

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

TROPICAL CHILL CORP., ET AL.,

Plaintiffs,

v.

HON. PEDRO R. PIERLUISI URRUTIA, IN
HIS OFFICIAL CAPACITY AS
GOVERNOR OF THE COMMONWEALTH
OF PUERTO RICO, ET AL.,

Defendants.

Civil No. 21-1411 (RAM)

“Good intention will always be pleaded for every assumption of power.... [T]he Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.”

-Daniel Webster

MOTION FOR PRELIMINARY INJUNCTION AND HEARING

The plaintiffs, Tropical Chill Corp., Alexandra Irizarry, Yasmin Vega, and Rene Matos move, under Federal Rule of Civil Procedure 65, for a preliminary injunction to enjoin the defendants from implementing or enforcing the Executive Orders Nos. 2021-062-064 and the Health Secretary Regulation No. 138-A.

INTRODUCTION AND FACTUAL BACKGROUND

This § 1983 action challenges the constitutionality of the Commonwealth of Puerto Rico’s series of executive orders, particularly the imposition of vaccination-verification duties on the private sector, as described in Executive Orders Nos. 2021-062-064 (“Rolling EOs”). It also impugns the constitutionality of Regulation No. 138, which amends Regulation No. 138

for the Issuance of Health Certificates in Puerto Rico to require proof of COVID-19 vaccination. In compliance with Local Rule 65, this motion is “accompanied by a proposed order.”

The Puerto Rico government no doubt has good intentions in getting all its eligible population fully vaccinated. But coercion and threats do not motivate or foster healthy behaviors; public-health policy is effective only when it is based on education and dialogue. More to the point, there is less justification for government coercion now than at the beginning of the pandemic. We know much more about COVID-19 and, even more importantly, have vaccines that prevent hospitalizations and deaths. The world is coming to grips with the undeniable reality that COVID-19 is here to stay, an endemic part of our ecosystem like the coronaviruses that cause the common cold. *Cf.* Jeffrey A. Singer, *Society Will Never Be Free of COVID-19—It's Time to Embrace Harm Reduction*, Cato Inst. *Pandemics & Policy*, Aug. 25, 2021, <https://bit.ly/3ksoyRx>. 6. Because COVID is here to stay, an indefinite state of emergency, with extraordinary government—and especially executive powers—that restrict individual liberties is unconstitutional. Puerto Rico’s low rates of COVID infection, hospitalization, and death, combined with its high vaccination rates and low burdening of the health care system—despite low institutional capacity across a variety of sectors—make COVID-vaccination mandates particularly unreasonable in the Commonwealth.

To begin with, the Rolling EOs are completely arbitrary. Why is it that employees, like Plaintiffs Matos and Irizarry, who are not vaccinated but interact with customers constantly

need testing once a week, but those same customers, who patronize different businesses briefly and sporadically, need testing every 72 hours? Why do the non-vaccinated need a negative test but the vaccinated don't, when both can carry the same viral load if infected? These are wholly irrational and arbitrary distinctions. You can't have the same person—say, the supermarket worker—subject to two different vaccination regimes. Recent studies show that the “highest risk of resistant strain establishment occurs when a large fraction of the population has already been vaccinated but the transmission is not controlled.” That is, the non-vaccinated are not contributing to the establishment of resistant vaccination strains. See *Rates of SARS-CoV-2 transmission and vaccination impact the fate of vaccine-resistant strains*, <https://www.nature.com/articles/s41598-021-95025-3>.

Because of the Plaintiffs' fundamental rights of personal choice, bodily autonomy, medical privacy, and religious free exercise, all protected under modern substantive due process jurisprudence, this Court should examine the Rolling EOs and Regulation 138-A under heightened scrutiny. Although public health can be considered a compelling interest to justify invading individual liberties under certain circumstances, those circumstances do not now exist in Puerto Rico.

But even if this Court rejects the Supreme Court's approach in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020)—being less deferential to government action in light of fundamental rights claims—and extends *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—essentially modern rational basis review applied to pandemics—the Rolling EOs and Regulation 138-A are arbitrary, capricious, and irrational. That is because, among other

things, the scientific data show that it is unnecessary to protect absolutely every citizen from COVID, when, as here, vaccines are highly effective and widely available for those who choose to take them.

The Rolling EOs and Regulation 138–A also violate the economic liberty and property rights protected by the Fourteenth Amendment, which includes the right to earn an honest living, to contract with customers in mutually beneficial voluntary exchange, and to use and enjoy one’s property. The Rolling EOs and Regulation 138-A thus violate the Fourteenth Amendment, as well as Religious Freedom Restoration Act for religious objectors like Plaintiff Vega).

Last, but certainly not least, the Rolling EOs encroach on the separation of powers by exercising legislative powers that have either not been delegated *or cannot be delegated* to the executive under the Puerto Rico constitution, further to the detriment of individual rights and freedoms that the rule of law is meant to protect. The plaintiffs, then, would most likely succeed on the merits of their claims. And they also meet the remaining three elements.

First, loss of bodily autonomy, loss of current and future earning potential, incurring substantial expenses, and loss of medical privacy are but a few of the real harms that await the plaintiffs who do not submit to Rolling EOs’ mandates. And the plaintiffs have no adequate remedy at law for their losses; they cannot recover their lost bodily autonomy, time, or privacy. Nor can they realistically recover monetary damages from the Commonwealth. Second, the minimal risk that the pandemic will flourish in an environment where vaccines are widely available does not outweigh the liberty interests of the plaintiffs at stake here. The

Commonwealth certainly has had an important interest in controlling the COVID pandemic. But in the current situation, if the Rolling EOs and Regulation 138-A are not enjoined, the plaintiffs' now superior interest in liberty will be lost. Puerto Rico runs the risk of having a (supposedly) marginally healthier population but consisting of people who have virtually no control over their own lives, livelihood, and businesses, and what they must inject into their bodies. Finally, the public interest is advanced by preserving the status quo, as it would force the Commonwealth to be transparent and justify the necessity of imposing such draconian and wholly disproportionate measures.

In short, for the reasons laid out below, the plaintiffs meet the requirements for a preliminary injunction. Further, because the defendant cannot suffer any damages resulting from a wrongful issuance of an injunction, and because of the public interest in this specific case, this Court may waive the bond requirement and set an indemnity of \$0.

STANDARD OF REVIEW

A plaintiff seeking a preliminary injunction must show: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam). "The first two factors," the First Circuit has explained, "are the most important and, in most cases, 'irreparable harm constitutes a necessary threshold showing for an award of preliminary injunctive relief.'" *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009) (quoting *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004)).

ARGUMENT

I. Plaintiffs Are More Than Likely to Succeed on the Merits.

A. The Rolling EOs violate Plaintiffs' Substantive Due Process rights (*Counts I and II*).

The Rolling EOs and Regulation 138-A are the most stringent mandates in the Nation. For example, as of the filing of this motion, only three U.S. cities—no states—have a similar “vaccine passport” policy: Los Angeles, New York City, and New Orleans. But note that New York City’s population density (27,346 people/km²) is 80 times greater than Puerto Rico’s (323/km²), San Francisco’s is 20 times greater (6,658/km²), and New Orleans’s is six times greater (2,292/km²). Moreover, 71.3% of Puerto Rico’s population is fully vaccinated and 81.3% have had at least one dose, which is 20% more than New York City (58.1% full, 64.8% one dose) and 34% more than New Orleans (53% full, 62% one dose). Only San Francisco has marginally more people vaccinated than Puerto Rico (80% full, 86% one dose).

