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)

REPLY TO PLAINTIFFS' "OPPOSITION TO MOTION TO DISMISS"

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 9, 2021, Plaintiffs filed a motion styled *Opposition to Motion to Dismiss* ("Opposition"). [Docket No. 42]. In said Opposition, Plaintiffs echo their arguments in their *Reply to Opposition to Motion for Preliminary Injunction* [Docket No. 32], which was the subject of Defendant's *Sur-Reply to Plaintiffs' Reply to Opposition to Motion for Preliminary Injunction* ("Sur-reply") [Docket No. 40]. Although duly addressed in his Sur-reply, Defendant deems necessary to file the instant Reply to further clarify Plaintiffs' misconstrued arguments in their opposition. **First**, under the substantial burden standard, Plaintiffs failed to plead a free exercise of religion claim under RFRA considering that Executive Order 2021-058's ("EO 2021-058" or "Executive Order") exemptions and opt-out alternative, despite not being constitutionally or

statutorily required, satisfy the least restrictive means comprised within the narrowly tailored burden. **Second**, Plaintiffs have failed to plausibly allege a significant property interest under § 1983 for having to exhaust the accrued vacation and sick leave. **Third**, Plaintiffs cannot force their own interpretation of empirical and scientific data, second-guessing public health policy, upon the Governor of Puerto Rico through an unelected federal judiciary. **Fourth**, Plaintiffs failed to establish that the weekly testing requirement for those unvaccinated violates any substantive due process right and their opposition is devoid of a single reference to a case showing that the requirement is egregious to shock the conscience. **Fifth**, the Pfizer Comirnaty vaccine approval forecloses Plaintiffs' Preemption Claim. **Finally**, absent a cognizable federal claim, this Court should abstain from exercising its supplemental jurisdiction as to the Commonwealth's constitutional claims; nonetheless, in the recent decision of the Puerto Rico Court of First Instance on the matter, it took judicial notice of all official statistics provided in the Department of Health dashboard, denying the injunctive relief, and dismissing the case with prejudice.[1]

II. DISCUSSION

A. Plaintiffs' RFRA claim is meritless.

Plaintiffs mistakenly contend that Defendant ignored the correct standard for their RFRA claim. [Docket No. 32 at 5-8]. Nevertheless, a simple reading of the Motion to Dismiss supports the contrary. [*See* Docket No. 20]. 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 guarantee its application in all cases where free exercise of religion is substantially burdened." This means that the Court must apply a strict scrutiny if Plaintiffs' "free exercise of

[1] As with district court decisions, while trial court judgments are not binding, the holding in Amadeo Ocasio, et al. v. Pierluisi Urrutia, et al., Civil No. SJ2021CV04779, is highly persuasive as it is the only recent Puerto Rico case validating a vaccinate mandate pursuant to the Puerto Rico Constitution.

religion is substantially burdened" and determine whether the challenged provision satisfies the least restrictive means comprised within the narrowly tailored burden. [Docket No. 20 at 23-25]. See Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1328 (2007) ("the least restrictive alternative formulation invites the conclusion that a regulation that is necessary to promote a compelling governmental interest will therefore satisfy strict scrutiny as long as no narrower regulation would suffice").

The Challenged Executive Order clearly provides the least restrictive means to achieve the purpose of safeguarding the public health and safety during the existing COVID-19 pandemic, without affecting the work and services rendered in the public employment sector by providing multiple alternatives that, while not constitutionally or statutorily required, allow public employees not to be inoculated.

However, Plaintiffs insist on their contention that Defendant's Motion to Dismiss does not apply the right RFRA standard, since it does not discuss the meaning of "substantial burden." It goes on citing 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)), stating that 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 sanctions, punishment, or denial of an important benefit as a consequence for noncompliance." [Docket No. 40 at 4-5]. However, New Doe Child #1 is clearly distinguishable from the instant case, since Plaintiffs were atheists who sued the Government challenging the inscription of national motto, "In God We Trust," on United States coins and currency, for violation of RFRA, among other claims. The United States Court of Appeals for the Eighth Circuit held, inter alias, that: (1) government did not compel citizens to engage in religious observance when it placed national motto on money; (2) use or possession of U.S. money that displayed motto did not require person to express, adopt, or risk association with any particular viewpoint; (3) statutes requiring inscription of motto on U.S. coins and currency were neutral and generally applicable; and (4) atheists were not substantially

burdened by statutes requiring inscription of motto on U.S. coins and currency. The Eighth Circuit further explained that "[t]he substantial-burden requirement of RFRA is satisfied if the "penalty" suffered for not complying with the required conduct is so severe as to "put[ ] substantial pressure on an adherent to modify his behavior and to violate his beliefs." New Doe Child #1, at 1026 (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717-18).

