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)**

Surreply to Reply to 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 surreply to Defendant's reply (ECF No. 45) to their opposition (Opp.), ECF No. 42, to Defendants' motion to dismiss (MTD), ECF No. 20.

Because, for the most part, Defendant's reply rehashes the same arguments set forth in his MTD and in his opposition to the motion for preliminary injunction (PI Motion), Plaintiffs here address only the new arguments and caselaw which, in any event, had to be brought in the motion to dismiss. It bears clarifying at the outset Defendant's incorrect assertion that Plaintiffs' opposition to the MTD did "not rebut[ ]" Defendant's invocation of *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) to argue that this Court cannot compel Defendant to allow Plaintiffs to work remotely because that would be compelling government officials "to conform to their conduct to state law." ECF No. 45 at 6. But this, Plaintiffs noted, is a red herring. *See* Opp. at 17–18 (explaining why "this Court need not

compel Defendant to allow Plaintiffs to work remotely. It need only to declare that" because Plaintiffs have plausibly pleaded that Defendant could—but did not—provide less burdensome alternatives, e.g., free and readily accessible testing, he violated their rights).

I. RFRA

In his reply, Defendant, for the first time, marshalled a still-undeveloped argument to support the MTD's *ipse dixit* that Plaintiffs have not plausibly pleaded the substantial-burden factor of a RFRA claim. *See* Opp. at at 4 (making clear that "the MTD neither discusses nor applies the [substantial-burden] standard."). Recall that the Plaintiffs were the ones who researched, analyzed, and applied the standard. *See id.* at 4–6 (citing and construing caselaw). Accordingly, contrary to the surreply's intimations ("as discussed in the [MTD]"), the MTD never mentioned the phrase "substantial pressure on Plaintiffs' to violate their sincere beliefs," ECF No. 45 at 4, let alone even any caselaw construing or defining the substantial-burden standard. So the argument is kneecapped: it was not developed in the 48-page MTD.

But even if this Court were to entertain this plainly waived argument, it still doesn't hold water. Insisting that EO 058 does not substantially burdens Plaintiff's exercise of religion, Defendant, for the first time, cites *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008). There, the Ninth Circuit held that the proposed use of recycled wastewater to make artificial snow for a commercial ski resort located in national park on mountain considered sacred by some Indian tribes would not "substantially burden" free exercise of religion by tribal members, within meaning of the RFRA. The court underscored that the ski resort occupied roughly one percent the mountain's surface and the proposed use neither

prevented tribal members from accessing the mountain for purpose of carrying out religious observances, nor coerced them to act contrary to their religious beliefs under threat of sanctions. Nor, the Ninth Circuit further reasoned, did the ski resort condition any governmental benefit on conduct that would violate their religious beliefs. This case stands in an entirely different posture.

Next, Defendant points to *Gary S. v. Manchester Sch. Dist*., 374 F.3d 15, 21 (1st Cir. 2004), in which the First Circuit held that "the mere non-funding of private secular and religious school programs does not 'burden' a person's religion or the free exercise thereof," because the parents and children "[were] not being deprived of a *generally available* public benefit." *Id.* It thus follows, without serious question, that *Gary S.* is a horse of a different color.

Finally, Defendant mentions in passing *Worldwide Church of God v. Phila. Church of God, Inc*., 227 F.3d 1110, 1121 (9th Cir. 2000). But, as with the other cases, he neither analyzes this case nor discusses its relevance. In *Worldwide Church of God*, the Ninth Circuit held that the defendant could not copy and distribute copies of a book that it used in its religion without asking permission and perhaps paying the copyright owner. In so doing, the court noted that "[i]t seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation." *Id*. To fit this case into the contours of *Worldwide Church of God* is like trying to fit a square peg into a round hole.

None of the foregoing cases, in short, punished the plaintiffs for exercising their religious beliefs. They just did not present the kind of burdens at issue here: Putting aside the burden

of having been bamboozled to go on a wild-goose chase to obtain a plainly unconstitutional and seemingly *unnecessary* religious affidavit, Plaintiffs are being so punished by being forced, on a weekly basis, to change their routines, and sometime exhaust sick or vacation leave, to be subjected to intrusive tests at their own costs and against their will. Contrary to *Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021), where the tests were less intrusive, scheduled, and provided on site at no cost, Plaintiffs' ordeals amount to substantial burdens, not mere inconveniences.

For the reasons already given, this Court should thus deny Defendants' rehashed argument on how the government is supposedly using the least restrictive means to achieve its public-health goal. After all, "consistent with the Rule 12(b)(6) standard," this Court should "assume[] the truth of [Plaintiffs'] factual claims," and draw all inferences in their favor. *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63, 73 (1st Cir. 2021). But dismissing the RFRA claims at this plaintiff-friendly stage would turn the 12(b)(6) standard on its head.

