UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZULAY RODRIGUEZ VELEZ, ET AL., 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)**

Reply to Opposition to Motion for Preliminary Injunction

The plaintiffs, Zulay Rodríguez Velez, Yohama González, Leila G. Ginorio Carrasquillo, and Julissa Piñero (collectively, Plaintiffs), in accordance with the order at ECF No. 26, respectfully reply to the defendant's (Defendant) Memorandum in Opposition to Motion for Preliminary Injunction, ECF No. 22 (Opposition or "Opp.").

It bears noting at the outset that the Opposition to the preliminary-injunction motion, ECF No. 16 (PI Motion or "PI Mot."), is devoid of almost any empirical, statistical, or scientific data. Plaintiffs, on the other hand, have gone to great lengths to include all data and peer-reviewed studies available to them—precisely to place this Court in a position to gauge whether, considering Puerto Rico's health system capacity and related COVID statistics, EO 058 is proportional (or even rational) to the infringement of Plaintiffs' constitutional rights. The Opposition, among other things discussed below, (1) applies the wrong RFRA standard; (2) invites this Court to apply an outdated standard for Plaintiffs' substantive due process

claims that "predates modern tiers of scrutiny," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring), but does not say why it should not apply the more recent Supreme Court cases discussed in the PI Motion; (3) questions Plaintiffs' standing to allege a procedural due process claim even as they are subject to government action without any process, dismissing the harms they are suffering as "fears of hypothetical future harm"; (4) argues that the Supremacy Clause claim, which is based on a straightforward preemption argument given standard tools of statutory interpretation, is somehow both moot and flawed; (5) questions whether Plaintiffs would suffer irreparable harm absent an injunction; and (6) urges this Court to set a whopping and unconscionable $35,000 bond.[1]

Alas, the tone of the Opposition not only shows little to no regard for Plaintiffs' constitutional rights, but also promotes segregation and demonization by classifying them—and thus those who refuse or cannot take the vaccine and those, like the undersigned, who defend their individual liberties—as antivaxxers. *See* Opp. at 5 (saying that Plaintiffs' challenges "are a subterfuge to further their anti-vaccine agenda through a federal court").

[1] The Opposition also argues, in one sentence devoid of legal citations, that "Plaintiffs[']s delay in presenting this extraordinary remedy under Fed. R. Civ. P. 65, in and of itself shows a lack of urgency on behalf of Plaintiffs that goes against the very purpose of such relief." Opp. at 2. But waiting six days to file the factually and legally complicated PI Motion, with intervening events (related agency orders, official government translations, and the filing of an amended complaint) is a far cry from what the First Circuit considers a "delay." *Compare Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) (finding delay when movant "waited more than a year after the commencement of the action to seek an injunction," and concluding that "delay between the institution of an action and the filing of a motion for preliminary injunction, not attributable to intervening events, detracts from the movant's claim of irreparable harm"); *with Maram v. Universidad Interamericana De Puerto Rico, Inc.*, 722 F.2d 953, 960 (1st Cir. 1983) ("reject[ing] the [district] court's reliance on . . . four months delay").

But Plaintiffs don't have any such agenda: They are not advocating that willing government employees (or anyone else) not get vaccinated. They are simply arguing that, absent truly extraordinary and extenuating circumstances (not present in the Commonwealth), the choice to get vaccinated should remain within the individual and that the government should not unduly burden that choice. Indeed, both the amended complaint and the PI Motion make clear that the vaccines are effective at preventing hospitalizations and deaths.[2] And, for whatever it may be worth—which, despite the Opposition's conflation of Plaintiffs and counsel, shouldn't be much—undersigned counsel are all vaccinated. In short, this case is not anti-vaccine, but anti-mandate.

This case is about how far—and for how long—can the state curtail their citizens' liberty and religious freedom in the name of safety. The world, after all, is coming to grips with the undeniable reality that COVID-19 is here to stay, an endemic part of our ecosystem like the coronaviruses that cause the common cold. *Cf.* Jeffrey A. Singer, *Society Will Never Be Free of COVID-19—It's Time to Embrace Harm Reduction*, Cato Inst. Pandemics & Policy, Aug. 25. 2021, https://tinyurl.com/354ke6ux. But more to the point, Plaintiffs just want to be treated fairly and with dignity. They merely ask that public employees like them be provided the

[2] Because viral load is the most significant factor in the ability to infect, "an unvaccinated individual is not fundamentally different when it comes to the direct risk to transmit the virus compared to a vaccinated individual." https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm. And the "highest risk of resistant strain establishment occurs when a large fraction of the population has already been vaccinated but the transmission is not controlled." https://www.nature.com/articles/s41598-021-95025-3. So the non-vaccinated are not contributing to the establishment of resistant vaccination strains. *See id.* In other words, even if symptoms may be much worse for an unvaccinated person than a vaccinated person—which is a good reason for someone to choose to get vaccinated—transmissibility is not much different. *See* Medrxiv, *Impact of Delta on viral burden and vaccine effectiveness against new SARS-CoV-2 infections in the UK* (August 24, 2021), available at https://tinyurl.com/jdnm5u5h; *see also* page 14, below.

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), for example, to be allowed to work remotely. Or the same alternatives provided to those employees from states with other, less overreaching mandates, like paid leave for employees to be able to obtain the referrals and take the tests during labor hours. This Court can take judicial notice that there are 14 states, plus the District of Columbia, with vaccine mandates applicable to government employees. *See* Mandatory Employee Vaccines – Coming to A State Near You? | Littler Mendelson P.C., available at https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you. Unlike Puerto Rico, those jurisdictions offer testing for free to all their employees, which can be done at dedicated testing locations on site or through at-home self-administering testing by mail. And all allow testing to be done during working hours without deducting the employee's sick or vacation leave. What's more, all these states except Washington offer a remote work option. Remote work as an accommodation is nothing extraordinary, as the past 19 months of the pandemic have shown, and Defendant has yet to explain why that's not feasible here.

Even worse, Puerto Rico is the only U.S. jurisdiction with a vaccine mandate applied to all its public employees that offers no widely available free testing, at public locations, and during working hours. Yet the federal government reportedly gave Puerto Rico $183,823,862 to support efforts to administer COVID tests. *See Jenniffer González Colón anuncia $212 millones para pruebas y vacunas de COVID-19 en Puerto Rico*, (Jan 7. 2021), available at https://tinyurl.com/3ht4kshj.

I. Given Defendant's concessions, this Court should apply the correct RFRA standard (which Defendant ignored) to summarily enjoin EO 058.

As a threshold matter, Defendant admitted that EO 058 discriminates against employees who decline the vaccine because of their religious beliefs. For it places upon them a higher burden—the need to obtain and affidavit that almost no pastor, priest, or spiritual leader is willing to issue, *e.g.*, PI Mot. at 14—than the burden imposed upon those who decline the vaccine for any other reason, *see* Opp. at 2 ("public employees who do not wish to get vaccinated for whatever reason are required to get tested on a weekly basis and provide a negative COVID-19 test result at the beginning of each week."). As Defendant candidly admits, "any public employee whose religious dogma prohibits him or her to immunize does not have to invoke the religious exception and can avoid the sworn declaration required by simply showing a weekly negative COVID-19 test." *Id.* at 33. And because such an admission is clear and relates to a material fact, it falls squarely under the purview of the judicial admission doctrine, so it's both binding and conclusive. *See Harrington v. City of Nashua*, 610 F.3d 24, 31 (1st Cir. 2010) (discussing and construing this doctrine).

What is the purpose of the so-called exemptions? And why is the government requiring some people to go through the additional burdens of paying for and obtaining religious affidavits (and medical certificates for those with bona fide medical reasons)? Why tell the public that "an exception will be made for people with medical conditions whose health could be affected [by the vaccine], but they must obtain a medical certificate … [and for] those who have decided not to get vaccinated for religious reasons [who] must certify this by means

of a sworn statement from the leader of their religious congregation or denomination," ECF No. 11-3, if *anyone* is able to decline vaccination as long as they submit to the same weekly COVID tests, but without the need of submitting a medical certificate or religious affidavit?

The answer to these questions is simple: the government is purposely deceiving its employees and the public into believing that *only* those with religious beliefs and medical conditions may choose to undergo the weekly test process instead of vaccination. Otherwise, the Department of Justice would not be investigating or questioning the religious objectors and the "spiritual leaders" who have to execute the mandated affidavits. El Nuevo Día (Aug.18, 2021), *El Departamento de Justicia determina ampliar investigación de la organización del pastor Norman González Chacón,* available at https://tinyurl.com/27tuvwec; (*Telemundo Video and Article* at https://tinyurl.com/t5ztt49. This is beyond the pale and, above all, unnecessary. Religious exemptions cannot be administered in an unconstitutional matter. *See*, *e.g.*, *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 90 (E.D.N.Y. 1987) (so holding).

