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)**

Reply to Opposition to Motion for Preliminary Injunction

The plaintiffs, Tropical Chill Corp. (Tropic Chill), Alexandra Irizarry, Yasmin Vega, and Rene Matos (collectively, "Plaintiffs") respectfully reply to the defendants' (Defendants) Memorandum in Opposition to Motion for Preliminary Injunction, ECF No. 20 (Opposition or "Opp.").

It bears noting at the outset that the Opposition is devoid of any empirical, statistical, or scientific data. It ignores all that. Plaintiffs, by contrast, have gone to great lengths to include all data available to them—precisely to place this Court in a position to gauge whether, considering Puerto Rico's COVID metrics, health system capacity, and related statistics, Regulation 138-A and the Rolling EOs are proportional (or even rational) to the infringement of Plaintiffs' constitutional rights. After all—and putting aside the protectorate of Palau (with a population akin to the town of Adjuntas)—Puerto Rico leads the United States in Covid-19 vaccination rates.

Against this backdrop, the Opposition, among other things discussed below, (1) argues that Plaintiff Vega's religious beliefs are not being substantially burdened; (2) invites this Court to apply an outdated standard for Plaintiffs' substantive due process claims that "predates modern tiers of scrutiny," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring), but does not say why it should not apply the more recent Supreme Court cases discussed in the PI Motion; (3) questions whether Plaintiffs would suffer irreparable harm absent an injunction; and (4) tells this Court that it has neither the discretion nor the power to set the $0 bond requested by Plaintiffs. As to the pendent claims, Defendants say that Plaintiffs "lack standing to bring a separation of power claim, the authority bestowed upon the Governor to issue the challenged EOs was dully delegated and was not excessive . . . and the criminal sanctions for failure to comply with the EOs are contemplated" by law. Opp. at 5. Plaintiffs will discuss each argument in turn.

It bears mentioning that Plaintiffs are not advocating that willing citizens (or anyone else) not get vaccinated. They are simply arguing that, absent truly extraordinary and extenuating circumstances (not present in the Commonwealth), the choice to get vaccinated should remain within the individual and that the government should not unduly burden that choice. Indeed, both the complaint and the PI Motion make clear that the vaccines are effective at preventing hospitalizations and deaths. But that's not at issue here. This case is about how far—and for how long—the state can curtail its citizens' freedom in the name of safety.

Even under rational basis review, does the government get to do anything it wants to combat this pandemic? If its measures aren't tied to data but are on the order of "we must do

something. This is something, therefore we must do it," does that pass constitutional muster? Recall that the mandates were imposed when all case/hospital/death metrics were already moving in a negative direction (and in a jurisdiction that has the highest vaccination rate in the United States, save Palau).

The government says (Opp. at 9) that economic liberties aren't protected by Fourteenth Amendment, which is laughably wrong. Since the New Deal, notably the infamous Footnote Four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), economic regulations are subject to rational basis review—fair enough—, but that doesn't mean that the government doesn't know the law of it says economic rights don't exist at all or aren't protected under the Fourteenth Amendment. Especially in a place with high rates of poverty and inequality, it's insulting to say that the freedom to earn an honest living is worth nothing. Contrary to the government's assertions, there have been plenty of cases upholding economic-liberty claims (*e.g.,* when the state acts out of pure protectionism, to help incumbent firms). So it's inaccurate to say that economic-rights claims are never upheld. And it's unclear how compelling each of the plaintiffs—especially an Airbnb owner who never meets customers—stops viral spread and is thus a compelling interest.

In short, on the government's logic, vaccine mandates are justified forever, just by invoking the magic words "public health." That can't be right.

I. Regulation 138-A

The Opposition completely ignores the core of Plaintiffs Matos's and Irizarry's arguments, namely, that Regulation 138-A is arbitrary and capricious. Recall that Plaintiffs

made it clear that requiring proof of vaccination to obtain a health certificate is wholly irrational—for one can be vaccinated and still get (and spread) Covid. *See Mulero-Carrillo v. Roman-Hernandez*, 790 F.3d 99, 107 (1st Cir. 2015) ("when plaintiffs do not allege that a fundamental right is affected, they are required to show that the governmental infringement is not rationally related to a legitimate government purpose"). If anything, a negative Covid test would make more sense. Defendants conveniently ignore Plaintiffs' argument that the new vaccination requirement is part of the "tests" needed to obtain a health certificate, which of course lends credence to the irrationality of Regulation 138-A.

Still, Defendants say that "the Secretary of Health, in the valid exercise of his authority under Regulation No. 138-A, determines when and under what circumstances and exceptions are health certificates to be issued." Opp. at 14. And they assume for argument's sake that Plaintiffs Matos and Irizarry "have a substantive due process right in their health certificates." Opp. at 11. This hypothetical concession well-taken, for these health certificates are necessary for people to earn their livelihoods. Even so, the argument goes, "the requirements established in Regulation 138-A for the issuance of health certificates—among them, evidence of vaccination against COVID-19, unless health or religious exceptions apply—on its face is substantially less intrusive and onerous than the ones contained in the Executive Orders, which comply with applicable scrutiny standards . . . ." *Id.* This rejoinder is off the mark.

