**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF PUERTO RICO**

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| **TROPICAL CHILL CORP. *et. al.*** | |
| *Plaintiffs,* | **Civil No**. 21-1411 (RAM) |
| **v.** | **Jury Trial Demanded** |
| **HON. PEDRO R. PIERLUISI URRUTIA *et. al.*** | |
| *Defendants*. | |

**MOTION TO DISMISS THE AMENDED COMPLAINT**

**TO THE HONORABLE DISTRICT COURT**:

**COME NOW**, **Hon. Pedro R. Pierluisi-Urrutia**, in his official capacity as Governor of Puerto Rico, and **Dr. Carlos R. Mellado-López**, in his official capacity as Secretary of the Department of Health, without waiving any right or defense arising from Title III of Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. 20 *et seq*., and the Commonwealth of Puerto Rico's ("Commonwealth") Petition under said Title or under this case, represented by the undersigned counsel, and respectfully **STATES** and **PRAYS** as follows:

## I. INTRODUCTION AND PROCEDURAL BACKGROUND

On August 27, 2021, plaintiffs Tropical Chill Corp., a Puerto Rico corporation which operates ice cream stores in three municipalities; Ms. Yasmín Vega, the owner and operator of a short-term lodging business; and Mr. René Matos, a supermarket stock clerk, filed a complaint against Hon. Pedro R. Pierluisi-Urrutia, in his official capacity as Governor of Puerto Rico ("Governor"), and Dr. Carlos R. Mellado-López, in his official capacity as Secretary of the Department of Health ("Secretary" or "Secretary of Health"), for declaratory and injunctive relief challenging the

constitutionality of several Executive Orders under the Fourteenth Amendment, the Religious Freedom Restoration Act ("RFRA"), and § 1985 (Docket No. 1).[1] On August 31, 2021, plaintiffs filed a motion for preliminary injunction (Docket No. 7). On September 16, 2021, defendants moved to dismiss the complaint and opposed the preliminary injunction request (Docket Nos. 18 and 20).[2] On October 7, 2021, plaintiffs amended the complaint to include Mrs. Eliza Llenza, unemployed and a volunteer, as a plaintiff (Docket No. 35).

In essence, plaintiffs challenged the constitutionality of Executive Orders Nos. 2021-062 through 2021-064 ("Executive Orders" or "EO") and the Secretary of Health's Regulation No. 138-A ("Regulation No. 138-A"), claiming they are "particularly unreasonable", because, from their perspective, the rates of infection, hospitalization, and mortality are low and not a significant burden to the health care system of the Commonwealth (Docket No. 35 at 3, ¶8). Id.[3] In support, they claim that: (i) vaccination should be voluntary and grounded on individual risk/benefit assessments, as well as moral considerations; (ii) the existing mandates infringe on their right to earn a living and use their property as they see fit, without sufficient justification for such infringement, in violation of their economic liberty and property rights under the Fourteenth Amendment of the U.S. Constitution; and (iii) the existing mandates violate their rights to personal autonomy, bodily integrity, and the right to reject medical treatment (Docket No. 35).

In the case of co-plaintiffs Tropical Chill and Ms. Vega, they invoke the constitutional right to privacy of their customers and clients, inasmuch as the mandates require proofs of vaccination,

[1] Mrs. Alexandra Irizarry was initially named as a plaintiff but not so in the amended complaint (Docket Nos. 1 ad 35).

[2] On October 4, 2021, plaintiffs replied to defendants' opposition to the preliminary injunction (Docket No. 29), and on October 15, 2021, defendants sur-replied (Docket No. 42).

[3] The Executive Orders and Regulation No. 138-A were part of the official policy response of the Government of Puerto Rico to the COVID-19 epidemic and were enacted to attack or curtail the spread of the deadly virus by establishing additional vaccination and verification requirements, mostly directed to the private sector.

masking, and other unjustified impositions not narrowly tailored as constitutionally required (Docket No. 35 at p. 32-33, ¶¶139-41 and 143-147). They cast doubt on the existence of a compelling government interest to justify the Executive Orders and point to the existence of "…less onerous means to obtain the desired result which would lessen the burden on the plaintiff's individual liberties and property interest." Id. at p. 35, ¶156. Co-plaintiff Vega also asserts a claim under the RFRA alleging her religious beliefs compel her not to take the COVID vaccine and that the mandate infringes on her "free exercise of religion as an unalienable right" by forcing her to participate and condone forced vaccination even though least restrictive alternatives exist (Docket No. 35 at 35-36, ¶¶158 and 161-166). Finally, they all assert the Executive Orders lack appropriate legal basis and violate the separation of powers under Puerto Rico's Constitution (Docket No. 35 at 37, ¶170), the *Puerto Rico Department of Public Safety* Act, Act No. 20-2017 (Docket No. 35 at 37-39, ¶¶172-80), as well as the rulemaking process established in the *Uniform Administrative Procedure Act of the Government of Puerto Rico* ("UAPA"), Act No. 38-2017 (Docket No. 35 at 39-40, ¶¶181-184).