Because of Defendant's admission, this Court can summarily declare unconstitutional on its face the requirement that objectors submit an affidavit or medical certificate and enjoin every government agency from requesting an affidavit or medical certificate from any employee who chooses to decline vaccination. *See* ECF No. 11 at 54, ¶ d(1).[3] And given his

[3] Defendant even accuses Plaintiffs of waiving the argument and of "misleading to the Court" by suggesting "that public employees, had only two options to 'opt-out' of the vaccination mandate." *Opp*. at 8 & n. 3. This raises eyebrows: Defendant just admitted that the affidavits and medical certificates are *worthless*—they are but sham to compel unwilling employees to get vaccinated.

admission, Defendant should not object to this reasonable request unless he wants to bolster his vaccination campaign by deceiving public employees into getting vaccinated.

The same holds true for the plainly unconstitutional requirement of a pastor or spiritual leader's under-penalty-of-law imprimatur. *See* ECF No. 11, ¶ 153 (recounting how Plaintiff Ginorio's "spiritual leader refuses to sign an affidavit for her to obtain the religious exception"). Tellingly, Defendant made no rebuttal to—and simply ignored—the patent unconstitutionality of that requirement. And that silence is no doubt a testament to the merits of this aspect of the RFRA claim. *See* PI Mot. at 21 (citing *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989)). On that record, then, this Court may also summarily enjoin Defendant from continuing to require the unconstitutional third-party affidavit.

Moving to the third aspect of the RFRA claims—that the government is not using the least restrictive means to achieve its alleged compelling interest—it bears noting at the outset the Opposition did not directly address this issue. *See* Opp. at 15 ("defendant incorporates by reference its discussion of Plaintiffs' RFRA violation claim in pages 31-38 of their Motion to Dismiss" (MTD)). But Defendant also ignores that, as distinct from a Free Exercise claim challenging a law of neutral application, which triggers rational basis scrutiny, RFRA imposes the burden upon the government to prove not that the means are narrowly tailored to achieve the government's alleged compelling interest, but that the government is using "*the least restrictive means* of furthering that compelling governmental interest." 42 U.S.C. § 200bb(a)(3) (emphasis added); *see Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (construing RFRA). So the MTD's invocation (pp. 31–32) of *Employment Division v. Smith*, 494 U.S. 872

(1990) is patently without merit: This is not a Free Exercise claim; it is one under RFRA, *see* § 2000bb (one of RFRA's purpose is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)); *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1922 (2021) (Barret, J., concurring) (noting that RFRA "impose[s] essentially the same requirements as *Sherbert,* and we have observed that the courts are well "up to the task" of applying that test").[4]

And, as made plain by now, there are myriad ways by which the government can achieve its interest—even if it were compelling—than the extremely burdensome means that it is currently employing. Allowing the plaintiffs to work remotely is not only the least restrictive mean by which the government can further its interest, but also the most effective way to prevent COVID transmission in government offices. Common sense dictates that employees who work remotely cannot transmit COVID at the office: they just are not there. But even other alternatives—like providing on-site testing or providing public employees with paid leave to obtain the required medical referrals and take the tests and reimbursing the plaintiffs for any costs associated with complying with EO 058—are less restrictive and burdensome than the EO 058's testing scheme.

[4] The same holds true for Defendant's misleading reference to *Chemerinsky & Goodwin* for the proposition "that RFRA does not provide a 'basis for challenging compulsory vaccination laws.'" Opp. at 16 (citing *Compulsory Vaccination Laws Are Constitutional*, 110 Nw. U.L. Rev. 589, 610 (2016)). The author had been referring to RFRA's inapplicability to the States. *See id.* ("However, the Supreme Court quickly declared the Religious Freedom Restoration Act unconstitutional as applied to state and local governments.") But RFRA continues to Puerto Rico as a covered entity of the United States. *See* PI Mot. at 20 (quoting *Comité Fiestas De La Calle San Sebastián, Inc. v. Cruz*, 207 F. Supp. 3d 129, 144 n. 8 (D.P.R. 2016) (so holding)).

II. Because EO 058 is already harming Plaintiffs—and, in any event, because the harm of ending up on indefinite unpaid leave is impending—they have standing to assert their procedural-due-process claims.

The thrust of the defendant's argument is that because Plaintiffs "did not allege to be on unpaid leave," Opp. at 13, they lack standing. In doing so, they misconstrue the Court's Article III standing jurisprudence. Unlike the respondents in *Clapper v. Amnesty Int'l USA*, much touted (but not discussed) by Defendant, Plaintiffs do not base their procedural-due-process claim on "incurr[ing] certain costs as a reasonable reaction to a risk of harm . . . ." 568 U.S. 398, 416 (2013). In *Clapper*, the Court reversed the appellate court's analysis, which, the Court held, "improperly allowed respondents to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not 'fanciful, paranoid, or otherwise unreasonable.'" *Id.* (citation omitted).

But this case is readily distinguishable. Plaintiffs' standing here does not depend on "fear interceptions," *Clapper*, 568 U.S. at 424 (Breyer, J., dissenting); it hinges on no fears or hypotheticals of any kind. And it is also unlike *Humanistas Seculares de Puerto Rico v. Camara de Representantes de Puerto Rico*, in which this Court found standing lacking when the complaint "ofer[red] only scattered descriptions of generalized harms–feeling offended by the challenged conduct—that are insufficient to confer standing." No. 17-1298, 2017 WL 1327635, *3 (D.P.R. Apr. 7, 2017) (Delgado-Hernandez, J.) (cleaned up and citations omitted).

Plaintiffs Rodríguez and Ginorio will testify at the hearing that they are already having to exhaust their paid leave *because of* the government's action. So "the harm [Plaintiffs] seek to avoid" is . . . certainly impending." *Clapper*, 568 U.S. at 416. Unpaid leave is the natural

consequence of having to comply with the EO 058's indefinite and overly cumbersome alternatives to vaccination. So that aspect of the harm is no doubt impending. Plaintiffs' harms, after all, are constantly *evolving* and *accruing*. *See also* section V, below.

In any event, Plaintiffs are already suffering harm by having to exhaust their sick and vacation leave to comply with EO 058. This is because, under Puerto Rico law, they have a property interest in their employment and the income it produces. *See* PI Mot. at 18–19 (citing *Diaz Martinez v. Policia de P.R.*, 134 P.R. Dec. 144, 150—151, P.R. Offic. Trans. (1993)). And the EO 058 inarguably diminished that property interest. Yet it provided no due process of law. And the authorities they cited, but neglected to discuss, cannot bear the weight that Defendant loads upon them.

More critically, none of the authorities cited by the defendant supports the argument that, to have standing, the plaintiffs need to wait to exhaust their paid sick and vacation leave. Nor do they need to quit their jobs. That the EO 058 is indefinite is of critical importance here. Having to unfairly exhaust all sick and vacation leave—and then go on indefinite leave—is plainly a redressable harm. Indeed, even the impending threat of having to do those things is enough, the "threatened injury" is "imminent" or "actual" when the plaintiffs filed their complaint," *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 332 (1st Cir. 2020) (citations omitted). Defendant's reliance on *Clapper* is thus misplaced. And that's before even discussing the burden on Plaintiffs from complying with the alternative weekly testing pursuant to religious or medical "exemption." There are very real costs involved here that

are more than enough to obtain standing, regardless of this Court's ultimate ruling on the merits of Plaintiffs' claims.

With the Plaintiffs having "identi[ed] an injury in fact that is 1) 'concrete, particularized, and actual or imminent,' 2) 'fairly traceable to the challenged action,' and 3) 'redressable by a favorable ruling,'" *Signs for Jesus v. Town of Pembroke, NH*, 977 F.3d 93, 99 (1st Cir. 2020) (quoting *Clapper*, U.S. 398 at 409), this Court should hold that they have standing. And because they are likely to succeed on their procedural due process claims, an injunction on this front is warranted.

III. EO 058 Violates the Plaintiffs' Substantive Due Process Rights, Even Under Rational Basis Scrutiny.

The Opposition argues that "[t]he Executive Order…passes both a rational or strict scrutiny since, through its exceptions or 'opt outs', it uses less onerous means to advance the compelling public health interest in safeguarding the lives and health of its citizens." Opp. at 10. It also says that the EO 058 provides a "less restrictive approach, when compared with the vaccine mandates that were upheld by the Supreme Court in *Jacobson* and in *Zucht v. King*, 260 U.S. 174, 176, 177 (1922)." *Id.*

But *Zutch,* a 99-year-old case from a different epoch, is inapposite because it involved mandatory vaccination in the school context. *See* 260 U.S. at 175. In any event, the Court there did not entertain the merits of the constitutional claim because of the case's procedural posture. *See id.* at 178 ("Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this court only on petition for a writ of certiorari."). And

contrary to Defendant's contention, EO 058 is more restrictive than the mandate in *Jacobson.* Indeed, 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 (Gorsuch, J., concurring). True, in *Jacobson* an unvaccinated person who refused to pay the $5 fine would be subject to jail time until payment was made. But an unvaccinated person who paid the one-time $5 fine was then free to roam the streets—and if infected spread *smallpox*—while being fully compliant. That is precisely what Mr. Jacobson and others who refused the vaccine did back then. *See* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts* (Aug. 17, 2021), available at SSRN: https://tinyurl.com/28ts4t6e at 16-17. With EO 058, however, the punishment is far more severe than in *Jacobson*. Plaintiffs run the risk of losing their livelihoods unless they submit to at a weekly COVID test, which is neither free nor readily available as in the rest of the United States. Even worse, the tests require a medical referral to have the insurance plan pay for it. The *indefinite nature* of the costs and burdens of weekly required testing, then, is far more punitive than the nominal fine in *Jacobson*.