To begin with, neither Plaintiff Irizarry nor Plaintiff Matos qualifies for any of the so-called "exceptions." Perhaps if they did, they would not be seeking this Court's help. So that

aspect has no bearing here. Nor are the requirements for the health certificate "substantially less instructive and onerous than the ones contained in the Executive Orders." *Id.* This is because it has neither a general opt-out nor an option to submit a negative Covid result, which, as just noted, would make some sense. Regulation 138-A, simply put, is just irrational.

In sum, because Defendants provided no rejoinder on how Regulation 138-A could "rationally advance its legitimate interests," *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 10 (1st Cir. 2011), and because Defendants impermissibly withdrew a public benefit on account of the exercise of a right otherwise guaranteed by the Constitution, Regulation 138-A fails even under a rational basis.

II. RFRA

What is the purpose of the so-called religious exemptions? And why is the government requiring some people to go through the additional burdens of paying for and obtaining religious affidavits? The answer to these questions is simple: the government is purposely deceiving the public into believing that *only* those with religious beliefs and medical conditions may choose to undergo the weekly test process instead of vaccination. Otherwise, the Department of Justice would not be investigating or questioning the religious objectors and the "spiritual leaders" who have to execute the mandated affidavits. El Nuevo Día (Aug.18, 2021), *El Departamento de Justicia determina ampliar investigación de la organización del pastor Norman González Chacón,* available at https://tinyurl.com/27tuvwec; (*Telemundo Video and Article* at https://tinyurl.com/t5ztt49. This is beyond the pale and, above all, unnecessary.

Religious exemptions cannot be administered in an unconstitutional matter. *See*, *e.g.*, *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 90 (E.D.N.Y. 1987) (so holding).

More to the point, the government is forcing Plaintiff Vega to violate her deeply held religious beliefs by having to participate in a process that she considers immoral. More so, she is being compelled to inquire about a plainly unconstitutional religious affidavit from her would-be guests. And there are myriad ways by which the government can achieve its interest—even if it were compelling—than the extremely burdensome means that it is currently employing. The government could require travelers to get tested at an airport, for example, or put the onus on them to provide Plaintiff Vega with proof of a negative test, rather than forcing her to verify their vaccination status.

III. Substantive Due Process

The Opposition begins by eluding the studies, data, and statistics furnished by Plaintiffs. *See* Opp. at 7 (saying that "they will only address legal issues"). It describes these objective facts as "mostly based on their personal interpretation of data to promote, through this Court, their own COVID-19 public policy for the Commonwealth." Opp. at 7. Instead, Defendants say that "Plaintiffs have not been electorally entrusted with designing the Commonwealth's public health policy . . . ." *Id.* Relying mostly on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—and on the Chief Justice's concurrence in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020)—Defendants' position appears to be that they have absolute powers *beyond judicial review* when it implements executive orders during a health crisis. Not so.

Plaintiffs have explained why the *Jacobson* standard which predates modern tiers of scrutiny should not apply here, arguing instead for some form of heightened scrutiny.[1] Be that as it may, Defendants think 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. So viewed, it cannot be said that Defendants are justified in imposing the burdens that Rolling EOs and the Regulation 138-A impose. 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. Just because a particular vaccine mandate passes judicial muster (*Jacobson, Klaassen*), doesn't mean all are. Different mandates are structured differently and impose different burdens. The $5,000 fine or six-month jail time, not to mention the burdensome and costly

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

testing scheme, are far worse than Jacobson's modest one-time fine. No reported cases have dealt with such draconian measures.

More to the initial point, in *Jacobson* itself, the Supreme Court used statistics to justify its holding. *See Jacobson*, 197 U.S. at 33, n.†. ("Nothing proves this utility more clearly than the statistics obtained."). The Court noted, among other things, that "[o]f those vaccinated 953, or 1.77 per cent, became affected with smallpox, and of the uninoculated 2,643, or 46.3 per cent, had the disease." *Id*. With COVID, however, in the advent of the Delta variant, "Covid-19 vaccine was just 40.5% effective, on average, at preventing symptomatic disease." *See*, *e.g.*, CNBC *Fully vaccinated people are still getting infected with Covid. Experts explain why* (August 10, 2021), https://www.cnbc.com/2021/08/10/breakthrough-covid-cases-why-fully-vaccinated-people-can-get-covid.html. So the available data has shown that the vaccine is not as effective in preventing infection of the disease. And according to the statistics referenced in *Jacobson*, the smallpox vaccine was far deadlier than COVID and the smallpox vaccine was far more effective in preventing the disease than the COVID vaccines currently available.

Unlike the evidence so far furnished by Plaintiffs, what Mr. Jacobson offered in his defense, and which was rejected by the trial court, did not challenge the statistics supporting the smallpox vaccine mandate. Indeed, the Court noted that according to the recitals in the regulation, smallpox was increasing and "nothing [was] asserted or appear[ed] in the record to the contrary." *Jacobson*, 197 U.S. at 27–28. The evidence Mr. Jacobson introduced, and the trial court rejected, was instead aimed to challenge the efficacy and potential dangers of the smallpox vaccine. *See id.* at 30. In rejecting Mr. Jacobson's proffer of evidence, the Court noted

"that not only the medical profession and the people generally ha[d] *for a long time* entertained these opinions, but legislatures and courts have acted upon them with general unanimity." *Id.* at 24 (emphasis added).