- 1. Because the Rolling EOs violate the plaintiffs’ significant liberty interests in their personal normal autonomy, bodily integrity, and medical choice, heightened constitutional scrutiny, and not the more-than-a-century-old *Jacobson* standard applies.**

There should be no doubt that the plaintiffs have at the very least, a substantial liberty interest in rejecting the COVID-19 vaccine. *See, e.g., Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”)

Harper involved the forcible administration of medical treatment to an *inmate* with a mental illness. In that context the Supreme Court stated that “the extent of the prisoner’s right

. . . must be defined in the context of the inmate's confinement," *id.* at 222, and thus applied rational basis scrutiny. *Id.* at 226. ("SOC Policy 600.30 is a rational means of furthering the State's legitimate objectives."). But *Harper* left the door open to an argument that the right to reject medication could be considered fundamental, or at least require additional scrutiny, in other circumstances—*e.g.*, when the plaintiff is not an inmate. *See id.* at 222 ("This is true even when the constitutional right . . . is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." (citations omitted)); *see also O'Lone v. Est. of Shabazz*, 482 U.S. 342, 349 (1987) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights").

The upshot is that, to satisfy Due Process in the context of forced administration of drugs, modern jurisprudence has required that the government at the very least consider less intrusive alternatives. Thus, in *Riggins v. Nevada*, which involved a criminal defendant rather than a convicted felon, the Court held that the state-forced administration of antipsychotic medication during trial violated the rights guaranteed by the Sixth and Fourteenth Amendments. 504 U.S. 127 (1992). In so doing, the Court noted that "Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, *considering less intrusive alternatives*, essential for the sake of Riggins' own safety or the safety

of others.” *Id.* at 135; *see also Sell v. United States*, 539 U.S. 166, 181 (2003) (“The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results”). Although the Court in *Riggins* did not “adopt a standard of strict scrutiny,” it did highlight the need for the trial court to make “findings about reasonable alternatives” or a finding that “safety considerations or other compelling concerns outweighed *Riggins*’s interest in freedom from unwanted antipsychotic drugs.” *Id.* at 136.

Under *Riggins*, then, it is the government’s burden to show that there are no reasonable alternatives to those proposed in the Rolling EOs and Regulation 138-A. Regardless of whether the plaintiffs’ constitutionally protected interest in avoiding the COVID vaccines is deemed “significant,” “substantial,” or “fundamental,” it requires something more than rational basis scrutiny; the government is required to, at the very least, consider less intrusive means. Because the plaintiffs are neither convicted felons nor criminal defendants, higher scrutiny than in *Riggins* and *Sell* should apply.

And because, as shown below, the Rolling EOs and Regulation 138-A are arbitrary, capricious, and unreasonable, they do not survive *Jacobson*’s reasonableness test, much less can they survive heightened scrutiny.

2. Because the Rolling EOs and Regulation 138-A are unreasonable, arbitrary, and capricious, they cannot survive heightened scrutiny or even *Jacobson*’s reasonable test.

As just discussed, the plaintiffs’ liberty rights in their personal autonomy, bodily integrity, and medical choice include the right to refuse a vaccine and the right not to be medically tested for a virus. Of course, the plaintiffs concede that such rights are not absolute

and may yield when the government has an important interest in mitigating the spread of a deadly and contagious disease.

But COVID-19, particularly in a post-vaccine world, and especially in Puerto Rico, is not that kind of disease. To be sure, the circumstances here are unlike those in *Jacobson*. For instance, the case fatality rate (proportion of deaths compared to total diagnosis) in the city of Boston when *Jacobson* was decided was over 16%, see *Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at *17 (N.D. Ind. July 18, 2021 (“In the early 1900s, and closer to the time that Massachusetts wrestled with the disease, there were 1,596 cases of smallpox in Boston, with 270 deaths, in a city with a population close to 561,000.”) Here, in contrast, overall, the death rate is 88 per 100,000, the case fatality rate 2% and the average daily deaths is 5.2 (March 9, 2020 to August 29, 2021). The case fatality rate has been 2% and the average daily deaths 5.6 prior to a 60% full vaccination (March 9, 2020 to May 31, 2021). After Puerto Rico hit a 60% rate for full vaccination on June 1, 2021, however, the case fatality rate has gone down to 1.6% and the average daily deaths have dropped to 3.4 (as of August 29, 2021). Moreover, since the advent of the Delta variant on June 15, 2021, the case fatality rate is 1.5% and the average daily deaths are 3.7 (as of August 29, 2021). That is, we have a 25% lower case fatality rate and 30% less average daily deaths after 60% of the population got vaccinated and, even when Delta variant arrived, the case fatality rate has continued to go down and the average daily death remains the same. As a matter of fact, in this month of August, with 273 deaths related to COVID, Puerto Rico has fewer such deaths than in the pre-vaccine months of November (346) and December (445), similar to January (255), and pre-

Delta between April 15 and May 15 (249) of this year. See *Defunciones*, <https://covid19datos.salud.gov.pr/#defunciones>.

Further, *Jacobson* involved smallpox vaccinations which “had been used for some considerable time—begun by state-supported facilities in England in 1808 and mandated by many other countries throughout the 1800s before the Massachusetts mandate in 1902,” *Klaassen*, 2021 WL 3073926, at *17 (citing *Jacobson*, 197 U.S. at 25, n. 1). Here, however, the first vaccines were first available to the public less than nine months ago and only one has obtained full approval by the FDA. Considering that the available vaccines were developed faster than any other vaccine in modern times, that their long-term effects are still unknown, and the Commonwealth’s unprecedented coercive measures, including continued deceit throughout the EOs, and intimidation, *see infra*, § II. A (2), it should not surprise that part of the population is skeptical about these vaccines. And the Government is not making an effort to gain the public’s trust. Indeed, the Government has been repeatedly forced by journalists into court (the Government losing in court) for its refusal to provide accurate and complete information about the COVID pandemic, ¹ the latest being *Centro de Periodismo Investigativo v. Mellado López, et al*, SJ2021CV05403 (mandamus requesting the data base on the causes of deaths and registry of vaccinations). See *CPI vuelve al Tribunal para que salud haga públicos el Registro de vacunación del covid-19 y la base de datos de causas de muerte - Centro de Periodismo*

¹ See e.g., *Centro de Periodismo Investigativo v. Llovet Díaz, et al.*, SJ2020CV02641.6 (mandamus requesting COVID related deaths, April 28, 2020); *Centro de Periodismo Investigativo v. Llovet Díaz, et al.*, SJ2020CV02641 (judgment June 2, 2021)(mandamus requesting vaccination record); *Centro de Periodismo Investigativo v. Mellado López, et al.*, SJ2021CV00567 (mandamus requesting registry of vaccinations).

Investigativo Centro de Periodismo Investigativo, (Aug. 23, 2021) available at <https://periodismoinvestigativo.com/2021/08/mandamus-registro-vacunacion-causas-muertes/> (last seen on August 30, 2021).

Perhaps more important, the punishment for noncompliance in *Jacobson* was relatively modest: a “\$5 fine (about \$140 today).” *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J, concurring). True, an unvaccinated person who refused to pay the \$5 fine would be subject to jail time until payment was made. But an unvaccinated person who paid the \$5 fine was then free to roam the streets—and if infected spread smallpox—while being fully compliant. Indeed, that is precisely what Mr. Jacobson and others who refused the vaccine did back then. See Blackman, Josh, *The Irrepressible Myth of Jacobson v. Massachusetts* (August 17, 2021), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906452 at 16-17.

