No. 22-96

IN THE

Supreme Court of the United States

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

Petitioner,

v.

CENTRO DE PERIODISMO INVESTIGATIVO, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer-advocacy organization with members in every state. Since its founding in 1971, Public Citizen has worked before Congress, administrative agencies, and courts for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has long sought to preserve and expand access to courts for individuals harmed by corporate or government wrongdoing, and to maintain the federal courts' authority to provide appropriate redress efficiently and effectively. Accordingly, Public Citizen has a longstanding interest in the scope of government immunity from suit, which diminishes the ability of individuals injured by state actors to seek redress, and it has frequently filed briefs as amicus curiae in cases involving sovereign immunity and other immunity doctrines.

Throughout its 51 years, Public Citizen has also supported government transparency and advocated for legislative improvement of, agency compliance with, and judicial enforcement of freedom of information laws at the federal and state levels. Public Citizen itself relies on those laws as important tools for obtaining information used in its work. For these reasons, Public Citizen has litigated many freedom of information cases on its own behalf and submitted amicus curiae briefs in many others.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

This case presents a rare instance in which Public Citizen's interests in immunity doctrines and freedom of information laws meet—rare because freedom of information laws almost universally waive sovereign immunity and allow lawsuits to be brought directly against sovereign entities. The law of the Commonwealth of Puerto Rico, whose immunity the Financial Oversight and Management Board of Puerto Rico invokes here, is no different in this respect.

Public Citizen submits this brief because of its concern that the focus of the Oversight Board (and the United States as amicus curiae) on whether Congress has abrogated Puerto Rico's sovereign immunity in actions filed against the Oversight Board overlooks two questions that are predicates to an intelligent resolution of that issue: first, whether, under the law of Puerto Rico, sovereign immunity can be interposed as a defense to a claim for the access to records that Puerto Rico's constitution requires; and second, if not, whether the Puerto Rico Oversight, Management, and Economic Security Act (PROMESA), which created the Oversight Board, conferred such immunity by channeling claims against the Board to federal court. The answer to both questions is undoubtedly no.

SUMMARY OF ARGUMENT

Whether Congress abrogated the Commonwealth of Puerto Rico's sovereign immunity from a suit against the Oversight Board seeking access to official records matters only if the law of Puerto Rico supports a claim of immunity in such an action. The Oversight Board acknowledges that it possesses no sovereign immunity independent of that of the Commonwealth of Puerto Rico. Its immunity, therefore, can extend no further than Puerto Rico's. Puerto Rico's constitution

and laws, however, do not allow the Commonwealth to assert sovereign immunity to avoid actions seeking the disclosure of official records.

Thus, regardless of whether Congress *abrogated* Puerto Rico's sovereign immunity, where it otherwise would exist, when it created exclusive federal jurisdiction over nearly all actions against the Oversight Board, the Board's sovereign immunity defense cannot prevail here unless Congress *created* such immunity when it enacted PROMESA. But nothing in the PROMESA provision channeling claims against the Oversight Board to federal courts so much as hints that it creates sovereign immunity that Puerto Rico does not otherwise possess. Nor do PROMESA's provisions precluding enforcement of Puerto Rico's laws to the extent they are "inconsistent" with or would "impair or defeat the purposes" of PROMESA, 48 U.S.C. § 2103, 2128(a)(2), preempt Puerto Rico's *lack* of sovereign immunity against actions seeking public disclosure of records. Amenability to such suits is commonplace for government agencies at all levels within the United States, including those with duties far more sensitive than the Oversight Board's, and is fully consistent with their performance of the functions entrusted to them by law.

