UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZULAY RODRIGUEZ VELEZ; YOHAMA GONZALEZ MILAN; LEILA G. GINORIO CARRASQUILLO; AND JULISSA PIÑERO, Plaintiffs, v. HON. PEDRO R. PIERLUISI URRUTIA, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, Defendant.	**Civil No. 21-1366 (PAD)**

Motion for Preliminary Injunction

The plaintiffs, Zulay Rodriguez Velez, Yohama Gonzalez, Leila G. Ginorio Carrasquillo, and Julissa Piñero, respectfully move, under Federal Rule of Civil Procedure 65, for a preliminary injunction to enjoin the defendant, Hon. Pedro R. Pierluisi Urrutia, in his official capacity as governor of the Commonwealth of Puerto Rico, from implementing or enforcing the vaccine mandate included in Executive Order No. 2021–058 ("Vaccine Mandate"), which will go in effect tomorrow August 16, 2021. Pursuant to Local Rule 65 this motion is "accompanied by a proposed order."

Introduction

This Section 1983 action, brought by public-sector workers of modest means, arises under the Fourteenth Amendment to the United States Constitution, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb–2000bb(4), the Food and Drug

Administration's Emergency Use Authorization statute, 21 U.S.C. § 360bbb-3. It also includes supplemental claims under the Constitution of the Commonwealth of Puerto Rico, P.R. Const. Art. II, §§ 1; 8. And it challenges the constitutionality of Puerto Rico's vaccine mandate as described in Executive Order No. 2021–058 ("Vaccine Mandate").

The Puerto Rico government no doubt has good intentions in getting all its eligible population fully vaccinated. But there is less justification for government coercion now than at the beginning of the pandemic. We know much more about COVID-19 and, much more importantly, have vaccines with a tremendously effective rate ("reducing the risk of COVID-19, including severe illness, among people who are fully vaccinated by 90% or more"). *See COVID-19 Vaccines Work* (Aug. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html.

Because of the Plaintiffs' fundamental substantive due process rights of personal choice, bodily autonomy, medical privacy, and religious free exercise, this Court should examine the Vaccine Mandate under heightened scrutiny. Although public health can be considered a compelling state interest to invade individual liberties under certain circumstances, those circumstances do not exist now in Puerto Rico and the Vaccine Mandate is not narrowly tailored using the least restrictive means available. But even if this Court rejects the Supreme Court's approach in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020)—being less deferential to government action in light of fundamental rights claims—and extends *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—essentially modern rational basis review applied to pandemics—the Vaccine Mandate is arbitrary, capricious, and irrational. That is because

the scientific data show that it is unnecessary to protect absolutely every citizen from COVID, when, as here, vaccines are highly effective and widely available for those who choose to take them. The Vaccine Mandate thus violates the Fourteenth Amendment (as well as RFRA for religious objectors, such as the plaintiffs).

The plaintiffs meet all the elements to obtain a preliminary injunction. First, loss of bodily autonomy, loss of current and future earning potential, incurring substantial expenses, and loss of medical privacy are but a few of the real harms that await public employees who do not submit to Vaccine Mandate. Second, these employees have no adequate remedy at law for their losses; they cannot recover their lost bodily autonomy, time, or privacy. Third, the Commonwealth will not lose any government employees if the Vaccine Mandate is enjoined. The minimal risk that the pandemic will flourish in an environment where vaccines are widely available does not outweigh the liberty interests of the public employees at stake here. The Commonwealth certainly has had an important interest in controlling the COVID pandemic. But in the current situation, if the Vaccine Mandate is not enjoined, the plaintiffs' now superior interest in liberty will be lost. Puerto Rico runs the risk of having a (speculatively) marginally healthier population of government employees, but ones who have virtually no control over their own lives and what they must inject into their bodies. Finally, the public interest is advanced by preserving the status quo, as it would force the Commonwealth to justify—with real numbers and proper statistics—the necessity of imposing such draconian measures.

To be sure, as the amended complaint makes clear, the plaintiffs are not requesting that this Court invalidate the Vaccine Mandate in its entirety. The plaintiffs are requesting that the government provide them with the same alternatives that were provided to the students in *Klaassen v. Trustees of Indiana Univ.*, 2021 WL 3073926, at *6 (N.D. Ind. July 18, 2021), namely, to be allowed to work remotely, *id.* at *6 ("Students who are enrolled in an online program, with no on-campus component, don't need to receive the vaccine"), or to have the government pay for the mandated COVID tests either by administering the tests on site, or reimbursing the employees for all expenses incurred in obtaining the required medical referrals, insurance plan deductibles related to taking the test, and providing paid leave for the plaintiffs to be able to obtain the referrals and take the tests during labor hours. *See COVID Check Testing* (Aug. 14, 2021), https://www.iu.edu/covid/testing/mitigation-testing.html (describing the process for the "required COVID-19 testing of students, faculty, and staff who are not fully vaccinated of COVID," under which the students, faculty and staff will "schedule a 15-minute appointment for testing on the IU campus of [their] choice," and making no mention of expenses to be incurred by the students, faculty or staff.)

In short, for the reasons laid out below, the plaintiffs meet the requirements for a preliminary injunction. And because the defendant cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest in this specific case, this Court may waive the bond requirement and set an indemnity of $0.

Factual Background

Puerto Rico has achieved a high vaccination rate: 68% fully vaccinated and 78% with at least one dose. Puerto Rico currently ranks 7th among the States and territories in percentage of total population fully vaccinated. Among the most vulnerable, those 60 year and older, 73% are fully vaccinated and 81% have had one dose. And as of August 16, 2021, only 419 hospital beds are in use (5.9% utilization). Since June 15, 2021, when the first Delta-variant-confirmed case was reported in Puerto Rico, through August 16, 2021, the daily average of the 7-day moving average is 175 confirmed cases, and for the 11 months before that, July 1, 2020 to May 31, 2021, the daily average of the 7-day moving average was 340 confirmed cases per day. *See Vacunación* (August 15, 2021), https://covid19datos.salud.gov.pr/#vacunacion; *Data Table for COVID-19 Vaccinations in the United States* (Aug. 15, 2021), https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-fully-percent-total. The data used to compute the daily average (hereinafter referred to as "Data source") was *Sistema de Salud* (Aug. 16, 2021), https://covid19datos.salud.gov.pr/#sistemas_salud; *Casos* (Aug. 16, 2021), https://covid19datos.salud.gov.pr/#casos.

In other words, even with the Delta variant, there are half the daily confirmed cases than before the availability of vaccination. And when one compares Puerto Rico's cumulative confirmed cases with the confirmed cases within the five states with the closest population (Arkansas, Connecticut, Iowa, Nevada, and Utah), some of them with considerably lower population density, the Commonwealth is approximately 75% lower. *See Cumulative cases of*

Covid-19, reported to CDC, in AR, CT, IA, NV, UT, and PR (Aug. 14, 2021), https://covid.cdc.gov/covid-data-tracker/#compare-trends_cases-cum-rate-lin; Appendix I.

Perhaps more importantly, the daily average of Puerto Rico hospitalizations due to COVID from June 1 through August 16, 2021, has been about 1.6% (110 hospital beds) with a 38.2% (2,693) daily average of unused beds. For the 10 months before that, August 1, 2020 to May 31, 2021, the maximum hospital utilization due to COVID was 9.3% (649 beds) for one day, with the daily average utilization at 5.3% (366 beds) and the unused beds daily average at 41% (2,940). That is, with the Delta variant present, our daily average hospital utilization is three times and a half (3.5x) less than during the period of the pandemic without it. These is clear evidence that Puerto Rico's hospitals face no threat of being overwhelmed by COVID-19. *Data source, Sistema de Salud* (Aug. 16, 2021), https://covid19datos.salud.gov.pr/#sistemas_salud.

According to the CDC, moreover, the evidence shows the Delta variant might be spread as easily by vaccinated people who become infected as by the unvaccinated and the amount of viral load between vaccinated and unvaccinated patients is similar —*and that it is less deadly than the previous virus. See Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts* (Jul. 31, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm.

