UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ZULAY RODRÍGUEZ VÉLEZ, et al. Plaintiffs, **v.** **HON. PEDRO R. PIERLUISI URRUTIA,** Defendant.	**CIVIL NO. 21-1366 (PAD)**

SUR-REPLY TO PLAINTIFFS' "*REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION*"

TO THE HONORABLE COURT:

COME NOW Pedro R. Pierluisi Urrutia, in his official capacity as Governor of the Commonwealth of Puerto Rico, through the undersigned counsel, without waiving any right, objection or defense arising from the Title III of Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA"), 48 U.S.C. §§2101 et seq., the Commonwealth's Petition under said Title or under this case, and respectfully allege and pray as follows:

I. INTRODUCTION

On September 7, 2021, Plaintiffs filed a 25-page *Reply to Opposition to Motion for Preliminary Injunction*, largely rehashing previous arguments; insisting in bringing unnecessary scientific, empirical and statistical data; and attempting to bring new allegations disguised as "updates". (*See* Docket No. 32). At the outset, Defendant considers as unnecessary the analysis of the mentioned scientific data because the broad police powers of the Governor in light of the current public health emergency contemplates the present Executive Order. Also, arguments unrelated to the opening brief, and brought for the first time in a reply brief are belated, should be

deemed waived, and, thus, should not be considered. *See Latin American Music Co. v. The Archdiocese of San Juan of Roman Catholic & Apostolic Church*, 499 F.3d 32, 41 (1st Cir. 2007) (noting that courts will not consider arguments raised for the first time in a reply brief); *Southwire Co. v. Ramallo Bros. Printing, Inc.*, 540 F. Supp. 2d 307, 312 n.5 (D.P.R. 2008) ("The court's local rules strictly limit the content of a reply memorandum to 'new matter raised in the objection or opposing memorandum.' D.P.R. L. Cv. R. 7.1(c). A litigant may not use a reply to rehash old arguments or to assert arguments it could and should have presented in an earlier memorandum.").

In any event, as will be explained further on herein, Plaintiffs' Reply does not weigh in favor of enjoining Defendant from enforcing Executive Order 2021-058. As argued in our *Memorandum in Opposition to Motion for Preliminary Injunction* (*Memorandum in Opposition*) (Docket No. 22), Plaintiffs fail to meet the necessary requirements needed for the issuance of a preliminary injunction. Therefore, Defendant reiterates that Plaintiffs' request for preliminary injunction should be DENIED.[1]

II. DISCUSSION

A. Plaintiffs' RFRA claim is meritless.

Plaintiffs mistakenly contend that Defendant ignored the correct standard for their RFRA claim. 9See Docket No. 32 at 5-8). A simple reading of the Motion to Dismiss (Docket No. 20), which was incorporated by specific reference to Defendant's *Memorandum in Opposition* (Docket No. 22), supports the contrary. Succinctly, Defendant, in discussing the sections of RFRA, specified that the standard was that imposed by *Sherbert v. Vener,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972). RFRA clearly established that Congress' purpose for the statute was to restore the compelling interest test set forth in the above cited case law, and "to

[1] Defendant adopts by reference the arguments made in the Opposition at Docket 22 as if fully set forth herein.

guarantee its application in all cases where free exercise of religion is substantially burdened." This means that Court must apply the strict scrutiny if Plaintiffs' "free exercise of religion is substantially burdened." (Docket No. 20 at 23-25) However, as discussed in the Motion to Dismiss, the Executive Order would clearly pass said scrutiny, because it contemplates multiple exceptions and opt outs, thus, providing the least restrictive means to achieve the purpose of safeguarding the public health and safety during the existing COVID-19 pandemic.

Moreover, Plaintiffs only seem to question the need for a spiritual leader affidavit, which allegedly most are not willing to issue, and mistakenly conclude that "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." (Docket No. 32 at 6) A simple reading of Section 3 of the Executive Order proves Plaintiffs' conclusion wrong.