Defendants will establish that plaintiffs' constitutional challenges to the Executive Orders and Regulation No. 138-A are a subterfuge to further their own public policy agenda by way of federal court intervention and that they: (i) do not violate the Fourteenth Amendment's substantive due process rights because they meet both a rational and strict scrutiny standards, since through its exceptions or "opt outs" —although not constitutionally required— they apply less onerous means to advance the compelling public health interest in safeguarding the lives and health of its citizens; (ii) do not violate Plaintiffs' freedom to exercise their religious rights under RFRA; (iii) that absent a cognizable federal claim, this Court should abstain from exercising its supplemental jurisdiction as to the claims under the Constitution and the Laws of the Commonwealth of Puerto Rico; and the

supplemental claims hinged on the separation of powers and non-delegation doctrines, as well as the legality of the criminal penalties, fail either for lack of standing or on the merits.

## II. STANDARD FOR DISMISSAL UNDER FED.R.CIV.P. 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs' "well-pleaded facts must possess enough heft to show that they are entitled to relief." *Clark v. Boscher*, 514 F.3d 107, 112 (1st Cir. 2008). That is, a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In doing so, the court must accept as true all "well-pleaded facts [and indulge] all reasonable inferences in plaintiffs' favor." *Id*.; *see also Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 17 (1st Cir. 2011) (holding that federal courts are required to "constru[e] the facts of the complaint in the light most favorable to the plaintiffs, and to resolve any ambiguities in their favor."); *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996) (holding that dismissal under Rule 12 (b)(6) is "appropriate if the facts alleged, taken as true, do not justify recovery.").

In judging the sufficiency of a complaint, courts must "differentiate between well-pleaded facts, on the one hand, and 'bald assertions, unsupportable conclusions, periphrastic circumlocution, and the like,' on the other hand; the former must be credited, but the latter can safely be ignored." *LaChapelle v. Berkshire Life Ins.*, 142 F.3d 507, 508 (quoting *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)); *Buck v. American Airlines, Inc.*, 476 F.3d 29, 33 (1st Cir. 2007); *see also Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999). Moreover, "even under the liberal pleading standards of Fed R. Civ. P. 8, the Supreme Court has held that to survive a motion to dismiss, a complaint must allege 'a plausible entitlement to relief.'" *Twombly*, 550 U.S. at 559. Although complaints do not need detailed factual allegations, the plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *See id*. at 556.

In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Supreme Court of the United States clarified that two underlying principles must guide a court's assessment of the adequacy of pleadings when evaluating whether a complaint can survive a Rule 12(b)(6) motion. First, the Court explained that it is not compelled to accept legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citing *Twombly*, 550 U.S. at 555). Second, a complaint survives only if it states a plausible claim for relief. *Twombly*, 550 U.S. at 556. Thus, any non-conclusory factual allegations in the complaint, accepted as true, must be sufficient to give the claim facial plausibility. *See id*. A claim has facial plausibility when the pleaded facts allow the court to reasonably infer that the defendant is liable for the specific misconduct alleged. *Iqbal*, 556 U.S. at 678. Such inferences must amount to more than a sheer possibility and be as plausible as any obvious alternative explanation. *Id*. Plausibility is a context-specific determination that requires the court to draw on its judicial experience and common sense. *Id*. at 67.

## III. THE CONTENTS OF THE EXECUTIVE ORDERS AND REGULATION

To put this Court in position to dismiss the instant case, defendants will summarize for the Court the contents of the Health Department Regulation and the Executive Orders Plaintiffs challenged in this case.

### A. Regulation No. 138-A

Regulation No. 138-A amended Regulation No. 138, which deals with health certificates issued by medical professionals in Puerto Rico. The amendment establishes "the requirement to present the vaccination card against COVID-19 of the 'COVID-19 Vaccination Record Card' as an essential document for a doctor to issue a health certificate" (Docket No. 35-1 at p. 2, Art. 2). Medical doctors who issue health certificates must attest that the individual requesting it has shown evidence of vaccination against COVID-19, specifically the Vaccination Record Card issued by the CDC,

showing completion of the inoculation. By way of exemption. a doctor may issue a health certificate "in those cases where the patient has a compromised immune system or there is a medical contraindication that prevents inoculation" (Docket No. 35-1 at p. 3, Art. 2). The regulation also provides an exemption on religious grounds, which allows the doctor to issue the certificate being requested by people "not inoculated for religious reasons, as long as the vaccine goes against the dogmas of the patient's religion" (Docket No. 35-1 at p. 3, Art. 2).