ARGUMENT

I. The sovereign immunity at issue is that of the Commonwealth of Puerto Rico.

The Oversight Board's brief refers to "its sovereign immunity," *e.g.*, Pet. Br. 25, 36, 37, and the brief of the United States likewise repeatedly speaks of "the Board's sovereign immunity," *e.g.*, U.S. Br. 14, 25. As both briefs acknowledge, however, the sovereign immunity whose scope is at issue is not really that of the

Board, but that of the Commonwealth of Puerto Rico. *See* U.S. Br. 15 ("*Puerto Rico* is entitled to sovereign immunity by virtue of its governmental status." (emphasis added)); Pet. Br. 9 ("*Puerto Rico* enjoys sovereign immunity." (emphasis added)).

The Oversight Board itself is not, and makes no claim to be, a distinct sovereign entity. Nor is it shielded by the sovereign immunity of the federal government of the United States. Indeed, PROMESA expressly provides that the Oversight Board "shall not be considered to be a department, agency, establishment or instrumentality of the Federal Government." 48 U.S.C. § 2121(c)(2). Accordingly, as this Court recognized in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020), the Oversight Board does not, as a constitutional matter, exercise the authority of the federal government, and its members are not officers of the United States. Rather, as PROMESA states, the Board was "created as an entity within the territorial government for which it was established," 48 U.S.C. § 2121(c)(1), and, for constitutional purposes, it is part of the local, territorial government of the Commonwealth of Puerto Rico. *See Aurelius*, 140 S. Ct. at 1661–63. As this Court said in *Aurelius*, "Congress did not simply state that the Board is part of the local Puerto Rican government. Rather, Congress also gave the Board a structure, a set of duties, and related powers all of which are consistent with this statement." *Id*. at 1661.

That the sovereign immunity the Board invokes here is that of Puerto Rico is critical to the proper disposition of this case. This Court's precedents undoubtedly establish that, like other organized political entities classified as territories under the Constitution,

Puerto Rico possesses sovereign immunity by virtue of "the nature of the [Puerto] Rican government," which brings Puerto Rico "within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273–74 (1913); *see also Puerto Rico v. Shell Co.*, 302 U.S. 253, 262 (1937) (citing *Rosaly y Castillo*); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (recognizing sovereign immunity of territorial governments). The Board's invocation of Puerto Rico's sovereign immunity necessarily carries with it the limits on that immunity.

As the United States (at 15–16, 19–21) and respondent (at 17–25) point out, the source of the sovereign immunity asserted here is significant in a number of respects. First, the express terms of the Eleventh Amendment, applicable only to suits "against one of the United States," U.S. Const. amend. XI, do not limit Congress's powers with respect to the territories. Second, the underlying considerations of federalism manifested in the Eleventh Amendment, which this Court has held limit both the authority of Congress to abrogate state sovereign immunity and the authority of federal courts to entertain claims against states, *see Alden v. Maine*, 527 U.S. 706, 748 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, 106 (1984), are not present here. Territories, while analogous enough to sovereign entities to possess common-law sovereign immunity, do not themselves possess the same "residuary and inviolable sovereignty," *Alden*, 527 U.S. at 715 (quoting The Federalist No. 39, at 245 (C. Rossiter ed. 1961)), as states. Unlike state sovereignty, which this Court has held preexisted the Constitution and remains "intact" after states enter the federal system, *PennEast Pipeline Co., LLC v. New*

Jersey, 141 S. Ct. 2244, 2258 (2021) (citation omitted), the authority of the Puerto Rican government, under its current territorial status, "emanat[es] from the same sovereignty" as that of the United States. *Shell*, 302 U.S. at 264. Third, Congress's plenary authority to enact legislation providing "all needful Rules and Regulations respecting the Territory … belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, gives Congress broad power to abrogate territorial sovereign immunity that, under this Court's precedents, it lacks with respect to the states. *See* U.S. Br. 19–20; Resp. Br. 20–21.