If the argument for the Vaccine Mandate is that vaccinated people experience only mild symptoms and very few, if any, are hospitalized, as the studies do indeed show, and thus they don't affect the healthcare system's capacity, then we need to conclude that neither will

the non-vaccinated. After all, when no one was vaccinated, our healthcare system usage rate did not exceed 9.3% in hospital beds, 16.5% in ICU beds, and 9.2% in ventilators. *Data source*, *Sistema de Salud* (Aug. 16, 2021), https://covid19datos.salud.gov.pr/#sistemas_salud.

The most recent study of "breakthrough" cases—people fully vaccinated getting COVID—covered 25 states. The reported cases, it found, were well below 1%, fluctuating between 0.01% in Connecticut to 0.29% in Alaska. Hospitalizations were 0.00% in California, Delaware, D.C., Indiana, New Jersey, New Mexico, Vermont, and Virginia and 0.06% in Arkansas. And, according to that study, deaths were 0.00% in all but two reporting states, Arkansas, and Michigan, which were 0.01%. The unvaccinated represented more than 9 out of 10 cases, ranging from 94.1% in Arizona to 99.85% in Connecticut. Hospitalizations among the unvaccinated ranged from 95.02% in Alaska to 99.93% in New Jersey, while deaths ranged from 96.91% in Montana to 99.91% in New Jersey. *See COVID-19 Vaccine Breakthrough Cases: Data from the States* (July 30, 2021) https://www.kff.org/policy-watch/covid-19-vaccine-breakthrough-cases-data-from-the-states/ and Appendix III, IV. A CDC study adds that breakthrough cases are always expected, but now represent just 0.098% of those fully vaccinated. As vaccination rates go higher and higher, the percentage of total cases among the vaccinated will naturally increase, but that, too, will not be an alarming eventuality because the total rate of cases, hospitalizations, and deaths will go down the higher the vaccination rate goes. The upshot is that, of the 102,000 *not* vaccinated, 1.5% (1,603) were hospitalized and 0.4% (417) died. Among 102,000 vaccinated, only 100 (0.098%) presented symptoms, and there was only one death (0.00098%), the deceased having had previous

chronic health issues). *See Symptomatic breakthrough COVID-19 infections rare, CDC data estimates* (July 26, 2021) https://abcnews.go.com/US/symptomatic-breakthrough-covid-19-infections-rare-cdc-data/story?id=79048589 and Appendix V. This is sound evidence that vaccinated people have little to fear from non-vaccinated people.

Moreover, Puerto Rico performs 75% less COVID testing per 100,000 people than the average total of tests in the mainland, and it ranks second to last (ahead only of the U.S. Virgin Islands) in total tests performed per 100,000 people among U.S. jurisdictions. The U.S. test rate is an amazing 158,684 per 100,000 people, while Puerto Rico's is 39,678. *See Data Table for Cumulative COVID-19 Nucleic Acid Amplification Tests (NAATs) Performed per 100k by State/Territory* (Aug. 15, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_testsper100k Appendix II. The reason for our low amount of testing is quite simple: too many obstacles and burdens (*e.g.*, medical referral, health insurance plan exclusions, $75 cost) and extremely limited to non-existent public testing facilities. The Department of Health and Human Services created the system of "Community-Based Testing Sites" so COVID-19 tests are available, free of charge, throughout the country in select health centers and pharmacies. But Puerto Rico doesn't participate in that system. The Family First Coronavirus Response Act ensures that COVID testing isfree to anyone in the United States, including those without health insurance—but Puerto Rico failed to implement this program. Test offerings by local or municipal government are less than 2%. And they are also random, offered only at a particular day, usually a Saturday or Sunday every few months with significant lines and cumbersome processes. They are the exception, not the rule like in the States. *See Community-*

Based Testing Sites for COVID-19 (last seen Aug. 15, 2021), https://www.hhs.gov/coronavirus/community-based-testing-sites/index.html; *GISCorps COVID-19 Testing Sites Locator, Locate COVID-19 Testing Sites (00936*) (last seen Aug. 15, 2021),https://www.arcgis.com/apps/webappviewer/index.html?id=2ec47819f57c40598a4eaf45bf9e0d16.

Standard of Review

A plaintiff seeking a preliminary injunction must show: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam). "The first two factors," the First Circuit has explained, "are the most important and, in most cases, 'irreparable harm constitutes a necessary threshold showing for an award of preliminary injunctive relief.'" *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009) (quoting *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004)).

Argument

I. The plaintiffs will likely succeed on the merits of their claims.

A. The Vaccine Mandate violates Plaintiffs' Substantive Due Process rights.

1. Because the Vaccine Mandate affects the plaintiffs' significant liberty interests in their personal normal autonomy, bodily integrity and medical choice, heightened constitutional scrutiny, and not the more-than-a-century-old *Jacobson* standard applies.

There should be no doubt that the plaintiffs have at the very least, a substantial liberty interest in rejecting the COVID-19 vaccine. *See Washington v. Harper,* 494 U.S. 210, 229 (1990)

("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.")

Harper involved the forcible administration of medical treatment to an *inmate* with a mental illness. In that context the Supreme Court stated that "the extent of the prisoner's right . . .must be defined in the context of the inmate's confinement," *id.* at 222, and thus applied rational basis scrutiny. *Id.* at 226. ("SOC Policy 600.30 is a rational means of furthering the State's legitimate objectives."). But *Harper* left the door open to an argument that the right to reject medication could be considered fundamental, or at least require additional scrutiny, in other circumstances—*e.g.*, when the plaintiff is not an inmate. *See id.* at 222 ("This is true even when the constitutional right . . . is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." (citations omitted)); *see also O'Lone v. Est. of Shabazz*, 482 U.S. 342, 349 (1987) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights").

Indeed, to satisfy Due Process in the context of forced administration of drugs, modern Supreme Court jurisprudence has required that the government at the very least consider less intrusive alternatives. For example, in *Riggins v. Nevada*, which involved a criminal defendant rather than a convicted felon, the Supreme Court held that the state-forced administration of antipsychotic medication during trial violated the rights guaranteed by the

Sixth and Fourteenth Amendment. 504 U.S. 127 (1992). In so doing, the Court noted that "Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, *considering less intrusive alternatives*, essential for the sake of Riggins' own safety or the safety of others." *Id.* at 135; *see also Sell v. United States*, 539 U.S. 166, 181 (2003) ("The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results"). Although the Court in *Riggins* did not go so far as to "adopt a standard of strict scrutiny", it did state the need for the trial court to make "findings about reasonable alternatives" or a finding that "safety considerations or other compelling concerns outweighed Riggins's interest in freedom from unwanted antipsychotic drugs" *Id.* at 136. Under *Riggins*, then, it is the government's burden to demonstrate that there are no other reasonable alternatives to those proposed in the Vaccine Mandate.

Regardless of whether the plaintiffs' constitutionally protected interest in avoiding the COVID vaccines is deemed "significant," "substantial," or "fundamental," it requires something more than rational basis scrutiny; the government is required to, at the very least, consider less intrusive means or reasonable alternatives. Because the plaintiffs are neither convicted felons nor criminal defendants, higher scrutiny than in *Riggins* and *Sell* should apply. And because, as shown below, the alternatives provided in the pertinent sections of the Vaccine Mandate are arbitrary, capricious, and unreasonable, they do not survive *Jacobson's* reasonableness test, much less can they survive heightened scrutiny.

2. Because the alternatives provided the Vaccine Mandate are unreasonable, arbitrary, and capricious, they cannot survive heightened scrutiny.

As just discussed, the plaintiffs' liberty rights in their personal autonomy, bodily integrity, and medical choice include the right to refuse the EUA vaccines and the right not to be medically tested for a virus. Of course, the plaintiffs concede that such rights are not absolute and may yield when the government has an important interest in mitigating the spread of a deadly and contagious disease.

But COVID-19, particularly in a post-vaccine world, and especially in Puerto Rico, is not that kind of disease. Here, because the government is exercising its police power "in such an arbitrary, unreasonable manner," and is going "so far beyond what [i]s reasonably required for the safety of the public," this court's intervention is warranted. *Jacobson*, 197 U.S. at 28.