**B. Executive Order 2021-062**

EO 2021-062 requires that all government contractors and their employees—who work or regularly visit government offices—provide evidence of vaccination by means of showing their CDC Vaccination Record Card and sets specific deadlines to comply with this requirement (Docket No. 35-2 at p. 8, Section 1). For the **lodging industry**, EO 2021-062 requires vaccination for all employees of hotels, hostels ("*paradores*" in Spanish) and lodging facilities in general. Managers of these facilities are required to verify compliance with these requisites by requiring the Vaccination Record Card (Docket No. 35-2 at p. 9-10, Section 3).[4] Section 4 extends this requisite to guests of these facilities, as well as guests of short-term rental facilities, whether they operate independently or through a digital platform. Id.

Section 5 established a medical grounds exception, which applies to all individuals otherwise required to comply but whose immune system is compromised to the extent that the vaccine may be harmful to their health. It also established an exemption for religious grounds. If getting the vaccine goes against the religious beliefs or dogmas of the contractor, employee or guest, the individual may avail himself of the benefits of this exemption by furnishing a sworn statement by both the individual

[4] Franchise operators and licensees within these facilities, or in their vicinity, are recommended to follow these same requirements for their employees (Docket No. 35-2 at p. 10, Section 3).

and the minister or leader of his religious congregation. All individuals covered by EO 2021-062 who invoke the exception described in this section will also have to submit a negative laboratory result of COVID-19 from a qualified viral SARS-CoV2 test issued within the previous seventy-two (72) hours (Docket No. 35-2 at p. 12, Section 5). Those individuals who do not present the vaccination certificate and do not invoke, or do not comply with the requisites of any of the exemptions previously referred to need to present a COVID-19 negative result not more than seventy-two (72) hours old. (Docket No. 35-2 at p. 13, Section 6).

**C. Executive Order 2021-063**

Invoking the same statutory grounds and general description in its WHEREAS sections of the justifications for these emergency measures and restrictions, EO 2021-063 makes applicable the same restrictions, requirements and exemption requisites as those established in EO 2021-062 to all public locations where food and drink are prepared and sold. The management of these locations is charged with ensuring compliance with these restrictions for guests and visitors to access their facilities. Those venues who choose not to accept the verification requirements to ensure their guests comply with the vaccination mandate will have to limit the number of guests at their facilities at any given time to 50% of their maximum capacity (Docket No. 35-5 at pp. 11-13, Sections 4 and 5).

**D. Executive Order 2021-064**

EO 2021-064 establishes the same restrictions, requirements and exemption requisites provided in EOs 2021-062 and 2021-063 but to gyms, beauty salons, barber shops, spas, childcare centers, casinos, grocery stores, convenience stores, gas stations, and others. Those venues who choose not to accept the verification requirements to ensure their guests comply with the vaccination mandate will have to limit the number of guests at their facilities at any given time to 50% of their

maximum capacity. Nevertheless, visitors may not access any of these establishments if they refuse to comply with what the Order requires (Docket No. 35-6, at pp. 11-13, Sections 4-6).

## IV. MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

On the legal grounds set forth in this motion, Defendants respectfully request that Plaintiffs' causes of action be dismissed under Fed.R.Civ.P. 12(b)(6) because plaintiffs: (i) failed to state a claim for violations of their substantive due process rights under the Fourteenth Amendment of the U. S. Constitution, since no fundamental rights and liberties are infringed by the challenged Executive Orders; (b) even if taking as true that the mandates of the Executive Orders infringe on plaintiffs' fundamental rights and liberties, which defendants deny, a compelling state interest fully justifies these restrictions because they are narrowly tailored to achieve and promote their public health policy objectives; (c) co-plaintiff Vega fails to state a claim under RFRA, since the mandates and restrictions of the challenged Executive Orders are neutral requirements which do not infringe on her fundamental rights to freedom of worship; and (d) under the applicable legal standards, plaintiffs' pendent claims should be dismissed absent a cognizable federal claim and for failure to state a claim on the merits.

### A. The challenged legal precepts do not violate Plaintiffs' substantive due process rights.

The Due Process Clause of the Fourteenth Amendment, which prohibits a state from depriving any person of "life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, has both a substantive and a procedural component. *DePoutot v. Raffaelly*, 424 F.3d 112, 118 (1st Cir. 2005). The right to substantive due process is narrow. *See Ramos-Piñero v. Puerto Rico*, 453 F.3d 48, 52 (1st Cir. 2006). "The substantive component of due process protects against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Souza v. Pina*, 53 F.3d 423, 425-26 (1st Cir. 1995) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Generally, courts are "reluctant to expand the concept of substantive due process because guideposts

for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992).