The source of the sovereign immunity at issue, however, has still another, more basic consequence for this case: Because it invokes *Puerto Rico*'s sovereign immunity, the Oversight Board's sovereign immunity defense cannot succeed if, under the law of Puerto Rico, the Commonwealth of Puerto Rico does not have sovereign immunity against the kind of claim at issue. As this Court has long recognized, a territory, like other entities possessing sovereign immunity, can waive that immunity. *See Kawananakoa*, 205 U.S. at 353. Waivers of sovereign immunity, moreover, may take the form either of express or implied consent to suit in a particular case, *see id.* (citing instances of such consent), or of constitutional or statutory provisions allowing classes of suits to be brought against an entity that shares sovereign immunity, *see*, *e.g.*, *Thacker v. TVA*, 139 S. Ct. 1435 (2019); *see also Porto Rico v. Emmanuel*, 235 U.S. 251, 257–58 (1914) (giving effect to a statute manifesting Puerto Rico's consent to be sued). Thus, if suit against the Commonwealth is "authorized by a [Puerto] Rican law," Puerto Rico's sovereign immunity does not bar the suit. *Sancho v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939).

Because the Oversight Board's defense of sovereign immunity can give it no immunity greater than that of Puerto Rico itself, the constitution and laws of Puerto Rico determine in the first instance whether the Oversight Board has a viable claim of sovereign immunity against this action. Moreover, if the Oversight Board lacks a substantial basis for its argument that the Commonwealth's sovereign immunity bars claims for access to official records to begin with, there is no reason for this Court to grapple with the questions whether Congress must satisfy a clear statement standard when exercising its plenary authority under Article IV to abrogate a territory's sovereign immunity, or whether the legislation in this case satisfies such a standard of clarity—questions that divide the respondent and the United States despite their agreement on the nature of Puerto Rico's immunity and Congress's unfettered Article IV authority to abrogate it where it otherwise exists.

II. The constitution and laws of the Commonwealth of Puerto Rico disclaim sovereign immunity against actions seeking disclosure of government records.

The question whether Puerto Rico's sovereign immunity bars a suit for access to official records of the territorial government is easily answered. Puerto Rico's Supreme Court has long held that members of the public may sue to compel release of public records of the government. *See Bhatia Gautier v. Rosselló Nevares*, 199 D.P.R. 59, 80–82 (P.R. 2017) (citing decades of precedent). Indeed, even while advocating vacatur of the court of appeals' decision that the district court correctly denied the Oversight Board's motion to dismiss on sovereign immunity grounds, the United

States acknowledges that "[i]mplicitly or otherwise, Puerto Rico … appears to have waived its sovereign immunity for such suits, or otherwise rendered immunity inapplicable." U.S. Br. 32. That observation significantly understates the point.

Bhatia Gautier explains that Puerto Rico's Supreme Court has long "recognized the right of the press and of citizens in general to have access to public information as a fundamental right of constitutional origin." 199 D.P.R. at 80 (English translation) (citing *Soto v. Sec'y of Justice*, 112 D.P.R. 477 (1982)). That right is grounded in the Constitution of Puerto Rico's protections of freedom of speech, press, and association, *see id.*, and reinforced by statutory recognition of "the right of every citizen to inspect and copy any public document of Puerto Rico," *id.* at 81 (citing P.R. Laws Ann. tit. 32, § 1781). Moreover, the right is judicially enforceable against the government, ordinarily through the mechanism of mandamus. *See id.* at 75.

Following the decision in *Bhatia Gautier*, Puerto Rico's legislature underscored Puerto Rico's disavowal of sovereign immunity against claims of improper withholding of official records by enacting the Transparency and Expedited Procedure for Public Records Access Act, P.R. Laws Ann. tit. 3, §§ 9911–9923. That Act, applicable to all entities of the Government of Puerto Rico, *see id.* § 9912, recognizes a broad "right to access public records," *id.* § 9913(5), and creates an additional, expedited judicial remedy when access to records is wrongfully denied: a "[s]pecial petition for judicial review," *id.* § 9919. Significantly, however, the legislation recognizes that the special petition is not an exclusive remedy and does not limit the availability of "other … procedures … such as the traditional writ

of mandamus" for compelling production of improperly withheld records. *Id.* § 9922.