The circumstances here are unlike those in *Jacobson*. For instance, the case fatality rate (proportion of deaths compared to total diagnosis) in the city of Boston when *Jacobson* was decided was over 16%, *see Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at *17 (N.D. Ind. July 18, 2021 ("In the early 1900s, and closer to the time that Massachusetts wrestled with the disease, there were 1,596 cases of smallpox in Boston, with 270 deaths, in a city with a population close to 561,000.")

Here, in contrast, overall, the death rate is 83 per 100,000, the case fatality rate 2% and the average daily deaths is 5 (Jan. 21, 2020 to present). The case fatality rate has been 2% and the average daily deaths 6 prior to a 60% full vaccination (Mar. 17, 2020 to May 31, 2021). From June 1 until present, after 60% of people fully vaccinated, the case fatality rate is 1.3%

and the average daily deaths are 2. The case fatality rate is 1.1% and the average daily deaths are 2 after the advent of the Delta variant (June 15, 2021 until present). That is, we have half the case fatality rate and almost three times (3x) less average daily deaths after 60% of the population got vaccinated and, even when Delta variant arrived, the case fatality rate has continued to go down and the average daily death remain the same. *See Data Table for Death Rate by State/Territory* (Aug. 16, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100k and *Data source*, *Defunciones* (Aug. 16, 2021), https://covid19datos.salud.gov.pr/#defunciones; *Vacunación* (Aug. 15, 2021), https://covid19datos.salud.gov.pr/#vacunacion.

And *Jacobson* involved smallpox vaccinations which "had been used for some considerable time—begun by state-supported facilities in England in 1808 and mandated by many other countries throughout the 1800s before the Massachusetts mandate in 1902," *Klaassen*, 2021 WL 3073926, at *17 (citing *Jacobson*, 197 U.S. at 25, n. 1). Here, however, the first vaccines were first available to the public less than nine months ago and have yet to obtain full approval by the FDA. Last but not least, the punishment for noncompliance in *Jacobson* was relatively modest: a "$5 fine (about $140 today)." *Roman Cath. Diocese of Brooklyn,* 141 S. Ct. at 70. In this case, the punishment may entail losing the right to perform one's employment and receive compensation—in other words, one's livelihood.

By like token, this case is unlike *Klaassen v. Trustees of Indiana Univ.,* 2021 WL 3073926, --- F. 4th ---, 2021 WL 3281209 (7th Cir. 2021), for several reasons. For one thing, this case does not involve the education sector. For another, as of today, the percentage of fully vaccinated

people in Puerto Rico is 24% higher than in Indiana (68% versus 51.5%). *See Vacunación* (Aug. 15, 2021), https://covid19datos.salud.gov.pr/#vacunacion; *Population* (Aug. 17, 2021), https://www.coronavirus.in.gov/vaccine/2680.htm.

Moreover, unlike the accommodations provided in Indiana and elsewhere on the mainland—"the availability of accommodations is relevant to the reasonableness inquiry," *Est. of Shabazz*, 482 U.S. at 350 (1987)—the accommodations provided by the Commonwealth are heavily burdensome, unreasonable, and almost impossible to meet. For example, obtaining a religious exception at Indiana University is relatively easy, as no affidavit from a spiritual leader was required. *See* FAQ: COVID-19: Indiana University , https://www.iu.edu/covid/faq/index.html (last viewed on Aug. 15, 2021) ("Religious exemptions per Indiana state law"); IN Code § 21-40-5-6 (2019) (requiring only that the request be "1) made in writing; (2) signed by the student; and (3) delivered to the individual who might order a test, an examination, an immunization, or a treatment absent the religious objection.").

Here, in contrast, presuming that the government is actually implementing the so-called religious exemption, *see infra* § A (2)(c) (questioning whether the Vaccine Mandate's exceptions are "real exemptions"), under the Vaccine Mandate at issue, the "employee must furnish an affidavit of religious objection whereby the employee, together with the minister or spiritual leader of his church or religion, state under oath and under penalty of perjury that on the basis of his religious beliefs, the employee cannot receive a COVID-19 vaccine." (And the archbishop of San Juan has decreed that no priests may provide such an affidavit.)

Further, the COVID tests required in *Klassen* were less intrusive (swabs). They also were provided by and administered in Indiana University in multiple campuses, and appointments could be scheduled online. Here, the Vaccine Mandate requires not only more intrusive tests than in *Klassen*, but also that the employees, with modest government salaries, pay for them and obtain a medical referral prior to taking the test. This entails spending approximately $200 per month, depending on the employees' health insurance coverage, to comply with the Executive Order. Neither does the Vaccine Mandate provide paid leave for employees to obtain the required medical referrals and take the tests during working hours.

The Vaccine Mandate requires that the employee submit the tests at the beginning of each week, and that they be less than 72 hours old at that time. This nonsensical restriction makes it virtually impossible for employees to comply with the order, because the workweek starts on Mondays and most testing places and medical practitioners are closed over the weekend. And this requirement that the COVID tests for *all* applicable employees be submitted on Mondays makes little sense, as common sense dictates that most people engage in more social interactions, and thus are at greater risk of exposure, during the weekend.

Finally, the current COVID situation in Puerto Rico does not justify the government's draconian measures. The statistics and recent studies show that, given the effectiveness of the EUA vaccines, vaccinated people are rarely affected by unvaccinated people, even with the advent of the Delta variant *See COVID-19 Vaccines Work* (Aug. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html. In the United States, the data from the 25 states that report breakthrough cases, hospitalizations,

and deaths indicate that these occurrences are extremely rare among those who are fully vaccinated. *See COVID-19 Vaccine Breakthrough Cases: Data from the States* (Jul 30, 2021), https://www.kff.org/policy-watch/covid-19-vaccine-breakthrough-cases-data-from-the-states/.

The CDC also pointed to Barnstable County, Massachusetts (Provincetown), where it said multiple large public events in July 2021 led to 469 cases of COVID-19 infections, of which nearly three quarters (346 cases) occurred in fully vaccinated people. But of those 346 cases, 274 (79%) were asymptomatic and only four fully vaccinated people were hospitalized. Of those four, two had previous chronic health conditions. There were no deaths.

According to the CDC, the Barnstable County data contained two startling details: three-quarters of infected people were fully vaccinated, and samples showed that the amount of viral load was similar between vaccinated and unvaccinated patients. *See Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021* (August 6, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm. Given the foregoing, requiring a negligible number of people to become vaccinated lest their livelihood be jeopardized goes "beyond what [i]s reasonably required for the safety of the public," *Jacobson*, 197 U.S. at 28. The same evidence that shows there is no compelling interest or narrow tailoring with the Vaccine Mandate shows that it fails even under the more deferential *Jacobson v. Massachusetts* standard.

And as more people get vaccinated, the share of cases, hospitalizations, and deaths represented by unvaccinated people will tend to fall, because there will be fewer unvaccinated people in the population. That will be true even if infection, hospitalization, and death from COVID-19 is still very rare among vaccinated people. The logical conclusion is that the Vaccine Mandate is the government's attempt to protect the unvaccinated population, who choose to assume the risk of not getting vaccinated, from themselves. And recall again that the Puerto Rico's health care system was never in jeopardy of being overwhelmed even during the worst part of the pandemic in pre-vaccine times.

Considering the Covid situation in Puerto Rico, the constitutional liberty interests and stakes, the government should consider reasonable alternatives for compliance with Vaccine Mandate such as: (1) allowing the employees to work remotely; (2) providing the Covid tests at the employees' offices; or (3) providing paid leave and reimbursements of expenses incurred by employees who take the tests in private laboratories, and enlarging the timeframe that employees have to take the test each week.

The Vaccine Mandate is thus unconstitutional under both heightened scrutiny and *Jacobson's* older special rule. What is more, the Vaccine Mandate also violates the Due Process Clause of the Fourteenth Amendment, which bars the Commonwealth from discharging, without due process of law, a government employee who has a property interest in continued public employment.

B. Because the plaintiffs were given no hearing to show that the government may consider less onerous means, the Vaccine Mandate violates their Due Process.

The Commonwealth of Puerto Rico has recognized that public career employees have a protected right in their continued employment. *See, e.g., Torres Solano v. P.R.T.C.*, 127 P.R. Dec. 499 (1990). But because the Vaccine Mandate effectively removes them without a hearing or any due process of law their property interest—by relegating them to an indefinite "unpaid leave"—it deprives the plaintiffs of their continued employment.