The problem is compounded by the fact that, contrary to Defendant's intimation, *see* Opp. at 13 (boasting that the "Government has many places available where to get tested for COVID free of charge"), free testing is not as available in Puerto Rico. Indeed, the Commonwealth's Health Secretary candidly admitted that "[w]e had to limit the tests to 175 because there is a shortage of tests at the national level. They are guaranteeing a number of tests, but at least in [the] Health [Department's] tent, we limit [the amount of testing]." https://tinyurl.com/8xmakr3a (translation supplied). He also admitted that the lines to get a

free test are "kilometric." *Id.* And while explaining that the government, but not the private sector, is having a COVID test supply shortage, the Secretary stated the following: "different from the government, private laboratories can buy [tests] from any company, but in [the] Health [Department]—for example—the problem with the contracts is that they do some auctions and if that specific person doesn't have [the tests] then [the Health Department] gets nothing, unless [the Department] *searches for other [suppliers].*" *Id.* (translation and emphasis added). This raises the obvious question: why hasn't the government searched for other suppliers? It had ample time to do so since the COVID-test shortages had been reported before EO 058 became effective. *See* https://tinyurl.com/ubkjcy3d. Plaintiffs will certainly request Defendant's explanations on this and other issues of fact that go toward the burden imposed by the mandate regime—not least because the government has admitted it purchases these tests with federal funds. *See id.*

Defendant also argues that rational basis applies because the "Plaintiffs were unable to provide the Court with any binding or persuasive case law that has declined to apply *Jacobson's* rational basis scrutiny to a vaccine mandate in favor of a strict scrutiny. Thus, [the argument goes,] the Court must apply *Jacobson's* [antiquated proto-rational basis standard], until the Supreme Court squarely overrules the same." Opp. at 11 (citing *U.S. v. Moore-Bush*, 963 F.3d. 29, 31 (1st Cir. 2020) and *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020)). But Plaintiffs have explained why the more-than-a-century-old *Jacobson* standard—which predates the modern tiers of scrutiny—should not apply to this case, *see* PI Mot. at 9-12 (collecting caselaw on the rights to refuse medical treatment), and the Defendant has failed

to address that point. Plaintiffs readily concede that there is no precedent directly on point establishing that the right to decline a vaccine has been deemed fundamental. But there simply hasn't been a widespread pandemic in the modern era, at least not one that touches American law. And modern jurisprudence has applied intermediate scrutiny when the government compels a criminal defendant to take medication. *See, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *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"). In that situation, the government has the burden of showing at least that it considered less burdensome alternatives. But Defendant has failed to articulate a reason why the government has not considered letting employees to work remotely, even if, as with Plaintiffs, their duties allow them to do so.

The government is employing a process—mandatory COVID tests only for unvaccinated people—whose means to further the stated end–"to prevent and stop the spread of COVID19, as well as to safeguard the health, life, and safety of the residents of Puerto Rico," ECF No. 11-1 at 8-9—is seriously questionable. Not only because the government lacks a sufficient supply of free and readily available tests to impose its draconian measures, but also because it no longer makes sense to test only unvaccinated people. Why do the unvaccinated need a negative test but the vaccinated don't when both can carry the same viral load if infected? These are wholly irrational and arbitrary distinctions. Two separate studies have demonstrated that, with the Delta variant, the viral load is the same between unvaccinated and vaccinated. *See also* note 2, above. Counterintuitively, then, the EO may cause the

vaccinated to act in ways that pose greater risks to others. *See* The Israeli Public Emergency Council for the Covid 19 Crisis, *Position Paper—The Science and the Ethics Regarding the Risk Posed by Non-Vaccinated Individuals* (Aug. 11, 2021), available at https://tinyurl.com/n7vdrnj7.

Nor has the government explained a rational basis for requiring all its unvaccinated public employees to get tested in the same 72-hour window. That is, the only day Plaintiffs can obtain a free test from one of the public government facilities is Friday, in one of the very few places with short supply, which may be open to the public, not just state employees. Plaintiffs need to take time off work each Friday and charge it against their accrued vacation days just to see if they may be lucky enough to find a test location with availability.

Finally, as explained in the PI Motion, *Jacobson* involved a smallpox epidemic far deadlier than COVID, and the updated statistics set forth in Appendix No. 1, show that the circumstances, even with the advent of the Delta variant, do no warrant the application of the government's draconian measures. Also, different from the 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 only one (Comirnaty) which is still not widely available, has obtained full approval by the FDA. *See* section IV, below. Considering that the available vaccines were developed faster than any other vaccine in modern times, that their long-term effects are still unknown, and the Commonwealth's unprecedented coercive measures, including continued

deceit throughout the EOs, and intimidation, *see* section I, above, it should not surprise that part of the population is skeptical about these vaccines. And the Government is not trying to gain the public's trust. Indeed, the Government has been repeatedly forced by journalists into court (the government losing in court) for its refusal to provide accurate and complete information.[5]

IV. Because the Pfizer Comirnaty Vaccine approval does not extend to the available vaccines, it does not foreclose the preemption claim.

The Opposition argues that because "Plaintiffs can choose a vaccine that is fully approved by the FDA . . . [,] there is no longer a controversy as to any preemption claim under the EUA." Opp. 17. But the fact that the Pfizer Comirnaty vaccine has received full approval does not foreclose the preemption argument, because this approval does not extend to the Pfizer BioNTech vaccine, the one that is actually available at present. Indeed, even Pfizer acknowledges that the two vaccines are "legally distinct." FDA, *Fact Sheet for Health Care Providers Administering Vaccine (Vaccination Providers)* ("*Fact Sheet*"), (Aug. 23, 2021), nn. 1, 2, 4 & 5, available at https://www.fda.gov/media/144413/download. The claim that the two vaccines are interchangeable comes from a mere Guidance document, which does not carry force of law, and which is contradicted by Pfizer's own reissuance letter. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000) ("Interpretations such as those in opinion letters ...

[5] *Centro de Periodismo Investigativo v. Llovet Díaz*, et al., SJ2020CV02641.6 (mandamus requesting COVID related deaths, April 28, 2020); *Centro de Periodismo Investigativo v. Llovet Díaz, et al.*, SJ2020CV02641 (judgment June 2, 2021) (mandamus requesting registry of vaccination); *Centro de Periodismo Investigativo v. Mellado López, et al.*, SJ2021CV00567 (mandamus requesting registry of vaccinations). The latest one is *Centro de Periodismo Investigativo v. Mellado López, et al*, SJ2021CV05403 (mandamus requesting the database on the causes of deaths and registry of vaccinations).

do not warrant *Chevron*-style deference."); *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). *See also Drive Farms Ltd. v. Vilsack*, 781 F.3d 837, 857 (6th Cir. 2015) (instructing USDA to consider on remand whether its approach to the term "prior-converted wetlands" ran afoul of *Appalachian Power*). Pfizer cannot convert a legally distinct product (the BioNTech) into a fully approved vaccine (the Comirnaty).

Moreover, Pfizer states that there "is not sufficient approved vaccine available for distribution to this population in its entirety at the time of the reissuance of this EUA." *Fact Sheet*, n. 9. And because Comirnaty, the only fully FDA-approved vaccine, is not widely available, and certainly not to all members of the population, per the manufacturer's own admission, the force of Plaintiffs' preemption argument under the EUA statute remains nearly as strong as it was prior to Comirnaty's approval. Because the EO 058 (a state directive) coerces Plaintiffs by premising enjoyment of their statutorily protected consent rights contingent upon receiving an experimental vaccine, it cannot be reconciled with the letter or objectives of the EUA statute. *See* 21 U.S.C. § 360bbb-3. The conflict between EO 058 and the EUA statute is particularly stark given that the statute's informed consent language requires that recipients be given the "option to refuse" the EUA product. That is at odds with the EO 058's forcing Plaintiffs to sustain significant injury to their careers if they do not want to take the vaccine. Put differently, the EO 058 frustrates the objectives of the EUA process. *See Geier v. American Honda*, 520 U.S. 861, 873 (2000). For these reasons, and for those set forth in the PI Motion at pages 25–30, EO 058 is preempted by federal law.