That is certainly not the case here. "A long time" in *Jacobson* meant that the first compulsory act in England was passed in 1853, even though state-supported facilities for vaccinations had begun there since 1808. *Id.* at n. †. That is, it took over 40 years in England to impose a compulsory vaccination regime for a disease that was far deadlier than COVID. Here, in contrast, compulsory vaccination is being implemented—with far more burdens than in *Jacobson* for citizens like Plaintiffs—before a single year has passed since the vaccine was made available to the public. And recall that Plaintiffs are not challenging the efficacy of the vaccine in preventing COVID-related hospitalizations and deaths. Instead, they are questioning whether the statistics presented, *which raw data has been provided by the government itself*, support a vaccine mandate which is: (1) more stringent than the one in *Jacobson,* when (2) the underlying disease is less deadly than in *Jacobson,* (3) the available data of vaccine efficacy in preventing the spread of COVID has shown that it is not as effective as the smallpox vaccine contemplated in *Jacobson,* and (4) the long-term effects of the vaccine are still unknown. Moreover, the pertinent statistical data to support the mandate—which is less compelling than in *Jacobson*—has not been available for "a long time" to be deemed as "common knowledge" as it was in *Jacobson*.

The upshot is that nothing in *Jacobson* prevents Plaintiffs from introducing, and this Court from considering, the statistical evidence set forth in the complaint—which has yet to be

refuted by Defendants—to challenge the reasonableness of the vaccine mandate. *See Jackson v. Pollion*, 733 F.3d 786, 788 (7th Cir. 2013) (Posner, J.) (explaining that "the discomfort of the legal profession, including the judiciary, with science and technology is not a new phenomenon," and remarking that "it's increasingly concerning, because of the extraordinary rate of scientific and other technological advances that figure increasingly in litigation").

Defendants invoke (Opp. at 8) *Zucht v. King*, 260 U.S. 174, 176, 177 (1922), a 99-year-old case from a different epoch, which is inapposite. For it involved mandatory vaccination in the school context. *See* 260 U.S. at 175. In any event, the Court there did not entertain the merits of the constitutional claim because of the case's procedural posture. *See id.* at 178 ("Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this court only on petition for a writ of certiorari."). And again, contrary to Defendants' contention, the Rolling EOs are more restrictive than the mandate in *Jacobson.* Indeed, 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, in *Jacobson* 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 one-time $5 fine was then free to roam the streets—and if infected spread *smallpox*—while being fully compliant. That is precisely what Mr. Jacobson and others who refused the vaccine did back then. *See* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts* (Aug. 17, 2021), available at SSRN: https://tinyurl.com/28ts4t6e at 16-17.

With the Rolling EOs, however, the punishment is far more severe than in *Jacobson*. We are talking about a $5,000 fine or six months in jail. And Plaintiffs Matos and Irizarry, for example, run the risk of losing their livelihoods unless they submit to at a weekly COVID test, which is neither free nor readily available as in the rest of the United States. Even worse, the tests require a medical referral to have the insurance plan pay for it. The *indefinite nature* of the costs and burdens of weekly required testing, then, is far more punitive than the nominal fine in *Jacobson*. The problem is compounded by the fact that, contrary to Defendant's intimation, *see* Opp. at 20 (intimating, based on a newspaper article, that the government has the institutional capacity to provide free testing), free testing is not as available in Puerto Rico. Indeed, the Commonwealth's Health Secretary candidly admitted that "[w]e had to limit the tests to 175 because there is a shortage of tests at the national level. They are guaranteeing a number of tests, but at least in [the] Health [Department's] tent, we limit [the amount of testing]." https://tinyurl.com/8xmakr3a (translation supplied). He also admitted that the lines to get a free test are "kilometric." *Id.* And while explaining that the government, but not the private sector, is having a COVID test supply shortage, the Secretary stated the following: "different from the government, private laboratories can buy [tests] from any company, but in [the] Health [Department]—for example—the problem with the contracts is that they do some auctions and if that specific person doesn't have [the tests] then [the Health Department] gets nothing, unless [the Department] *searches for other [suppliers]*." *Id.* (translation and emphasis added). This raises the obvious question: why hasn't the government searched for other suppliers? It had ample time to do so since the COVID-test

shortages had been reported before the EOs became effective. *See* https://tinyurl.com/ubkjcy3d. Plaintiffs Matos and Irizarry, whose lives have been changed by Regulation 138-A and the Rolling EOs, will certainly request Defendants' explanations on this and other issues of fact that go toward the burden imposed by the mandate regime—not least because the government has admitted it purchases these tests with federal funds. *See id.*

Defendants also argue that rational basis applies because the "Plaintiffs were unable to provide the Court with any binding or persuasive case law that has declined to apply *Jacobson's* rational basis scrutiny to a vaccine mandate in favor of a strict scrutiny. Thus, [the argument goes,] the Court must apply *Jacobson's* [antiquated proto-rational basis standard], until the Supreme Court squarely overrules the same." Opp. at 10 (citing *U.S. v. Moore-Bush*, 963 F.3d. 29, 31 (1st Cir. 2020) and *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020)). And Plaintiffs readily concede that there is no precedent directly on point establishing that the right to decline a vaccine has been deemed fundamental. But there simply hasn't been a widespread pandemic in the modern era, at least not one that touches American law. And modern jurisprudence has applied intermediate scrutiny when the government compels a criminal defendant to take medication. *See, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *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"). In that situation, the government has the burden of showing at least that it considered less burdensome alternatives.