"To state a procedural due process claim under § 1983, the plaintiffs must allege facts which, if true, establish that they (1) had a property interest of constitutional magnitude and (2) was deprived of that property interest without due process of law." *Clukey v. Town of Camden*, 717 F.3d 52, 64–55 (1st Cir. 2013). And it is well settled that "property interests are creatures of state law, and under the laws of Puerto Rico, public employees who lawfully hold career positions have a protected property interest in continued employment in those positions." *Casiano–Montañez v. State Ins. Fund Corp.*, 707 F.3d 124, 129 (1st Cir. 2013).

Here, the plaintiffs' proprietary interest encompasses not only their continued employment, but also their salaries. *See*, *e.g.*, *Diaz Martinez v. Policia de P.R.*, 134.P.R. Dec. 144, PR Offic. Trans. (1993) ("[S]ummary suspension deprives a government employee of his or her property right to receive an income and fringe benefits and to fulfill the functions of his or her position . . . Considering that the property interest of a police officer is also substantially affected by an unpaid suspension . . ."); *id.* ("[I]n those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the

problem by suspending *with* pay." (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985))).

Although property rights are defined by state law, the "minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Loudermill*, 470 U.S. at 538 (1985) (cleaned up). And it "has been settled for some time now" that Due Process requires "some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Id.* at 542 (cleaned up). The need for some form of pretermination hearing … is evident from a balancing of the competing interests at stake. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). And "the significance of the private interest in retaining employment cannot be gainsaid." *Id.* at 543. Indeed, the Supreme Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Id*.

Even if the government shows a substantial interest for the vaccine mandate, there are less onerous means to obtain the desired result which would lessen the burden of the plaintiffs' individual liberties and property interest. For example, the defendant could allow the employees to work remotely. After all, they can all perform their functions remotely and the potential overall spread of Covid-19 is decreased by allowing employees, whose duties permits them to work remotely. The plaintiffs, however, were offered no hearing or due process of law to argue that the government should indeed take these more narrowly tailored

approaches. Accordingly, the Vaccine Mandate also violates the Due Process Clause of the Fourteenth Amendment.

C. Because the Vaccinate Mandate singles out religious objectors, and because the Vaccine Mandate provides no accommodations for them—instead imposes additional burdens by requiring an apparently unnecessary affidavit—it violates RFRA.

RFRA, which applies to actions by the Commonwealth of Puerto Rico as a covered entity of the United States," *Comité Fiestas De La Calle San Sebastián, Inc. v. Cruz*, 207 F. Supp. 3d 129, 144, n. 8 (D.P.R. 2016), *see* 42 U.S.C. § 2000bb-2(2), describes the "free exercise of religion as an unalienable right." §§ 2000bb(a)(1). And to protect this right, Congress provided that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." §§ 2000bb–1(a)–(b). The term "demonstrates" means "meet[ing] the burdens of going forward with the evidence and of persuasion." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegeta*l, 546 U.S. 418, 425 (2006).

A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." § 2000bb–1(c). "And compelling a person to do an act his religion forbids… [is a] paradigmatic religious-liberty injur[y] sufficient to invoke the jurisdiction of the federal courts." *Korte v.*

Sebelius, 735 F.3d 654, 668 (7th Cir. 2013); *see also Wisconsin v. Yoder*, 406 U.S. 205, 228 (1972) (compulsory schooling until age 16 violates the free exercise rights of Amish people.)

Here, the plaintiffs' sincere religious beliefs compel them not to take the COVID vaccine. For instance, Plaintiff González, a deep-faith, pro-life Christian, does not believe in vaccination. She believes that her body is a temple, and she must take care of it through natural medicine. Ms. González also refuses to get vaccinated because all the available vaccines used fetal cell lines in either the development, production, or testing phases. Ms. Ginorio, like Plaintiffs Piñero and González, refuses to get vaccinated because, among other things, she is pro-life, and all the available vaccines used fetal cell lines in either the development, production, or testing phases.

The Vaccine Mandate substantially burdens the plaintiffs' exercise of religion, because it obligates them to furnish an affidavit in which both she and her "ecclesiastical leader of their religion or sect, swear under penalty of perjury that, because of their religious beliefs, she cannot be inoculated against COVID-19." But the plaintiffs' sincere religious beliefs cannot be conditioned on a third-party's imprimatur. On this front, the Supreme Court has "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). And by forcing the plaintiffs to submit an affidavit by a spiritual leader, they force the plaintiffs to "respond[] to the commands of a particular religious organization." *Id*.

Even worse, the Vaccine Mandate is vague as it is unclear whether the affidavits are even required. Section 2 of the Vaccine Mandate suggests that *only* those who refuse the vaccine for medical or religious reasons are required to obtain a medical certificate or affidavit, *see* ECF No. 11-1 § 2 at 10-11, in which case they must submit to weekly testing at their own expense. And the governor has suggested that this is the correct interpretation of his Vaccine Mandate. S*ee* ECF No. 11-3 (referencing the "previous Executive Order against the COVID-19—i.e., the EO 2021-058—and noting that "the exceptions will be the persons with medical conditions . . . [and] persons who, for religious reasons decided not to get vaccinated . . .".)

But section 3 of the Vaccine Mandate then states that "[*a]ny* government employee to which this Executive Order applies who fails to furnish the COVID-19 Vaccination Record Card or document attesting to the completion or beginning of the vaccination process, shall be responsible for furnishing on the first business day of each week." ECF No. 11-1, §3 at 11-12 (emphasis added). Read literally, this means that an employee is required to submit an affidavit only if he or she invokes a religious faith, whereas employees who do not invoke an exception may "work in person" by submitting to weekly COVID tests, without the need of an affidavit or medical certificate.

This conclusion is buttressed by Special Normative Letter No. 2—2021, issued by the Human Resources Transformation and Administration Office of the Government of Puerto Rico—the office directed by the Vaccine Mandate to "to establish guidelines and regulations as pertinent to enforce the provisions of this Executive Order." ECF No. 11-1, § 4 at 12. In section V (6—8), without making any reference to exceptions, the Normative Letter states

that *any* government employee who fails to submit proof of vaccination is required to submit COVID test results weekly. Immediately below, section VI (2)(a), which applies only to those employees with medical or religious exceptions, requires religious objectors and their spiritual leaders to execute affidavits attesting that their religion prohibits vaccination. *Id.* Exhibit No. 2, at 5. But the Normative Letter then states that if an employee who refuses the vaccine for religious reasons is unable to obtain an affidavit from his or her spiritual leader, he or she is still eligible for, or required to comply, by analogy, with, the same process of § V (6), which requires weekly testing and other restrictions for *any* government employee who fails to provide proof of vaccination. *Id*.

Taken literally, the Vaccine Mandate seems to bamboozle public employees into believing that the exceptions are available only to those employees with religious exceptions. But this is still unclear, as sections 2 and 3 of the Vaccine Mandate have already been subject to diverse interpretations by different government agencies. For instance, plaintiff Julissa Piñero was told by her supervisor at the Department of Public Security that a medical certificate from her physician or affidavit from her spiritual leader was required if she preferred submitting to weekly tests instead of getting vaccinated. Meanwhile, the Human Resources Department of the Gaming Commission told plaintiff Yohama González that no affidavit was needed if she submitted the negative COVID-19 results on a weekly basis.

This inconsistent and sometimes contradictory way in which the Vaccine Mandate's demands have been publicized and rolled out across agencies contributes to the arbitrariness of the government action. More critically, insofar as affidavits are required only for those

employees who invoke a religious exception, but not for employees who do not invoke any exception, the Vaccine Mandate discriminates against those with religious beliefs by imposing additional unnecessary burdens, and thus violates RFRA. Indeed, instead of establishing a RFRA-required accommodation, the Mandate imposes an additional burden: having to obtain and pay for an affidavit. This conclusion should suffice for the Court to grant a preliminary injunction.