V. The deprivation of a constitutional right unquestionably constitutes irreparable injury—and there is no claim for monetary relief, so sovereign immunity is inapplicable.

It bears noting at the outset that, contrary to the Opposition's accusation, neither the PI Motion nor the amended complaint requested "to recover monetary losses against the Commonwealth . . . ." Opp. at 22. For this reason, the Opposition's barebone invocation of "sovereign immunity," *id.*, necessitates no discussion.

The heart of the Opposition is that "Plaintiffs utterly failed to specify the necessary factual allegations of irreparable harm needed to clear the threshold for an award of preliminary injunctive relief." *Id.* at 19. "Instead," the Opposition demurs, "Plaintiffs aver in a slapdash fashion that they made a strong showing of irreparable harm because they will allegedly suffer (1) loss of bodily autonomy; (2) loss of money; and (3) medical privacy." *Id.* at 19 (citing PI Mot. at 32).

But this paints an inaccurate portrayal and minimizes Plaintiffs' *evolving* and *accruing* calvaries. *See, e.g.,* ECF No. 11, ¶¶ 42–45, 61–64; PI Mot., at 14–15, 21–26. Plaintiffs, for example, will testify that, since August 17 (when the PI Motion was filed), they have incurred in expenses for medical referrals to be able to attend to a private lab after not being able to get a free test. Others have gone to other municipalities during their personal time only to find out that the facilities ran out of tests, and others have paid $45 for the test at a private lab, with a medical referral. The fact that the offering has a limited number of tests (e.g., 300 tests), is not consistently offered in the same place, and is for the public and not for state employees only, demonstrate the excessive burden the Plaintiffs must endure. *See, e.g., El*

Vocero, La Asociación de Alcaldes advierte la escasez de pruebas de antígenos de covid-19, (Sept. 7, 2021), available at https://tinyurl.com/5vv6mcy4. Unlike in *Klaassen*, where the students had the alternatives of studying remotely or getting tested on campus and free of charge, here Plaintiffs are suffering real irreparable harm, not mere "transient and trivial inconveniences." Opp. at 20 (quoting *Klaassen*, 2021 WL 3073926, *39).

In any event, "[a] deprivation of a [federal] constitutional right for 'even minimal periods of time, unquestionably constitutes irreparable injury.'" *DeNovellis v. Shalala*, 135 F.3d 58, 71–72 (1st Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also, e.g.*, *Jessen v. Village of Lyndon Station*, 519 F. Supp, 1183, 1189 (W.D. Wis. 1981) (finding irreparable injury where the plaintiff stood to lose a property right without due process). And requiring Plaintiffs—and all similarly situated public employees—to scramble to obtain an unnecessary affidavit to obtain an illusory "religious" objection is, in and of itself, irreparable harm that cannot be repaired by monetary damages. A district court in Michigan recently so held in a similar context, "[h]aving found a likelihood of success on the merits of Plaintiff's Free Exercise Claim, the balance of the factors weighs in favor of emergency injunctive relief." *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 2021 WL 3891620, at *3 (W.D. Mich. Aug. 31, 2021); *see id.* ("Where parties seek injunctive relief and allege a constitutional violation, the outcomes often turn on the likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." (internal quotations marks omitted)); *accord Pan Am. v. Municipality of San Juan, Puerto Rico*, 2018 WL 6503215, *25 (D.P.R. Dec. 10, 2018) (Delgado-Hernández, J.).

Finally, Defendant argues that "Plaintiffs have not shown that, without an injunction, they would suffer an irreparable harm, not economic in nature," and immediately thereafter admits that "Plaintiffs are not able to recover monetary losses against the Commonwealth, its agencies or its officers, in their official capacity, in light of the sovereign immunity." Opp. at 22. But it is precisely because Plaintiffs cannot recover money damages against Defendant that Plaintiffs will continue to suffer irreparable harm if EO 058 in not enjoined. *See Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 222 (1st Cir. 2003) ("The unavailability of back pay or other monetary damages against . . . the Commonwealth … goes a long way toward establishing irreparable injury."). Defendant closes by saying in passing that "Plaintiffs have readily available administrative remedies if they understand that the agency in which they work has retained any economic compensation." Opp. at 22. But Defendant does not specify which administrative remedies he is referring to and, in any event, Plaintiffs are not arguing that their agencies have "retained any economic compensation." Rather, they are arguing that if EO 058 is not enjoined, they will continue to incur in COVID tests related burdens and expenses, including being forced to exhaust their vacation and sick leave, at which point, they will be forced into unpaid leave.

Thus, the EO 058 is causing and continues to cause irreparable economic harms and, in any event, directly and unequivocally infringes the constitutional rights of Plaintiffs who need make no additional showing to establish irreparable injury.

VI. Transparency, fairness, and the rule of law further the public interest, and the harm to Plaintiffs morphs any potential and miniscule harm to Defendant.

At the outset, Plaintiffs agree with Defendant that this Court "should analyze . . . [the "two final factors"] together." Opp. at 23. The nub of Defendant's rejoinder is what they call "Plaintiffs' rash and irresponsible allegation that the Governor's public health policy regarding COVID-19 'is the government's attempt to protect the unvaccinated population, who chose to assume the risk of not getting vaccinated, from themselves.'" Opp. 24 (citing PI Mot. at. 17). According to Defendant, "Plaintiffs selfishly overlook the fact that at the moment children under twelve years old cannot get a vaccine to protect themselves against COVID-19." *Id.*

This is a wholly inaccurate charge, and one that seems to either move the goalposts or hide the ball. Is the whole purpose of the EO 058, as applied to government employees, is to protect under-12 children? At that, to protect them from a virus that is less harmful to them than the flu, for which of course no vaccine has been mandated.[6] But in raising the point

[6] From December 12, 2020 to September 5, 2021, PR has averaged 24 pediatric hospitalizations and no more than 10 children have been in pediatric ICU since November 18, 2020 when the first child was admitted to ICU. *See* https://covid19datos.salud.gov.pr/#sistemas_salud. And nobody under the age of 12 years old has died related to COVID in PR. https://covid19datos.salud.gov.pr/#defunciones. Referring to nationwide statistics, Defendant claims that "according to the CDC, hospitalization rates tripled in children aged four and younger the week of July 17 compared to June 26." Opp. at 24. But, *in the Commonwealth*, the recovery rate for children 0 to 9 years is 100% and between 10 and 19 years is 99.98%. https://covid19datos.salud.gov.pr/#defunciones. Among 24 states and NYC reporting, "children ranged from 1.6%-3.6% of their total cumulated hospitalizations, and 0.1%-1.9% of all their child COVID-19 cases resulted in hospitalization." As to mortality, children were 0.00%-0.24% of all COVID-19 deaths, and 7 states reported zero child deaths, including PR. In states reporting, 0.00%-0.03% of all child COVID-19 cases resulted in death. *See* American Academy of Pediatrics, *Children and COVID-19: State-Level Data Report*, https://tinyurl.com/376j6xyd.

about children not being eligible for vaccination, Defendant essentially admits the truth of the Plaintiffs' argument: that the EO 058 aims to protect the unvaccinated from themselves.

Defendant also categorizes Plaintiffs' alleged harms as "objections to the opt-outs," which, Defendant argues, are "mere inconveniences and general grievances." Opp. at 26. When once compares "[t]hese inconveniences and general grievances . . . with the fact that COVID-19 is spreading fast among the population of Puerto Rico," the argument goes, "the balance of equities undisputedly tip in favor of the public health and safety policy established by the Governor." *Id.* at 26. But, as extensively explained above, the Plaintiffs' "grievances" are much more than the burdensome and untailored "opt-ins." Recall that the Opposition makes no rebuttal whatsoever about the plainly unconstitutional requirement of getting a third-party's imprimatur to claim a religious exception. Nor has it explained why Puerto Rico provides none of the accommodations provided by those states with similar vaccine mandates. Government employees and Puerto Ricans are protected by getting vaccinated themselves or—in the case of minors under 12—by social distancing and wearing a mask.

And contrary to the Opposition's unsubstantiated assertions, the empirical data shows that the virus, even with the Delta variant is not "spreading fast among the population," Opp. at 26, even with all economic restrictions lifted.[7] But the point is that excepting Plaintiffs and

[7] On July 19, 2021, there were 127 confirmed cases (7-day running average). COVID-19 En Cifras En Puerto Rico, *Casos*, https://covid19datos.salud.gov.pr/#casos. It took 28 days, August 14, 2021, to reach 619 confirmed cases (7-day running average). Back on March 15, 2021, confirmed cases were at 124 (7-day running average), it took 30 days to reach 589 confirmed cases (7-day running average). So the empirical data shows that, even with no restrictions and the Delta variant, the virus is not spreading, currently, any faster than it did before. Perhaps more importantly, the 7-day running average of cases has been dropping

other public employees from unconstitutional conditions cannot seriously undermine the government's efforts to control the pandemic. As of August 16, 2021, the government reportedly said that over 90% of its public employees were fully vaccinated. *See* https://tinyurl.com/dfjdtrkc. So it strains credulity to say that the "public interest" would be advanced be having a tiny fraction of objectors (religious or otherwise) being so unfairly discriminated against.

