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)**

Opposition to Motion to Dismiss

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 oppose the defendant's (Defendant) Motion to Dismiss at ECF No. 20 (MTD).

The MTD, among other things discussed below, argues that all claims fail the plausibility test because (1) Executive Order No. 58 (EO 58) "does not violate Plaintiffs' freedom to exercise their religious rights under RFRA," MTD at 5; (2) Plaintiffs' substantive due process claims fail because EO No. 58 "passes either a rational or strict scrutiny [test], since, through its exceptions . . . ., it uses less onerous means to advance the compelling public health interest," *id.* at 4; (3) Plaintiffs "have not been deprived of a proprietary interest," *id*; and (4) the Supremacy Clause claim, which is both moot and flawed. And just like the opposition to the PI Motion, the MTD's tone is regrettably inflammatory. *See* MTD at 4 (saying that Plaintiffs' challenges "are a subterfuge to further their anti-vaccine agenda through a federal court"); *id.* (describing Plaintiffs "theories" as "reckless"); *id.* at 29 and 38 (calling two of

Plaintiffs' claims "frivolous"). But Defendant gains no "advantage from the incessant hurling of epithets. Rancor and petulance are not attractive qualities and giving vent to them rarely if ever advances a litigant's cause." *In re Efron*, 746 F.3d 30, 38 n. 4 (1st Cir. 2014). And as made clear in the reply to the opposition to the preliminary-junction motion, "Plaintiffs are not advocating that willing government employees (or anyone else) not get vaccinated." ECF No. 32 at 3. 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.

For the reasons laid out below, if this Court draws all reasonable inferences in Plaintiffs' favor and takes the amended complaint's well-pleaded facts as true—as it must under the 12(b)(6) standard—it should deny the motion to dismiss.

I. Given Defendant's concessions, this Court should apply the correct legal standard (which the MTD ignored) to readily hold that Plaintiffs plausibly plead a RFRA claim.

Defendant candidly admits that EO 58 "provides a general alternative to public employees that simply do not want to inoculate with a COVID-19 vaccine, regardless of the reasons not to do so." MTD at 7. So this Court can readily deny the MTD based on Defendant's *admission* that EO 058 discriminates against employees who decline the vaccine because of their religious beliefs. *Id.* at 6 (saying that EO 58 "provides a general 'opt-out' alternative for public employees that plainly refuse inoculat[ion] for *any* reason") (emphasis added). EO 58, after all, places upon religious objectors a higher burden than the burden imposed upon those who decline the vaccine for any other reason.

Indeed, insofar as EO 58 "requires affidavits from employees who refuse to get vaccinated due to their religious beliefs but does not require the affidavit of other employees who choose not to get vaccinated for any other reason, [it] imposes an additional burden only to those employees with certain religious faiths and beliefs . . . ." ECF No. 11, ¶ 164. It singles them out. *See also* ECF No. 32 at 5–6 (explaining how "the government is purposely deceiving its employees and the public"). For this reason alone, this Court can readily hold that Plaintiffs have plausibly plead that the requirement that objectors submit a religious affidavit violates RFRA. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (upholding the grant of a preliminary injunction to potential targets of federal drug prosecution under RFRA). And if more were needed, the EO 58 also violated a fundamental tenet, namely that government may "may not discriminate against religion generally . . . ." *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (Kavanaugh, J., concurring); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 524–525 (1993); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953).

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"). The MTD 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 id.* ¶¶ 149–152 (citing *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989)). Accordingly, this Court may also find that Plaintiffs have plausibly plead that Defendant is

unconstitutionality requiring a third-party affidavit as a condition to obtain an unnecessary religious exception.