But the Vaccine Mandate further burdens the plaintiffs' religious beliefs by coercing them into vaccination. This is because regardless of whether the affidavits are required, the alternatives provided by the Vaccine Mandate to the employees who refuse vaccination are almost impossible to comply with. To begin with, the plaintiffs would have to obtain medical referrals, also at their own cost, for each weekly COVID-19 test. The plaintiffs, who work on Mondays, would have to take a test either each Friday or Saturday, because the Vaccine Mandate dictates that the tests must be performed "within a maximum period of seventy-two (72) hours prior" to submission, and "[t]he appointing authorities of the public agencies, or the person to whom they delegate, should ensure the compliance with the above at the beginning of each week."

Against this backdrop, the Vaccine Mandate does not provide public employees with paid leave to obtain the required medical referrals or to take the test. Even if the Commonwealth had a "compelling" interest in avoiding the spread of Covid-19, there are other less restrictive ways in which to further that interest than forcing the plaintiffs into choosing between keeping their jobs or *having to pay* for allowing a foreign object inserted in

their bodies—against their will. For instance, the Vaccine Mandate does not provide the option of any criteria to determine which type of employee may work remotely. The Vaccine Mandate could also provide employees with the required tests on site, at the government's cost, at the beginning of each week. Alternatively, it could provide them with paid leave to obtain the required medical referrals and take the tests each week, as well as reimbursement for out-of-pocket costs that are required to obtain the required tests.

For these reasons, and those discussed in Sections I-A, the Vaccine Mandate is not the least restrictive way in which to further the Commonwealth's interest. So, it again violates RFRA.

D. The Vaccine Mandate is preempted by federal law.

The Constitution and federal laws are the "Supreme Law of the Land" and supersede local law. U.S. Const. art. VI, cl. 2. "State law is preempted to the extent that it actually conflicts with federal law." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (citations omitted). And federal law need not contain an express statement of intent to preempt state law for a court to find any conflicting state action invalid under the Supremacy Clause. *See Geier v. American Honda*, 520 U.S. 861, 867-68 (2000).

Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3, authorizes the FDA to issue an EUA for a medical product, such as a vaccine, under certain emergency circumstances. The FDA issued an EUA for the Pfizer Vaccine on December 11, 2020. Just one week later, FDA issued a second EUA for the Moderna Vaccine. FDA issued its most recent EUA for the Janssen (J&J) Vaccine on February 27, 2021. None of the three available vaccines

have been fully approved by the FDA; they are available to the public pursuant to the EUA statute. The EUA statute mandates informed and voluntary consent. *See John Doe No. 1 v. Rumsfeld*, No. Civ. A. 03-707(EGS), 2005 WL 1124589, *1 (D.D.C. Apr. 6, 2005) (allowing use of anthrax vaccine pursuant to EUA "on a voluntary basis"). *See also* 21 U.S.C. § 360bbb-3(e)(1)(A)(ii).

The EUA statute expressly states that recipients of products approved for use under it be informed of the "option to accept or refuse administration," and of the "significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown." *Id.* Because the Vaccine Mandate coerces the plaintiffs by making enjoyment of their constitutionally and statutorily protected consent rights contingent upon receiving an experimental vaccine, it cannot be reconciled with the letter or spirit of the EUA statute, *see* 21 U.S.C. § 360bbb-3, and it violates the unconstitutional conditions doctrine. *See*, *e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (reiterating that the government may not condition a person's exercise of a right or receipt of a benefit on the waiver of a different right). In short, regardless of the safety or efficacy of the vaccines themselves, the Vaccine Mandate frustrates the objectives of the EUA process. *See Geier*, 520 U.S. at 873 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In a highly publicized opinion recently made public, the U.S. Department of Justice's Office of Legal Counsel ("OLC") posits that public and private entities can lawfully mandate that their employees receive one of the vaccines. *See* "Memorandum Opinion for the Deputy Counsel to the President," Whether Section 564 of the Food, Drug, and Cosmetic Act

Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization (July 6, 2021) (OLC Op.) at 7-13. The opinion is silent on preemption, however, and thus cannot be read to prevent the EUA statute from having its ordinary preemptive effect, not least because OLC was not assigned a role by Congress to administer the EUA statute. Moreover, the separation of powers dictates that this Court is not bound by the OLC Opinion. *See Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 249 F.R.D. 1 (D.C. Cir. 2008) ("OLC opinions are not binding on the courts[; though] they are binding on the executive branch until withdrawn by the Attorney General or overruled by the courts[.]") (cleaned up). It bears noting that, until recently, the Department of Justice had taken a very different stance. *See* Attorney General Memorandum, Balancing Public Safety with the Preservation of Civil Rights (Apr. 27, 2020) ("If a state or local ordinance crosses the line from an appropriate exercise of authority to stop the spread of COVID-19 into an overbearing infringement of constitutional and statutory protections, the Department of Justice may have an obligation to address that overreach in federal court."); *see also id*. ("[T]he Constitution is not suspended in times of crisis.").

More importantly, the Opinion is also premised on unsound reasoning. While it acknowledges that EUA products have "not yet been generally approved as safe and effective," and that recipients must be given "the option to accept or refuse administration of the product," it nevertheless maintains that the EUA vaccines can be mandated. OLC Op. at 3-4, 7. According to OLC, the requirement that recipients be "informed" of their right to refuse the product does not mean that an administrator is precluded from mandating the

vaccine. All that an administrator must do, in OLC's view, is tell the recipient they have the option to refuse the vaccine. *Id.* at 7-13.7. But that interpretation ignores that refusing vaccination entails consequences that effectively coerce or at least unconstitutionally leverage the public employees into taking the vaccine, infringing the plaintiffs' constitutional and statutory rights to informed consent. This approach of stating the obvious while overlooking conflicting arguments is probably why the Opinion remained silent on the preemption doctrine. Recognizing the Opinion's illogical approach and its inability to square its construction with the text of the EUA statute, OLC admits that its "reading . . . does not fully explain why Congress created a scheme in which potential users of the product would be informed that they have 'the option to accept or refuse' the product." *Id.* at 10. The sensible way of reading the statute is that Congress called for potential users to be informed precisely so that they could refuse to receive an EUA product. Indeed, how can someone have a right to be informed of a right that he or she does not possess?

If the Opinion were taken as a blanket authorization for state and local governments to impose vaccine mandates, a critical portion of the EUA statute would be rendered superfluous. And "it is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (cleaned up). Dodging the issue, OLC argues that if Congress intended to prohibit mandates for EUA products, it would have said so explicitly *Id.* at 8-9. But Congress *did say so*. The plain language states that the recipient of an EUA vaccine must be informed "of the option to

accept or refuse the product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii). Congress's intent to protect informed consent is pellucid from the statute, more so when read against the framework of what the Constitution requires and against the common law rules from which the constitutional protections for informed consent arose. And Congress "is understood to legislate against a background of commonlaw . . . principles," *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991).

The statutory prohibition on mandating EUA products is buttressed by a corresponding provision that allows the President to waive the option to accept or refuse an EUA product to members of the U.S. military when national security so requires. 10 U.S.C. § 1107a(a)(1). That provision would be redundant if consent could be circumvented merely by telling a vaccine recipient that he or she is free to refuse the vaccine but would nonetheless encounter adverse consequences that violated the doctrine of unconstitutional conditions. Sidestepping the text about the military waiver, OLC spins out a tortured argument under which the president's waiver would only deprive military members of their rights to know that they can refuse the EUA product—rather than waiving their rights to refuse the product. OLC Op. at 14-15. But OLC's reading runs head-on into the Department of Defense's understanding of this statutory provision. As the OLC acknowledges, "DOD informs us that it has understood section 1107a to mean that DOD may not require service members to take an EUA product that is subject to the condition regarding the option to refuse, unless the President exercises the waiver authority contained in section 1107a." *Id.* at 16 (citing DOD Instruction 6200.02, § E3.4 (Feb. 27, 2008)). OLC even admits that its opinion is belied by the congressional

conference report, which also contemplated that 10 U.S.C. § 1107a(a)(1) "would authorize the President to waive the right of service members to refuse administration of a product if the President determines, in writing, that affording service members the right to refuse a product is not feasible[.]" *Id.* (citation omitted). Just as Congress prohibited the federal government from mandating EUA products, the state governments cannot do so, for the Supremacy Clause dictates that the EUA statute must prevail over conflicting state law or executive orders.