Together, Puerto Rico's judicial precedents and statutes leave no doubt that Puerto Rico's sovereign immunity, as limited by its own constitution and laws, does not extend to actions to compel Puerto Rico's government to release public records to which its people have a constitutional and statutory right of access. Accordingly, absent PROMESA's jurisdictional provision channeling cases against the Oversight Board to federal court, Puerto Rico's own courts would reject any assertion by the Board that the Commonwealth's sovereign immunity bars an action brought against the Board to enforce the right of public access to records it possesses as part of the government of Puerto Rico. Thus, the claims asserted in this case do not depend on whether PROMESA abrogated Puerto Rico's sovereign immunity against such claims: It had none. This suit is not barred unless PROMESA's conferral of exclusive federal jurisdiction over it also *imposed* sovereign immunity on Puerto Rico with respect to actions that its own law allows plaintiffs to bring against it.

III. PROMESA neither explicitly nor impliedly confers sovereign immunity on the Oversight Board.

A. Nothing in PROMESA provides the Oversight Board with a sovereign immunity defense to suits that are not otherwise barred by the sovereign immunity of the Commonwealth of Puerto Rico. The text of the provision granting the U.S. District Court for the District of Puerto Rico jurisdiction over "any action against the Oversight Board," 48 U.S.C. § 2126(a), says nothing to suggest that that court in fact *lacks* jurisdiction on sovereign immunity grounds over any

such action, let alone that the provision creates sovereign immunity over claims against which Puerto Rico is not otherwise immune. Indeed, the only limitation that the section of PROMESA granting jurisdiction imposes on the availability of relief against the Oversight Board is a restriction on preliminary declaratory or injunctive relief, *id.* § 2126(c)—a provision presupposing the absence of sovereign immunity against the claims to which it applies.

The parties vigorously debate whether, as respondent argues, PROMESA's provision of a federal forum for "any action," in context, abrogates sovereign immunity that Puerto Rico's government otherwise may assert. But neither the Oversight Board nor the United States suggests that the provision itself confers sovereign immunity that is otherwise absent. Indeed, the United States' view that the jurisdictional provision "is best read as a jurisdiction-granting provision that channels all claims against the Board to federal district court," U.S. Br. 25, is fundamentally incompatible with any assertion that the provision itself gives rise to sovereign immunity. Likewise, the Oversight Board insists that it "*retain[s]*" its immunity because a "claim-channeling provision" does not abrogate immunity, Pet. Br. 39 (emphasis added), but its brief does not suggest that a claim-channeling provision can *confer* immunity, still less explain how it could do so.

Other provisions in PROMESA likewise do not confer sovereign immunity. The provision creating a limited exemption for the Oversight Board, its members, and its employees from liability for obligations or claims "resulting from actions taken to carry out" PROMESA, 48 U.S.C. § 2125, provides a merits defense to certain liabilities, not a sovereign immunity

defense. And it is in any event inapplicable to the claims here. *See* U.S. Br. 14, 30–31. Whether or not its existence supports the inference that PROMESA abrogates sovereign immunity, *compare* Resp. Br. 39–40, *with* U.S. Br. 30–31, it does not *create* sovereign immunity against any suit, let alone this one.

B. The United States appears to argue that PROMESA may have the *effect* of creating sovereign immunity that would not otherwise exist by channeling actions seeking access to the Oversight Board's records to a federal district court where Puerto Rico has not specifically consented to be sued on claims for access to records. Observing that this Court has held that "a waiver of sovereign immunity in a sovereign's own court does not necessarily suffice to waive sovereign immunity in the court of another sovereign," U.S. Br. 32 (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)), the United States suggests that Puerto Rico law may provide the Oversight Board with sovereign immunity in an action subject to PROMESA's jurisdictional provision even though it would lack immunity if the same action could be brought in one of Puerto Rico's own courts.