The government is employing a process—mandatory COVID tests only for unvaccinated people—whose means to further the stated end–"to prevent and stop the spread of COVID19, as well as to safeguard the health, life, and safety of the residents of Puerto Rico," ECF No. 11-1 at 8-9—is seriously questionable. Not only because the government lacks a sufficient supply of free and readily available tests to impose its draconian measures, but also because it no longer makes sense to test only unvaccinated people. Why do the unvaccinated 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. Counterintuitively, then, the Rolling 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* (Aug. 11, 2021), available at https://tinyurl.com/n7vdrnj7.

According to a footnote in the opposition, and without citing any sources, Defendants say that "[t]he Department of Health of Puerto Rico has determined that 50% capacity occupancy is the only way to ensure that social distancing measures can be implemented in closed enclosures when there is no screening of vaccination or negative tests." Opp. 5 n. 3. But a 50% capacity limit on ice cream shops or other culinary establishments is arbitrary. Why not 75 or 25%? This seems to be a number chosen at random because it "feels right." More is required, considering the disastrous economic impact that this is having on Tropical Chill's sales.

IV. Supplemental Claims

Other than mentioning the supplemental claims in its introduction, the Opposition does not tackle Plaintiffs' supplemental claims directly. Because the Opposition incorporates the MTD's arguments, Plaintiffs will address those arguments

A. **Standing**

To claim, as Defendants intimate, that only the "injured" constitutional branch possesses standing in separation of powers controversies is, to say the least, a distorted and mistaken proposition of constitutional law. In fact, it misses the main purpose of the separation of powers doctrine, which is not merely the protection of each separate branch, but the liberty of individuals that are shielded from the abuse of absolute power. By "safeguarding this separation of powers, democracy guarantees the liberties of the people against excessive concentrations of authority". *Colon Cortes* v. *Pesquera*, 2000 P.R.-Eng. 424, 713, P.R. Offic. Trans. (2000) (citing *United Public Workers* v. *Mitchell*, 330 U.S. 75, 91 (1947)). As the Court remarked in *Bond* v. *U.S.*, "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." 564 US 211, 222 (2011). But under Defendants' amazing theory, if an executive order is considered to represent a usurpation of legislative power, only the legislative branch has standing to challenge its constitutionality in a court of law. So, according to Defendants, individuals like Plaintiffs—who are the ultimate beneficiaries and raison d'être of the doctrine—are then left

at the mercy of both the political branches of government. Such preposterous result is contrary to precedent and sound legal analysis.

For one thing, caselaw clearly recognizes that individuals can raise separation of powers claims in court. *Buckley* v. *Valeo*, 426 US 1, 117 (1976) ("Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." (cleaned up and collecting caselaw). In fact, it is customary for courts to address separation of powers controversies within the context of civil actions brought by individual citizens. For the US Supreme Court, see *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Lucia* v. *SEC*, 138 S.Ct. 2044 (2018); *Sheila Law LLC* v. *CFPB*, 140 S.Ct. 2183 (2020). For the Puerto Rico Supreme Court, *see Clases A, B y C* v. *PRTC*, 183 P.R. Dec. 166 (2011) and *Dominguez Castro* v. *ELA*, 178 P.R. Dec. 1 (2010).

As to cases where executive orders are being challenged, the classic and most important case of executive power limitations decided by the US Supreme Court was brought by an individual company. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the Court sought to clarify the boundaries limiting the President's authority to act in a quasi-legislative capacity. In particular, the Court invalidated President Truman's attempt to seize steel mills to preempt an imminent labor strike via executive order and emergency power allegedly implied in Article II of the Constitution. In Puerto Rico, see *Rodriguez Ramos* v. *ELA*, 190 DPR 448 (2014), in which our Supreme Court invalidated an executive order of the Governor in a case not brought by the legislative power.

Finally, while discussing standing, Defendants try to make an argument of legislative acquiescence with governor's authority to issue the rolling EOs, that rest on the vague notion of legislative silence. They argue that the lack of legislative expressions against the use of this type of executive power should be interpreted as a validation by the legislative branch. In making such argument, defendants cite law professor William Vazquez Irizarry for the proposition that legislative silence in the face of a repeated practice by the first executive to issue executive orders on a certain issue may be an element to consider in favor of the existence of a constitutional understanding between the two branches.

In fact, Professor Vazquez Irizarry does make that statement in a 2007 law review article. William Vázquez Irizarry, *Los poderes del Gobernador y el uso de órdenes ejecutivas*, 76 REV. JUR. UPR 951 (2007). However, it is important to also mention the citation he included in support of his affirmation. Footnote 292 of Vazquez Irizarry's article cites *US v. Midwest Oil Co.*, 236 US 459 (1915), a case in which the Court ruled for executive power by relying on a practice of almost a century of duration.[2] Accordingly, Defendants' attempt to apply that doctrine to legislative silence or inaction since March 2020, is totally unsound.

[2] "And while it is not known when the first of these orders was made, it is certain that the practice dates from an early period in the history of the government. Scores and hundreds of these orders have been made; and treating them as they must be . . . as the act of the President, an examination of official publications will show that (excluding those made by virtue of special congressional action . . . he has, during the past eighty years, without express statutory, but under the claim of power so to do, made a multitude of Executive orders which operated to withdraw public land that would otherwise have been open to private acquisition." *Id*. at 311 (cleaned up).