Moving to the core of the RFRA claims, the bulk of the MTD ignores that, 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). Thus, for example, the MTD's invocations (pp. 31–36) of *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020), are off the mark. They were free-exercise cases. But this is a RFRA claim, which requires the government to use "the least restrictive means of furthering [its] compelling governmental interest." [1]

Defendant also argues that "it cannot be reasonably found that [he] is imposing a substantial burden on Plaintiffs' religious practices." MTD at 34. It says only that EO 58 "does not promote a classification between employees based on any factor other than being public employees in the Executive Branch." MTD at 32–33. But the MTD neither discusses nor applies the right standard: "A substantial burden exists when the Government forces a person to act, or refrain from acting, in violation of his or her religious beliefs, by threatening

[1] 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.'" MTD at 34 (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.* But RFRA continues to apply Puerto Rico as a covered entity of the United States. 42 U.S.C. § 2000bb-2(2).

sanctions, punishment, or denial of an important benefit as a consequence for noncompliance." *New Doe Child #1 v. United States*, 901 F.3d 1015, 1026 (8th Cir. 2018) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014)).

At the outset, because EO 58 directs Plaintiffs to do something, it governs private conduct. *See Hobby Lobby*, 573 U.S. at 720–724. And Plaintiffs have plausibly alleged a substantial burden under RFRA—one that could be redressed through less-draconic exemptions or accommodations. *See id.*; *see also Sherbert*, 374 U.S. at 399-401 (violating a requirement that a person accept available work on the Sabbath would make the individual categorically ineligible for unemployment benefits). It's true that not all burdens are "substantial." But this case is a far cry from, say, *New Doe Child #1*, which rejected a RFRA challenge to of national motto, "In God We Trust," on United States coins and currency, finding that the inconveniences of relying on the many alternatives to cash does not rise to the level of a substantial burden. 901 F.3d at 1026; *see also id*. ("[W]e do not think that difficulty buying 'a popsicle from the neighborhood ice cream truck" or using a coin-operated laundry machine is what the Supreme Court had in mind when it said that RFRA protects against the denial of 'full participation in the economic life of the Nation.'" (quoting *Hobby Lobby*, 573 U.S. at 733). Having to go through the additional and sometimes impossible burden of obtaining an unnecessary religious affidavit, combined with the draconian and irrational testing scheme—with mounting and indefinite expenses, including having to exhaust available sick and vacation leave, and then going on unpaid leave—no doubt forces into

caving in and violating their religious beliefs by getting vaccinated. *See* ECF No. 11, ¶¶ 15, 57, 153-160; *see also* § 3B, below, and ECF No. 32 at 12-5.

Not content to let the matter rest, Defendant argues that the EO 58 "is narrowly tailored because, while it mandates vaccination, it provides multiple exceptions and "opt-outs" for employees that decide not to inoculate." MTD at 37. But, as just discussed, the so-called religious exemptions are illusory. More critically, Defendant ignores that the amended complaint plausibly pleads that 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. *See* ECF No. 11, ¶ 131 ("Where, as here, the plaintiffs have the equipment necessary to work remotely, their duties allow them to do so, and they have worked remotely in the past without any indication that their performance has been affected, forcing them to submit to weekly tests at their own cost constitutes an undue burden."); *id.* ¶ 160 (alleging that EO 58 "does not provide the option of any criteria to determine which type of employee may work remotely"). But even other alternatives—like providing on-site testing or giving public employees paid leave to obtain the required medical referrals and take the tests and reimbursing the plaintiffs for any costs associated with complying with the executive order—are less restrictive and burdensome than the EO 058's testing scheme. ECF No. 11, ¶ 157–164 (so alleging). *See also Magliulo v. Edward Via Coll. of Osteopathic Med.*, No. 3:21-CV-2304, 2021 WL 3679227, *7 (W.D. La. Aug. 17, 2021) (finding that university that mandated unvaccinated students "to wear a mask on campus, have frequent testing for the COVID-19 virus and to use the MyHealthTracer.com application was "unlikely to be able to

show that it used the least restrictive means of compelling their interest of keeping students, employees, and patients safe"); *Hobby Lobby*, 573 U.S. 682 at 730 ("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs.").

Accordingly, and "consistent with the Rule 12(b)(6) standard," this Court should "assume[] the truth of [these] factual claims." *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63, 73 (1st Cir. 2021). So viewed, the amended complaint plausibly pleads a RFRA claim in at least three different ways.

II. Because EO 058 is already harming Plaintiffs and because they have plausibly plead a property interest, Plaintiffs plausibly plead a procedural-due-process violation.