At any rate, and having Defendant conceded that the exceptions are meaningless, the public interest would no doubt be best served by enjoining Defendant from implementing or enforcing these so-called exceptions, particularly the religious one. After all, "a court called upon to do equity should always consider whether the petitioning party has acted in bad faith or with unclean hands." *Vaqueria Tres Monjitas, Inc. v. LaBoy*, 448 F. Supp. 2d 340, 350 (D.P.R. 2006) (quoting *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 880 (1st Cir. 1995)). And "there is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated . . . ." *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002). *See also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Republican*

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significantly, over 44%, in the last 20 days, when it reached its peak at 619 on August 14, 2021, currently at 350 (September 3, 2021). The Effective Reproductive Number (Rt) for Puerto Rico it's at an all-time low, 0.51. It has been below 1 since August 12, 2021, four days prior to the EO 058's becoming effective. Puerto Rico's Rt has continue to go on a downward trajectory since then. Previously, the lowest it had been 0.67 from May 9 to 14, 2021. *See* Appendix No. 1(citing *The covidestim project (Stanford, Yale and Harvard), Effective reproduction number (Rt) (Puerto Rico)* (September 7, 2021), https://covidestim.org/.)

Party of Minn. v. White, 416 F.3d 738, 753 (8th Cir. 2005) ("It can hardly be argued that seeking to uphold a constitutional protection . . . is not per se a compelling state interest.").

Defendant has nothing to balance against the losses described above. Thus, the balance of equities weighs heavily in favor of the preliminary injunction, which would also be in the public interest.

VII. Because Defendant cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest here, the $35,000 suggested bond is unconscionable.

Without citing to any binding caselaw, nor discussing the factors outlined by the First Circuit, *see* PI Mot. at 34, Defendant argues that it's "not possible" to set an indemnity of $0. Opp at. 26. Defendant says that this case does not fall under some undisclosed "exceptions," Defendant urges this Court to set a "bond of no less than $35,000 . . . ." Opp. at 27.

But Defendant ignored that it is both possible and common to set 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). More so when, as here, this case meets all the First Circuit-binding exceptions, *see* PI Mot. at 34–35, which other judges in this and other circuits have regularly applied, *see id.* (citing caselaw). The claims here are all constitutional in nature, and Plaintiffs, four government employees with modest means, are not seeking any monetary damages.

The alleged harm that would be inflicted on Defendant is illusory. Treating Plaintiffs, and a negligible number of other public employees fairly, will have no "adverse impact . . . on the public health and safety . . ." Opp. at 27. So Defendant's speculative and arbitrary

$35,000 bond is unconscionable and should be rejected out of hand. The upshot is that this is an easy call: because of the public interest here, this Court may set an indemnity of $0.

Conclusion

For the reasons stated, this Court should grant the PI Motion and issue a preliminary injunction that stops the defendant from implementing or enforcing the EO 058.

Dated: September 7, 2021 Respectfully submitted,

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	Ilya Shapiro /s/ Ilya Shapiro D.C. Bar. No. 489100 (admitted *pro hac vice*) 1000 Mass. Ave. NW Washington, DC 20001 202-577-1134

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZULAY RODRIGUEZ VELEZ, ET AL., 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)**

APPENDIX NO. 1

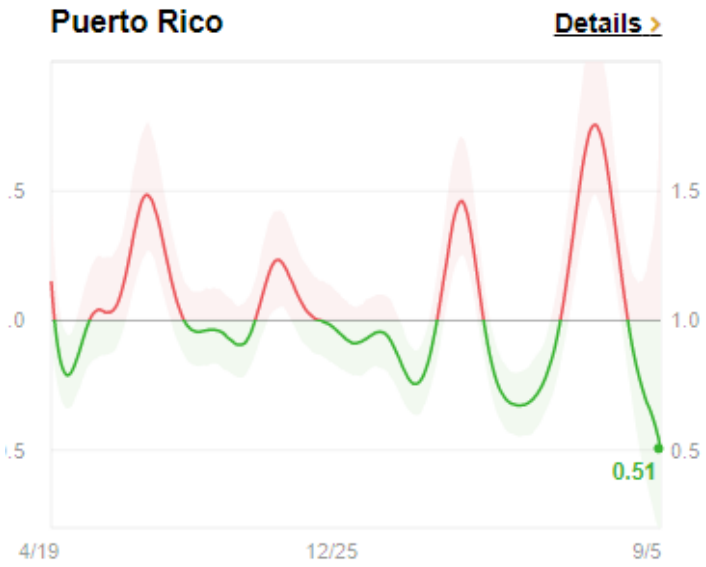
Plaintiffs' Update on COVID-19 Scientific Studies, Empirical Data and Statistical Analysis for Puerto Rico

A. Effective Reproductive Number (Rt)

Rt identifies the epidemic growth. It is an accurate measure of widespread. Rt it's considered a "leading" indicator, with much more precise and accurate results that the "positivity rate". Rt is the average number of people that an individual infected on day t is expected to go on to infect. When Rt is above 1, we expect cases to increase in the near future. When Rt is below one, we expect cases to decrease in the near future. *See* The covidestim project (Stanford, Yale and Harvard), *Effective reproduction number (Rt)* https://covidestim.org/.

Puerto Rico's Rt it's at an all-time low, 0.51. It has been below 1 since August 12, 2021, four days prior to the EO 058 becoming effective. Puerto Rico's Rt has continue to go on a downward trajectory since then. Prior to now, the lowest it had been before was 0.67 from May 9 to 14, 2021.

Refer to Graph below. *See* The covidestim project (Stanford, Yale and Harvard), *Effective reproduction number (Rt) (Puerto Rico)* (September 7, 2021), https://covidestim.org/.



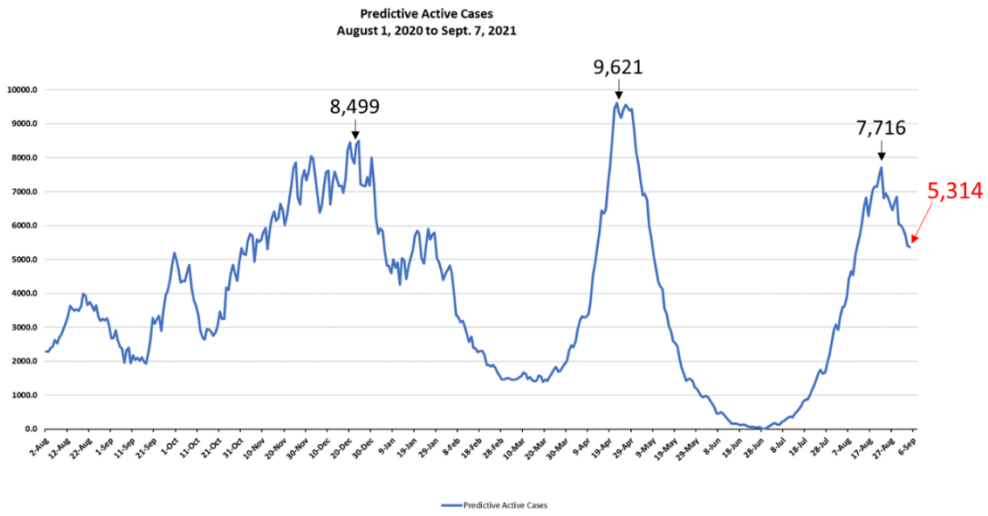
B. Predictive Active Cases

The prediction of Active Cases presents a crucial measure when evaluating the current COVID-19 situation. This is because every active case has the potential to infect even more people, if Rt is above 1 or infect less than one person if below 1, thus can contribute to a more serious or lessen situation in the near future. Therefore, in combination with Rt, it is a sound "leading" indicator to predict the future. The model to predict the Active Cases is based on the assumption of a recovery time of 14 days. Estimates of medical experts vary between 10 and 20+ days. Therefore, 14 days seems to be reasonable. The Active Cases for any given day are predicted as follows: Predicted Active Cases (previous day) + New Cases (current day) - New Cases (14 days ago) = Predicted Active Cases (current day). New Cases (14 days ago) are used as an estimate for recovered cases and deaths, because under the recovery time assumption all people infected 14

days ago would have either recovered or died by today. *See* 4 Predicted Active Cases, *https://www.cpp.edu/~clange/covid19/Covid19ReportCaliforniaComp.html#4_Predicted_Active_Cases*.

