IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZULAY RODRÍGUEZ-VÉLEZ, et al. Plaintiffs V.S. **PEDRO R. PIERLUISI-URRUTIA**, in his official capacity as Governor of the Commonwealth of Puerto Rico Defendant	**CASE NO. 21-1366 (PAD)** **DECLARATORY JUDGMENT; INJUNCTIVE AND OTHER EQUITABLE RELIEF**

BRIEF OF *AMICUS CURIAE* FILED BY THE ASOCIACIÓN DE ALCALDES DE PUERTO RICO

TO THE HONORABLE COURT:

COMES NOW *amicus curiae* **Asociación de Alcaldes de Puerto Rico**, through the undersigned counsels and very respectfully **SETS FORTH** and **PRAY:**

I. INTRODUCTION

The Asociación de Alcaldes de Puerto Rico (hereinafter referred to as "Asociación") is grateful for the Court's graceful exercise of judicial discretion to allow its appearance as *amicus curiae* in this important case (docket number 64). Whatever is ultimately decided in the instant litigation will directly impact all 78 municipalities. Regardless of party affiliation or other ideological leanings, Puerto Rico has been fortunate to have mayors who, since a pandemic was declared on March 2020, have used the legal authority vested on them[1] to establish certain restrictions that are

[1] 21 P.R. Laws Ann. 7013(o) (allowing the use of municipal executive and legislative powers to further public health interests); 21 P.R. Laws Ann. § 7028(u) (authorizing the mayor to decree states of emergency through executive order); 21 P.R. Laws Ann. § 7065(l) (authorizing the municipal legislature to ratify

consonant with the prevailing scientific consensus and that are reasonably aimed at curbing the spread of COVID-19.

Plaintiffs in the instant case object to a very moderate vaccine reasonable issued by Governor Hon. Pierluisi-Urrutia for public service employees[2], which has been almost universally adopted (or at least some version of it has) by the vast majority of municipal governments. The objections raised by the plaintiffs are mostly grounded on sincerely held religious convictions. Needless to say, under the First Amendment plaintiffs are free to have those convictions. What the Constitution does not mandate is that the Government act pursuant to those religious beliefs or that religious convictions exempt believers from legitimate regulation adopted by the state.

As explained by the Eighth Circuit, "[t]he religious freedom to believe is absolute but the freedom to act or exercise one's religion is not absolute". Native American Council of Tribes v. Solem, 691 F.2d 382, 384 (8th Cir. 1982). Were the state to -in observing an individual's right to religious freedom- be limited from protecting the common good with regulation to be applied across the board, sincere belief in Aztec religion would raise a First Amendment defense in a murder trial, arguing that he was merely performing a ritual sacrifice to appease his gods, an absurd result to be avoided at all costs. A good example of this important aspect of religious freedom may be found in Reynolds v. United States, 98 U.S. 145 (1873), the authorities of the then-territory of Utah charged Mr. Reynolds with the felony of bigamy and, one of the defenses raised

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states of emergency decreed by the mayor and to authorize emergency expenditures and other obligations).

[2] While it is not at the core of this action, paragraphs 62-98 of the complaint seem to be an invitation for the Court to second-guess the Government's legitimate exercise of discretion to decide the existence and duration of a health emergency.

was that the defendant was a member of the Church of Jesus Christ of the Latter-Day Saints, and as such held a sincere doctrinal belief in polygamy, a claim that, upon a deep dive into the Founder's debates on this matter, was rejected with the conclusion that "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion". Id. at 161-166.

Individual religious beliefs are sacred, and the state has no business telling its citizens what to believe. This however is a duty owed to each individual citizen which must necessarily yield to the reasonable protection of collective well-being. An example of this is the Supreme Court's ruling upholding the constitutionality of a Massachusetts statute that **summarily** suspended the driver's license of anyone who refused to submit to an invasive breath alcohol test, based on the well-settled notion that state governments have traditionally been granted "**great leeway in adopting summary procedures to protect public health and safety**". Mackey v. Montrym, 443 U.S. 1, 17 (1979) (emphasis added). In other words, "the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests", meaning that "obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution". Northern P. R. Co. v. Minnesota, 208 U.S. 583, 597 (1908); see also McGuire v. Reilly, 260 F.3d 36, 44 (1st Cir. 2001) (finding that "promoting public health" is one of the "conventional objectives" of the state's police power).

Against this backdrop, we now address plaintiffs' legal contentions[3].