With the Rolling EOs, however, the punishment is far more severe than in *Jacobson*. Under the Rolling EOs, unvaccinated people are not allowed to attend restaurants and bars, watch a movie at a cinema or a show at a theater, or even work at their respective jobs—as is the case with plaintiffs Irizarry and Matos who work at pharmacy and a supermarket, respectively—unless they submit to one or more costly, intrusive, and burdensome COVID tests each week. For plaintiffs Vega and Irizarry, submitting to several weekly COVID tests that are neither free nor readily available as in the United States, and which require a prior medical referral to have the insurance plan pay for it, is extremely burdensome. But for people like plaintiff Matos, who nets \$194 per week and whose employer does not provide

health insurance, compliance is financially impossible. The cost of testing, then, which will be imposed indefinitely, is far more punitive than the nominal fine in *Jacobson*. And non-compliance with the EOs exposes each person or entity to incarceration for up to six months and/or to a fine up to \$5,000—more than 35 times the \$5 fine imposed in *Jacobson* at present value (\$140).

For Tropical Chill and Ms. Vega, as the owners of ice cream shops and an Airbnb business, respectively, the Rolling EOs also impose irrational and arbitrary burdens in their business by commandeering them to act as the government's enforcers. The EOs compel Tropical Chill to either incur additional costs to verify its customers' private health information and risk upsetting customers or suffer a decrease in sales by operating at 50% capacity. And complying with the first option is tricky for Tropical Chill. Since ice cream shops' customer base is families—including children who cannot be vaccinated before they turn 12—a vaccine mandate puts Tropical Chill into deep freeze. Even if young children are exempt, there is confusion over whether and how Tropical Chill is supposed to verify age thresholds: Take the parents' word? Ask for a birth certificate? Would a Mickey Mouse Club membership card be enough? Tropical Chill may be subject to a \$5,000 fine if it mistakenly allows a 14-year-old inside its ice cream shops thinking that he was 10 or 11. Regardless, the Rolling EO regime undermines customer goodwill and brand equity—cognizable harms that the government cannot justify imposing.

For Ms. Vega, who operates Hillside Cabin, a completely private and isolated Airbnb business situated on 1.5 acres of land at a mountain peak, the EO impositions are woefully

irrational. EO 062 threatens Vega to a \$5,000 fine or six months incarceration if she does not verify her guests' vaccination status. And if the guests are not vaccinated, presumably she is required not only to verify that her guests have a recent negative COVID test result, but she must also inquire into their religious beliefs or medical conditions to determine whether they are legally exempted from the vaccination requirement. This latter part, however, is unclear as it seems that the so-called medical and religious exemptions included in each of the Rolling EOs are not actual exemptions but a sham to deceive the public into succumbing to vaccination. *See Complaint*, ¶¶ 54-68 (explaining why the so-called exemptions in the Rolling EOs "seem to be worthless"). And deceiving the public into believing that medical certificates or religious affidavits are necessary to decline vaccination further lends credence to the EOs' arbitrariness and capriciousness.

Even putting aside the EOs' ambiguity on the so-called exemptions, Ms. Vega may face a real threat of prosecution if she allows unvaccinated guests at Hillside Cabin who submit negative test results, but who do not show a medical certificate or an affidavit attesting to their religious beliefs. On this front, the Department of Justice is investigating the religious objectors and the "spiritual leaders" who execute the affidavits. *See, e.g.,* El Nuevo Día (August 18, 2021), *El Justicia determina ampliar investigación de la organización del pastor Norman González Chacón*, available at <https://www.elnuevodia.com/noticias/locales/notas/justicia-determina-ampliar-investigacion-de-la-organizacion-mision-de-salud-sustentada-del-pastor-norman-gonzalez-chacon/>; (last seen on August 29, 2021); and Telemundo video and

article at <https://www.telemundopr.com/noticias/puerto-rico/justicia-comienza-a-citar-a-los-no-vacunados-del-dr-norman/2251916/> (last seen on August 30, 2021).

So, despite the apparent ambiguities in each of the Rolling EOs casting doubt on whether religious affidavits are even necessary, the Commonwealth's Department of Justice is taking this issue very seriously, and it may very well decide prosecute businesses who allow unvaccinated guests to enter with negative test results, but without proof of any of the so-called exemptions.

In any case, compelling Ms. Vega to enforce the EOs is also unreasonable, arbitrary and capricious. As part of her business, Ms. Vega never has physical contact with any of her guests. And her guests never have contact with guests outside their traveling party. Instead, the guests make their booking online and then unlock a key container with a password provided to them shortly before their stay commences. Staying in a private and isolated Airbnb like Hillside Cabin is not different, for COVID purposes, from staying at a friend's or family member's private house—except it's less risky, because there's no interaction with the friend or family member.

Having two different testing regimes for workers and customers by covered businesses also shows that the Rolling EOs are arbitrary and capricious. Unvaccinated employees of the businesses covered under EOs 063 and 064—as plaintiffs Irizarry and Matos—must present *one test result each week* to be allowed to work. But patrons of those very same businesses are required to provide a negative test result not older than 72 hours *each time* they visit one of the covered businesses. So a grocery clerk who interacts with customers may work for a

whole week by submitting a negative test result on Monday. But if that same person wants to go to a restaurant for half an hour on a Thursday, he or she would need another test. How can the same person be subject to different testing regimes? Meanwhile, the unvaccinated waiter who attends the clerk at the restaurant, who is constantly interacting with customers, is allowed to work at the restaurant for the whole week with a single test. At the same time, two separate studies have demonstrated that, with the Delta variant, the viral load is the same between unvaccinated and vaccinated. One [study](#) stated that viral load “appears similar in infected vaccinated and unvaccinated individuals, with potential implications for onward transmission risk.” *Impact of Delta on viral burden and vaccine effectiveness against new SARS-CoV-2 infections in the UK*, available at <https://www.medrxiv.org/content/10.1101/2021.08.18.21262237v1> (last seen on August 30, 2021). The other study stated that “the viral load of vaccinated and unvaccinated persons infected with SARS-CoV-2 is also similar.” Since viral load is the most significant factor in the ability to infect, “an unvaccinated individual is not fundamentally different when it comes to the direct risk to transmit the virus compared to a vaccinated individual”. *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021* | MMWR (cdc.gov), available at <https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm> (last seen on August 30, 2021). In other words, even if COVID’s symptoms may be much worse for an unvaccinated person than a vaccinated person—which is a good reason for someone to choose to get vaccinated—transmissibility is apparently not much different.

But how can the same transmission risk between two individuals be subject to conflicting testing regimes? By treating the unvaccinated differently, the Rolling EOs are sending an implicit message, “suggesting that unvaccinated people, unlike vaccinated people, pose a risk to others, is actually most dangerous to the vaccinated persons themselves, as it fosters the illusion that vaccination protects against contagion, and thus encourages careless behaviors of vaccinated persons in public spaces shared with high-risk populations.” Counterintuitively, then, the EOs may cause the vaccinated to act in ways that pose greater risks to others. See The Israeli Public Emergency Council for the Covid 19 Crisis’ Position Paper—*The Science and the Ethics Regarding the Risk Posed by Non-Vaccinated Individuals*, available at <https://pecc-il.org/docs/position-paperthe-science-and-the-ethics-regarding-the-risk-posed-by-non-vaccinated-individuals/>.