In Puerto Rico, as of September 7, 2021, the Predicted Active Cases (PAC) were 5,314 (0.16% of population). There have been three waves in Puerto Rico, two before the Delta variant and one after it (the current one). In the first wave, between November 1 and January 4, 2021, daily average of PAC was 6,813 and the peak was 8,499 (0.26% of population) on December 23, 2020. For the second wave, from April 4 to May 5, 2021, the daily average of PAC was 6,922 and the peak was 9,621 (0.29% of population) on April 21, 2021. For this third wave, which started on August 1, 2021, until now (September 7, 2021), the daily average of PAC is 5,802 and the peak was 7,716 (0.23% of population) on August 21, 2021. *See* COVID-19 En Cifras En Puerto Rico, *Casos*, https://covid19datos.salud.gov.pr/#casos.

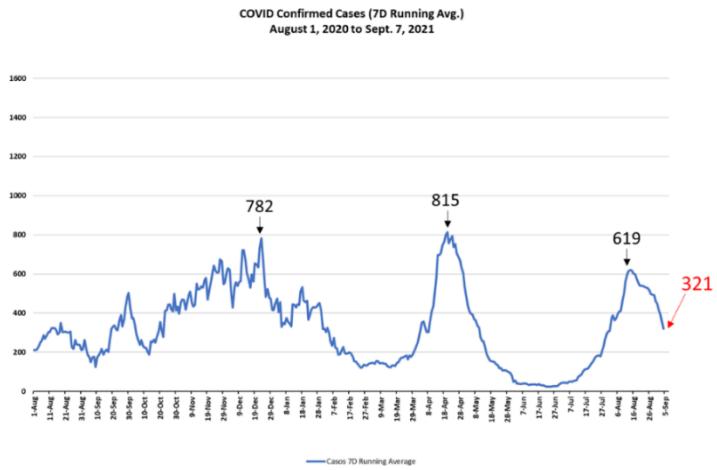
That is, our daily average of predicted active cases and its peak, in this third wave, with the Delta variant included and no restrictions, are up to 20% lower than the previous waves without the Delta variant and with restrictions.



C. Cases

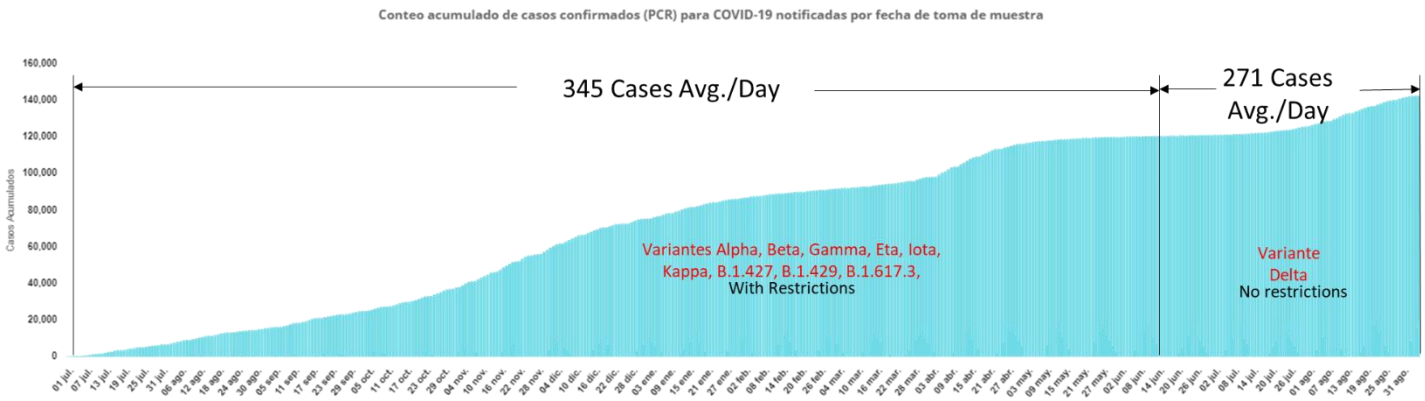
Currently, the confirmed cases have been going down for 21 consecutive days, since August 14 when it reached its peak at 619 (0.02% of the population). As of today, September 7, 2021, the 7-day running average of confirm cases is 321 (September 4, 2021). For our first wave of COVID surge, which started on November 1, 2020 and lasted until January 4, 2021, the daily 7-day running average was 549 cases and the peak was 721 on December 12, 2020. The second wave, from April 5 to May 4, 2021, the daily 7-day running average was 593 cases and the peak was 815 on April 20, 2021. The third wave, the current one from August 1 to September 7, 2021, has a daily 7-day running average of 484 cases and the peak was 619 on August 4, 2021. *See* COVID-19 En Cifras En Puerto Rico, *Casos*, https://covid19datos.salud.gov.pr/#casos.

That is, our daily cases in this third wave, with the Delta variant included and no restrictions, are up to 20% lower and its peak up to 25% lower than in the previous waves without the Delta variant and with restrictions.



Turning to the accumulated confirmed cases, from July 1, 2020 to when the first case of Delta variant was confirmed in Puerto Rico, June 15, 2021, the daily average was 345 cases. From June

16 to September 7, 2021, the daily average is 271 cases. That is, with the Delta variant and no restrictions, the daily average of cases is over 20% lower. *See* COVID-19 En Cifras En Puerto Rico, *Casos*, https://covid19datos.salud.gov.pr/#casos.