In that sense, as discussed in the Motion to Dismiss, the Executive Order would clearly pass RFRA's strict scrutiny, because it does not put "substantial pressure" on Plaintiffs to violate their sincere beliefs in order to attend in-person work. Defendant, through the Executive Order, has provided Plaintiffs with multiple options so that they can adhere to their religious beliefs while still working in-person, be it by providing a weekly negative COVID-19 test result (either under an exception or a general opt-out) or taking an authorized leave until the public health emergency ends. The Executive Order has only stopped Plaintiffs from imposing their religious mandates on others. See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063-64 (9th Cir. 2008) (describing as problematic the idea that, without a "substantial burden," RFRA would give each citizen an individual veto when a practice offended his religious beliefs or sensibilities, despite depriving others of a benefit). While Plaintiffs might find the options offered by the Executive Order subjectively burdensome not every imposition or inconvenience rises to the level of a "substantial burden." See Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 21-22 (1st Cir. 2004) (finding that a government program imposed no cognizable burden for the purposes of RFRA despite the plaintiffs' belief that such program violated their free exercise rights); New Doe Child #1, 901 F.3d at 1026-27 (finding that "not all burdens constitute substantial burdens" and "mere inconvenience" does not always amount to a substantial burden); New Doe Child #1 v. Congress of U.S., 891 F.3d 578, 590 (6th Cir. 2018) (finding that a substantial burden must be "more than a 'mere inconvenience' "); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000) (same). Thus, the fact that Plaintiffs find the weekly

COVID-19 testing as a mere inconvenience to attend to in-person work if they are not vaccinated does not amount to the substantial burden required by RFRA.

Also, Plaintiffs question the need for a spiritual leader's signature in an affidavit, which they allege most are not willing to issue. Plaintiffs 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], but a simple reading of Section 3 of the Executive Order proves Plaintiffs' conclusion wrong. The Executive Order clearly states that "[a]ny government employee to whom this Executive Order is applicable and who does not present their immunization certificate ('COVID-19 Vaccination Record Card') or document proving that they have completed or started their vaccination process against COVID-19, must present the first working day of each week a negative COVID-19 result from a qualified SARS-CoV2 viral test [ ] performed within a maximum period of seventy-two (72) hours prior." [Docket No. 1-1 at 11]. It is pellucidly clear that the section titled *Denial of Vaccination* is clear and does not require to invoke any exceptions. Moreover, the Executive Order does not impose a penalty for not complying with the required conduct. There is no indication in Section 2 of the Executive Order of any penalty to the persons who opt to invoke the religious exception for not getting vaccinated, forcing them to modify their behavior and to disobey their beliefs. Plaintiffs' purported contention—that requiring a sworn statement from their religious leader is a substantial burden equal to a penalty, sanction or denial of important benefits—cannot be surmised from the Executive Order since the same is devoid of any such punishment. Consequently, Plaintiffs' argument squarely fails because any person whose spiritual leader declines to sign an affidavit can simply invoke the general opt-out and show a negative COVID-19 test result without the need to invoke a religious exception.

Since Plaintiffs clearly failed to establish that the Defendant imposed a **substantial** burden on their exercise of religion, the RFRA analysis should end here. Nonetheless, to put the Court in

position to dismiss the case, Defendant will briefly discuss the allegation that working remotely would be a less intrusive way of promoting the Government's interests in avoiding the spread of the virus. [Docket No. 42 at 6]. At the outset, Defendant must reiterate that Plaintiffs are not elected officials with policy making authority, and their self-serving alternatives sidestep altogether particular circumstance and needs of each agency as part of the Executive Branch of the Government. Plaintiffs further ignore that vaccination plays a crucial role in limiting the spread of the virus and minimizing severe disease. In that sense, Plaintiffs very much admit to the vaccines' effectiveness and important role that has played in preventing hospitalizations and deaths. [Docket No. 42 at 12]. Accordingly, 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 in the context of public employment.

In short, the only entity that has authority to administer its personnel is the Government of Puerto Rico. 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)], not rebutted in Plaintiffs' Opposition, 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. [Docket No. 20 at 26-28].

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 allege that they are already suffering harm by having to exhaust their sick and vacation leave to comply with EO 058. [Docket No. 42 at 7]. Taking this assertion as 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 provide them with 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).

However, even if Plaintiffs had standing—which they do not—they are wrong to imply that they have a property interest in their accrued sick and vacation leave. Plaintiffs do not have a significant property interest at stake in the accrued vacation and sick leave. Ramírez-De León v. Mujica-Cotto, 345 F. Supp. 2d 174, 191 (D.P.R. 2004) (holding that ["e]ven assuming Ramirez has a property interest in his accrued vacation and sick leave, the same does not rise to the level of a significant property interest", finding no due process violation) (citing *Gendalia v. Gioffre,* 606 F.Supp. 363 (S.D.N.Y.1985) (even if employee had property interest in payment for unused vacation and sick leave, where adequate post deprivation state remedies provided requisite due process, complaint failed to state a claim under § 1983)).