Regulation 138-A, which amended Article X of *Regulation of the Secretary of Health No. 138 for the Issuance of Health Certificates in Puerto Rico*, is also arbitrary and capricious. Regulation 138-A was “adopted with the purpose of expressly establishing the requirement to present the vaccination card against COVID-19 or the ‘COVID-19 Vaccination Record Card’ as an essential document for a doctor to issue a health certificate.” ECF No. 1, ¶ 45-46. Although the COVID-19 Vaccination Record Card is not a “test,” Regulation 138-A nonsensically added the COVID vaccine as part of the “tests” required to issue a health certificate, which, as relevant here, is legally required to work in pharmacies, as well as for many other occupational licenses. In requiring proof of vaccination under one of the “tests” for a health certificate, Regulation 138-A is arbitrary and capricious: One could be vaccinated and still get

and spread COVID. Indeed, mandatory regular testing—assuming it’s government-provided and paid for—would have greater justification than mandatory vaccination.

Finally, the current COVID situation in Puerto Rico does not justify the government’s draconian measures. The statistics and recent [studies](#) show that, given the effectiveness of the vaccines, vaccinated people are rarely affected by unvaccinated people, even with the advent of the Delta variant. See *COVID-19 Vaccines Work* (Aug. 16, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html>. At this point, it is undisputed that vaccinated people can get and spread infection just like nonvaccinated people, more so with the Delta variant—just that the disease is unlikely to affect them as severely, if at all. Indeed, explaining the change in the CDC Guideline recommending again the use of masks indoors for vaccinated people, Dr. Anthony Fauci said that “when you look at *the level of virus in the nasal pharynx of a vaccinated person who gets a breakthrough infection with Delta, it is exactly the same as the level of virus in an unvaccinated person who is infected*. That’s the problem. So those data were very compelling, and that triggered the change in the CDC Guideline.” Video available at <https://rumble.com/vlt9b1-dr.-anthony-fauci-fully-vaccinated-people-carry-as-much-virus-as-unvaccinat.html> (last seen on August 29, 2021).

At least two scientific studies confirmed Dr. Fauci’s statement. There is no scientific evidence supporting the claim that unvaccinated people are risking vaccinated people in any way more than vaccinated people are. See <https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm> and

<https://www.medrxiv.org/content/10.1101/2021.08.18.21262237v1>. And while some recent studies suggest that the viral load may take longer to decrease for unvaccinated people, because vaccinated people rarely suffer any symptoms, they can be spreading COVID without knowing it. *See id.* (“This may be particularly important when vaccinated individuals are not aware of their infection status or perceive that their risk of transmission is low.”) As a result, discriminating against people who refuse to inject a vaccine by not allowing them to work or enjoy their lives without incurring significant burdens and costs, is pure paternalism; it can’t be justified with appeals to the public (as opposed to the unvaccinated individual’s) health. More so when it has been demonstrated that vaccinated people can spread the virus as easily as unvaccinated people. Medicine is not only a science; it is also intertwined into the social, ethical and moral fabric. “The aforementioned discourse that has been taking place carries tremendous ethical significance. The cries against those who have not yet been vaccinated sometimes amount to incitement and encouragement of physical violence. We should be able to expect that in the twenty-first century, the ugly phenomena that accompanied pandemics in the middle ages, such as blaming minorities for the spread of the illness, shall be avoided.” *See* The Israeli Public Emergency Council for the Covid 19 Crisis’ Position Paper—*The Science and the Ethics Regarding the Risk Posed by Non-Vaccinated Individuals*, available at <https://pecc-il.org/docs/position-paperthe-science-and-the-ethics-regarding-the-risk-posed-by-non-vaccinated-individuals/>.

Given the foregoing, requiring almost everyone to become vaccinated lest their liberty rights, income, and livelihoods be jeopardized goes “beyond what [i]s reasonably required

for the safety of the public,” *Jacobson*, 197 U.S. at 28. And as more people get vaccinated, the share of cases, hospitalizations, and deaths represented by unvaccinated people will tend to fall, because there will be fewer unvaccinated people in the population. That will be true even if hospitalization and death from COVID-19 is still very rare among vaccinated people. The logical conclusion is that the Vaccine Mandate is the government’s attempt to protect the unvaccinated population, who choose to assume the risk of not getting vaccinated, from themselves. And recall again that the Puerto Rico’s health care system has never been in real jeopardy of being overwhelmed even during the worst part of the pandemic during pre-vaccine times. Considering the Covid situation in Puerto Rico, the constitutional liberty interests, and stakes, and because the government is exercising its police power “in such an arbitrary, unreasonable manner,” and is going “so far beyond what [i]s reasonably required for the safety of the public,” this court’s intervention is warranted. *Jacobson*, 197 U.S. at 28. The Rolling EOs and Regulation 138-A are unconstitutional under both heightened scrutiny and *Jacobson*’s older special rule.

B. Because EO 062 forces Plaintiff Vega to request and verify vaccination status—to which she is religiously opposed—it violates RFRA.

RFRA, which applies to actions by the Commonwealth of Puerto Rico as a covered entity of the United States,” *Comité Fiestas De La Calle San Sebastián, Inc. v. Cruz*, 207 F. Supp. 3d 129, 144, n. 8 (D.P.R. 2016), *see* 42 U.S.C. § 2000bb-2(2), describes the “free exercise of religion as an unalienable right.” §§ 2000bb(a)(1). And to protect this right, Congress provided that the “Government shall not substantially burden a person’s exercise of religion even if the burden

results from a rule of general applicability” unless “it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.” §§ 2000bb–1(a)–(b). The term “demonstrates” means “meet[ing] the burdens of going forward with the evidence and of persuasion.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006).

A person whose religious practices are burdened in violation of RFRA “may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.” § 2000bb–1(c). “And compelling a person to do an act his religion forbids... [is a] paradigmatic religious-liberty injur[y] sufficient to invoke the jurisdiction of the federal courts.” *Korte v. Sebelius*, 735 F.3d 654, 668 (7th Cir. 2013); *see also Wisconsin v. Yoder*, 406 U.S. 205, 228 (1972) (compulsory schooling until age 16 violates the free exercise rights of Amish people.)

On this front, the Supreme Court long ago concluded that “[t]he ‘truth’ of a belief is not open to question,” whether by the government or by the courts. *Gillette v. United States*, 401 U.S. 437, 457 (1971). Article III tribunals are not ecclesiastical courts. They have neither the authority nor the “competence to inquire whether” someone who sincerely objects to a law on religious grounds has “correctly perceived the commands of [his] faith.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981). That is just as true of beliefs about facilitation or complicity as it is of any other religious belief. *See, e.g., United States v. Lee*, 455 U.S. 252, 261 n.12 (1982) (courts cannot “speculate whether” the peculiarities of a legal scheme “ease or mitigate the perceived sin of participation”). Instead, the only questions courts may

resolve are “whether the objector’s beliefs are ‘truly held,’” *Gillette*, 401 U.S. at 457, and whether the “pressure” the government has “put[] ... on an adherent ... to violate his beliefs” is “substantial,” *Thomas*, 450 U.S. at 718.

And the Supreme Court has recognized that mandates may violate RFRA as applied to complicity-based objectors. *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (“we expressly stated in *Hobby Lobby* that the contraceptive mandate violated RFRA as applied to entities with complicity-based objections” (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014))).