B. Lack of statutory authority

Let us begin by referring to Defendants' invitation for this Court to consider "that Puerto Rico, as well as worldwide, is still under a public health emergency, thus the Governor has to use all his constitutional powers to face the everchanging pandemic". MTD at 34. Such statement is appropriate for the preamble of any of the challenged EOs, but clearly is insufficient to support a legal defense in federal court. Later, Defendants add that "Plaintiffs' claim lack merit altogether because aside from lacking standing, the Rolling EOs are a valid exercise of the Governor's constitutional authority". *Id.* at 35. But Defendants never identify these alleged "constitutional powers" or the alleged "constitutional authority."

Instead, they just attempt, again, to ground the governor's legal authority to issue the Rolling EOs in Art. 6.10 of Act 20-2017. In fact, they argue that Plaintiffs' position is that Article 6.10 of Act 20-2017 is applicable only in scenarios such as a hurricane or an earthquake. But that is oversimplification and mischaracterization of our position. The real problem is that the governor cannot claim a generic power to do through Act 20-2017 what the Legislative Assembly has particularly delegated to the Health Secretary by providing him with concrete statutory authority to act in epidemic scenarios. Because of Act 20-2017's vagueness, Defendants try to move to more solid ground by invoking Act No. 157 of May 10, 1938. They argue that this statute "expressly recognizes the authority of the Governor to act in an epidemic through executive orders". And that is true. But Defendants avoid engaging in what exactly is the governor authorized to do under that statute.

Act 157-1938 states the following: "Whereby proclamation of the Governor of Puerto Rico an epidemic shall be declared to exist in one or several municipalities, the Secretary of Health, immediately upon such declaration of an epidemic, shall take charge of the municipal sanitation of such municipality or municipalities so affected." 24 L.P.R.A. § 354. The text is clear. Under the best reading for Defendants, the governor may declare an emergency is case of an epidemic. However, the actual and concrete measures to act upon that emergency are delegated to the Secretary. He/she is the one duly authorized "to take charge" of sanitation of the localities affected. To have the words "Governor", "epidemic" and "declaration" in the same sentence, cannot be enough to justify the power being used by the Governor of Puerto Rico through the rolling EOs.

The complaint makes it clear that "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". Defendants now claim that Plaintiffs' argument—a legal one, not a policy preference—is preposterous because there is a current emergency that cannot wait for rulemaking procedures and citizen participation. What is surprising is that Defendants, high-ranked executive officers of the Puerto Rico Government, fail to mention that, in case of urgent need to act, the Puerto Rico Uniform Administrative Procedure Act 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. Sec. 2.13 of the Puerto Rico Uniform Administrative Procedure Act, P.R. Laws Ann., tit. 3, § 9623; *see Grupo*

HIMA v. *Depto. de Salud*, 181 DPR 72 (2011). We must assume Defendants know this, in which case their position is an exemplary *argumentum in terrorem*.

C. Non-delegation

Defendants' arguments regarding the inapplicability of the non-delegation doctrine also fail to address the substance of Plaintiffs' non-delegation claims. According to Defendants, Act. 20-2017 is constitutionally valid because the Puerto Rico Legislative Assembly included in the statute the "intelligible principles" required under the non-delegation doctrine. They claim those intelligible principles are the following:

> The plain language of the challenged statute, Article 5.10 of Act No. 20-2017, clearly allows the Governor to: (1) *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, and (2) *to 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 (emphasis added).

The basic problem with this argument is the obvious confusion that it creates between two different components of the doctrine. Defendants fail to differentiate the *power granted*, from the *intelligible principles* that would then serve to guide the use of the delegated power. Their mistake is clearly proven when confronted with the same precedent they use to explain the doctrine as applied by the Puerto Rico Supreme Court. 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 ("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. The plaintiffs there 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. But 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. That is a far cry from this case.

The plaintiffs in *Dominguez Castro* also challenged a section of Act No. 7 that granted powers to the governor through the issuance of executive powers.[3] They claimed that, by

[3] 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.

granting authority to the governor to issue executive orders taking all measures "necessary and convenient" to cutback expenses, an unconstitutional delegation of powers occurred. But the court aptly concluded that in Act No. 7 the Legislature 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.

Again, Defendants confuse *power granted* and *intelligible principles*. In *Dominguez Castro* the *power granted* was over the dismissal of public employees. The *intelligible principles* were the criteria just discussed, including guiding principles very concrete and specific, such a seniority. Here, however, Defendants fail to identify any discernible principle.

D. Lack of legal basis for penalties included in the Rolling EOs.

The complaint makes it clear that, while the Rolling EOs make an explicit threat of penalty under criminal law in case of non-compliance with the mandates therein established, the truth is that neither Art. 5.14 of Act 20-2017 nor Art. 33 of the Health Department Act (Act 81) provide for such penalties. Defendants now argue that Act. 5.14 does include the penalties, but unsurprisingly, fail to make any argument at all to support the inclusion of the references that nowadays exists in the rolling EOs to Art. 33 of Act 81. Thus, Plaintiffs' claims

as to the nullity of the reference made in the rolling EOs to penalties pursuant to Art. 33 of Act 81, is uncontested.