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. [Docket No. 20 at 25]. Therefore, since Plaintiffs' self-inflicted injuries are not traceable to the Government's purported activities, it follows that they have no standing to assert a procedural due process claim. Suee Clapper v. Amnesty Int'l USA, 568 U.S. 398, 418 (2013).

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

Plaintiffs contend that the Supreme Court case of Jacobson should not apply since it is "more-than-a-century-old" and "predates modern tiers of scrutiny". [Docket No. 42 at 9-10]. Defendant has stated before that if by the mere passage of time binding caselaw became 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, 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 (2020), 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 and finds no support in case law.

Plaintiffs state that they have introduced statistical evidence, which they claim Defendant has yet to refute, to challenge the reasonableness of the vaccine mandate. [Docket No. 42 at 12].

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 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. [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. [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. Moreover, Plaintiffs cannot—through a federal lawsuit—substitute the Government's public health policy that has taken into consideration appointed officers that are experts in public health field with their own policy just because they would prefer a "survival of the fittest" approach. Thus, the Government's interest in avoiding the spread of this virus through vaccination of governmental employees is more than justified and it will validly use its police powers to protect the lives of all, vaccinated or not.

[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.

Plaintiff, once more, concentrates its effort in arguing regarding the "less restrictive measure" of remote work. Defendant incorporates by reference its discussion in page 4 to avoid rehashing the same. Likewise, Defendant hereby incorporates its Motion to Dismiss' discussion of the rational basis scrutiny and the strict scrutiny, [Docket No. 20, at 21-25], to avoid rehashing its arguments. Being that, based on Defendant's arguments in the instant motion, as well as its Motion to Dismiss, the Court should dismiss the instant case with prejudice.

D. The Pfizer Comirnaty vaccine approval forecloses Plaintiffs' Preemption Claim.

Plaintiffs argue against foreclosing their preemption claim because Pfizer cannot convert a legally distinct product (the BioNTech) into a fully approved vaccine (the Comirnaty). [Docket No. 42 at 18-19]. 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, Case No. 1:21-CV-756, 2021 WL 3891615, at *2 (W.D. Mich. Aug. 31, 2021), 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." Therefore, it is forceful to concluded that Plaintiffs' preemption claim is moot, and this Court should dismiss with prejudice said claim as it is not justiciable.

E. Plaintiffs have failed to plead a plausible violation to their fundamental right to privacy under the Commonwealth's Constitution.

Defendant hereby incorporates by reference his discussion of the Pendent Claims in his Motion to Dismiss. [Docket No. 20 at 42-47]. At the outset, absent a cognizable federal claim, this Court should abstain from exercising its supplemental jurisdiction as to the Commonwealth's constitutional claims. However, even if entertains—which they should not—dismissal on the merits follows.

Plaintiffs, to controvert Defendant's legal argument on the merits, proceed to try to discredit the determination of the Puerto Rico Court of First Instance in Amadeo Ocasio, [Docket No. 20-2]. Even if the determination of said Court does not constitute precedent, it is highly persuasive, since it analyzed a vaccine mandate for schools and universities and it went so far as to say that it passes the strict scrutiny muster under the Constitution of Puerto Rico. Also, Plaintiffs attempt to discredit the Puerto Rico Court of First Instance's judgment because the plaintiffs in that case did not allegedly provide better statistics. However, in Amadeo Ocasio, the Court did not second-guess the Government's interpretation of statistical data as Plaintiffs attempt to do in the instant case, since it had announced that it would take judicial notice of the same without the need of a witness, [see Docket No. 20-2 at 7, n. 3], and it held that "[t]he state of emergency caused by the pandemic is reflected in the official statistics available," [Docket No. 20-2 at 7]. Thus, said Court did not have to engage in a statistics debate since it took judicial notice of all official statistics provided in the Department of Health dashboard, denying the injunctive relief, and dismissing the case in its entirety with prejudice.

III. CONCLUSION

In light of above-discussed exigent circumstances, this 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. Therefore, the Court must **GRANT** Defendant's Motion to Dismiss [Docket No. 20].

WHEREFORE, the Defendant prays that this Court take notice of the present motion and consequently **GRANT** Defendant's Motion to Dismiss [Docket No. 20].

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.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on September 14, 2021.

DOMINGO EMANUELLI-HERNÁNDEZ
Secretary of Justice

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

/s/ Idza Díaz Rivera
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