Here, as in *Hobby Lobby*, because plaintiff Vega is being compelled to be complicit in enforcing the Government’s Vaccine Mandate to which she objects on religious grounds, the Vaccine Mandate in EO 062 violates RFRA as applied to her.

C. The Rolling EOs also violate the Puerto Rico Constitution

The plaintiffs also are likely to prevail on their pendent claims under the Puerto Rico Constitution. Their pendent claims are three-fold, and each is discussed in turn.

1. The Rolling EOs violate the separation of powers.

The Puerto Rico constitutional structure emulates the federal design, including a government that is organized pursuant to the doctrine of separation of power with distinct legislative, judicial, and executive branches. P.R. Const., Art. I, § 2. *A.A.R. Ex parte*, 187 DPR 835, 854 (2013). *See also, Colon Cortes v. Pesquera*, 150 DPR 724, 754 (2000), 2000 P.R.-Eng. 424,713, P.R. Offic. Trans. (“The separation of powers in Puerto Rico is expressly enshrined in [Article I, Sec. 2 of the Constitution of the Commonwealth of Puerto Rico](#).”). As is the case

in most state constitutions, in Puerto Rico, the power to enact laws for the protection of the life, health, and general welfare of the people rests with the legislative branch. P.R. Const., Art. II, § 19. The Puerto Rico Legislative Assembly has enacted specific laws for the protection of life and health against the threat of an epidemic or infectious disease, *none* of which include rulemaking delegation to the governor by way of executive order. *See* Proclamation of Epidemics Act, P.R. Laws Ann. tit. 24, § 354 and Act No. 81 of March 14, 1912, which delegates to the secretary of health the power to quarantine sick individuals during times of pandemic.

An executive order of general application constitutes a state act of a legislative nature which, without an appropriate legal basis, constitute a violation of the separation of powers. William Vazquez Irizarry, *Los poderes del Gobernador y el uso de ordenes ejecutivas*, 74 Rev.Jur. U.P.R. 951, 1030 (2007). Indeed, it is well-settled under Puerto Rico caselaw that the governor does not possess the power to issue executive orders abridging fundamental rights or that contravene an act of the Legislature. *Hernandez, Romero v. Pol. de P.R.*, 177 DPR 121, 138. (2009); *Rodríguez Ramos v. ELA*, 190 DPR 448, 464 (2014). Yet all the Rolling EOs invoke their power from the same law: Puerto Rico Department of Public Safety Act, Act 20-2017, as amended. P.R. Laws Ann., tit. 25, § 3550, et seq. Specifically, the Rolling EOs point to Article 5.10 of Act 20-2017, which provides in pertinent part:

In emergency or disaster situations, the Governor of Puerto Rico may declare through a proclamation that a state of emergency or disaster exists, as the case may be, in all of the territory of Puerto Rico or part thereof. The Governor, for the duration of such state of emergency or

disaster shall have, in addition to any others conferred by other laws, the following powers:

- (a) May request the President of the United States of America any federal disaster assistance available under the federal legislation in effect, and accept such assistance and use it at his discretion and subject only to the conditions established by the federal legislation under which it was granted.
- (b) May prescribe, amend, and revoke any regulations as well as issue, amend, and rescind such orders as deemed convenient which shall be in effect for the duration of the state of emergency or disaster. Regulations prescribed or orders issued during a state of emergency or disaster shall have force of law for the duration of the state of emergency or disaster.
- (c) May render effective any state regulations, orders, plans, or measures for emergency or disaster situations or modify them at his discretion. . . .

P.R. Laws Ann. tit. 25, § 3650.

It is critical to consider that the purpose of Act 20-2017 was to reform Puerto Rico's public security system and consolidate under the new Department of Public Safety all resources to combat criminality and violence in Puerto Rico, as well as emergency response to disaster situations. zeroing-in on Article 5.10 of Act 20-2017 reveals that it forms part of the provisions concerning the management of natural disasters in Puerto Rico—such as hurricanes and earthquakes—for which the Emergency Management and Disaster Administration Bureau is responsible. P.R. Laws Ann. tit. 25, §§ 3641-3655. It bears highlighting that the Puerto Rico Department of Public Health was not even considered as being part of the agencies consolidated under Act 20-2017 to serve as a key element to Puerto Rico's emergency response system.

Thus, Article 5.10, cannot be construed to authorize the governor to declare an emergency of a completely different nature, such as learning how to grapple with COVID. As most governors, the Governor of Puerto Rico has ample powers, but he is not legally authorized to issue any executive order he wants. *Otero de Ramos v. Srio. de Hacienda*, 156 DPR 876, 892 (2002). To say that the governor may issue any executive order he deems “convenient” with whatever content or impact upon fundamental rights he decides, based on the existence of a health situation and in disregard of the statutory framework specifically granting those kinds of powers to the Health Secretary, cannot be a sound construction of Article 5.10. In fact, under his own statutory authority (Act 81) the Health Secretary can adopt rules and regulations to address health safety matters and has done so in relation to the COVID situation. *See* Regulation 9210 of the Puerto Rico Health Department, August 21, 2020 (requiring mandatory use of masks and establishing administrative fines for non-compliance).

To adopt this kind of regulation, the Health Department must comply with the rulemaking process established by the Puerto Rico Uniform Administrative Procedure Act (LPAU), Act. 38-2017, P.R. Laws Ann., tit. 3, §§ 9601-9713, which provides for citizen participation through a written comments period and in the case of the Health Department, even a public hearing. As a principle of the separation of powers, the governor cannot exercise rulemaking power specifically delegated by the Legislature to an administrative agency. The Puerto Rico Supreme Court has recognized that an executive order of such fashion undermines the public policy of public participation that encompasses the LPAU.

Rodríguez Ramos v. ELA, 190 P.R. Dec. 448, 464 (2014). That is the case of the Rolling EOs. Moreover, in case of urgent need to act in cases such as the COVID situation, the LPAU specifically provides for an emergency rulemaking procedure which allows the governor himself to grant immediate effectiveness to a regulation adopted by an administrative agency, subject to subsequent completion of the regular rulemaking process. P.R. Laws Ann. tit. 3, § 9623.

The Rolling EO's adoption unlawfully sidelined this statutory framework and constitute an attempt to circumvent compliance with LPAU under color of an emergency, which has its own emergency rulemaking provisions. By directly infringing on the conduct of private citizens, in violation of their fundamental individual and economic liberties, the rolling EOs' extraordinary measures unconstitutionally encroach upon the legislative powers. The upshot is that the Rolling EOs are null because the governor lacks the statutory authority to issue them.

2. Even if the Legislature delegated the statutory authority to issue the Rolling EOs, such a delegation violates the Puerto Rico Constitution.

If this Court finds that Article 5.10 grants authority to the governor to issue these types of Rolling EOs, it should nonetheless hold that it constitutes an unconstitutional delegation of power. "[A] statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Gundy v. US*, 139 S.Ct. 2116, 2123 (2019) (plurality opinion).

The non-delegation doctrine equally applies to separation-of-powers controversies under Puerto Rico law. *Dominguez Castro v. ELA*, 178 P.R. Dec. 1, 92-94 (2010). A delegation of legislative powers is valid if it provides intelligible principles and sufficient procedural and substantive guidelines that limit the use of the delegated power.