As to Art. 5.14, Defendants are threatening Plaintiffs and, for what is worth, the Puerto Rico population, with the possibility of facing criminal charges for not complying with the challenged EOs. According to Defendants, this possibility of criminal responsibility rests in the following language: "any person who persists in carrying out any activity that endangers his life or the lives of other persons, after having been warned by the authorities while a state of emergency declared by the Governor of Puerto Rico through Executive Order is in effect, shall be punished by imprisonment for a term not to exceed six months or a fine not to exceed 5,000 dollars, or both penalties at the discretion of the court". MTD at 40–41.

It is evident that the statutory text cited does not contain any language at all covering the specific conduct prohibited in the Rolling EOs. Defendants try to force a construction of the statutory language in which an individual that does not comply with any of the mandates dictated by the EOs, is endangering his live or other persons lives. Further, the EOs are then considered to be the warnings made by the authorities pursuant to a state of emergency declared by the Governor. Defendants' interpretation, however, is flawed.

To start, their reading of the statute is neither the best nor the most reasonable one. It is important to understand the structure within which Art. 5.14 operates. By enacting Act 20-2017, the Puerto Rico Legislature consolidated pre-existing administrative agencies under the umbrella of the new Public Safety Department. Among those agencies was the Emergency Management and Disaster Administration Agency that before that was regulated by its own

enabling law, Act No. 211-1999, the "Commonwealth of Puerto Rico Emergency Management and Disaster Administration Agency Act". In very short terms, Act No. 211-1999 was rearticulated as Chapter 5 of the new Act 20-2017.

What we refer now as Article 5.14 of Act 20-2017 is the substitute of Section 20 of Act 211-1999. The previous legal provision stated the following:

> Section 20. — Violations and Penalties. (25 L.P.R.A. § 172r)
>
> Any person who commits any of the following acts shall be sanctioned with a penalty of imprisonment not to exceed six (6) months or a fine not to exceed five thousand dollars ($5,000), or both penalties at the discretion of the court:
> (a) Violating any provision of this Act or any regulation drafted or order issued thereunder.
> (b) Raising a false alarm with respect to the imminent occurrence of a catastrophe in Puerto Rico, or spreading rumors or raising a false alarm regarding nonexisting abnormalities under a state of emergency or disaster.
>
> (c) Failing to observe civilian population evacuation orders issued by the Commonwealth Agency as part of the enforcement of its plan in cases of emergency or disaster. It is hereby provided that minors or disabled persons may be removed against the will of their parents, guardians, custodians or tutors during a state of emergency and once the Governor has declared such a state of emergency. For the purposes of this Act, a "disabled person" is an individual with a mental disability that seriously impairs his capacity to act on his own.
>
> (d) Hindering the evacuation, search, reconstruction or assessment and investigation of damages conducted by federal, Commonwealth or municipal agencies, endangering his life or the lives of other persons, or persisting in carrying out any activity, including those of a recreational nature that endanger his life or the lives of other persons, after having been alerted by the authorities once a hurricane watch has been issued by the pertinent authorities or while a state of emergency declared by the Governor of Puerto Rico through an Executive Order is in effect.
>
> The court may impose community service as an alternate penalty.

This legal text is key to understand the illegality of what Defendants are trying to justify. Note that subsection (d) provides a clear understanding of what the current statute means when it makes a crime to commit actions that endanger a person own live or those of others. The "warnings" made by authorities refer to those actions taken by civil authorities

empowered to perform duties related to the protection of persons from endangered themselves by conducting actions like those of a recreational nature. The classic example would be a police officer or a beach lifeguard that has warned a surfer from not practicing her sport and the person keeps engaging in such conduct.

Plaintiffs now turn to subsection (a), providing for a simple and clear description of the conduct to be punished: the violation of any order or regulation adopted pursuant to Act 211-1999. This legal provision simply demolishes Defendants' arguments. Why? Because subsection (a) was not included in Article 5.14. Nowadays Article 5.14 includes the description of various conducts that the Legislative Branch in Puerto Rico decided to keep worth it of punishment. A simply and straight disobedience to an executive order is not one of those, as was the case under the previous statute.

Finally, it is a criminal statute we are expounding. Defendants cannot pretend to make intricated statutory constructions when discussing criminal law. In Puerto Rico, it is prohibited by the legality principal enshrined in Article 2 of the Penal Code rejecting the prosecution of any person based on a conduct that it not expressly defined as a crime under any Puerto Rico statute. The provision also forbids the application of crimes by analogy as well. The principle of legality represents a limit to the punitive power of the state. In essence, the principle of legality establishes that a conduct will not be punished, or a penalty will be imposed, if the prohibitions and penalties are not previously established by law. *See Pueblo v. Plaza Plaza*, 199 D.P.R. 276, 281-83 (2017).

But because Article 5.14 does not textually establish as an offense any of the prohibitions contained in the Rolling EOs and *vice versa*, the Rolling EOs do not cover any of the specific acts enumerated in Article 5.14. And as a matter of statutory interpretation, this provision falls short of providing a legal basis for the conduct the Rolling EO's attempt to criminalize. Thus, it is contrary to the principle of legality to state that the penalties created by the Rolling EOs, absent a legal basis, are valid.

