry in cases "challenging the government's display of a religious symbol" is "whether the display has the effect of endorsing religion." And "when a cross is displayed on public property, the government may be presumed to endorse its religious content."

Justice Ginsburg disagreed that when the cross is used in the context of a war memorial it becomes a universal symbol of sacrifice. This position, in her view, "'[a]ttempts to secularize what is unquestionably a sacred [symbol] . . . .'" Even where used as a memorial, "the commemorative meaning of the cross rests on—and is inseparable from—its Christian meaning." Justice Ginsburg also disputed the Court's description of the Latin cross as a "'well-established' secular symbol commemorating, in particular, 'military valor and sacrifice [in] World War I.'" In her telling of history, while there was a debate of how to design permanent headstones following the war, "[e]veryone involved in the dispute . . . saw the Latin cross as a Christian symbol, not as a universal or secular one." Further, she

described the Bladensburg Cross an "outlier" and "an aberration . . . even in the era [in which] it was built and dedicated." Finally, she wrote that holding cross-shaped monuments to be unconstitutional would not necessarily require them to be torn down; they can sometimes be relocated to private land or their ownership could be transferred.

● *Gundy v. United States,* 17-6086. By a 5-3 vote (with a 4-Justice plurality opinion, a 1-Justice concurring opinion, and Justice Kavanaugh taking no part in the decision), the Court held that §20913(d) of the Sex Offender Registration and Notification Act (SORNA) does not violate the non-delegation doctrine. Section 20913(d) authorizes the Attorney General to "specify the applicability" of SORNA's registration requirements to sex offenders convicted prior to SORNA's enactment and "to prescribe rules for [their] registration." 34 U.S.C. §20913(d). The Attorney General issued a rule (finalized in 2010) specifying that SORNA's registration requirements apply to pre-Act offenders. 72 Fed. Reg. 8897. Herman Gundy, a pre-Act offender who never registered, challenged his failure-to-register conviction by arguing that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to specify the applicability of SORNA's registration requirements to pre-Act offenders. The district court and Second Circuit rejected this claim. Through a plurailty opinion by Justice Kagan and a concurring opinion by Justice Alito, the Court affirmed.

The plurality applied the Court's established precedent holding "that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." Considering SORNA's text, along with its context, purpose, and legislative history, the plurality determined—as the Court did in *Reynolds v. United States*, 565 U.S. 432 (2012)—that §20913(d) requires the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible and grants only the discretion to consider and address feasibility issues. The plurality pointed to SORNA's declaration of purpose—"to protect the public" by "establish[ing] a comprehensive national system for the registration" of sex offenders, §20901; and to its definition of "sex offender" as "an individual who was"—rather than "is"—convicted of a sex offense, §20911(1). These show, according to the plurality, that Congress intended the Act's registration requirements to apply to pre-Act offenders. The plurality found this conclusion further supported by legislative history, which revealed Congress' concern that SORNA serve to locate current sex offenders whose whereabouts were unknown. In light of Congress' intent that SORNA apply to pre-Act offenders, the plurality concluded that §20913(d)'s authorization to "specify the applicability" of registration requirements to pre-Act offenders "does not mean 'specify *whether* to apply SORNA' to pre-Act offenders at all," but "'[s]pecify *how* to apply SORNA' to pre-Act offenders if transitional difficulties require some delay." The plurality concluded that §20913(d) "easily passes muster" under the "intelligible principle" standard because "[t]he statute conveyed Congress' policy that the Attorney General require sex offenders to register as soon as feasible." It cautioned that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement programs."

Justice Alito concurred in the judgment because he could not "say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years." But Justice Alito would support reconsideration of that approach, which "has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards," were a majority of the Court willing to do so.

Justice Gorsuch dissented, joined by Chief Justice Roberts and Justice Thomas. The dissent rejected the plurality's "mutated version of the 'intelligible principle'" as having "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." The dissent discussed the framers' intent that Congress alone possess legislative powers and stated that they did not intend that "Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." The dissent understood such delegations to evade the deliberately "arduous" processes for enacting legislation and muddle accountability for government action. The dissent identified three constitutionally permissible types of congressional delegation. When Congress enacts a rule governing private conduct, it may (1) "authorize another branch to 'fill up the details'"; (2) "make the application of that rule dependent on executive fact-finding"; and (3) "assign the executive and judicial branches certain non-legislative responsibilities" that are already within those branches' constitutional authority, such as assigning the executive branch discretion in its application of a foreign-affairs-related statute. The dissent tracked the Court's use of the term "intelligible principle" from its first appearance in *J.W. Hampton, Jr. & Co. v. United* States, 276 U.S. 394, 409 (1928), and asserted that the Court, in using the term, "sought only to explain the operation of these traditional tests," and "gave no hint of a wish to overrule or revise them."