Defendant first argues that "since Plaintiffs have not pleaded to have suffered a constructive discharge . . . all allegations related to a procedural due process violation must be dismissed for lack of Article III standing." MTD at 29 (citation omitted).[2] But this is smoke and mirrors: Plaintiffs do not base their procedural-due-process claim on being discharged. Plaintiffs are already suffering harm by having to exhaust their sick and vacation leave to comply with EO 058. Of course, the EO 58 went into effect on August 16, 2021, the same day Plaintiffs filed the amended complaint. Opening to the gates to discovery will show that, since August 16, 2021, Plaintiffs have exhausted sick or vacation leave because of the government's action.

[2] Defendants also make the same standing argument rebutted in Plaintiff's reply to the opposition to their PI Motion. ECF No. 32 at 9. For efficiency's sake, Plaintiffs fully incorporate the arguments in the reply.

Next, Defendant "briefly discuss[es]" what the MTD calls Plaintiffs "frivolous argument as to that the unpaid leave contemplated by the Executive Order violates the procedural due process of the Fourteenth Amendment." MTD at 29. The EO 58, Defendant explains, "primarily contemplates 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." *Id.* (cleaned up).

But Defendant marshals no binding authorities for the proposition that, under Puerto Rico law, Plaintiffs lack 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, drawing all inferences in Plaintiffs' favor, the EO 058 inarguably diminishes that property interest without due process of law. Indeed, having to unfairly exhaust all sick and vacation leave—and then having to use unpaid leave indefinitely to obtain a COVID test—is plainly a diminishment, and an indefinite one to boot. And that's before adding the burden on Plaintiffs from complying with the alternative weekly testing pursuant. There are very real costs involved here that are more than enough to plead a claim. That EO 058 is indefinite is of critical importance here. The following reasonable inference follows at this plaintiff friendly stage: Unpaid leave is the natural consequence of having to comply with the EO 058's indefinite and overly cumbersome alternatives to vaccination. And once Plaintiffs' vacation and sick leave are exhausted, they will be relegated to an indefinite leave without pay.

Taking all well-pleaded allegations as true, and drawing all reasonable inference in Plaintiffs' favor, they have plausibly pleaded that they are suffering 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.

III. The amended complaint plausibly pleads violations of Plaintiffs' Substantive Due Process Rights, even under rational-basis scrutiny.

A. Plaintiffs have the right to challenge—with empirical data and statistical analysis—the government's rationale for imposing public policies that impose significant restrictions on their constitutionally protected rights to liberty.

In its introduction, the MTD says that it "will put this Court in position to confirm that Plaintiffs' reckless theories are based on *flawed* statistical and public policy conclusions . . . ." MTD at 3 (emphasis added). Defendant never discusses the detailed statistics set forth in the amended complaint, much less explains why he characterizes them as "flawed." Instead, Defendant says that, because "Plaintiffs are not in charge of designing the Commonwealth's public health policy," he "will not waste the Court's time by engaging on a never-ending debate regarding statistical conclusions and public policy that is certainly not appropriate for a court of law." *Id.* at 14. Relying mostly on *Jacobson v. Massachusetts,* 197 U.S. 11 (1905)—and on the Chief Justice's concurrence in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020)—Defendant's position is that the Government has absolute powers *beyond judicial review* when it implements executive orders during a health crisis, *see* MTD at 3–4 & 13.

In their previous filings, which are fully adopted here by reference, Plaintiffs explained why the more-than-a-century-old *Jacobson* standard which predates modern tiers of scrutiny

should not apply here, arguing instead for some form of heightened scrutiny. *See*, *e.g.*, PI Mot. at 9-12. And *Jacobson* has been thoughtfully criticized by legal scholars across the ideological spectrum for lacking in limiting principles characteristics of legal standards. *See generally*, *e.g.*, Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts*: *The Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179, 182 (2020) ("[T]he suspension principle is inextricably linked with the idea that a crisis is of finite--and brief—duration."); Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies*, The Volokh Conspiracy, https://reason.com/volokh/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/ ("[I]mposing normal judicial review on emergency measures can help reduce the risk that the emergency will be used as a pretext to undermine constitutional rights and weaken constraints on government power even in ways that are not really necessary to address the crisis."). Even more, *Jacobson* explicitly acknowledged the role of the courts to adjudicate claims that a state's police powers have gone too far. *Jacobson* 197 U.S. at 28 (recognizing that a state's police power "might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons").