It is true that this Court has long taken the view that a state may "give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts." *Smith v. Reeves*, 178 U.S. 436, 445 (1900). The Court has also indicated that the same principle may apply to territories. *See Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 46 (1918) (noting Puerto Rico's argument that it had "only consented to be sued in its own courts" but holding that Puerto Rico had waived any claim of sovereign immunity by appearing and defending the case

in federal court). The Court has not held, however, that when a territory has consented to suit on a cause of action in its own courts, and Congress has exercised its plenary authority under Article IV to transfer jurisdiction over all such claims to a federal court, the territorial government has involuntarily acquired sovereign immunity—much less acquired it in the absence of any intent by Congress to confer such immunity or by the territory to obtain it.

The Court need not consider whether its sovereign immunity precedents would ever require such a perverse result because, as to the claims in this case, the principles of Puerto Rico law set forth in *Bhatia Gautier* preclude the assertion of sovereign immunity in this case just as much as they would in a case in Puerto Rico's own courts. *Bhatia Gautier* holds that Puerto Rico's constitution and laws create a right of access to official records and mandate the availability of a judicial remedy when that right is denied. It might be consistent with that mandate for the territorial government to assert sovereign immunity against public-access claims in federal court—but only as long Puerto Rico's own courts were available to provide the necessary remedy. When Congress has acted to preclude resort to Puerto Rico's courts and limited plaintiffs to a federal court, however, the holding of *Bhatia Gautier* forecloses the assertion of sovereign immunity to bar the judicial relief that the law of Puerto Rico requires. Accordingly, in the circumstances of this case, where a suit can only be brought in federal court, Puerto Rico has, by its constitution and laws, necessarily consented to suit in that court.

C. The United States suggests that PROMESA may somehow preempt Puerto Rico's *lack* of sovereign immunity against a claim for access to official records

of the Oversight Board. The United States' brief (at 33) points to PROMESA's provision precluding Puerto Rico's governor and legislature from "exercis[ing] any control, supervision, oversight, or review over the Oversight Board or its activities." 48 U.S.C. § 2128(a)(1). But the United States offers no explanation of how the amenability of the Oversight Board to actions brought in court to enforce the constitutional and statutory right of public access to records of Puerto Rico's government—a right that pre-existed PROMESA—constitutes supervision of the Board by Puerto Rico's governor or legislature.

The United States (at 33) also cites one of PROMESA's two preemption provisions, which provides that the governor and legislature may not "enact, implement, or enforce any statute … that would impair or defeat the purposes" of PROMESA. *Id.* § 2128(a)(2).[2] In itself, however, the Oversight Board's amenability to suits seeking access to official records does not impair or defeat the purposes of PROMESA. This Court has long recognized that public access to official records, far from impairing the purposes of laws authorizing government actions, advances the public's legitimate interest in knowing what its government is up to—and in holding the government accountable for properly pursuing its objectives consistent with statutory and constitutional requirements. *See*, *e.g.*, *U.S. Dep't of Justice v. Tax Analysts*,

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[2] For good reason, the United States does not suggest that subjecting the Oversight Board to a suit for access to records would violate PROMESA's other preemption provision, which states that PROMESA "shall prevail over" territorial laws that are "inconsistent" with PROMESA. 48 U.S.C. § 2103. Nothing in PROMESA is, by its terms, inconsistent with the absence of sovereign immunity for claims seeking official records.

492 U.S. 136, 142 (1989). Any suggestion that the interest in "ensur[ing] an informed citizenry, vital to the functioning of a democratic society," *id.* (citation omitted), is somehow inimical to the purposes of PROMESA would be baseless.