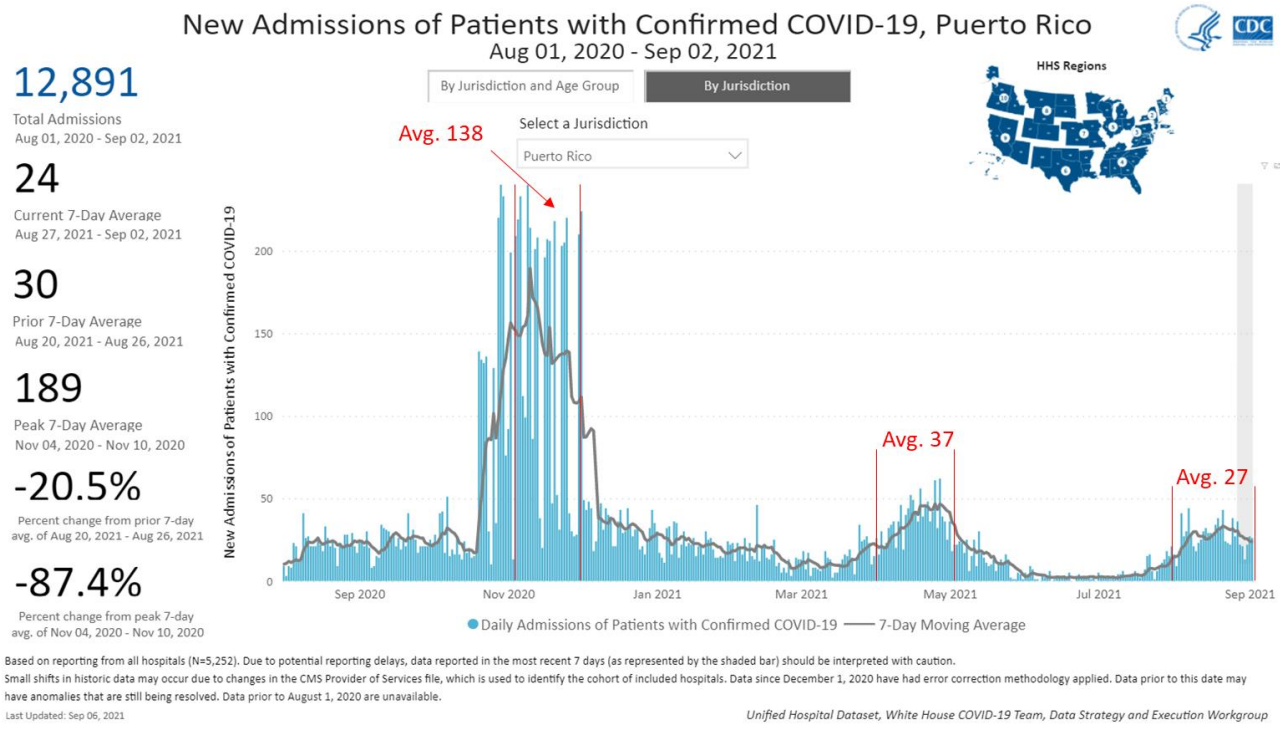


D. New Admissions of Patients Confirmed with COVID-19

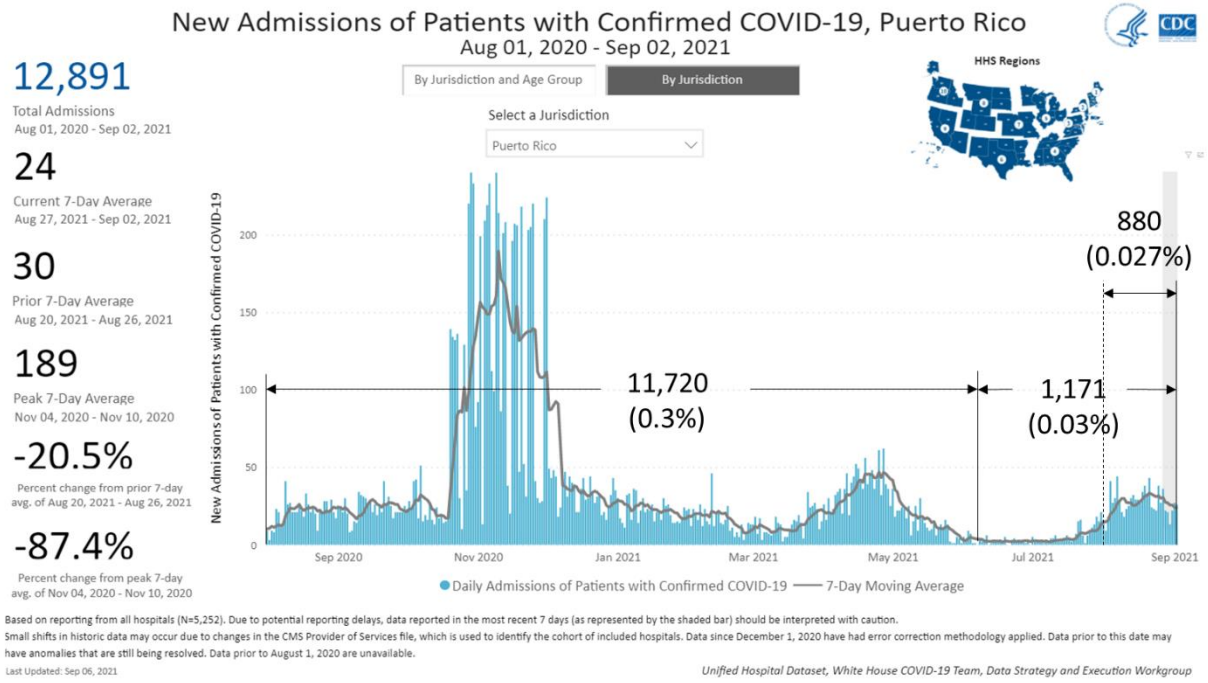
The new admissions in hospitals for confirmed COVID cases have gone down in the past 14 days, having reached their peak, with 33 new admissions (7-day running average), on August 22, 2021. As of today, September 7, 2021, new admissions in hospitals were 24 (0.0007% of the population). The new admissions during our first wave of COVID surge started, November 1, 2020 to January 4, 2021, had a daily average of 83 and peaked at 189 on November 10, 2020. For the month of November, it had a daily average of 138 and for December a daily average of 33. The second wave, April 5 to May 4, 2021, had a daily average of 37 and peaked at 47 on November 10, 2020. New admissions of patients with confirmed COVID-19 had peaked at 47 on April 27, 2021. The third wave, August 1 to September 7, 2021, has a daily average of 27 and peaked at 30 on August 10, 2020. *See* CDC | New Hospital Admissions, *New Admissions of Patients with*

Confirmed COVID-19, Puerto Rico, https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions.

Put another way, new admissions of patients with confirmed COVID-19 in this third wave, with the Delta variant included and no restrictions, are up to 80% lower and its peak six-times lower than in the previous waves without the Delta variant and with restrictions.



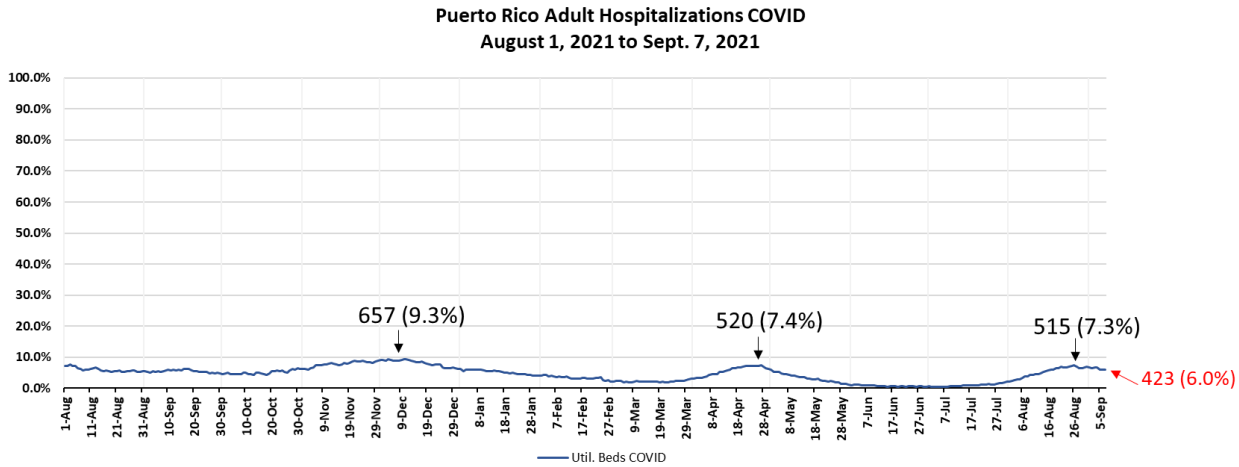
Looking at new admissions prior to the Delta variant, August 1, 2020 to June 14, 2021, there were 11,720 new admissions of patients (0.3% of the population). After the Delta variant, June 15 to September 2, 2021, the total of new admissions was 1,171. That is 0.03% of the population. And since August 1, 2021 to September 2, 2021, there have been 880 new admissions (0.027% of the population).



E. Hospitalizations

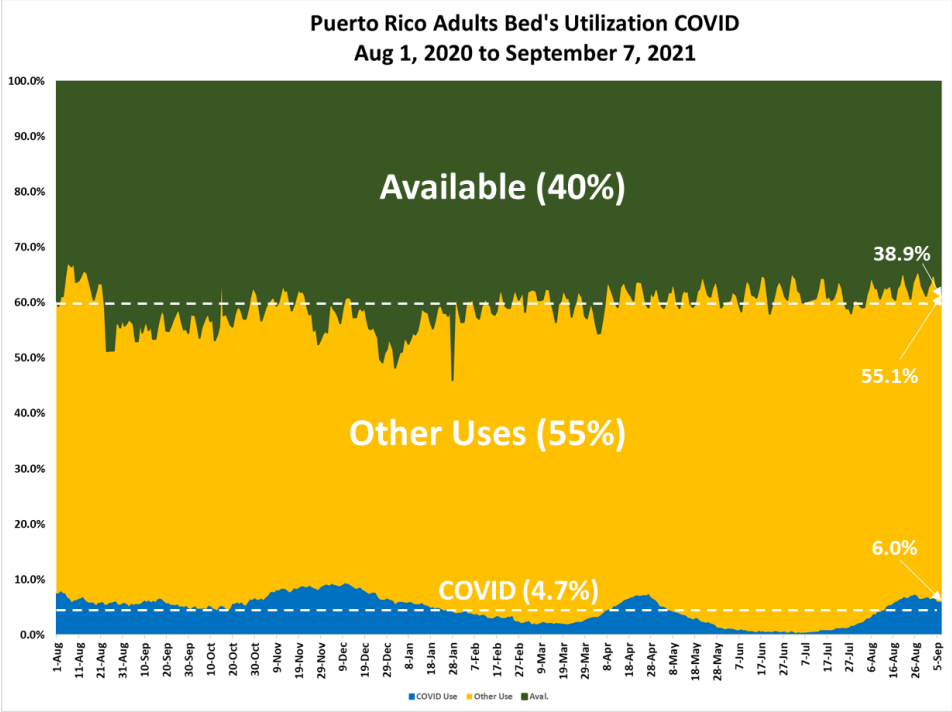
Our hospitalizations have gone down in the past 12 days, having reached their peak on August 26, 2021, with 515 (7.3%). As of today, September 7, 2021, the adult hospitalization total is 423 (6.0%). On our first wave of COVID surge, November 1, 2020 to January 4, 2021, our adult bed and hospital utilization average was 7.8% (550) with the peak at 657 (9.3%) on December 10, 2021. The second wave, from April 5 to May 4, 2021, the adult bed and hospital-utilization average was 6.2% (440) with the peak at 520 (7.4%) on April 27, 2021. The third wave, the current one, August 1 to September 7, 2021, the adult bed and hospital utilization average 5.4% (382) with the peak at 515 (7.3%) on August 26, 2021. *See* COVID-19 En Cifras En Puerto Rico, *Sistema de Salud*, https://covid19datos.salud.gov.pr/#sistemas_salud.