More critically, in *Jacobson* itself, the Supreme Court used statistics to justify its holding. *See Jacobson*, 197 U.S. at 33, n.†. ("Nothing proves this utility more clearly than the statistics obtained."). The Court noted, among other things, that "[o]f those vaccinated 953, or 1.77 per cent, became affected with smallpox, and of the uninoculated 2,643, or 46.3 per cent, had the disease." *Id*. With COVID, however, in the advent of the Delta variant, "Covid-19 vaccine

was just 40.5% effective, on average, at preventing symptomatic disease." *See* CNBC *Fully vaccinated people are still getting infected with Covid. Experts explain why* (August 10, 2021), https://www.cnbc.com/2021/08/10/breakthrough-covid-cases-why-fully-vaccinated-people-can-get-covid.html.[3] So the available data has shown that the vaccine is not as effective in preventing infection of the disease. And according to the statistics referenced in *Jacobson*, the smallpox vaccine was far deadlier than COVID and the smallpox vaccine was far more effective in preventing the disease than the COVID vaccines currently available.

Unlike the evidence so far furnished by Plaintiffs, what Mr. Jacobson offered in his defense, and which was rejected by the trial court, did not challenge the statistics supporting the smallpox vaccine mandate. Indeed, the Court noted that according to the recitals in the regulation, smallpox was increasing and "nothing [was] asserted or appear[ed] in the record to the contrary." *Jacobson*, 197 U.S. at 27–28. The evidence Mr. Jacobson introduced, and the trial court rejected, was instead aimed to challenge the efficacy and potential dangers of the smallpox vaccine. *See id.* at 30. In rejecting Mr. Jacobson's proffer of evidence, the Court noted "that not only the medical profession and the people generally ha[d] *for a long time* entertained these opinions, but legislatures and courts have acted upon them with general unanimity." *Id.* at 24 (emphasis added).

[3] Most recent studies, yet to be peer-reviewed, have shown that within two months, the vaccine has a high efficacy but after 6 months, the vaccine may have a much lower efficacy, almost none. *See* MedRxiv, *Viral loads of Delta-variant SARS-CoV2 breakthrough infections following vaccination and booster with the BNT162b2 vaccine* (September 1, 2021), https://www.medrxiv.org/content/10.1101/2021.08.29.21262798v1.

That is certainly not the case here. "A long time" in *Jacobson* meant that the first compulsory act in England was passed in 1853, even though state-supported facilities for vaccinations had begun there since 1808. *Id.* at n. †. That is, it took over 40 years in England to impose a compulsory vaccination regime for a disease that was far deadlier than COVID. Here, in contrast, compulsory vaccination is being implemented—with far more burdens than in *Jacobson* for citizens like Plaintiffs—before a single year has passed since the vaccine was made available to the public.

And recall that Plaintiffs are not challenging the efficacy of the vaccine in preventing COVID-related hospitalizations and deaths. Instead, they are questioning whether the statistics presented, *which raw data has been provided by the government itself*, support a vaccine mandate which is: (1) more stringent than the one in *Jacobson,* when (2) the underlying disease is less deadly than in *Jacobson,* (3) the available data of vaccine efficacy in preventing the spread of COVID has shown that it is not as effective as the smallpox vaccine contemplated in *Jacobson,* and (4) the long-term effects of the vaccine are still unknown. Moreover, the pertinent statistical data to support the mandate—which is less compelling than in *Jacobson*—has not been available for "a long time" to be deemed as "common knowledge" as it was in *Jacobson*.

The upshot is that nothing in *Jacobson* prevents the Plaintiffs from introducing, and this Court from considering, the statistical evidence set forth in the amended complaint and related filings, *e.g.*, ECF No. 32-1—which has yet to be refuted by Defendant—to challenge the reasonableness of the vaccine mandate. *See Jackson v. Pollion*, 733 F.3d 786, 788 (7th Cir.