The dissent read §20913(d) as leaving the Attorney General "free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them," and "free to change his mind at any point or over the course of different political administrations." As such, found the dissent, the provision did not make any of the three constitutionally permissible delegations. The dissent rejected the plurality's reading of §29013(d) as limiting the Attorney General's discretion to matters of feasibility because the statute "says *nothing* about feasibility," and neither does SORNA's declaration of purpose. Justice Gorsuch concluded by saying that, "[i]n a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code."

● *McDonough v. Smith,* 18-485. By a 6-3 vote, the Court held that the statute of limitations for a §1983 claim that a prosecutor fabricated evidence runs from the termination of the challenged prosecution in the criminal defendant's favor. Edward McDonough, the commissioner of the county board of elections, was acquitted of charges arising from an investigation into his processing of forged absentee ballots. He then brought a §1983 claim against the prosecutor for fabricating evidence. The district court dismissed the claim as outside the three-year limitations period. The Second Circuit affirmed on the ground that McDonough brought his claim more than three years after he discovered that the evidence was false and caused his deprivation of liberty. In an opinion by Justice Sotomayor, the Court reversed.

Because McDonough did not specify the constitutional right infringed in his fabricated-evidence claim, the Court assumed without deciding that the Second Circuit correctly treated the claim as arising under the Due Process Clause. The Court further assumed without deciding that the Second Circuit's "articulations of the right at issue and its contours are sound." The Court then noted that it "often decides [§1983] accrual questions by referring to the common-law principles governing

analogous torts." It concluded that malicious prosecution was the common-law tort most analogous to McDonough's fabricated-evidence claim. And that tort "accrues only once the underlying proceedings have resolved in the plaintiff's favor." The Court concluded that a fabricated-evidence claim likewise cannot be brought prior to the favorable termination of the challenged prosecution. As the Court explained in *Heck v. Humphrey*, 512 U.S. 477 (1994), pragmatic concerns underlie malicious prosecution's favorable-termination requirement, namely, "avoiding parallel criminal and civil litigation over the same subject matter and the possibility of conflicting criminal and civil judgments." Those concerns, the Court found here, apply with equal force to fabricated-evidence claims. The Court also pointed to the consequences that would follow from the discovery rule adopted by the Second Circuit. In jurisdictions where prosecutions regularly last longer than the three-year limitations period, "criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them."

The Court then distinguished *Wallace v. Kato*, 549 U.S. 384 (2007), which held that the limitations period on a §1983 action alleging unlawful arrest under the Fourth Amendment begins to run as soon as the arrestee "becomes detained pursuant to legal process," not when he is later released. *Wallace* reasoned that a false-arrest claim "attacks the arrest only to the extent it was without legal process, even if legal process later commences. That feature made the claim analogous to common-law false imprisonment. By contrast, a claim like McDonough's centers on evidence used to secure an indictment and at a criminal trial, so it does not require 'speculat[ion] about whether a prosecution will be brought.' It directly challenges—and thus necessarily threatens to impugn—the prosecution itself." (Citations omitted.)

Justice Thomas dissented, joined by Justices Kagan and Gorsuch. The dissent would have dismissed the case as improvidently granted because McDonough did not identify the specific constitutional right at issue in his fabricated-evidence claim. Yet, the dissent said, identifying the specific constitutional right at issue is necessary so that the Court can "adhere to the contours of the right" when selecting or adjusting a common-law approach, and can "confirm that he has a constitutional claim at all." In the dissent's view, "it would be both logical and prudent to address that antecedent question before addressing the statute of limitations for that claim."

● *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 17-1705. The Court remanded for further consideration a case concerning a party's ability to challenge in an enforcement action the Federal Communication Commission's interpretation of statutory language, notwithstanding the Administrative Orders Review Act (Hobbs Act), which limits jurisdiction over challenges to the FCC's orders. Carlton & Harris brought a class action on behalf of businesses that received faxes advertising free copies of PDR's Physician Desk Reference. Carlton & Harris alleged that PDR's faxes were "unsolicited advertisements" in violation of the Telephone Consumer Protection Act of 1991 (Telephone Act), 47 U.S.C. §227(b)(1)(C). The district court dismissed the case, determining that the faxes were not "unsolicited advertisements." The Fourth Circuit reversed, holding that under the Hobbs Act it was compelled to rely on the FCC's interpretation of "unsolicited advertisement" in a 2006 Order, which encompassed "any offer of a free good or service." Because the Hobbs Act gives the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain orders of the FCC, 28 U.S.C. §2342(1), it concluded that PDR could not contest the FCC's interpretation in this case. The Court granted certiorari to determine whether the Hobbs

Act required the district court to accept the FCC's interpretation of the Telephone Act. In an opinion by Justice Breyer, the Court vacated and remanded, without answering the question presented.