II. Procedural Due Process

After repeating previously made arguments, Defendant brandishes *Wade v. Univ. of Connecticut Bd. of Trustees* to somehow imply that Plaintiffs' procedural-due-process claims lack standing. ECF No. 45 at 7 (citing No. 3:21-CV-924 (JAM), 2021 WL 3616035, at *5 (D. Conn. Aug. 16, 2021)). But in *Wade*, decided two weeks before the MTD's filing, the University was granting non-medical and non-religious exemptions to the vaccine mandate, including to a plaintiff who had "'apprehension and fear' about the vaccination" who wanted to wait

until "more time has passed and there is more research supporting the need for it and refuting an[y] dangerous short- or long-term effects from getting it." 2021 WL 3616035, at 5. And, unlike here, the exemptions there were not seemingly worthless. Finally, that case had no mention of mandatory covid tests only for unvaccinated students at their own cost.

The only other case that warrants brief discussion is *Ramírez-De León v. Mujica-Cotto*, 345 F. Supp. 2d 174 (D.P.R. 2004). There, the plaintiff had submitted a resignation letter which the defendant refused to accept pending the resolution of an ethical investigation. The defendant argued that the plaintiff had "no property interest in his accrued vacation and sick leave days, [because] he [was] not definitely and completely removed from the public service." *Id* at 190. Later, the district court said *in dicta*, and citing non-binding caselaw from New York and New Jersey, that "even assuming [that the plaintiff] ha[d] a property interest in his accrued vacation and sick leave, the same does not rise to the level of a significant property interest."

But the cases cited to support the dicta were either based on contract law, *see Diederich v. Cty. of Rockland*, 999 F. Supp. 568, 573 (S.D.N.Y. 1998) ("His unlawful takings claim is thus based on his underlying state contract action") or, as in *Ramírez-De León*, the state statute provided the plaintiff "with an adequate post deprivation remedy to contest the withholding of the accrued benefits." 1998) ("His unlawful takings claim is thus based on his underlying state contract action"), or, as in *Ramírez-De León*, the state statute provided the plaintiff "with an adequate post deprivation remedy to contest the withholding of the accrued benefits." 345 F. Supp. 2d at 191. Here, in contrast, the issue is that Plaintiffs are being

forced to exhaust their sick and vacation leave to comply with the EO 58's burdensome testing regime. And because EO 058 has no termination date, once Plaintiffs exhaust their paid leave, their compensation will be reduced. More to the point, they have been afforded no due process to determine whether they may work remotely which would eliminate the financial burdens imposed by EO 058's testing regime. All these facts were plausibly alleged in the amended complaint.

III. Substantive Due Process

The only legal argument worth addressing regarding this claim is Defendant's repetition of the myth that *Jacobson v. Massachusetts* is a "get out of court free" card for any pandemic-related measures. It's not. Plaintiffs fully accept that the Puerto Rican government has certain police powers to act for the public health and safety, but that doesn't mean it gets to do whatever it wants, without meaningful judicial scrutiny. That's where the scientific data comes in. Viewing the facts and assertions in a light most favorable to the Plaintiffs, it cannot be said at this stage that the Defendant is justified in imposing the burdens that the vaccine mandate does. Indeed, even if *Jacobson* applied directly, with no intervening jurisprudence to add nuance, perspective, and relevant doctrine, all it would mean is that, with a contagious disease as *deadly* as smallpox (which COVID-19 thankfully isn't), someone can choose between getting vaccinated and paying $140. Indeed, even if *Jacobson* applied directly, with no intervening jurisprudence to add nuance, perspective, and relevant doctrine, all it would mean is that, with a disease as deadly as smallpox (which COVID-19 thankfully

isn't), someone can choose between getting vaccinated and paying $140. The latter option—or some other equivalent small burden—has not been offered to the Plaintiffs.

Conclusion

This Court should deny the defendant's motion to dismiss.

Dated: September 16, 2021 Respectfully submitted,

B&D LLC José R. Dávila-Acevedo /s/ José R. Dávila-Acevedo jose@bdlawpr.com USDCPR No. 231511 1519 Ponce de Leon Ave. Ste. 501 San Juan, PR 00909 787-931-0941	**Puerto Rico Institute for Economic Liberty** */s/ Arturo V. Bauermeister* Arturo V. Bauermeister bauermeistera@ilepr.org USDCPR No. 302604 P.O. Box 363232 San Juan, PR 00936-3232 Tel: 787.721.5290 Fax: 787.721.5938
	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 Plaintiffs