2013) (Posner, J.) (explaining that "the discomfort of the legal profession, including the judiciary, with science and technology is not a new phenomenon," and remarking that "it's increasingly concerning, because of the extraordinary rate of scientific and other technological advances that figure increasingly in litigation"). Certainly not at the motion-to-dismiss stage.

B. EO 58's regime, even with the so-called "exemptions" or available "opt outs," infringe on Plaintiffs' substantive due process rights.

After challenging the Court's authority to consider COVID-related statistics, Defendant singles out and misquotes (see omitted sections in brackets) one of Plaintiffs' allegation that "[some may consider] forcing citizens to have objects inserted up their noses weekly against their will is itself a personal-integrity violation." MTD at 14 (quoting ECF No. 11, ¶ 156). According to Defendant, "Plaintiffs' argument falls flat because not a single federal court has recognized a fundamental constitutional right to not be tested for a virus before entering a place of public accommodation." MTD at 20. Defendant cites several non-binding cases for the proposition that a "testing regime does not violate substantive due process because it is 'reasonably related to a legitimate state objective–curbing the spread of the COVID-19 virus.'" MTD at 20 (quoting *Aviles v. Di Blasio*, No. 20 CIV. 9829, 2021 WL 796033, *18 (S.D.N.Y. Mar. 2, 2021), and citing *Webb v. Johnson*, 2021 WL 2002712 (D. Neb. Mar. 2, 2021) (prisoner had no fundamental right to refuse having his temperature taken); *Wilcox v. Lancour*, 2021 WL 230113 (W.D. Mich. Jan. 22, 2021) (prisoner had no fundamental right to refuse a nasal passage test for COVID); *Little Rock Family Planning Servs. v. Rutledge*, 458 F.

Supp.3d 1065, 1074 (E.D. Ark. 2020) (applying *Jacobson* to uphold requirement that women obtain negative COVID test before medical procedure)).

But Defendant seems to be purposely missing the point. It bears noting that the allegation partially quoted by Defendant was made in the RFRA count, not on the Substantive Due Process count. And the previous allegation, which Defendant omitted for some reason, properly describes the burdens that Plaintiffs are going through. *See* ECF No. 11, ¶ 155 ("[T]he religious objectors would need to obtain negative COVID-19 results on a weekly basis by having objects inserted up their noses *weekly at their own cost, on pain of losing all their accrued vacation and sick days, and eventually their salaries*.") (emphasis added).

In any event, the cases cited by Defendant are easily distinguishable. None of them required ongoing burdens (including economic non-redressable burdens) for *indefinite* periods. For instance, in *Aviles v. Blasio*, the court held that the mayor could condition in-person classes on the parents signing "form consenting to random COVID-19 testing of their children." 2021 WL 796033, *1. But the testing regime in *Aviles*, unlike the one here, did not require that the students obtain medical referrals and pay for the potential random weekly COVID tests. Perhaps more importantly, the court in *Aviles* held that one of the plaintiffs lacked standing because, "like 63% of parents of children in New York City public schools," the plaintiff had "chose[n] remote learning for his child at the outset of the school year." *Id.* at *15.

That is precisely what Plaintiffs are proposing as a less burdensome alternative here: the ability to work remotely. Yet Defendant has yet to articulate a reason for refusing such a

sensible option. *Webb v. Johnson*, No. 4:21CV3042, 2021 WL 2982110 (D. Neb. July 15, 2021), is even easier to distinguish. Not only did it involve an inmate, but Plaintiffs (law abiding public employees) aren't challenging here the Commonwealth's right to have their temperatures taken at their respective workplaces. Nor does *Wilcox v. Lancour* aid Defendant: It also involved an inmate. No. 2:20-CV-183, 2021 WL 230113 (W.D. Mich. Jan. 22, 2021). And, in any event, Plaintiffs are not challenging a testing regime where the government provides COVID tests on-site at no cost to the required recipient. Indeed, that is precisely one of the least restrictive means ignored—that the government provide the required COVID test on-site at the workplace.[4]

Invoking *Klassen*, 7 F.4th at 592, Defendant argues that EO 58 is not "constitutionally problematic," because it provides Plaintiffs with multiple alternatives like the so-called "exemptions" or "the general 'opt out'", in which case, "[they] just need to wear masks and be tested." MTD at 18. But Plaintiffs have gone to great lengths to explain that they are merely asking to "be provided the same alternatives that were provided to the students in *Klassen*."