The Court explained that it "found it difficult to answer" the question presented, "for the answer may depend upon the resolution of two preliminary issues" that were not considered below. It therefore vacated the Fourth Circuit's judgment and remanded the case. First, the Court asked the court of appeals to consider "the legal nature of the 2006 FCC Order," in particular whether it is the equivalent of a "legislative rule" or an "interpretive rule." While a legislative rule "has the 'force and effect of law,'" an interpretive rule "simply 'advis[es] the public'" and lacks such legal force. If the FCC Order is an interpretive rule, the Court explained, "it may not be binding on a district court," avoiding the question of the Hobbs Act's jurisdictional exclusivity for challenging administrative orders. Second, the Court remanded for consideration of whether PDR had "a 'prior' and 'adequate' opportunity to seek judicial review of the Order." "If the answer is 'no,' it may be that the Administrative Procedure Act permits PDR to challenge the validity of the Order . . . even if the Order is deemed a 'legislative' rule."

Justice Thomas wrote an opinion concurring in the judgment, which Justice Gorsuch joined. He wrote "separately to address a more fundamental problem" with the Fourth Circuit's holding: "It rests on a mistaken—and possibly unconstitutional—understanding of the relationship between federal statutes and the agency orders interpreting them." Justice Thomas opined that if the Hobbs Act "required courts to treat 'FCC interpretations of the [Telephone Act] as authoritative, then the act would trench upon Article III's vesting of the 'judicial Power' in the courts." It would suffer the additional constitutional infirmity, in his view, of allowing agencies to issue binding pronouncements on matters of private conduct without regard to statutory text, thus "'permit[ting] a body other than Congress' to exercise the legislative power, in violation of Article I." Justice Thomas emphasized the need to reconsider "precedents requiring judicial deference to certain agency interpretations," citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Justice Kavanaugh also concurred in the judgment, joined by Justices Thomas, Alito, and Gorsuch. Although he "agree[d] with the Court that we should vacate the judgment of the Fourth Circuit," he "would conclude that the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong." Justice Kavanaugh identified a "general rule of administrative law" that a defendant in an enforcement action "may argue that an agency's interpretation of a statute is wrong, at least unless Congress has expressly precluded the defendant from advancing such an argument." And the Hobbs Act, in his view, "does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action." This distinguishes the Hobbs Act from a category of statutes, like CERCLA and the Clean Air Act, that "authorize facial, pre-enforcement judicial review and expressly preclude judicial review in subsequent enforcement actions." Thus, "the District Court should interpret the [Telephone Act] under usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation." To do otherwise, Justice Kavanaugh explained, would invite unwelcome practical consequences: "Denying judicial review of an agency's interpretation of the statute in enforcement actions can be grossly inefficient and unfair." Every potentially affected party would have "to bring pre-enforcement . . . challenges against every agency order that might possibly affect them in the future." For this reason,

he wrote, "Congress traditionally takes the extraordinary step of barring as-applied review in enforcement proceedings only . . . where the regulated parties are likely to be well aware of any agency rules and to have both the incentive and the capacity to challenge those rules immediately." Otherwise, the unfairness of precluding judicial review "raises a serious constitutional issue" under the Due Process Clause.

● *Manhattan Community Access Corp. v. Halleck,* 17-1702. By a 5-4 vote, the Court held that public access channel Manhattan Neighborhood Network (MNN) is not a state actor subject to the First Amendment. New York cable operators are required to set aside channels for public access, which are to be used free of charge on a first-come, first-served basis and operated by the cable operator unless the local government designates a private entity to operate them. MNN, a private nonprofit, was designated by New York City to operate Time Warner's public access channels. After receiving complaints about a film that DeeDee Halleck and Jesus Papoleto produced and aired on the public access channels, MNN suspended their use of the channels. The two producers sued MNN, claiming that MNN violated their First Amendment free-speech rights by restricting their access to the channels based on the content of their film. The district court dismissed the claim on the ground that MNN is not a state actor subject to First Amendment restrictions. The Second Circuit reversed, holding that the channels are public forums and that MNN, in operating those forums, is a state actor. In an opinion by Justice Kavanaugh, the Court reversed in part and remanded.