In *Dominguez Castro*, a group of government employees challenged the constitutionality of Act No. 7 of 2009, a statute that created the Restructure and Fiscal Stabilization Board (“Junta de Reestructuración y Estabilización Fiscal”, “JREF” by its Spanish acronym) with authority to terminate and transfer public employees. Such terminations were geared to reduce the size of the government and promote efficiency, as an emergency fiscal measure under Act No. 7. Plaintiffs in *Dominguez Castro* claimed that Act No. 7 violated the separation of powers by delegating legal power upon the JREF, without clear guidance and thus vesting such body with an undue concentration of authority. The Puerto Rico Supreme Court rejected the constitutional challenge after finding that the statute did include the type of guidelines that validate a delegation of power under the Puerto Rico Constitution. For example, JREF’s power over dismissals authorized by Act No. 7 was ruled by a criterion expressly included in the statute: seniority. As to transfers, Act No. 7 established criterion to be considered, including educational and professional background of each employee, subjecting the determination to a goal of guaranteeing continuity and quality in the provision of public services.

Plaintiffs also challenged a specific section of Act No. 7 that granted powers to the Governor through the issuance of executive powers. Section 68 of Act No. 7 provides:

The Governor is hereby empowered to take all measures that are necessary and convenient, in addition to those provided by this Act, to cutback expenses through Executive Order; to promote economy in the Executive Branch to the maximum extent compatible with the efficient operation of the Government; to maintain efficiency in the operations of the Executive Branch to the greatest extent possible; and to group, coordinate and consolidate functions in all Agencies; all of this in accordance with the objectives of this Act. Provided, however, that the Governor shall not create, consolidate nor reorganize executive departments, nor eliminate bodies created by law. Those reorganizations requiring legislation or amendments to statutes in effect shall be presented before the Legislature for consideration.

The powers granted under this Act shall not limit all others that the Governor may have and take, if the objective set forth by Section 33(g) is not achieved.

Plaintiffs claimed that by granting authority to the Governor to issue executive orders taking all measures “necessary and convenient” to cutback expenses, an unconstitutional delegation of powers occurred. However, the Puerto Rico Supreme Court aptly concluded that in Act No. 7 the Legislative Assembly clearly made a delegation subjected to specific guidelines: 1) “to promote economy in the Executive Branch to the maximum extent compatible with the efficient operation of the Government”; 2) “to maintain efficiency in the operations of the Executive Branch to the greatest extent possible”; 3) “to group, coordinate and consolidate functions in all Agencies”; 4) and “all of this in accordance with the objectives of this Act”. In fact, the statute included specific prohibitions among the alternative available to the Governor: the creation, consolidation or reorganization of executive departments, nor the elimination of bodies created by law.

Compare that precedent with Article 5.10. It is clear that by limiting Article 5.10 to a simple notion of authorizing any order the governor deems “convenient,” here the Puerto Rico Legislature failed to provide the safeguards mandated by the Puerto Rico Constitution:

As interpreted by the Puerto Rico Supreme Court, Article 5.10 lacks parameters or “intelligible principles” to guide his executive actions.

Compare also the statute being challenged here with the one examined by the Michigan Supreme Court in *In re Certified Questions from US District Court, Western District of Michigan, Southern Division*, 506 Mich. 332, 958 N.W. 2d 1 (2020). The statute under consideration in that case was the Michigan Emergency Management Act of 1976, conferring the Governor power to “promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property,” [MCL 10.31\(1\)](#). As to the argument that the words “reasonable” or “necessary” may suffice to legally sustain an all-encompassing delegation, the Court concluded:

The consequence of such illusory “non-standard” standards in this case is that the Governor possesses free rein to exercise a substantial part of our state and local legislative authority--including police powers--for an indefinite period of time. There is, in other words, nothing within either the “necessary” or “reasonable” standards that serves in any realistic way to transform an otherwise impermissible delegation of *legislative* power into a permissible delegation of *executive* power. This is particularly true in the specific context of the EPGA, a statute that delegates power of immense breadth and is devoid of all temporal limitations. These facets of the EPGA--its expansiveness, its indefinite duration, and its inadequate standards--are simply insufficient to sustain *this* delegation. While, in the context of a less-encompassing delegation, the standard might be sufficient to sustain the delegation, that is not the case the Court entertains today. *Id.* at 371.

So too here.

Inasmuch as any responsible public officer will act upon a matter with a purpose and not merely based on an arbitrary desire, that officer will always act as he or she deems convenient and necessary. Taking that as a commonsense interpretation of what “deemed

convenient” means, it cannot be considered itself as the statutory parameter that is needed to validate a constitutional delegation of power. In any case, no intelligible principle or guidelines can be inferred from Act 20-2017’s legislative history or Statement of Motives that could limit the governor’s sole discretion.

Article 5.10 had not been interpreted by any court until recently in the case of *Amadeo Ocasio v. Urrutia*, SJ2021CV04779, decided on August 6, 2021. In this case, a Puerto Rico trial court recognized as dicta that Article 5.10 was a valid delegation of powers to the governor in the context of COVID-19 response measures. The plaintiffs challenged the governor’s delegation to the health secretary through executive order of the power to establish guidelines, directives, protocols and recommendations to respond to the COVID-19 emergency as excessively broad and in contravention of the separation of powers. Plaintiffs also impugned the health secretary’s Administrative Orders 508-509, regarding mask mandates, among other restrictions, and COVID-19 vaccine mandates for school attendance to children 12 years and older.

The Court held that Executive Order 2021-054 and Administrative Orders 508 and 509-509A were a valid exercise of the authority delegated to both the governor and health secretary by the Puerto Rico Constitution, Act 81 of May 14, 1912, Act 157 of May 10, 1938, Act 25 of September 25, 1983, and Act 20-2017. Sentence, p. 23. In so reaching, the court referenced Article 6.10 (now 5.10) of Act 20-2017 as a “clear example” of the “broad” authority delegated by the legislature to the governor in emergency situations.

But that case is inapposite here, since the constitutionality of Act 20-2017 was not at stake in that earlier case. The main issue in *Ocasio* was the validity of the Administrative Orders 058-059, and whether through EOs 2021-054 the governor could delegate his powers to officials within his cabinet without violating the separation of powers. The plaintiffs here, on the other hand, question the validity of the legislative delegation to the executive branch—which delegation is vague, overbroad, and thus invalid as a matter of Puerto Rico constitutional law.

3. The Rolling EOs lack the statutory authority to include the threat of criminal penalties.

To make matters worse, each Rolling EO includes a direct threat of criminal sanctions for failing to comply with its provisions. *See ECF No. 1*, Paragraph 73. This threat of criminal penalties lacks a legal basis and should be declared null and void. Neither Art. 5.14 of Act 20-2017 nor Art. 33 of the Health Department Act (Act 81) provides for such penalty. Act. 5.14 details certain specific conducts that are punishable, but noncompliance with an EO is not included among those. The punishable conduct contemplated in Act. 5.14 is limited to: making false public warnings about a catastrophe; noncompliance with evacuation orders; obstruction to preventive orders issued by the Governor or evacuation and search and rescue efforts; insistence in engaging in activities that endanger other persons lives after being warned against doing it; and noncompliance with a curfew order while a disaster declaration is in place. And although Art. 33 of the Health Department Act contemplates criminal

punishment by failing to comply with Health Department regulations, it provides no such power against noncompliance with executive orders, like the Rolling EOs.

In sum, the unlawful threat of criminal prosecution contained in the Rolling EOs are null and void and should be so declared and immediately enjoined by this Court.