II. DISCUSSION

A) BRIEF HISTORICAL CONTEXT

A reading of the pleadings in this case might suggest that the Court is being asked to enforce basic constitutional norms to prevent an unprecedented overreach by the government into personal freedoms. The fact is that harsh restrictions aimed at protecting public health in the face of contagious disease are nothing new.

Laws to prevent the contagion with infectious disease are indeed **ancient** in nature. For example, one important tenet of Mosaic law can be found in the Book of Leviticus, chapters 13 and 14, which set forth very specific measures for dealing with "the plague of leprosy" and chapter 15 of which deals with the treatment of those afflicted by other diseases (such as "the flow of semen"), all of whom suffered the dire consequences of being declared "unclean" and, as such, separated from the rest of the People of Israel.

Later the Fourteenth Century the Venetian Republic, zealously enforced laws requiring all sailors to remain outside the City 40 days or a "*quarantena*"[4] after arrival in port, in order to curtail the spread of the plague and other contagions of concern at that time.

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[3] We eschew any discussion of the facts, as the Court received evidence from both sides during the preliminary injunction hearings that it held and, at the end of the day, the facts that justify the challenged vaccine mandate are of such nature that they be subject to judicial knowledge. For instance, as of Saturday, September 25, 2021, a grand total of **3,109** deaths. https://covid19.who.int/region/amro/country/pr. **That is more than twice the population of Culebra and about 65.38% of the population of Maricao**. https://www.census.gov/library/stories/state-by-state/puerto-rico-population-change-between-census-decade.html. Paragraphs 92-114 seem to go through great pains to provide statistical support for downplaying the virus in what is ultimately a futile attempt to jam the proverbial square peg into a round hole.

[4] This is, of course, the origin of the word "quarantine".

Of course the United States government has historically implemented public health measures that, while inevitably inconveniencing some groups, protect the citizenry as a whole. It is a well known fact that the first vaccine mandate was issued by then General and future President George Washington in 1777 (i.e., in the midst of the Revolutionary War), as he mandated the inoculation of the Continental Army's troops against smallpox[5].

As early as 1798, the Fifth Congress enacted the "Act for the Relief of Sick and Disabled Seamen", 1 Stat. 605 (1798), which established the Marine Hospital Service, which was charged from preventing sailors from introducing infectious diseases into the country. Eighty years thereafter, Congress enacted the "National Quarantine Act", 21 Stat. 5 (1878), which allowed the imposition of even more restrictive measures evolving into current legislation that allows the Surgeon General to enact regulations providing "for the **apprehension and examination** of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State". 42 U.S.C. § 264(d)(1) (emphasis added).

To summarize, governments throughout history have endeavored to protect the life and safety of the collective, even where the measures imposed may slightly or substantially inconvenience some individuals.

[5] https://historynewsnetwork.org/article/180947

B) THE JACOBSON PRECEDENT

Over one century ago, the Supreme Court upheld a decree by State of Massachusetts' that established a vaccine mandate requiring citizens to receive inoculations against smallpox, observing that:

> **We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State**. While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take; and we do not perceive that this legislation has invaded by right secured by the Federal Constitution.

Jacobson v. Massachusetts, 197 U.S. 11, 37-38 (1905) (emphasis added)

The law created by Jacobson is not merely inconvenient to plaintiffs' case, it is **fatal** to said parties' claims. Understandably, the complaint seeks to downplay this decision as some arcane relic that is no longer good law. Plaintiffs fall way short of their goal. The doctrine of *stare decisis* requires a much more robust showing since, "[t]o

reverse a decision, we demand a 'special justification,' over and above the belief 'that the precedent was wrongly decided'". Allen v. Cooper, 140 S. Ct. 994, 1003 (2020) (internal citation omitted).

At paragraph 2 of the complaint, plaintiffs attempt to discredit Jacobson by pointing to the Court's reliance on that case to validate a Virginia statute the involuntary sterilization of the mentally ill in Buck v. Bell, 274 U.S. 200 (1927). While Jacobson is cited twice in this infamous opinion as an example of other exercises of the state's police power to have been validated by the Court, the majority's *ratio decidendo* was sadly grounded on notions reminiscent of Nazi Germany, such as "[i]t would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence", adding that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind", concluding that "[t]hree generations of imbeciles are enough". Buck, 274 U.S. at 207. As pointed out by Justice Thomas, this decision constituted a full endorsement of the unethical concept of "eugenics". Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780, 1786-1787 (2019) (Thomas, J., concurring).