Plaintiffs argue that working remotely would be a less intrusive way of promoting the Government's interests in avoiding the spread of the virus. (Docket No. 32 at 8). However, Plaintiffs are not elected officials with policy making authority. Plaintiffs further ignore that vaccination plays a crucial role in limiting spread of the virus and minimizing severe disease. Plaintiffs very much admit to the vaccines effectiveness and important role that has played in preventing hospitalizations and deaths. (See Docket No. 30 at 3). Thus, from Plaintiffs' own admissions, it can be concluded that the Government has a compelling interest and has employed the least restrictive means in promoting the vaccination of all residents in Puerto Rico.

For starters, the only entity that has authority to administer its personnel is the Government of Puerto Rico. Within said authority, the Government of Puerto Rico has enacted the *Government of Puerto Rico Remote Work Act*, Act No. 36-2020, which provides the alternative of remote work for its employees if they meet several parameters. Any request from a public employee regrading

remote work must be analyzed by the employees' public agency in order to determine if they qualify or not. Nonetheless, as argued in Defendant's Motion to Dismiss (Docket No. 20 at 27-28 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984)), the Eleventh Amendment bars this Court from ordering state officer to conform their conduct to state law. Defendant hereby incorporates said discussion to the instant motion.

B. Plaintiffs were unable to rebut Defendant's lack of standing argument as to their procedural due process claim.

Federal courts do not possess a roving commission to publicly opine on every legal question and do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities, nor do they issue advisory opinions. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (deciding that federal courts decide only matters "of a Judiciary Nature.")

Plaintiffs contend that they will testify in a hearing that they are already exhausting their paid leaves. (*See* Docket No. 32 at 9). If Plaintiffs' testimony is believed to be true then it means that they have chosen to (1) not get vaccinated and (2) have failed to provide a negative COVID-19 test. As previously stated, the Executive Order primarily contemplates, as an opt-out, regular or compensatory paid leave for public employees that decide not to immunize and refuse to provide their employer with a weekly negative COVID-19 test result. (Docket No. 11-1 at 13). On the other hand, the unpaid leave provision of the Executive Order offers a viable option for public employees that do not have any regular or compensatory time accrued and that decide not to comply with any of the Executive Order's requirements, including opt outs and exceptions, for in-person work. Accordingly, Plaintiffs self-inflicted injury cannot be construed as having standing in this case. Another federal district court, cited for its persuasive value, has determined that a plaintiff that fails to invoke a vaccination exception does not have standing to sue. The United States District Court for the District of Connecticut recently held the following:

> The third plaintiff has declined even to seek an exemption. Having failed to avail herself of a simple process that may allow her to avoid the vaccination requirement, she has not suffered an injury that the law recognizes as the basis for a right to complain in federal court. Accordingly, the Constitution requires me to dismiss this action for lack of federal jurisdiction.

Wade v. Univ. of Connecticut Bd. of Trustees, No. 3:21-CV-924 (JAM), 2021 WL 3616035, at *1 (D. Conn. Aug. 16, 2021). Plaintiffs can easily avoid exhausting their paid leaves if they provide weekly negative COVID-19 test results and they have ample testing alternative to choose from outside their working hours or, depending on the agency's policy, even request a special work schedule to accommodate the COVID-19 testing. Plaintiffs alleged that weekly testing is too burdensome but pursuant to their own statements, they ignore the fact that the Government and municipalities have been offering free COVID-19 tests. (*See* Docket No. 20 at 25). Therefore, since Plaintiffs' self-inflicted injuries are not fairly traceable to the Government's purported activities, it follows that they have no standing to assert a procedural due process claim. *See* *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