The Vaccine Mandate is thus preempted by federal law. *See* U.S. Const. art. VI, cl. 2; *see also, e.g.*, *Kindred Nursing Ctrs. Ltd P'ship v. Clark*, 137 S. Ct. 1421 (2017) (holding that Federal Arbitration Act preempted incompatible state rule); *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016) (explaining that "federal law preempts contrary state law," so "where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" the state law cannot survive). Because the Vaccine Mandate is invalid under Article VI, Cl. 2 of the Constitution, it must be enjoined and set aside.

E. Pendent Claims

The plaintiffs also are likely to prevail on their pendent claims under the Puerto Rico Constitution. For one thing, the Vaccine Mandate violates "[t]he dignity of the human being," which "is inviolable." Puerto Rico Const. Art. II, § 1.

The Vaccine Mandate also violates Article 2, Section 8 of the Puerto Rico Constitution, which guarantees every person "the right to the protection of law against abusive attacks on

his honor, reputation and private or family life." *Id*. § 8. And the Puerto Rico Supreme Court has held that the "scope for a just interpretation [of invasion of privacy] is very wide." *Cortes Portalatin v. Hau Colon*, 3 P.R. Offic. Trans. 1019, 103 D.P.R. 734 (1975). For the same reasons that the Vaccinate Mandate violates the Substantive Due Process Clause of the Fourteenth Amendment and RFRA, it also runs head-on into the plaintiffs' constitutional right to decisional privacy under the Puerto Rico Constitution. The Puerto Rico Supreme Court has made it clear that "it is impossible to obtain a really voluntary waiver of the right of privacy, particularly if such waiver becomes a requirement for obtaining a job or for staying in it. The risk of losing a job or not getting one, and the worker's position of disadvantage vis-à-vis his employer's, impair the possibility of a really free and voluntary waiver." *Arroyo v. Rattan Specialties, Inc.*, 117 P.R. Dec. 35 (1986).

Here, the exceptions provided for by the Vaccine Mandate—mandatory proof of negative COVID tests, financed by the plaintiffs—violate their constitutional rights to privacy and harm to their personal integrity. *Cf. Maryland v. King*, 569 U.S. 435, 482 (2013) ("But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.") (Scalia, J., dissenting). For these reasons, the plaintiffs have also shown a probability of prevailing on their pendent claims under the Puerto Rico Constitution.

II. The plaintiffs will suffer irreparable harm absent interim relief.

As noted above, to show irreparable harm, the plaintiffs must state facts to demonstrate more than speculation that they might suffer harm in the future if the court fails to issue the

requested injunction. *See Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6–7 (1st Cir. 1991) ("[s]peculative injury does not constitute a showing of irreparable harm"). The plaintiffs readily meet this requirement. The short of it is that, starting on August 16, the plaintiffs began suffering irreparable harm, and will continue enduring more harm if the Vaccine Mandate is not enjoined. This is because they will suffer loss of bodily autonomy, loss of money for doctor's referrals and COVID tests, loss of current and future earning potential, and loss of medical privacy.

III. Because their constitutional rights outweigh the defendant's minimal and speculative risk, the balance of equities favors the plaintiffs.

The defendant has nothing to balance against the losses described above. Government employees and Puerto Ricans are protected by getting vaccinated themselves or by social distancing and wearing a mask. The Commonwealth will not lose employees. On the contrary, it will prevent forced resignations if the Vaccine Mandate is enjoined. The risk that the pandemic will flourish in an environment where vaccines are widely available and taken does not outweigh the loss of liberty interests at stake here.

Excepting public employees, like the plaintiffs, from forced vaccination cannot seriously undermine the government's efforts to control the pandemic. The Vaccine Mandate, after all, justifies its strong measures by referencing the "positivity rate," meaning that a high percentage of COVID tests are coming back positive. But this a classic denominator problem: not that many Puerto Ricans are being tested—50% less than on the mainland. That's because COVID tests are not as readily available in Puerto Rico. So if the only people getting tested

are those who have symptoms or are required to get tested for travel or job-related purposes, it is likely that a good chunk of people will test positive. But that doesn't necessarily mean that there are widespread infections in the community; it much more likely means that there is not enough testing to really obtain a good sample of COVID-19 in the community. In other words, the government is using its own lack of institutional capacity to justify imposing severe burdens on individuals.

People with higher risks of serious COVID complications, such as individuals over 60 and people with underlying health conditions, can choose to take the vaccine to protect themselves. The much smaller subset of people who are at higher COVID risk because they cannot safely receive the vaccine can mitigate their risks by practicing social distancing and wearing a mask. "Protection of others," especially in the current COVID context, does not relieve our society from the central canon of medical ethics requiring free and informed consent. The third prong, then, militates in the plaintiffs' favor.

IV. A preliminary injunction would be in the public interest.

The government certainly has an important interest in controlling the COVID pandemic. But it should go without saying that the public interest is best served by a government that properly balances its interested in protecting health with its citizen's constitutional liberties. And, as particularly relevant here, the public interest is advanced by preserving the status quo, as it would force the defendant to justify—with real numbers and proper statistics—the necessity of imposing such draconian measures. It would also force the defendant to clarify the conflicting interpretations of the Vaccine Mandate's exceptions. And a preliminary

injunction would make it clear to the government that it cannot have carte blanche to encroach on its citizens' rights. As Justice Gorsuch eloquently observed, "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J., concurring). It thus follows that a preliminary injunction here would be in the public interest.

V. Because the defendant cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest here, this Court may waive the bond requirement and set an indemnity of $0.

Federal Rule of Civil Procedure 65(c) provides in pertinent part that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." But this Court may—and should—"consider an indemnity of $0 (that is, no bond) 'proper' when the suit is about constitutional principles rather than commercial transactions . . . ." *BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019). As the First Circuit has instructed courts to consider the following factors:

> First, at least in noncommercial cases, the court should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant. . . . Second, in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right should also be considered. . . .

Crowley v. Loc. No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers, 679 F.2d 978, 1000 (1st Cir. 1982), rev'd on other grounds, 467 U.S.

526 (1984); *accord*, *e.g.*, *Watchtower Bible Tract Soc'y of New York, Inc. v. Municipality of Aguada*, 160 F. Supp. 3d 440, 448 (D.P.R. 2016).

The claims here are all constitutional in nature, and the plaintiffs, five government employees with modest means, are not seeking any monetary damages. "A bond requirement," the First Circuit has made clear, "would have a greater adverse effect where the applicant is an individual and the enjoined party an institution that otherwise has some control over the applicant than where both parties are individuals or institutions." *Id.* The same rings true here. Indeed, the plaintiffs, five individuals, are in a clear economic disadvantage to the behemoth that is the government of Puerto Rico. So here, like in *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, this Court may "waive the bond requirement based on its evaluation of public interest in this specific case." 826 F.3d 1030, 1043 (8th Cir. 2016). Because the defendant cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest in this specific case, this Court may waive the bond requirement and set an indemnity of $0.

Conclusion

For the reasons stated, this Court should grant this motion and issue a preliminary injunction that stops the defendant from implementing or enforcing the Vaccine Mandate.