While the reference to the noxious holding in Buck is a clever move from a rhetorical point of view, a cursory inspection of the underlying issue in that case, *vis-à-vis* the one in Jacobson suffices to disregard the argument as a red herring. It is impossible to say (at least with a straight face) that requiring citizens to protect

themselves and others against a deadly disease by submitting to a safe medical procedure is in the same universe as forcibly mutilating the bodies of the mentally ill to permanently prevent them from having any offspring. Contrary to Buck, which is only cited to -justifiably- critique its rationale, Jacobson has steadfastly been deemed as good law by contemporary courts, especially in the age of COVID. See eg. South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring) (citing Jacobson for the notion that so long as the state's "broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people"); Gonzáles v. Carhart, 550 U.S. 124, 163 (2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty"); Big Tyme Invs., L.L.C. v. Edwards, 985 F.3d 456, 465-468 (5th Cir. 2021) (upholding bar closures in Louisiana to arrest the spread of COVID)[6]; Harris v. Univ. of Mass., 2021 U.S. Dist. LEXIS 162444, at * 16-19 (D. Mass. 2021) (upholding vaccine mandate in a university); Vincent v. Bysiewicz, 2020 U.S. Dist. LEXIS 191941, at * 35 (D. Conn. 2020) (denying injunctive relief against state's mask mandate); Stewart v. Justice, 502 F. Supp. 3d 1057, 1063 (W.D. Va. 2020) (denying injunctive relief while observing that it is "the apparent consensus that Jacobson applies to challenges to COVID-19 related restrictions"); League of Independent Fitness Facilities & Trainers v. Whitmer, 468 F. Supp. 3d 940, 948-949 (W.D. Mich. 2020) (observing that"[a] growing number of courts, both federal and state, have applied

[6] This Court had previously rejected challenges to COVID restrictions while relying on Jacobson. In re Abbott, 956 F.3d 696, 711 (5th Cir. 2020).

Jacobson to COVID-19 related regulations in the last few months"). Probably the best-known decision validating the continued force of Jacobson is Klaassen v. Trustees of the University of Indiana, ___ F.3d ___, 2021 U.S. App. LEXIS 22785 (7th Cir. 2021), a case that gained national attention because of the Supreme Court's refusal for a *pendente lite* stay of the challenged vaccination mandate. See Klaassen v. Trustees of the University of Indiana, ___ U.S. ___, 2021 U.S. LEXIS 3677 (2021)

Just this last summer, a Judge in the Northern District of Indiana was faced with a similar argument that Jacobson has been tacitly overturned by Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (cited by plaintiffs here for an undeveloped argument built around a concurring opinion issued by Justice Gorsuch). Klaassen v. Trs. of Ind. Univ., 2021 U.S. Dist. LEXIS 133300 (N.D. Ind. 2021). That Court cogently rejected **the very same arguments** anti-Jacobson brought by plaintiffs herein at paragraph 2 of the complaint namely: 1) the decision's use in the fascistic holding in Buck somehow subtracted from its precedential value; and 2) as per Justice Gorsuch's concurring opinion in Cuomo, Jacobson does not conform to modern standards of scrutiny. Credit where credit is due, Judge Leichly did such a great job addressing these contentions, must agree with the sister District Court that:

> The students read Cuomo as implicitly overruling Jacobson, or at least as abrogating it. Though the Supreme Court may overrule a case without explicitly saying so, see Levine v. Heffernan, 864 F.2d 457, 461 (7th Cir. 1988), this is a tall task. Before a federal court concludes that the Supreme Court has implicitly overruled a prior decision, it must be "certain or almost certain that the decision or doctrine would be rejected by the higher court if a case presenting the issue came before it." Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 741 (7th Cir. 1986). **This high bar is rarely met**. Id. It isn't met here. Cuomo and Jacobson involved

entirely different modes of analysis, entirely different rights, and entirely different kinds of restriction. See Cuomo, 141 S. Ct. at 70 (Gorusch, J., concurring) (saying the same). "Jacobson applied what would become the traditional legal test associated with the right at issue"—exactly what Cuomo did. Id. The cases walk hand-in-hand.