C. <u>EO 2021-058 does not violate Plaintiffs' substantive due process rights under any constitutional scrutiny</u>.

Plaintiffs contend that the Supreme Court cases of *Jacobson* and *Zucht* are inapposite because they are from a different epoch. (*See* Docket No. 32 at 11). If by the mere passage of time binding caselaw becomes obsolete, then *Marbury v. Madison*, 5 U.S. 137 (1803), which establishes the principle of judicial review doctrine and is considered one the foundations of U.S. constitutional law, would be equally anachronistic, according to Plaintiffs' logic. In fact, the Constitutional grounds in which Plaintiffs assert their Complaint, such as the Fourteenth Amendment, are more than a century old. Moreover, the case of *Jacobson* is still good law and has been recently cited with approval by the Supreme Court in cases like *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2000), and *Calvary Chapel Dayton Valley v. Sisolak,* 140 S.Ct.

2603 (2020), as well as in federal circuit courts such as in *Klassen,* 7 F.4th 592 (7th Cir. 2020). It is undisputed that *Jacobson's* rational basis standard has not been overruled by the Supreme Court. Therefore, to categorize *Jacobson* standard as antiquated is unfounded.

Even though, Plaintiffs concede that there is no precedent to a right to decline a vaccine that has been deemed fundamental, they still obstinately contend that *Jacobson's "proto-rational basis standard"* should not be applied because is too old. (*See* Docket No. 32 at 13-14). However, Plaintiffs cited case law does not support their argument that *Jacobson's* rational basis standard of review should not be applied in the present case. For starters, *Riggins v. Nevada*, 504 U.S. 127, 135 (1992), and *Sell v. United States,* 539 U.S. 166, 181 (2003), dealt with detained individuals who were **forced** to take antipsychotic drugs during the course of trial. As has been explained *ad nauseum*, the EO 2021-058 gives the option for unvaccinated workers to provide a weekly negative COVID-19 test. Hence, since EO 2021-058 does not force public employs to involuntarily vaccinate, *Riggins* and *Sell* are clearly distinguishable from the instant case.

Plaintiffs state that the *Memorandum in Opposition* is devoid of almost any empirical, statistical, or scientific data and that they have gone to great lengths to include all data available to them to put this Court in a position to gauge the alleged infringement of their constitutional rights. (*See* Docket No. 30 at 1). However, as set forth in the Motion to Dismiss (Docket No. 20 at 3, 13-14), statistical analysis of the Government's data is unnecessary. Furthermore, in light of the unquestionable spike in COVID-19 cases and the broad police powers of the Governor of Puerto Rico to safeguard the health and safety of the residents of Puerto Rico during an emergency.[2] For argument's sake only, even if Defendant were to indulge in Plaintiffs' scientific debate, which is

[2] Pursuant to Rule 201 (b) (2) of Federal Rules of Evidence, this Court can take judicial notice of the data provided by the Department of Health regarding the spike of COVID-19 cases and deaths resulting from COVID-19 in Puerto Rico, as well as the Center for Disease Control and Preventions ("CDC") declaration that Puerto Rico is a high-risk destination for non-vaccinated persons.

completely unnecessary for purposes of adjudicating the present case, this Court can easily verify that Plaintiffs' supposedly empirical data does not support their allegations, as they intend to establish. For example, Plaintiffs contend that the EO 2021-058 makes irrational and arbitrary distinctions between vaccinated and unvaccinated individuals because studies have demonstrated that with the Delta variant, the viral load is the same between unvaccinated and vaccinated. (*See* Docket No. 30 at 14). While it is true that preliminary studies have shown that the viral load may be the same with Delta variant, the CDC has stated that vaccinated people appear to spread the virus **for a shorter time** and, as a result, the greatest risk of transmission is among unvaccinated people who are much more likely to get infected and transmit the virus. (*See* Docket No. 30-3). That is one of many reasons why governmental employees, who are unvaccinated, are required a negative COVID-19 test on a weekly basis, while the vaccinated are not. Hence, the Government's interest in avoiding the spread of this virus through vaccination of governmental employees is more than justified.