The Court found that the "[t]he threshold problem with [the producers'] First Amendment claim is a fundamental one: MNN is a private entity," which qualifies as a state actor only if it performs a function that is "traditionally *and* exclusively" performed by the government. The Court identified "the relevant function" as "operation of public access channels on a cable system," and determined that it was not one traditionally and exclusively performed by the government. Since the 1970s, "a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries." The Court rejected the producers' contention that operation of public access channels is equivalent to "operation of a public forum for speech" because "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." If opening up one's private property for speech subjected one to First Amendment constraints, then "[p]rivate property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether."

Nor was the Court persuaded that MNN is a state actor because it was designated by the government to operate the public access channels and its operation of those channels is heavily regulated. The Court viewed MNN's designation as "analogous to a government license, a government contract, or a government-granted monopoly," which the Court has held does not convert the private entity into a state actor. The Court dismissed the theory that being regulated by the state makes one a state actor as "entirely circular and would significantly endanger individual liberty and private enterprise"; it could "eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms." The Court also rejected the producers' alternative argument that the public access channels are the property of New York City, rather than Time Warner or MNN, such that MNN is "in essence simply managing government property on behalf of

New York City." The Court found no evidence that a government owns or leases the cable system generally or the public access channels specifically; the government has no property interest in either.

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, dissented. The dissent stated that the majority "mistakes a case about the government choosing to hand off responsibility to an agent for a case about a private entity that simply enters a marketplace." The dissent faulted the Court for focusing on the fact that both Time Warner and MNN are private entities. In its view, "[t]he issue is not who owns the cable network or that MNN uses its own property to operate the channels," but "whether the channels themselves are purely private property." The dissent found that the city had a significant property interest in the public access channels because the state "required the City to obtain public-access channels from Time Warner in exchange for awarding a cable franchise"; "the exclusive right to use these channels (and, as necessary, Time Warner's infrastructure) qualifies as a property interest, akin at the very least to an easement." Because state law prohibits the exercise of any editorial control over the public access channels and makes them available on a first-come, first-served, nondiscriminatory basis, the dissent would have found the channels a public forum. The dissent concluded that because the channels are a public forum, "it follows that New York cannot evade the First Amendment by contracting out administration of that forum to a private agent." So "[w]hen MNN took on the responsibility of administering the forum, it stood in the City's shoes and became a state actor for the purposes of 42 U.S.C. §1983." All told, said the dissent, "[t]his is not a case about bigger governments and small individuals," but "about principals and agents." The dissent thus viewed as "inapposite" the line of precedent holding that a private entity does not, by entering a heavily regulated market, become a state actor. "MNN is not a private entity that simply ventured into the marketplace," it said.

II. Cases Granted Review

● *Financial Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Investment, LLC*, 18-1334; *Aurelius Investment, LLC v. Puerto Rico*, 18-1475; *Official Committee of Debtors v. Aurelius Investment, LLC*, 18-1496; *United States v. Aurelius Investment, LLC*, 18-1514; *UTIER v. Financial Oversight & Mgmt. Bd. for Puerto Rico*, 18-1521. The Court will resolve whether members of the Financial Oversight and Management Board, created to provide oversight of Puerto Rico's financial affairs, are "Officers of the United States" for purposes of the Appointments Clause, who require Senate confirmation. The Court will also resolve whether, if they are, the Board's actions prior to the First Circuit's ruling in this case are subject to the *de facto* officer doctrine, which "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment to office is deficient."

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. 2101 *et seq*., to address the economic emergency facing Puerto Rico. The Commonwealth and its instrumentalities carried about $71.5 billion in outstanding debt, more than its economy's entire annual output. PROMESA, enacted pursuant to the Territories Clause, art. IV, §3, created a Financial Oversight and Management Board as an entity within Puerto Rico's government. Among its powers, the Board is authorized to approve the Commonwealth's fiscal plans and budgets

and supervise the handling of its debts. Title III of PROMESA establishes a debt-restructuring procedure for the Commonwealth government, modeled on federal bankruptcy law. "The Board serves as Puerto Rico's sole representative in Title III proceedings, and it is the only entity empowered to propose a debt-adjustment plan on behalf of Puerto Rico and its instrumentalities." The Board is composed of seven voting members and the Governor of Puerto Rico (or his designee), who is a nonvoting member. The President selects one member at his sole discretion; and selects the other six from lists of candidates provided by congressional leadership. When the President selects a member from those lists, "no Senate confirmation is required." 48 U.S.C. §2121(e)(2)(E). The President may appoint persons not on the lists with the advice and consent of the Senate. President Obama appointed all seven voting members of the Board, six from the congressionally provided lists and one at his sole discretion.