[4] *Little Rock Family Planning Servs. v. Rutledge*, which mas decided in *May 2020*, is also distinguishable, as it involved a directive requiring COVID test performed no longer than 48 hours before having an abortion and other elective medical procedures. *See* 458 F. Supp.3d 1065, 1074 (E.D. Ark. 2020). The problem was that obtaining tests results within that time frame was difficult for asymptomatic people. The court noted that the plaintiffs had a "very obvious problem" because the Eight Circuit had recently vacated a preliminary injunction on a similar but more stringent directive: "an outright ban on all pre-viability surgical abortions." *Id.* at 1072 (citation omitted). But the court made it clear that "the directive at issue clearly infringes on a right protected by the Constitution." *Id.* It ultimately denied the injunction noting that unlike here, the directive was set to expire in less than two months, and that the plaintiffs' concern was "mitigated by the fact that new COVID-19 testing facilities are coming online to alleviate this problem." *Id.* at 1074. But because *Rutledge* did not involve a vaccine mandate and did not require a person to submit to weekly COVID tests at their own cost, on pain of losing their accrued sick and vacation leave, and eventually their salaries, it does not help Defendant.

ECF No. 32 at 3-4; *see also* ECF No. 16 at 15. That is, to be allowed to work remotely, to have the government provide the required weekly tests at the workplace, or to be provided paid leave and reimbursement of the out-of-pocket costs related to compliance with the government's burdensome testing regime. *See* ECF No. 11, ¶¶ 66, 133, 158–162.

Undeterred, Defendant insists that Plaintiffs' substantive due process argument "falls flat . . . because *Jacobson* is essentially a substantive due process case concerning medical decisions in which the Supreme Court rejected the claim that the Constitution prevented a state from enforcing its compulsory vaccination law against an individual's will." MTD at 19 (citing *Jacobson,* 197 U.S. at 39). Although that is an inaccurate description of *Jacobson's* holding, Defendant again misses the point. The facts here are miles apart from those in *Jacobson* and *Klassen*. For example:

i. In *Jacobson*, the plaintiff did not challenge the statistics used by the trial court to support its holding.

ii. The smallpox disease in *Jacobson* was far deadlier, publicly available vaccines had been developed at least decades before a mandate had been implemented, and the vaccine was far more effective in preventing transmission than the currently available COVID vaccines.

iii. Although the penalty for refusing the vaccine in *Jacobson* was a modest $5 fine ($140 today), here Plaintiffs must *indefinitely* exhaust sick and vacation leave to obtain and pay for a medical referral and COVID tests at least once a week

iv. In *Klassen*, the students had the option of studying remotely, or submitting to free COVID swab tests that were scheduled and administered at the campus.

Defendant adds that "not a single federal court has found that a vaccine mandate or a weekly test requirement is 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" MTD at 20. But as explained above, even if that were true, none of the vaccine mandates or weekly testing regimes that required the enormous burdens employed under EO 058. In short, the burdens that Plaintiffs must go through to obtain a weekly COVID test set this case apart from *Jacobson* and *Klassen*.

But, in an effort to elide or efface that reasoning, the MTD ignores the substance of Plaintiffs' arguments and incorrectly suggests that Plaintiffs are antivaxxers who also object even to get tested for COVID. *See* MTD at 4 (claiming that Plaintiffs have an anti-vaccine agenda) & 17 (incorrectly construing Plaintiffs' argument as complaining only that EO 058 forces citizens "to have objects inserted up their noses weekly against their will."); Docket No. 11 at 47, ¶ 156. If Defendant had allowed Plaintiffs to work remotely or had provided free COVID tests for public employees at the workplace or other convenient and designated facilities and during working hours, this action would have been unnecessary. Even so, Defendant articulates no reason for refusing to consider these sensible options. Instead, Defendant dodges the question and invokes *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) to argue that this Court cannot compel the government to allow Plaintiffs to work remotely because that would be compelling government officials to comply with the Commonwealth's Act No. 63-2020. MTD at 27. That may be true so far as it goes, but