Plaintiffs' allegation that the Government is promoting segregation and demonization is misplaced and outrageous. (*See* Docket No. 32 at 2). The agenda of the Defendant is no secret, the Government of Puerto Rico is responsible for promoting the health and safety of all residents, including public employees, without classification of their vaccination status. This is exactly the purpose that Executive Order 2021-058 attempt to achieve by requiring the vaccination of governmental employees or, in the alternative, the weekly negative COVID-19 test results.

D. <u>The Pfizer Comirnaty vaccine approval forecloses Plaintiffs' Preemption Claim</u>.

Astonishingly, Plaintiffs argue against foreclosing their preemption claim because Pfizer cannot convert a legally distinct product (the BioNTech) into a fully approved vaccine (the Comirnaty). (*See* Docket No. 32 at 17). However, "the FDA-approved COMIRNATY (COVID-

19 Vaccine, mRNA) and the EUA-authorized Pfizer-BioNTech COVID-19 Vaccine have **the same formulation and can be used interchangeably** to provide the COVID-19 vaccination series." *See* https://www.fda.gov/media/144413/download. It is undisputable that the Pfizer approved vaccine and Comirnaty are the same product because they have same formulation. Basically, it is the same product with a different name. Before an FDA approval, pharmaceutical companies do not have a patent to move forward with names and branding for their product. Accordingly, Plaintiff preemption claims falls flat because it is moot. In *Norris v. Stanley*, The United States District Court for the Western District of Michigan held that "should Plaintiff be offered the FDA-approved Pfizer Comirnaty vaccine, her argument under the EUA statute would be moot, as she would not be entitled the option to refuse the vaccine. Thus, Plaintiff has failed to demonstrate a substantial likelihood of success on the merits on EUA grounds as well." Case No. 1:21-CV-756, 2021 WL 3891615, at *2 (W.D. Mich. Aug. 31, 2021). Thus, Plaintiffs have failed to demonstrate a substantial likelihood of success on the merits on the preemption claim on EUA grounds.

E. <u>Plaintiffs admitted that their alleged irreparable harm is economic in nature, thus, they fail to establish an irreparable harm for purposes of an injunctive relief</u>.

In their Reply, Plaintiffs argue that they will establish irreparable harm by testifying that they have incurred in expenses for medical referrals in order to obtain a weekly COVID-19 test result. (*See* Docket No. 32 at 18) Clearly, Plaintiffs purported testimony does not amount to an irreparable harm. An irreparable harm is an extraordinary harm—one that cannot be fully compensated by money damages. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs did not rebut the availability of venues providing free COVID-19 tests. (*See* Docket No. 22 at 22). These venues are still available to the general public, including Plaintiffs. Therefore, the vaccine requirement in the EO 2021-058 does not pose an irreparable harm to Plaintiffs since, at best, the

harm would be economic in nature. (*See* Docket No. 32 at 20) (stating that "the EO 058 is causing and continues to cause irreparable economic harm".)

Also, Plaintiffs argue that Defendant has not specify which administrative remedies they have available. (*See* Docket No. 32 at 20). However, it is important to clarify that each agency has a human resources office in which they can process a grievance that is labor related. Moreover, the Public Service Appeals Commission ("CASP", for its Spanish acronym) acts as a quasi-judicial body in the Executive Branch, specialized in labor-management matters, attending labor cases, appeals of human resources decisions by an agency for public employees. In the case at hand, Plaintiffs have utterly failed to mention that they have filed an appeal any human resources decisions within the agency in which they are currently employed in CASP. Accordingly, Plaintiffs still have not shown that, without an injunction, they would suffer an irreparable harm, not economic in nature.