This history isn't all rosy. Unsuccessful thus far, the students turn to Buck v. Bell, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927). In a rather infamous case, an eight-member majority, save for one dissenting justice, upheld the involuntary sterilization of a woman based on a Virginia law that rested on faulty science and public support for "eugenics"—the repulsive notion that the human race could be improved by controlling reproduction from those with developmental challenges, mental illness, or criminal histories. Citing Jacobson for the principle that "compulsory vaccination is broad enough to cover cutting the Fallopian tubes," and offering the chilling justification that "[t]hree generations of imbeciles are enough," the majority upheld the law against a Fourteenth Amendment challenge. Id. at 207. **This case isn't Buck; and one over-extension of Jacobson merely counsels once more that the Constitution cannot be cut loose even now, in a pandemic's seeming twilight**. Cuomo, 141 S. Ct. at 68.

Jacobson was written before the modern tiers of constitutional scrutiny, so a legitimate question is the extent to which Jacobson applies with full force today. This is a topic of some debate. See, e.g., id. at 70 (Gorsuch, J., concurring) ("Jacobson didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so."); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608, 207 L. Ed. 2d 1129 (2020) (Alito, J., dissenting) ("it is a mistake to take language in Jacobson as the last word on what the constitution allows public officials to do during the COVID-19 pandemic"); Big Tyme Invs., LLC v. Edwards, 985 F.3d 456, 470-71 and n.3 (5th Cir. 2021) (Willett, J., concurring) ("I am not the first to express doubts about Jacobson"); S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 943 n.2 (9th Cir. 2020) (Collins, J., dissenting) ("I am unable to agree with the Fifth Circuit's conclusion that Jacobson instructs that all constitutional rights may be reasonably restricted to combat a public health emergency.") (quotations omitted), cert. denied, 140 S. Ct. 1613, 207 L. Ed. 2d 154 (2020). **No Supreme Court opinion has overruled or abrogated Jacobson**.

Considering the modern tiers of constitutional scrutiny, the court reads Jacobson and Cuomo harmoniously, appreciating their respective spheres. Though Jacobson was decided before tiers of scrutiny, it effectively endorsed—as a considered precursor—rational basis review of a

> government's mandate during a health crisis. See Jacobson, 197 U.S. at 31; see also Cuomo, 141 S. Ct. at 70 (Gorusch, J., concurring). In its words, if a law purporting to be enacted to protect public health "has no real or substantial relation to [that legitimate aim]" or if the law proves "a plain, palpable invasion of rights secured by the fundamental law," the court's job is to give effect to the Constitution. Jacobson, 197 U.S. at 31. Should the court have this melding of history and modernity wrong in faithfully adhering to the Fourteenth Amendment's plain original meaning of "life" and "liberty," comfort should come in knowing that Jacobson, whether rational basis review by any other name, leads to the same result today.
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> This view remains consistent with the right at stake in Jacobson: though a true "liberty" proved at stake—the right to refuse a vaccine during a smallpox epidemic—this interest in bodily autonomy, though protected by the Constitution, wasn't fundamental under the Constitution to require greater scrutiny than rational basis review. See Sweeney, 767 F.3d at 668 (rational basis review for infringements on non-fundamental rights). At the same time, Jacobson didn't hold that the government's authority in a pandemic balloons for it do whatever it wants in the name of public safety.
>
> Jacobson instead counseled that federal courts should require a rational relation to a legitimate interest in public health. See Jacobson, 197 U.S. at 31; Cuomo, 141 S. Ct. at 70 (Gorsuch, J., concurring). **That Cuomo imposed heightened scrutiny of the government's interference with the free exercise of religion—a fundamental right under the First Amendment—was presciently contemplated a century beforehand by Jacobson: a court should intervene if a state imposes a regulation that is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Jacobson, 197 U.S. at 31 (emphasis added)**. Because Cuomo involved a fundamental right, a "right[] secured by the fundamental law" under today's jurisprudence, the court intervened. See Cuomo, 141 S. Ct. at 67; see also Glucksberg, 521 U.S. at 721 (Fourteenth Amendment forbids the government to infringe "fundamental" liberty interests at all, unless it has narrowly tailored its law to serve a compelling state interest). The Constitution's original meaning should be so enduring.

Id. at * 51-56 (emphasis added)

Like death and taxes, unless and until the Supreme Court holds otherwise, the Jacobson precedent is unavoidable.

C) FOURTEENTH AMENDMENT CLAIM

For the previously stated reasons, plaintiffs' Fourteenth Amendment due process challenge must be assessed under the Jacobson holding that, in light of a legitimate health crisis which might be substantially ameliorated through vaccination, the state (and there is no law indicated that Puerto Rico should not be treated as a state for such purposes) may legitimately mandate compulsory vaccination, save for those unfit for immunization.