the conclusion that the Court is powerless to grant the Plaintiffs relief does not follow. For this Court need not compel Defendant to allow Plaintiffs to work remotely. It need only to declare that because Defendant may allow Plaintiffs to work remotely but *has not even considered that less burdensome alternative*, EO 058 is unreasonable and violates Plaintiffs' substantive due process rights.

Finally, and relatedly, it thus follows that Defendant may also allow testing options like the ones described above and others such as providing in-mail testing, allowing home-tests kits, among many other less burdensome options. Defendant demurs, citing a newspaper article "retrieved on August 29, 2021," and arguing that "[EO 058] does not infringe Plaintiffs' 'economic liberties'" because "the Commonwealth's Health Department has dozens of fixed COVID-19 testing facilities throughout the Island, where Plaintiffs and other persons can get tested for COVID19 free of charge." MTD at 25 & n. 4. Of course, this is a factual allegation that cannot be considered at this juncture, and in any event, it was debunked in Plaintiffs' reply to the PI Motion's opposition. ECF No. 32 at 12-13.

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

Defendant 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." MTD at 38. 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 available at present. For ease of discussion, Plaintiffs hereby incorporate the portion of their reply on this front. *See* ECF No. at 16–17.

Next, Defendant argues that, even if the EUA claim were not moot, it "must be dismiss[ed] for failure to state a claim upon which a relief can be granted." MTD at 40. The nub of the rejoinder is that the EUA statute applies only to "medical providers." MTD at 41 (quoting *Kassen*, 2021 WL 3073926, *25). But that issue was never before the court, as the plaintiffs there "admit[ted] that the informed consent requirement under the EUA only applies to "medical providers." *Id.* Here, however, Plaintiffs have made no such concession. On the contrary, they have alleged from the get-go that the EUA statute does apply to—and preempts—the challenged government action here. *See* ECF No. 11, pp. 48–52. But the MTD provides no rebuttal on this front. It merely adopts the OLC Opinion but fails to rebut the amended complaint's argument that it is "premised on unsound reasoning." ECF No. 11, ¶ 178. 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.

For these reasons, and for those set forth in Plaintiffs' other filings, Plaintiffs plausibly plead a preemption claim under the EUA statute.

V. Plaintiffs plausibly pleaded a violation to their fundamental right to privacy under the Commonwealth's Constitution.

Defendant's attempt to distinguish *Rattan* is off the mark. *See* MTD at 43. Defendant essentially invokes his power to act during a health emergency. But, at the pleading stage,

where Plaintiffs have properly plead that the government is amplifying the COVID situation, this Court should evaluate the record before taking Defendant's word at face value. The same holds true about the dictum in *Lozada Tirado*. There is no Puerto Rico binding decision evaluating a vaccine mandate in the current context of COVID.

Defendant then points out to a recent case where a Commonwealth trial court upheld a COVID related vaccine mandate for public schools. *See* MTD at 46. To start, that case is not binding on this or any other court. And the complaint had deficiencies, not least because it involved over 300 plaintiffs whose standing was questionable. Nor should that case be persuasive because it involved a mandate only in schools and universities and none of the Plaintiffs in this case work in the education sector. More critically, the plaintiffs there did not directly challenge the government's statistics to support the mandate. *See* ECF No. 20-2, p. 7 n. 2 ("However, *the plaintiffs did not present expert witness or documental evidence* that allows us to reach the conclusion that the official statistics published by the government as to COVID-19 are not susceptible to immediate and exact corroboration by sources which accuracy cannot be reasonably questioned."). But most importantly, the court granted the motion to dismiss after holding a preliminary injunction hearing.

This Court should allow the properly plead supplemental claim to proceed to discovery.

Conclusion

For the reasons stated, this Court should deny the defendant's motion to dismiss.

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