F. Public Interest tips heavily in favor of Defendant.

In analyzing the balance of equites and public interest, Plaintiffs appear to refuse to understand that the purpose of EO 2021-058 is to prevent the spread of COVID-19. In his Response, Defendant pointed out Plaintiffs' rash and irresponsible allegation at Docket No. 16 at 17 that the government is attempting "to protect the unvaccinated population, who chose to assume the risk of not getting vaccinated, from themselves." Defendant contended that children under twelve years old cannot get a vaccine to protect themselves against COVID-19. (*See* Docket No. 22 at 24). Plaintiffs replied by stating that the COVID-19 virus is less harmful to children than the flu and that no children under twelve has died of COVID-19 in Puerto Rico. (*See* Docket No. 32 at 21 & FN 6). Plaintiffs' irresponsible reasoning implies that as long as thousands of children are

not dying in Puerto Rico of COVID-19, then it is not necessary to make efforts to avoid the spread of the virus.

However, Plaintiffs deceive the court inasmuch as tragically there have been 5 deaths in the age group of 10-19 years old, most of them before the advent of the vaccines.[3] This number is increasing because as of August 8, 2021, at least 520 children have died, according to CDC data.[4] It bears noting that many of those children had no known preexisting conditions. Furthermore, over 55,000 children have been hospitalized with Covid-19 since August 2020, according to CDC data.[5] Plaintiffs' egregious statement in no way means that the Government cannot take affirmative actions to control the spread and avoid further deaths, being pediatric or adult deaths due to COVID-19.

Accordingly, the public interest here is great and tips heavily in favor of Defendant. The balance of equities cannot be in favor of Plaintiffs when their alleged harm consists of the expense of medical referrals and private testing, despite the availability of free testing. The most important pressing issue at the moment is to prevent the spread of the COVID-10 virus and its variants. Public health and safety during the emergency of the COVID-19 pandemic are still major factors that outweigh Plaintiffs' alleged economic harms. Specially, when Plaintiffs' objections to the opt-outs in the Executive Order are mere inconveniences and general grievances. Therefore, Plaintiffs' request for a preliminary injunction must be DENIED.

G. The Bond requirement under Rule 65(c) of Civil Procedure cannot be waived.

Plaintiffs alleged in their Reply that since their claims are constitutional in nature and they are governmental employees of modest means then the Court should waive the bond requirement.

[3] https://www.salud.gov.pr/estadisticas_v2#defunciones
[4] https://covid.cdc.gov/covid-data-tracker/#demographics
[5] https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions

(*See* Docket No. 32 at 24). However, Defendant maintains that Rule 65(c) **requires** that a bond be posted before the issuing of a preliminary injunction and the only discretion left to the Court is the amount of the same. After all, what is the price of a life lost due to the deadly disease that is COVID-19, when compared to the bond. Therefore, if the Court were to grant the injunctive relief, which Defendant insist is unwarranted, he reiterates that due to the adverse impact in the public health that an issuance of a preliminary injunction could have, a bond of no less than $35,000 is required to be posted by Plaintiffs.

III. CONCLUSION

In light of above-discussed exigent circumstances, this Honorable Court must not enjoin Defendant from requiring vaccination among governmental employees through EO 2021-058. The Governor's compelling interest in issuing the challenged EO 2021-058 is to safeguard the public health and safety of all residents of Puerto Rico, including Plaintiffs.[6]

Plaintiffs have not been able to establish the required four prongs for a preliminary injunctive relief. Therefore, it is forceful to conclude that Plaintiffs request for a preliminary injunction must be denied.

WHEREFORE, the Defendant prays that this Court take notice of the present motion and consequently DENY Plaintiffs' request for preliminary injunction.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all attorneys of record.

[6] This Court can take judicial notice that on this date President Joe Biden has signed an Executive Order making vaccination among federal employees and contractors mandatory.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on September 9, 2021.

DOMINGO EMANUELLI-HERNÁNDEZ
Secretary of Justice

SUSANA I. PEÑAGARÍCANO-BROWN
Deputy Secretary in Charge of Litigation

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