Dated: August 17, 2021 Respectfully submitted,

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Counsel for Plaintiff

Appendix I

Compare Trends in COVID-19 Cases and Deaths in the US

Reported to the CDC by State or Territory; Maps, charts, and data provided by CDC, updates Mon-Sat by 8 pm ET[†]

View: ◉ Cases ○ Deaths
Measure: ○ Daily ◉ Cumulative
Metric: ○ Raw Totals ◉ Rate per 100,000
Scale: ◉ Linear ○ Logarithmic

Select up to 6 states, territories, or HHS regions:

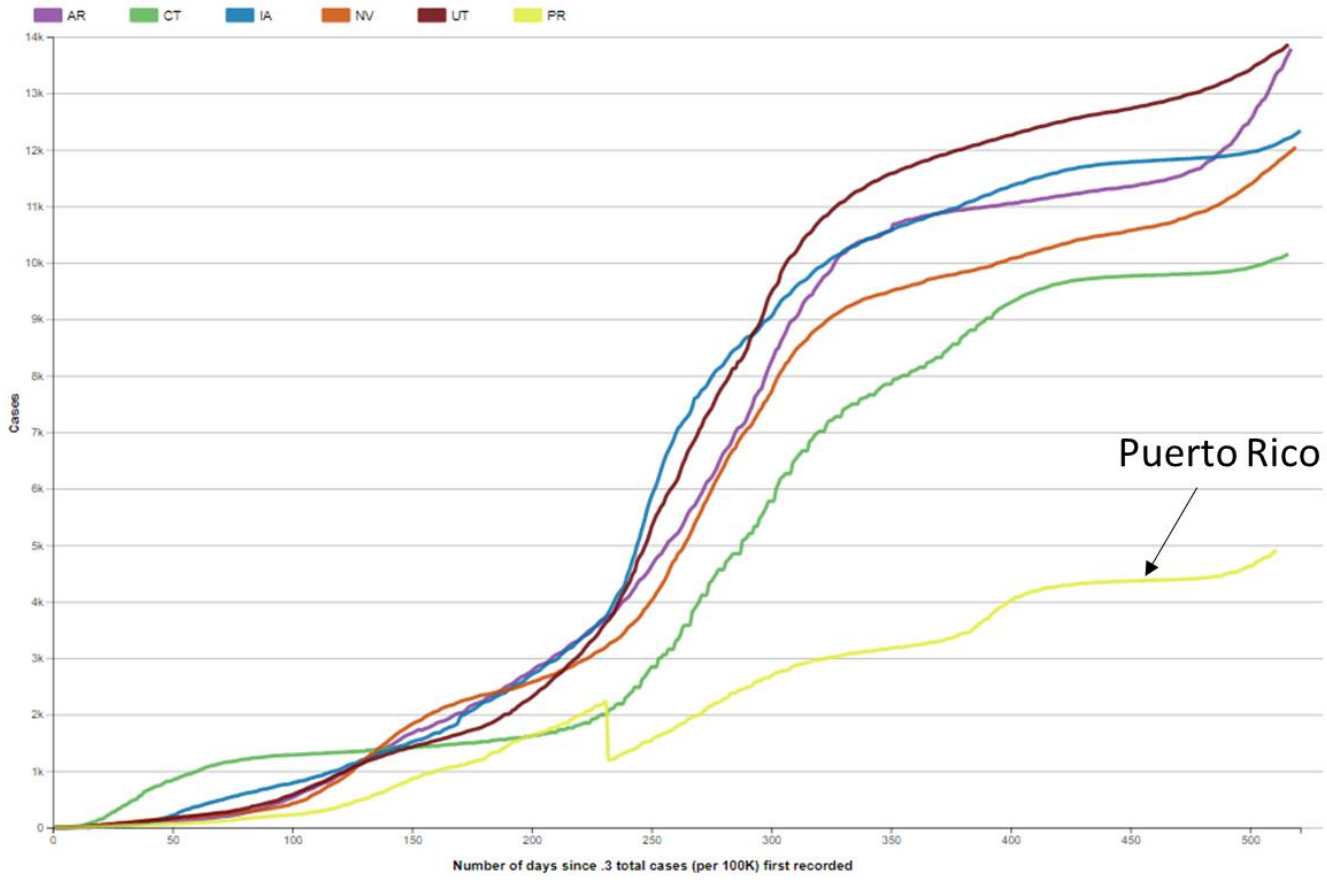
Arkansas × Connecticut × Iowa × Nevada × Utah × Puerto Rico ×

☐ Show full US Data (available only in logarithmic scale)

This allows you to compare trends in the cumulative numbers of cases for every 100,000 people for up to 6 states, territories, or HHS regions, allowing you to compare areas with different population sizes.

Cumulative cases of Covid-19, reported to CDC, in AR, CT, IA, NV, UT, and PR

Cumulative cases (per 100K), by number of days since .3 total cases (per 100K) first recorded.



Appendix II

Data Table for Cumulative COVID-19 Nucleic Acid Amplification Tests (NAATs) Performed per 100k by State/Territory

CDC | Data as of: August 13, 2021 12:51 PM ET. Posted: August 13, 2021 4:36 PM ET

Download Data

State	Cumulative Tests Performed per 100K	Cumulative Percent Positivity
Rhode Island	369,563.07	5-7.9%
Alaska	356,904.91	3-4.9%
District of Columbia	311,126.62	3-4.9%
Vermont	301,950.03	< 3%
New York*	260,286.03	5-7.9%
Minnesota	238,868.87	5-7.9%
Delaware	232,714.09	5-7.9%
North Dakota	222,493.18	5-7.9%
Maine	184,016.88	3-4.9%
Illinois	179,394.49	5-7.9%
New Jersey	177,497.34	5-7.9%
Wisconsin	175,148.19	5-7.9%
West Virginia	166,608.1	5-7.9%
New Hampshire	162,292.43	3-4.9%
Louisiana	160,436.04	8-9.9%
New Mexico	158,759.54	10-14.9%
Florida	158,163.13	10-14.9%
Colorado	152,562.85	5-7.9%
Michigan	150,396.82	5-7.9%
Wyoming	149,686.14	5-7.9%
Utah	142,295.25	10-14.9%
Indiana	136,535.15	8-9.9%
Pennsylvania	125,811.01	8-9.9%
Montana	123,157.01	10-14.9%
North Carolina	122,940.39	8-9.9%
Nevada	121,814.61	10-14.9%
Arizona	121,632.7	10-14.9%
Iowa	120,676.21	10-14.9%
Ohio	118,811.06	5-7.9%
Kansas	115,830.6	10-14.9%
Kentucky	112,098.62	10-14.9%
Nebraska	110,536.66	10-14.9%
Virginia	103,535.1	10-14.9%
Texas	102,942.34	10-14.9%
Arkansas	102,681.55	8-9.9%
Oregon	100,467.86	5-7.9%
Idaho	99,803.2	10-14.9%
Georgia	88,084.27	10-14.9%
Guam	83,632.74	5-7.9%
South Dakota	76,907.37	10-14.9%
Oklahoma	64,470.27	20-24.9%
Mississippi	52,600.32	10-14.9%
Puerto Rico	39,184.09	5-7.9%
Virgin Islands	37,986.61	8-9.9%

Appendix III

Figure 1

Percent of Fully Vaccinated Individuals That Have Experienced a COVID-19 Breakthrough Event

Events include COVID-19 diagnoses, hospitalizations, and deaths.

NOTE: Hospitalizations and deaths may include those that were not directly caused by COVID-19, but occurred in fully vaccinated individuals diagnosed with COVID-19. Only states that have collected data on breakthrough COVID-19 deaths for more than a month have been included.

SOURCE: KFF Analysis of State Level Data; Johns Hopkins University; U.S. Department of Health and Human Services • PNG

KFF

Appendix IV

Figure 2

Share of Overall COVID-19 Cases by Those Fully Vaccinated v. Those Not Fully Vaccinated Among Reporting States