In May 2017, the Board initiated a Title III proceeding in federal district court. It proposed a plan of adjustment for the debts of the Puerto Rico Sales Tax Financing Corporation, which the court confirmed in February 2019. The proofs of claim filed by creditors in this proceeding "implicate approximately $74 billion of bond debt and $49 billion of unfunded pension liabilities." In August 2017, a group of hedge funds and other creditors moved to dismiss the Title III proceeding on the ground that the Board's members were appointed in violation of the Appointments Clause. The district court denied the motion. The First Circuit reversed. 915 F.3d 838. The court reasoned that the "specific governs the general"—and deemed the Appointments Clause specifically applicable to the appointment of federal officers, whereas the Territories Clause was only "of general application authorizing Congress to engage in rulemaking for the temporary governance of territories." Just as the Territories Clause does not override Article I's presentment requirement for laws involving territories, neither does it override the Appointments Clause, which "serves as one of the Constitution's important structural pillars, one that was intended to prevent the 'manipulation of official appointments.'" The First Circuit then held that Board members qualify as "Officers of the United States." Turning to remedy, the court declined to "cast a specter of invalidity over all of the Board's actions until the present day. To the contrary, we find that application of the *de facto* officer doctrine is especially appropriate in this case." The court reasoned that "the Board Members were acting with the color of authority—namely, PROMESA—when, as an entity, they decided to file the Title III petitions on the Commonwealth's behalf, a power squarely within their lawful toolkit. And there is no indication but that the Board Members acted in good faith in moving to initiate such proceedings." The court therefore declined to order dismissal of the Title III proceeding; stated that its ruling "does not eliminate any otherwise valid actions of the Board prior to the issuance of our mandate in this case"; and provided that its mandate would not issue for 90 days.

One group of petitioners, which includes the United States, challenges the First Circuit's Appointments Clause ruling. In the United States' words, "For the first time in the Nation's history, a court has declared that territorial officials must be appointed in conformity with the Appointments Clause. That holding, which cannot be squared with this Court's precedents, necessarily implies that the government of Puerto Rico has been unconstitutional since its inception. The court of appeals' reasoning similarly calls into question territorial home rule, including statutes that establish popular elections in Puerto Rico, Guam, and the U.S. Virgin Islands." The United States points to the Court's statement that, when exercising the Territories Clause's power to legislate for a territory, "'Congress

has the entire dominion and sovereignty, national and local, Federal and state.'" The Court has therefore held, for example, that nondelegation principles do not apply to territorial governments. Further, argues the United States, "[b]ecause the Board is a territorial entity, created under Article IV, its members do not occupy offices within the Executive Branch of the federal government. They are accordingly not "Officers *of the United States*," as the Appointments Clause uses that term. Instead, they are Article IV officers, exercising a delegated portion of Congress's own plenary authority over the territories." (Citation omitted.) The United States notes that the Northwest Ordinance did not comply with the Appointments Clause—and "that pattern of non-Article II territorial appointments was repeated numerous times over the next two centuries. Indeed, Congress has established elected legislatures in the vast majority of territories for which it created governments."

A second group of petitioners challenges the First Circuit's remedial ruling. They rely on *Ryder v. United States*, 515 U.S. 177 (1995), and other "decisions of th[e] Court that declined to apply the *de facto* officer doctrine to Appointments Clause and other separation-of-powers violations, and that limited past applications of the doctrine to the peculiar facts of the relevant cases." They insist that, "[a]s *Ryder* makes plain, the *de facto* officer doctrine does not allow courts to validate governmental actions taken in flagrant violation of the Appointments Clause over a prolonged period; otherwise, no 'rational litigant' would bring such a structural challenge." They maintain that the Court has applied the doctrine in only two narrow situations, not applicable here: "to limit relief flowing from 'merely technical' statutory defects in an officer's appointment"; and "to excuse defects in an officer's appointment that are raised in a 'collateral[] attack[]' on a judgment, such as in a habeas petition." Generally, however, "one who makes a timely challenge to the constitutional validity of the appointment of an officer" is "entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder*, 515 U.S. at 182-83.

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