III. The deprivation of a constitutional right unquestionably constitutes irreparable injury.

The heart of the Opposition is that "Plaintiffs utterly failed to specify the necessary factual allegations of irreparable harm needed to clear the threshold for an award of preliminary injunctive relief." *Id.* at 16. "Instead," the Opposition demurs, "Plaintiffs aver . . . that they made a strong showing of irreparable harm because they will allegedly suffer (1) loss of bodily autonomy; (2) loss of money for doctor's referrals for COVID tests, and loss of income and future earning potential; and (3) medical privacy." *Id.* (citing PI Mot. at 31).

But this paints an inaccurate portrayal and minimizes Plaintiffs' *evolving* and *accruing* calvaries. Plaintiffs, for example, will testify about the lack of institutional capacity for testing and expenses incurred because of such incapacity, dwindling profits, and the emotional pain of losing their jobs if they do not obtain a health certifificate. The fact that the offering has a limited number of tests (e.g., 300 tests), is not consistently offered in the same place, demonstrate the excessive burden the Plaintiffs must endure. *See, e.g.*, *El Vocero, La Asociación de Alcaldes advierte la escasez de pruebas de antígenos de covid-19*, (Sept. 7, 2021), available at

https://tinyurl.com/5vv6mcy4. Unlike in *Klaassen*, where the students had the alternatives of studying remotely or getting tested on campus and free of charge, here Plaintiffs are suffering real irreparable harm, not mere "transient and trivial inconveniences." Opp. at 17 (quoting *Klaassen*, 2021 WL 3073926, *39).

In any event, "[a] deprivation of a [federal] constitutional right for 'even minimal periods of time, unquestionably constitutes irreparable injury.'" *DeNovellis v. Shalala*, 135 F.3d 58, 71–72 (1st Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also, e.g.*, *Jessen v. Village of Lyndon Station*, 519 F. Supp, 1183, 1189 (W.D. Wis. 1981) (finding irreparable injury where the plaintiff stood to lose a property right without due process). A district court in Michigan recently so held in a similar context, "[h]aving found a likelihood of success on the merits of Plaintiff's Free Exercise Claim, the balance of the factors weighs in favor of emergency injunctive relief." *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 2021 WL 3891620, at *3 (W.D. Mich. Aug. 31, 2021); *see id.* ("Where parties seek injunctive relief and allege a constitutional violation, the outcomes often turn on the likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." (internal quotations marks omitted)).

Finally, Defendants argue that "Plaintiffs have not shown that, without an injunction, they would suffer an irreparable harm, not economic in nature . . . ." Opp. at 21. But it is precisely because Plaintiffs cannot recover money damages against Defendants that Plaintiffs will continue to suffer irreparable harm if the Regulation 138-A and the Rolling EOs are not enjoined. *See Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 222 (1st Cir. 2003) ("The

unavailability of back pay or other monetary damages against . . . the Commonwealth … goes a long way toward establishing irreparable injury.").

Thus, Regulation 138-A and the Rolling EOs are causing and continue to cause irreparable economic harms and, in any event, directly and unequivocally infringes the constitutional rights of Plaintiffs who need make no additional showing to establish irreparable injury.

V. Transparency, fairness, and the rule of law further the public interest, and the harm to Plaintiffs morphs any potential and miniscule harm to Defendants.

At the outset, Plaintiffs agree with Defendants that this Court "should analyze . . . [the "two final factors"] together." Opp. at 21. The nub of Defendants' rejoinder is what they call "Plaintiffs' rash and irresponsible allegation that the Governor's public health policy regarding COVID-19 'is the government's attempt to protect the unvaccinated population, who chose to assume the risk of not getting vaccinated, from themselves.'" *Id.* 22 (citing PI Mot. at. 19). According to Defendants, "Plaintiffs irresponsibly overlook the fact that at the moment children under twelve years old cannot get a vaccine to protect themselves against COVID-19." *Id.*

This is a wholly inaccurate charge, and one that seems to either move the goalposts or hide the ball. Is the whole purpose of the Rolling EOs and Regulation 138-A, as applied to Plaintiffs, is to protect under-12 children? At that, to protect them from a virus that is less harmful to them than the flu, for which of course no vaccine has been mandated. But in raising the point about children not being eligible for vaccination, Defendants essentially

admit the truth of the Plaintiffs' argument: that the Rolling EOs and Regulation 138-A aim to protect the unvaccinated from themselves.

Defendants also categorize Plaintiffs' alleged harms as "objections to the opt-outs," which, Defendants argue, are "mere inconveniences and general grievances." Opp. at 25. When one compares "[t]hese inconveniences and general grievances . . . with the fact that COVID-19 is spreading fast among the population of Puerto Rico," the argument goes, "the balance of equities undisputedly tip in favor of the public health and safety policy established by the Governor." *Id.* at 26. But, as extensively explained above, the Plaintiffs' "grievances" are much more than the burdensome and untailored "opt-outs." For example, Tropical Chill's sales last month tanked by 20%, when compared to the month before the Rolling EOs went into effect. Plaintiffs Irizarry and Matos will lose their jobs if they cannot obtain the health certificate. Plaintiffs should be allowed to have their day in Court and testify about the real harms that they are suffering—and will continue to suffer, given the indefinite nature of the Rolling EOs and Regulation 138-A.