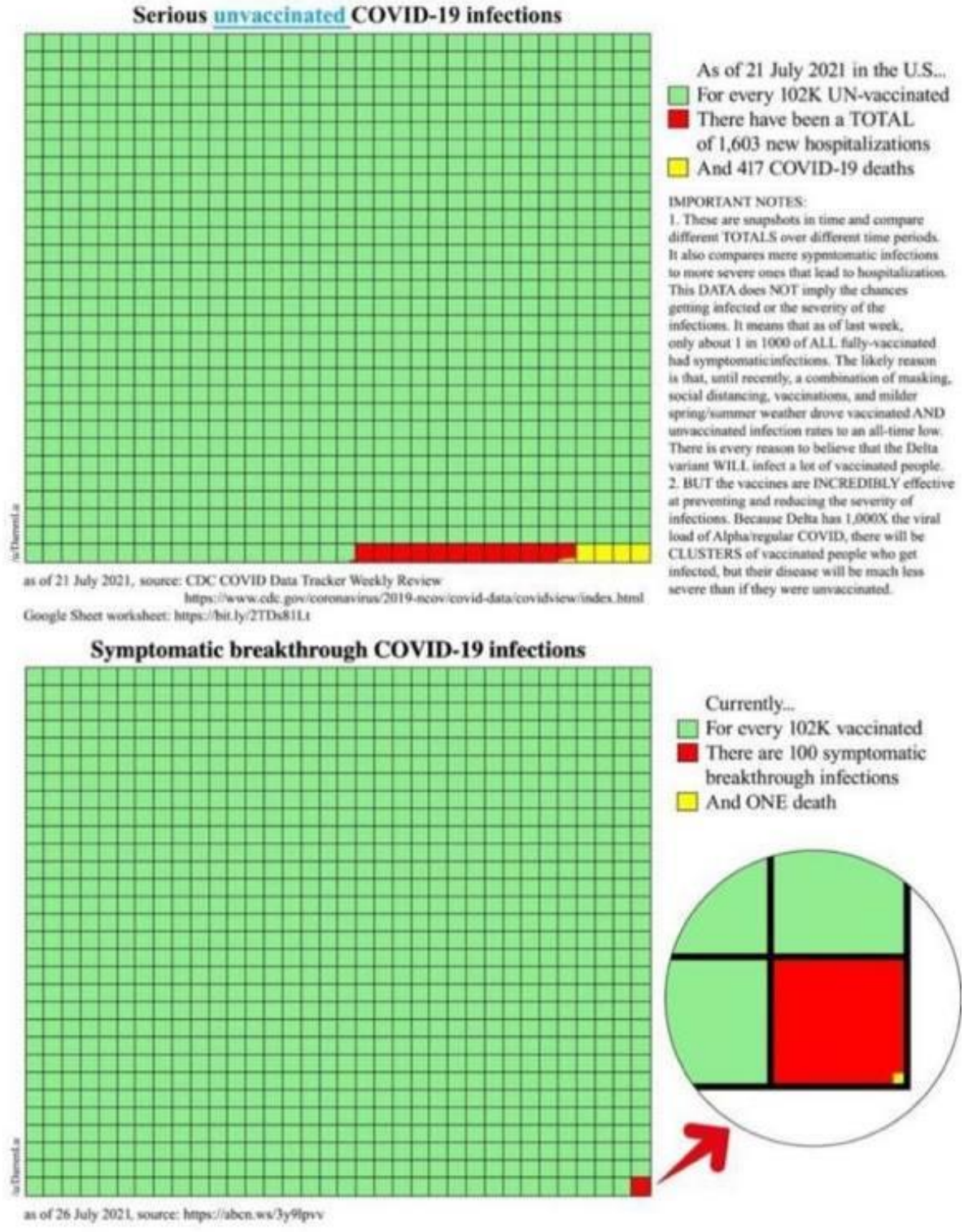
Cases | Hospitalizations | Deaths

State	Share of Overall Cases Among Fully Vaccinated	Share of Overall Cases Among Not Fully Vaccinated*
Alaska	4.0%	96.0%
Arizona	5.9%	94.1%
Arkansas	3.6%	96.4%
California	1.4%	98.6%
Connecticut	0.2%	99.9%
Delaware	1.0%	99.0%
District of Columbia	1.3%	98.7%
Idaho	1.2%	98.8%
Indiana	1.1%	98.9%
Maine	1.3%	98.7%
Massachusetts	1.0%	99.0%
Michigan	1.6%	98.4%
Montana	3.2%	96.8%
Nebraska	0.4%	99.6%
New Jersey	0.2%	99.8%
New Mexico	1.2%	98.9%
Oklahoma	0.8%	99.2%
Oregon	1.9%	98.1%
Rhode Island	1.7%	98.3%
Tennessee	0.4%	99.7%
Utah	3.2%	96.8%
Vermont	1.6%	98.4%
Virginia	0.7%	99.3%
Washington	2.0%	98.0%

NOTE: *Those not fully vaccinated includes those who are unvaccinated, not yet fully vaccinated, or where vaccination status is unknown. Only states that have collected data on breakthrough COVID-19 cases for more than a month have been included.
SOURCE: KFF Analysis of State Level Data; Johns Hopkins University • PNG

KFF

Appendix V


Serious unvaccinated COVID-19 infections
As of 21 July 2021 in the U.S...
For every 102K UN-vaccinated
There have been a TOTAL
of 1,603 new hospitalizations
And 417 COVID-19 deaths
IMPORTANT NOTES:
1. These are snapshots in time and compare different TOTALS over different time periods. It also compares mere symptomatic infections to more severe ones that lead to hospitalization. This DATA does NOT imply the chances getting infected or the severity of the infections. It means that as of last week, only about 1 in 1000 of ALL fully-vaccinated had symptomatic infections. The likely reason is that, until recently, a combination of masking, social distancing, vaccinations, and milder spring/summer weather drove vaccinated AND unvaccinated infection rates to an all-time low. There is every reason to believe that the Delta variant WILL infect a lot of vaccinated people.
2. BUT the vaccines are INCREDIBLY effective at preventing and reducing the severity of infections. Because Delta has 1,000X the viral load of Alpha/regular COVID, there will be CLUSTERS of vaccinated people who get infected, but their disease will be much less severe than if they were unvaccinated.
as of 21 July 2021, source: CDC COVID Data Tracker Weekly Review
https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html
Google Sheet worksheet: https://bit.ly/2TDs81Lt
Symptomatic breakthrough COVID-19 infections
Currently...
For every 102K vaccinated
There are 100 symptomatic
breakthrough infections
And ONE death
as of 26 July 2021, source: https://abcn.ws/3y9lpvv

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZULAY RODRIGUEZ VELEZ; YOHAMA GONZALEZ MILAN; LEILA G. GINORIO CARRASQUILLO; AND JULISSA PIÑERO, Plaintiffs, v. HON. PEDRO R. PIERLUISI URRUTIA, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, Defendant.	**Civil No. 21-1366 (PAD)**

ORDER FOR PRELIMINARY INJUNCTION

Before the court is the plaintiffs' motion for preliminary injunction (ECF No. ___) against the defendant. For the reasons set forth below, the court hereby grants the plaintiffs' motion for preliminary injunction and orders the Terms of Preliminary Injunction.

The issues have been fully briefed. The plaintiffs have shown a likelihood of success on the merits of their claims. It can hardly be doubted that the balance of hardships runs in their favor. They do not seek monetary damages and have no other remedy at law. And the public interest would not be disserved by a preliminary injunction. Under these conditions, the plaintiffs' request for a preliminary injunction must be granted.

Accordingly, it is hereby ordered that

The Commonwealth of Puerto Rico, and its respective agencies and all related persons or entities, be preliminarily enjoined until the full resolution of the dispute (which will be expedited pursuant to this court's procedures in such circumstances) from:

a. implementing the Vaccine Mandate.

Finally, Federal Rule of Civil Procedure 65(c) provides in pertinent part that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." But this Court may—and should—"consider an indemnity of $0 (that is, no bond) 'proper' when the suit is about constitutional principles rather than commercial transactions . . . ." *BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019). As the First Circuit has explained,

> [A] district court should [consider] the following factors in deciding whether to require a bond. First, at least in noncommercial cases, the court should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant. . . . Second, in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right should also be considered. . . .

Crowley v. Loc. No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers, 679 F.2d 978, 1000 (1st Cir. 1982), rev'd on other grounds, 467 U.S. 526 (1984).

The claims here are all constitutional in nature, and the plaintiffs, five individuals, are not seeking any monetary damages. "A bond requirement," the First Circuit has made clear, "would have a greater adverse effect where the applicant is an individual and the enjoined party an institution that otherwise has some control over the applicant than where both parties are individuals or institutions." *Id.* And here the plaintiffs, five individuals, are in a clear economic disadvantage to the government of Puerto Rico. So here, like in *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, the court may "waive the bond requirement based on its evaluation of public interest in this specific case." 826 F.3d 1030, 1043 (8th Cir. 2016). Because the defendant cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest in this specific case, the court will waive the bond requirement and set an indemnity of $0.

Conclusion

For the reasons stated, the plaintiffs' motion for preliminary injunction is granted without bond.

SO ORDERED.

In San Juan, Puerto Rico, this ____ day of August, 2021.

/s/ Pedro A. Delgado-Hernández.
Pedro A. Delgado-Hernández
U.S. District Court Judge