Conceivably, an order requiring access to some categories of highly sensitive records might impair PROMESA's purposes. But the right of public access under Puerto Rico law incorporates protections against the release of privileged information, including information protected by the deliberative process privilege and executive privilege, and Puerto Rico's courts look to precedents of this Court and other federal courts under the Freedom of Information Act (FOIA) in defining the scope of those privileges. *See Bhatia Gautier*, 199 D.P.R. at 83–95; *see also* P.R. Laws Ann. tit. 3, § 9913(7) (right to access public records is "subject to the applicable … exceptions"). The privileges recognized under the law of Puerto Rico are consistent with those that this Court has held adequate to protect the quality of agency decisionmaking against the impairment that would occur if agency deliberations took place "in a fishbowl." *U.S. Fish & Wildlife Serv. v. Sierra Club*, 141 S. Ct. 777, 785 (2021) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

In light of those protections, the right of action for public access to records under Puerto Rico law does not, on its face, even arguably impair PROMESA's purposes. And the bare possibility that a court in such an action might order release of some document whose confidentiality should be maintained to protect the Board's functioning would not justify affording the Oversight Board sovereign immunity against *all* actions seeking any of its records. To the extent that PROMESA might preempt release of particular

documents as necessary to avoid impairment of PROMESA's purposes, such preemption would properly be treated as a defense on the merits to claims for access to those specific records, not as a basis for concluding that PROMESA overrides Puerto Rico's lack of sovereign immunity.

D. A holding that PROMESA requires that the Oversight Board be afforded sovereign immunity against all claims seeking access to its public records would be highly anomalous. Freedom of information laws at all levels of American government routinely waive sovereign immunity, and those waivers do not impair the functioning of government agencies.

At the federal level, FOIA broadly waives sovereign immunity against suits to compel public disclosure of records held by federal agencies. *See* 5 U.S.C. § 552(a)(4)(B). FOIA's provisions are applicable to "[e]ach agency," *id.* § 552(a)(1), defined for purposes of the statute to include nearly all establishments in the executive branch, *see id.* § 552(f)(1).[3] FOIA's waiver of sovereign immunity encompasses agencies performing even the most sensitive of functions, including the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, and the Internal Revenue Service. Rather than protecting "special needs for confidentiality in carrying out [agency] responsibilities," U.S. Br. 33, through

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[3] Although the term "agency" includes the Executive Office of the President, it does not encompass the "Office of the President," comprising "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)).

sovereign immunity that cuts off legal claims for public access to records at the courthouse door, FOIA relies on nine exemptions from disclosure, including exemptions protecting privileged materials, national security classified information, sensitive law enforcement information, and information whose release would violate personal privacy. *See* 5 U.S.C. § 552(b).

The right of Americans to take government entities to court for wrongful withholding of official records is firmly entrenched at the state level as well. Among the states, freedom of information laws waiving sovereign immunity against lawsuits for access to records are ubiquitous. Indeed, although their terms vary, freedom of information laws exist in all 50 states, as well as the District of Columbia. *See* Reporters Comm. for Freedom of the Press, Open Government Guide, https://www.rcfp.org/open-government-guide/ (summarizing freedom of information laws of the states and District of Columbia).

The Oversight Board's arguments posit that, in enacting PROMESA, Congress, without ever saying so, intended to confer on an arm of the government of Puerto Rico sovereign immunity against claims seeking official records—immunity that Puerto Rico does not otherwise possess and that would set the Board apart from the great majority of government entities exercising executive authority in the federal, state, and territorial governments of the United States. To be sure, Congress has given the Oversight Board extraordinary powers to override decisions of the democratic institutions of Puerto Rico. But the extent of those powers does not suggest that Congress also sought to deny Puerto Ricans the ability to seek judicial redress when the Board attempts to shield its

records from public scrutiny in violation of principles of Puerto Rico law that PROMESA does not preempt.

In short, Puerto Rico's sovereign immunity, which the Oversight Board invokes, does not bar the claims here, and PROMESA does not create immunity against them. Accordingly, this Court can affirm the First Circuit's judgment without deciding whether PROMESA abrogates sovereign immunity that would otherwise be available to the Board under the law of Puerto Rico.

CONCLUSION

The Court should affirm the court of appeals' judgment that this action is not subject to dismissal for lack of jurisdiction on grounds of sovereign immunity and should remand for further proceedings.

Respectfully submitted,

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