II. The Plaintiffs Will Suffer Irreparable Harm Absent Interim Relief.

As noted above, to show irreparable harm, the plaintiffs must state facts to demonstrate more than speculation that they might suffer harm in the future if the court fails to issue the requested injunction. *See Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6–7 (1st Cir. 1991) (“[s]peculative injury does not constitute a showing of irreparable harm”). The plaintiffs readily meet this requirement.

The short of it is that all the plaintiffs have been suffering irreparable harm—and will continue enduring more harm if Regulation 138-A and the Rolling EOs are not enjoined. This is because they will suffer loss of bodily autonomy, loss of money for doctor’s referrals and COVID tests, loss of income and future earning potential, and loss of medical privacy.

Plaintiffs Irizarry and Matos both have been forced to submit to weekly COVID Tests against their will to keep their jobs. Yesterday (Monday, August 30), Irizarry and her daughter (younger than 12) were denied entrance to a dentist’s office because Irizarry’s test was had been taken last Wednesday and was thus “too old.” She was told at the dentist’s office that the denial was required by the Rolling EOs. Mr. Matos, meanwhile, was forced by his employer to take a day off to take a COVID test and will have to work next Sunday to compensate. He was able to schedule a test at a Walgreens for which he had to travel for more

than half an hour each way. When he arrived, he was told that he would have to return the next day because he has no health insurance and Walgreens had yet to obtain approval to provide the test to him free of charge. It is thus unclear whether Walgreens will provide the test to him free of charge, and if so, whether Walgreens will provide it on a weekly basis.

Plaintiff Vega has not been tested but is limiting her activities to only those places which do not require proof of vaccination. In accordance with her religious beliefs, Vega refuses to endorse venues which have chosen to require proof of vaccination or negative test results, and instead attends only those venues that operate at 50% capacity. She will also have to choose between risking incarceration or paying a fine and violating her religious beliefs by becoming the Government's enforcer.

Plaintiff Tropical Chill has been forced to reduce its operating capacity to 50%, which causes obvious economic losses.

All the plaintiffs would suffer irreparable harm if the Rolling EOs are not enjoined. Although economic loss, on its own, is not an irreparable injury, because "money damages are unavailable against the [defendants] in this action," *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 222 (1st Cir. 2003) ("neither a State nor its officers in their representative capacities are 'persons' within the meaning of 42 U.S.C. § 1983 with respect to actions for damages,") in this case, the plaintiffs economic losses are indeed irreparable harm. Moreover, the plaintiffs' loss of their constitutional liberty rights to bodily autonomy, medical choice, and religious freedoms alone are irreparable.

III. Constitutional Rights Outweighs the Defendant’s Minimal and Speculative Risk Claim, So the Balance of Equities Favor the Plaintiffs

The defendants have nothing to balance against the losses described above. Puerto Ricans are protected by getting vaccinated themselves, if they so choose, and by social distancing and wearing a mask. The risk that the pandemic will flourish in an environment where vaccines are widely available and taken does not outweigh the loss of liberty interests at stake here. To put a finer point on it, enjoining the Rolling EOs—even permanently so—cannot possibly undermine the government’s efforts to control the pandemic.

To begin with, the government justifies the Rolling EOs, including criminal penalties, by referencing the “positivity rate,” meaning that a high percentage of COVID tests are coming back positive. But this a classic denominator problem: not that many Puerto Ricans are being tested. Since the pandemic started, Puerto Rico’s testing rate is almost four times less than on the mainland. In the last 30 days, since the first of the EOs was announced, it’s still only about half the rate on the mainland. *See Data Table for COVID-19 Nucleic Acid Amplification Tests (NAATs) Performed in Last 30 Days per 100k by State/Territory*, https://covid.cdc.gov/covid-data-tracker/#cases_testsper100k30day. That’s because COVID tests are not as readily available in Puerto Rico. If most of the people getting tested are those who have symptoms (plus those who are required to get tested for travel or job-related purposes), it is likely that a high percentage of tests will come back positive. But that doesn’t necessarily mean that there are widespread infections; it is much more likely means that there is not enough testing

to obtain a good sample of COVID-19 in the community. In other words, the government is using its own lack of institutional capacity to justify imposing severe burdens on individuals.

A more accurate measure of widespread infection is the effective reproductive number (R_t). It could be used instead as a leading indicator with much more precise and accurate results than the “positivity rate”. R_t identifies the epidemic growth. R_t is the average number of people that an individual infected on day t is expected to go on to infect. When R_t is above 1, we expect cases to increase in the near future. When R_t is below one, we expect cases to decrease in the near future. Puerto Rico’s R_t is currently at 0.64. On August 12, 2021, it went below 1, to 0.99 and it has continued on a downward trajectory. See The covidestim project (Stanford, Yale and Harvard Colb), *Effective reproduction number (R_t) (Puerto Rico)* (Aug. 30, 2021), <https://covidestim.org/>.

These Rolling EO’s do not present any criteria or metrics to justify either establishing or removing the draconian measures they impose; they seem to be in effect indefinitely, until the government feels it’s politically opportune to change them. For example, the current number of cases, adult hospitalizations, and deaths are lower than during the past two COVID-19 waves that we have experienced. This is expected, as the virus, although more easily transmitted, lowers its potency to stay alive. Moreover, by having a large percentage of the eligible population vaccinated—again, 70.6% full and 81.7% with one dose), there are fewer hospitalizations. Vaccination is great, so there’s no need to take drastic, coercive, and punitive steps!

Our first wave COVID surge started on November 1, 2020 and lasted until January 4, 2021, with a daily 7-day running average of 550 cases, an adult bed and hospital utilization average of 7.8% (550), and an average of 13 daily deaths. The second wave was from April 5 to May 4, 2021, with a daily 7-day running average of 593 cases, adult bed and hospital utilization average of 6.2% (440), and an average of 8 daily deaths. The third wave, the current one from August 1 to August 31, 2021, has a 7-day running average of 494 cases, an adult bed and hospital utilization average of 5.2% (367), and an average of 9 daily deaths.

These statistics show what science has always taught about viral behavior, lowering its strength as to not kill its host and thus stay alive. Most importantly, the current wave is not only the smallest one, but also the shortest one, lasting only 14 days before reaching its “peak.” (The previous one peaked after 53 and 16 days, respectively.) In the current wave, cases have been going down for 14 consecutive days since August 14 when it reached its peak at 619. As of today, the case total is 404. Adult hospitalizations, which always lag cases, just had three consecutive days of decrease, having reached their peak on August 26, 2021 with 515. As of today, the hospitalization total is 479. And deaths started a downward trend on August 19, with a peak at 16 six consecutive days of reductions until August 26 saw 19 deaths. As of August 31, 2021, reported deaths have decreased in the last two days, to 8 (*eight*), and 8 (*eight*), respectively, and the 7-day running average of deaths is lower (10) than 8 days ago (13). All these metrics are expected to continue to go down.

This third wave is essentially over, with all three key indicators (cases, adult hospitalizations, and deaths) reaching a peak and beginning to decline in a much shorter time

than the previous waves, and at a lower “peak”. Most importantly, through all these waves, our hospital availability has remained extremely high, 40%, compared to non-pandemic times when it used to be 18% to 23%. See *En estado de alerta los hospitales*, <https://tinyurl.com/2twmhpse>. Viruses will do what they do, and waves will continue, each more damped than the previous one, as science has predicted since the first discovery of viral agents. And of course, because most vaccines required 28 days for full effectiveness, the end of this third wave has nothing to do with the Rolling EOs. Puerto Rico’s total vaccinated population has only increased by 1.5% (full) and 1.9% (one dose) since the first EO (OE-2021-058) became effective on August 16, 2021. See <https://covid19datos.salud.gov.pr/#casos>, <https://covid19datos.salud.gov.pr/#defunciones>; https://covid19datos.salud.gov.pr/#sistemas_salud; <https://covid19datos.salud.gov.pr/#vacunacion>.