By contrast, Puerto Ricans are protected by getting vaccinated themselves or—in the case of minors under 12—by social distancing and wearing a mask. Moreover, the government has implemented many other measures unrelated to vaccine coercion. And contrary to the Opposition's unsubstantiated assertions, the empirical data shows that the virus, even with the Delta variant is not "spreading fast among the population," Opp. at 26,[4] But the point is

[4] On July 19, 2021, there were 127 confirmed cases (7-day running average). COVID-19 En Cifras En Puerto Rico, *Casos*, https://covid19datos.salud.gov.pr/#casos. It took 28 days, August 14, 2021, to reach 619

that excepting Plaintiffs and from unconstitutional conditions cannot seriously undermine the government's efforts to control the pandemic. As noted above, Puerto Rico leads the Nation in vaccination rates. So it strains credulity to say that the "public interest" would be advanced be having a tiny fraction of unvaccinated individuals (religious or otherwise) being so unfairly treated. Defendants have *provided no evidence* to show how the public interest would be negatively affected by enjoining the Rolling EOs and Regulation 138-A. *See Chinyere Aaaduka Osuji et al., v. Glenda Grena-Rios*, No. 20-1545 (RAM), 2021 WL 4438085, at *18 (D.P.R. Sept. 1, 2021) ("Beyond these conclusory allegations, however, Defendants have failed to set forth any evidence as to how adequate English language services to monolingual English-speaking parents such as Plaintiffs or temporary custody with an English-speaking foster family would not be in the public's interest or interfere with public policy.").

At any rate, and because the Rolling EOs' so-called religious exceptions are meaningless, the public interest would no doubt be best served by enjoining Defendants from

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confirmed cases (7-day running average). Back on March 15, 2021, confirmed cases were at 124 (7-day running average), it took 30 days to reach 589 confirmed cases (7-day running average). So, the empirical data shows that, even with no restrictions and the Delta variant, the virus is not spreading, currently, any faster than it did before and at this time, it has receded considerably. The daily 7-day Moving Average (7dMA) of cases has been dropping significantly in the last 49 days, with 8.6x less cases, from when it reached its peak at 619 cases on August 14, 2021, currently at 72 cases (October 2, 2021). Puerto Rico's "New Admissions of Patients with Confirmed Covid-19" is at its lowest with 7dMA of 4 news admissions (October 2, 2021), that is over 8x less that at its peak on August 21, 2021 (33 new admissions). See CDC, *New Hospital Admissions*, https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions. Our adult hospitalizations are at 123 beds (1.7% utilization) and ICU adult beds at 42 beds (6.3% utilization) (October 4, 2021), that is 4x and 3x less that at its peak on August 26, 2021 (515 beds) and August 31, 2021 (130 beds) respectively. *See Sistema de Salud*, https://covid19datos.salud.gov.pr/#sistemas_salud. Our daily deaths related to COVID are currently at a 7dMA of 2.4 deaths (October 3, 2021) when at its peak, September 1, 2021, it was at 14.3 deaths. That is almost 6x less deaths now. *See Defunciones*, https://covid19datos.salud.gov.pr/#defunciones. Our Rt is at 0.59 (October 3, 2021), a record low since the pandemic started in March 2020. *See The covidestim project (Stanford, Yale and Harvard), Effective reproduction number (Rt) (Puerto Rico)*, https://covidestim.org/.)

implementing or enforcing the Rolling EOs' so-called exceptions, particularly the religious one. After all, "a court called upon to do equity should always consider whether the petitioning party has acted in bad faith or with unclean hands." *Vaqueria Tres Monjitas, Inc. v. LaBoy*, 448 F. Supp. 2d 340, 350 (D.P.R. 2006) (quoting *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 880 (1st Cir. 1995)). And "there is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated . . . ." *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002). *See also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Republican Party of Minn. v. White*, 416 F.3d 738, 753 (8th Cir. 2005) ("It can hardly be argued that seeking to uphold a constitutional protection . . . is not per se a compelling state interest.").

Defendants have nothing to balance against the losses described above. Thus, the balance of equities weighs heavily in favor of the preliminary injunction, which would also be in the public interest.

VI. Because Defendants cannot suffer any damages resulting from a wrongful issuance of an injunction and because of the public interest here, this Court can easily set a $0 bond.

Without citing to any binding caselaw, nor discussing the factors outlined by the First Circuit, *see* PI Mot. at 38–39, Defendants argue that it's "not possible" to set an indemnity of $0. Opp at. 26. But Defendants ignored that it is both possible and common to set 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). More so when, as here, this case meets all the First Circuit-binding exceptions, *see* PI Mot. at 38, which other judges in this and other circuits have regularly applied, *see id.* (citing caselaw). The claims here are all constitutional in nature, and Plaintiffs, two small businesses and two very modest workers, are not seeking any monetary damages.

The alleged harm that would be inflicted on Defendants is illusory. Defendants marshal no explanation of how enjoining the Rolling EOs and Regulation 138-A would have an "adverse impact . . . on the public health and safety . . ." Opp. at 26. The upshot is that this is an easy call: because of the public interest here, this Court may set an indemnity of $0.

Conclusion

For the reasons stated, and for those laid out in the PI Motion, this Court should grant the PI Motion and issue a preliminary injunction that stops Defendants from implementing or enforcing the Rolling EOs and Regulation 138-A.

Dated: October 4, 2021 Respectfully submitted,

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