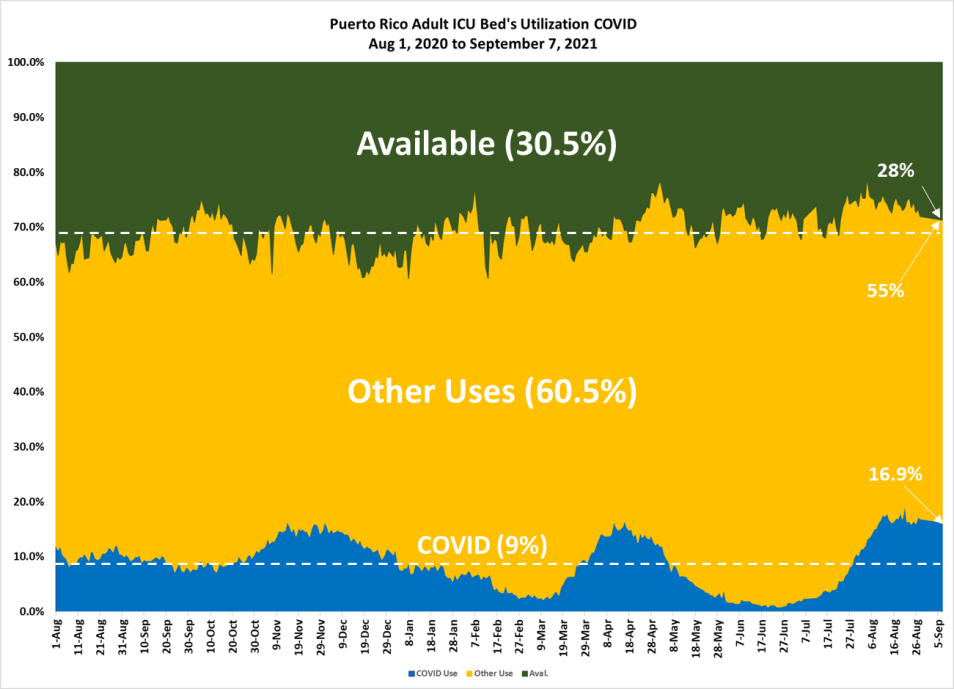
Put differently, adult bed hospitalizations and hospital utilization in this third wave, with the Delta variant included and fewer restrictions, are up to 30% lower and its peak over 20% lower than in the previous waves without the Delta variant and with more restrictions.



E. Hospital Capacity

Currently, as of September 7, 2021, PR's adult bed availability was 38.9% and adult ICU was 28%. From August 1, 2020 to September 7, 2021, the average availability of adult beds in hospital has been 40% and for ICU it has been 30.5%. And adult hospital bed availability has never been in jeopardy. *See* COVID-19 En Cifras En Puerto Rico, *Sistema de Salud*, https://covid19datos.salud.gov.pr/#sistemas_salud.



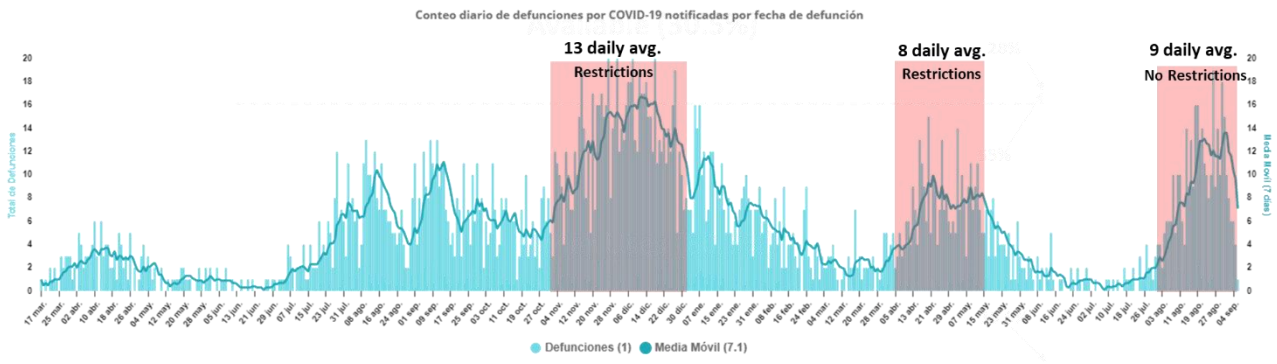


F. Deaths and Vaccinations Rates

Currently, our deaths have started to recede for the past seven consecutive days. As of September 7, 2021, we had reported 4 deaths on September 5, 2021. That is over 4x lower than our

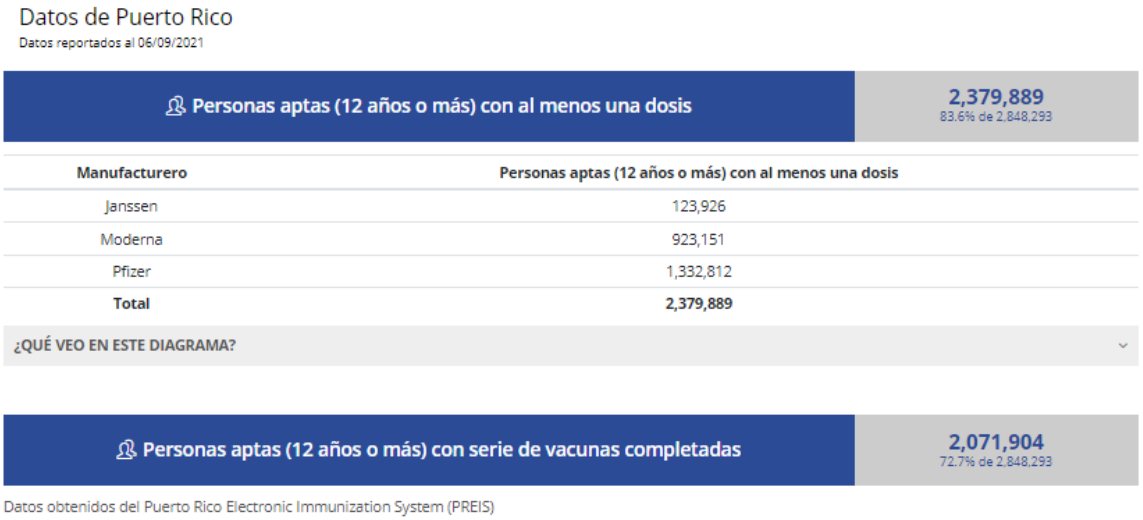
peak on August 30, 2021, 18 deaths. For our first wave of COVID surge, November 1, 2020 to January 4, 2021, our daily deaths average was 13 with the peak at 20 on December 8, 2020. For the second wave, April 5 to May 4, 2021, the average daily deaths were eight and the peak was 15 on April 20, 2021. For the third wave, August 1 to September 5, 2021, the average daily deaths are nine and the peak is 19 on August 26, 2021. As a matter of fact, in August 2021, with 306 deaths related to COVID in the month of August 2021, Puerto Rico has fewer such deaths than in the pre-vaccine, non-Delta variant, months of November (346) and December (445). *See* COVID-19 En Cifras En Puerto Rico, *Defunciones*, *https://covid19datos.salud.gov.pr/#defunciones*.

That is, our average daily deaths in this third wave, with the Delta variant included and no restrictions, are up to two times lower than in the previous waves without Delta variant and with restrictions. Moreover, August 2021 is third in total deaths, after November and December 2021.



Empirically, with the Delta variant and with fewer restrictions, there has been fewer active cases, fewer people have been infected, fewer people have been hospitalized, and fewer people have died than before the Delta variant within a similar timeframe. The current wave (August 1 to September 7, 2021) is not only the smallest one, but also the shortest one, lasting only 14 days before reaching its "peak." (The previous one peaked after 53 and 16 days, respectively.)

The current number of cases, adult hospitalizations, and deaths are lower than during the past two COVID-19 spikes that we have experienced. Moreover, by having a large percentage of the eligible population vaccinated—again, 72.7% full and 83.6% with one dose as of September 7, 2021, there are fewer hospitalizations. *See COVID-19 En Cifras En Puerto Rico, Vacunación* https://covid19datos.salud.gov.pr/#vacunacion.



Datos de Puerto Rico

Datos reportados al 06/09/2021

Personas aptas (12 años o más) con al menos una dosis	2,379,889 83.6% de 2,848,293

Manufacturero	Personas aptas (12 años o más) con al menos una dosis
Janssen	123,926
Moderna	923,151
Pfizer	1,332,812
Total	**2,379,889**

¿QUÉ VEO EN ESTE DIAGRAMA?

Personas aptas (12 años o más) con serie de vacunas completadas	2,071,904 72.7% de 2,848,293

Datos obtenidos del Puerto Rico Electronic Immunization System (PREIS)