While the complaint does not attempt to distinguish between the procedural and the substantive aspects of plaintiffs' due process claim, such claims are analyzed under different prisms. As explained by Judge Selya "[w]hen a procedural due process claim is advanced, the proper focus must be on the manner in which the state has acted: 'how and when' the alleged deprivation was effected", whereas "a substantive due process claim implicates the essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible". Amsden v. Moran, 904 F.2d 748, 753 (1st Cir. 1990).

It would seem that plaintiffs' procedural gripe boils down to the very naked assertion that "[t]he plaintiffs, however, were offered no hearing or due process of law". See Docket Number 1, at ¶ 143. They cite no legal authority whatsoever to attempt to answer the question asked in all procedural due process cases: "what process is due?". Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In any event, if keeping intoxicated drivers off the streets sufficed to justify summary action in Mackey, the still-applicable

holding in Jacobson and the perils of the deadliest pandemic in a century must justify the issuance of a vaccine mandate to government employees without having to grant individual hearings to each one of the potential thousands of opponents.

As to the substantive due process claim, Jacobson suffices to reject it. Notably, if plaintiffs were to mount a worthwhile attack on that 1905 precedent, they would have to persuade this Honorable Court, not only that a vaccination mandate is improper but that it would **shock the conscience** to submit public employees to such mandate, something that is not even pled in the complaint. United States v. Salerno, 481 U.S. 739, 746 (1987) (remarking that the substantive component of the Due Process Clause "prevents the government from engaging in conduct that 'shocks the conscience', or interferes with rights 'implicit in the concept of ordered liberty'") (internal citation omitted).

There is no due process violation here.

D) PREEMPTION

Finally, plaintiffs contend that the Governor's vaccine mandate is preempted by federal law, specifically, the U.S. Food and Drug Administration's emergency authorization of three brands of COVID-19 vaccines. This strained argument does not hold water. Citations to specific statutory authority are conspicuously lacking.

There are two known types of preemption: "express" and "implied", the latter being subdivided into "field" preemption (when the federal regulatory scheme is so pervasive that there is no room for the state to legislate) and "conflict preemption"

(when the federal and state schemes cannot be reconciled. AES Puerto Rico, L.P. v. Trujillo-Panisse, 133 F. Supp. 3d 409, 420 (D.P.R. 2015).

Express preemption is out the window, as plaintiffs do not identify a federal statutory or even administrative mandate proscribing states and/or territories from imposing vaccine mandates. There is no field preemption either, as the emergency use regulatory framework only covers the authorization by federal health authorities for the use of a particular medication for a specific purpose.

Plaintiffs seem to be arguing conflict preemption saying, without any effort at elaboration, that vaccine mandates are incompatible with federal guidance requiring "informed consent". This figure -typically discussed in the context of medical malpractice actions- has been construed as one that "imposes upon medical practitioners the duty to inform 'patients of the nature and risks of the proposed treatment so as to place the patient in a position to reach an intelligent and informed decision'", which in turn is based on "the tenet that every person has the right 'to self-determination, that is, to freely decide what can be done with his or her body . . . .'". Santana-Concepción v. Centro Medico Del Turabo, 2012 U.S. Dist. LEXIS 108637, at * 11 (D.P.R. 2012) (citing Puerto Rico Supreme Court decisions) (internal citations omitted). Hence, the only way in which informed consent would be implicated in the context of a COVID-19 immunization would be if the person administering it failed to advise the patient of the possible adverse reactions and/or of the possible side effects. This would happen, if at all, in specific instances **during the process of vaccination** and bears no relation whatsoever to the vaccination mandate being challenged herein.

E) SUPPLEMENTAL CLAIMS

The fact that plaintiffs' federal claims fail on the merits and basic notions of comity counsel against deciding the Puerto Rico constitutional claims in this case. It is however worth noting that the Puerto Rico Supreme Court cited Jacobson as good law 79 years after it was issued. See Estado Libre Asociado de Puerto Rico v. Coca-Cola Bottling Company of Puerto Rico, 115 D.P.R. 197, 207 (Trías Monge, C.J.).

WHEREFORE it is very respectfully requested from this Honorable Court that the Court consider the arguments brought forth by the *amicus* in its final ruling in the instant case.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the instant document has been filed with the Court's CM/ECF System, which will simultaneously serve notice on all counsels of record, to their registered e-mail addresses. Any non-registered attorneys and/or parties will be served via regular mail.

In San Juan, Puerto Rico this 25th day of September, 2021.

RESPECTFULLY SUBMITTED,

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