People with higher risks of serious COVID complications, such as individuals over 60 and people with underlying health conditions, can (and probably should) take the vaccine to protect themselves. The much smaller subset of people who are at higher COVID risk because they cannot safely receive the vaccine can mitigate their risks by practicing social distancing and wearing a mask. But “protection of others,” especially in the current COVID context, does not relieve our society from the central canon of medical ethics requiring free and informed consent. “In a democracy, in whose core are human dignity and human rights, there is no room for calls and incitement of this kind. The right of society to protection prevails over the right of the individual to freedom only when there is a real danger (as is done in the

case of violent psychotic patients, or in the very different case of prisoners). It is wrong to restrict a person's liberty due to a remote potential risk." <https://pecc-il.org/docs/position-paperthe-science-and-the-ethics-regarding-the-risk-posed-by-non-vaccinated-individuals/>.

Current public health statistics simply don't justify extreme government actions, so the balance of equities favors the plaintiffs.

IV. A Preliminary Injunction Would Be in the Public Interest

The government certainly has an important interest in controlling the COVID pandemic. But it should go without saying that the public interest is best served by a government that properly balances its interest in protecting health with its citizen's constitutional liberties. And, as particularly relevant here, the public interest is advanced by preserving the status quo, as it would force the defendant to justify the necessity of imposing such draconian measures.

It would also force the defendant to clarify the conflicting interpretations of the Vaccine Mandate's exceptions. And a preliminary injunction would make it clear to the government that it cannot have carte blanche to encroach on its citizens' rights. As Justice Gorsuch eloquently observed, "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J., concurring). It thus follows that a preliminary injunction here would be in the public interest.

V. Because the Defendant Cannot Suffer Any Damages Resulting from a Wrongful Issuance of an Injunction and Because of the Public Interest Here, This Court May Waive the Bond Requirement and Set an Indemnity of \$0

Federal Rule of Civil Procedure 65(c) provides in pertinent part that “[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” But this Court may—and should—“consider an indemnity of \$0 (that is, no bond) ‘proper’ when the suit is about constitutional principles rather than commercial transactions” *BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019). The First Circuit has instructed courts to consider the following factors:

First, at least in noncommercial cases, the court should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant. . . . Second, in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right should also be considered. . . .

Crowley v. Loc. No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers, 679 F.2d 978, 1000 (1st Cir. 1982), rev’d on other grounds, 467 U.S. 526 (1984); accord, e.g., *Watchtower Bible Tract Soc’y of New York, Inc. v. Municipality of Aguada*, 160 F. Supp. 3d 440, 448 (D.P.R. 2016).

The claims here are all constitutional in nature, two small entrepreneurs and two employees of modest means, are not seeking any monetary damages. “A bond requirement,” the First Circuit has made clear, “would have a greater adverse effect where the applicant is an individual and the enjoined party an institution that otherwise has some control over the applicant than where both parties are individuals or institutions.” *Id.* The same rings true here. Indeed, the plaintiffs, three individuals and a small business, are in a clear economic

disadvantage to the behemoth that is the government of Puerto Rico. So here, like in *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, this Court may “waive the bond requirement based on its evaluation of public interest in this specific case.” 826 F.3d 1030, 1043 (8th Cir. 2016). Because the defendant cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest in this specific case, this Court may waive the bond requirement and set an indemnity of \$0.

CONCLUSION

For the reasons stated, this Court should grant this motion and issue a preliminary injunction that stops the defendant from implementing or enforcing the Rolling EOs and Regulation 138-A.

Dated: August 31, 2021

Respectfully submitted,

<p>B&D LLC José R. Dávila-Acevedo jose@bdlawpr.com USDCPR No. 231511 1519 Ponce de Leon Ave. Ste. 501 San Juan, PR 00909 787-931-0941</p>	<p>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</p>
	<p>Ilya Shapiro D.C. Bar. No. 489100 <i>(pending pro hac vice admission)</i> 1000 Mass. Ave. NW Washington, DC 20001 202-577-1134</p>

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

TROPICAL CHILL CORP., ET AL.,

Plaintiffs,

v.

HON. PEDRO R. PIERLUISI URRUTIA, IN
HIS OFFICIAL CAPACITY AS
GOVERNOR OF THE COMMONWEALTH
OF PUERTO RICO, ET AL.,

Defendants.

Civil No. 21-1411 (RAM)

ORDER FOR PRELIMINARY INJUNCTION

Before the court is the plaintiffs' motion for preliminary injunction (ECF No. __) against the defendants. For the reasons set forth below, the court hereby grants the plaintiffs' motion for preliminary injunction and orders the Terms of Preliminary Injunction.

The issues have been fully briefed. The plaintiffs have shown a likelihood of success on the merits of their claims. It can hardly be doubted that the balance of hardships runs in their favor. They do not seek monetary damages and have no other remedy at law. And the public interest would not be disserved by a preliminary injunction. Under these conditions, the plaintiffs' request for a preliminary injunction must be granted.

Accordingly, it is hereby ordered that

The Commonwealth of Puerto Rico, and its respective agencies and all related persons or entities, be preliminarily enjoined until the full resolution of the dispute (which will be expedited pursuant to this court's procedures in such circumstances) from:

- a. implementing the Executive Orders ("EO") Nos. 2021 062–064 and Health Secretary's Regulation No. 138-A, Exhibit No. 1, which amends Regulation No. 138 for the Issuance of Health Certificates in Puerto Rico ("Regulation 138-A")

Finally, Federal Rule of Civil Procedure 65(c) provides in pertinent part that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." But this Court may—and should—"consider an indemnity of \$0 (that is, no bond) 'proper' when the suit is about constitutional principles rather than commercial transactions" *BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019). As the First Circuit has explained,

[A] district court should [consider] the following factors in deciding whether to require a bond. First, at least in noncommercial cases, the court should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant. . . . Second, in order not to restrict a federal right unduly, the impact that a bond requirement would have on enforcement of the right should also be considered. . . .

Crowley v. Loc. No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers, 679 F.2d 978, 1000 (1st Cir. 1982), rev'd on other grounds, 467 U.S. 526 (1984).

The claims here are all constitutional in nature, and the plaintiffs, two entrepreneurs and two individuals, are not seeking any monetary damages. "A bond requirement," the First Circuit has made clear, "would have a greater adverse effect where the applicant is an individual and the enjoined party an institution that otherwise has some control over the applicant than where both parties are individuals or institutions." *Id.* And here the plaintiffs are in a clear economic disadvantage to the government of Puerto Rico. So here, like in *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, the court may "waive the bond requirement based on its evaluation of public interest in this specific case." 826 F.3d 1030, 1043 (8th Cir. 2016). Because the defendants cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest in this specific case, the court will waive the bond requirement and set an indemnity of \$0.

Conclusion

For the reasons stated, the plaintiffs' motion for preliminary injunction is granted without bond.

SO ORDERED.

In San Juan, Puerto Rico, this ____ day of August, 2021.

U.S. District Court Judge