Specifically, bodily integrity and autonomy claims are based on the common law "right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *see also Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties so protected [by the Due Process Clause] was a right to be free from and to obtain judicial relief [...] for unjustified intrusions on personal security."). Indeed, "[n]o right is held more sacred." *Union Pac. Ry. Co.*, 141 U.S. at 251. In this sense, the First Circuit has held that a plaintiff must bring a substantive due process claim by demonstrating a deprivation of a "fundamental" interest protected by the Fourteenth Amendment. *See Sever v. City of Salem, Mass.*, 2020 WL 948413, at *1 (1st Cir. 2020).

Along this line, individuals have a constitutional liberty interest under the Due Process Clause to refuse medical treatment. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990).[5] This right is not absolute, however, and can be regulated by the State. *See Jacobson*, 197 U.S. at 24-30. "[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether [an individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Cruzan*, 497 U.S. at 279 (internal quotation omitted).

In addition to demonstrating a deprivation of a constitutionally protected interest—in this case, a liberty interest in bodily integrity, autonomy, and refusal of medical treatment—a plaintiff

[5] Examples of this are the forced administration of antipsychotic drugs, *Washington v. Harper*, 494 U.S. 210, 221–22 (1990), and the transfer to a mental hospital along with mandatory behavior modification treatment, *Vitek v. Jones*, 445 U.S. 480, 487 (1980).

asserting a substantive due process claim must also ultimately show that the defendant's "acts were so egregious as to shock the conscience." *Harron v. Town of Franklin*, 660 F.3d 531, 536 (1st Cir. 2011) (quoting *Pagán v. Calderón*, 448 F.3d 16, 32 (1st Cir. 2006)); *see also Rivera v. Rhode Island*, 402 F.3d 27, 36 (1st Cir. 2005) ("The state actions must be 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience") (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).

Plaintiffs' substantive due process allegations are mostly based on their personal interpretation of random data to promote, through this Court, their own COVID-19 public health policy for the Commonwealth. Plaintiffs have not been electorally entrusted with designing the Commonwealth's public health policy, as that matter falls within the sole responsibility and discretion of elected officers and a team of public health experts. *See* S. *Bay United Pentecostal Church*, 140 S. Ct. at 1613 (stating that the Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States and that they should not be subject to second-guessing by an "unelected federal judiciary). Thus, defendants will only address legal issues regarding substantive due process raised in the Amended Complaint.

Plaintiffs allege that the vaccination requirement and mandates of the challenged Executive Orders are unconstitutional restrictions on individual liberties and ineffective tools to deal with the COVID-19 crisis (Docket No. 35 at p. 3, ¶¶6-7). More to the point, they claim the existing mandates infringe on their right to earn a living and use their property as they see fit, without sufficient justification for such infringement, in violation of their economic liberty and property rights under the Fourteenth Amendment (Docket No. 35 at pp. 29, 31-32, ¶¶123, 133, 134 & 139).[6]

[6] Plaintiffs' venturous theories are based on flawed statistical and public policy conclusions that are more fit to be analyzed and rebutted in scientific or political forums rather than in a court of law. *See S. Bay United Pentecostal Church*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring opinion) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect. […] Where [public officials'] broad

As to Department of Health's Regulation 138-A, co-plaintiffs Tropical Chill and Mrs. Vega do not attack the legality or constitutionality of its requirements (Docket No. 35 at pp. 27-32, ¶¶114-123, ¶¶134-39).[7] As to co-plaintiff Matos, his argument against Regulation 138-A is grounded on an alleged property interest in his health certificate, a proposition for which no authority was cited, even though it was the foundation for the constitutional attack (Docket No. 35 at pp. 30-31, ¶¶128-133). Co-plaintiff Llenza claims to have natural immunity to COVID-19 because she tested positive in December 2020 (Docket No. 35 at p. 29, ¶124).[8] She claims that "to work as a Professional Food Manager, she is required to obtain a Health Certificate which regulation 138-A precludes her from obtaining because she is unvaccinated" (Docket No. 35 at p. 30, ¶127). She has not alleged to have actually applied for a food management position or to have been rejected because of her lack of a health certificate. She argues that her natural immunity is equivalent, or stronger than the protection afforded by any vaccine," - a doubtful scientific proposition.[9]

The Secretary of Health, in the valid exercise of his authority under Regulation No. 138-A, determined when and under what circumstances and exceptions are health certificates to be issued.

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limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' **which lacks the background, competence, and expertise to assess public health and is not accountable to the people**."); *see also Klaassen v. Trustees of Indiana U.*, 1:21-CV-238 DRL, 2021 WL 3073926, at *46 (N.D. Ind. July 18, 2021) ("Reasonable social policy is for the state legislatures and its authorized arms, and for the People to demand through their representatives").

[7] It bears noting that in subsection c. of the "WHEREFORE" section, only co-plaintiff Llenza requests this Court to declare Regulation 138-A unconstitutional.

[8] She claims that in March 2019, she was certified by OSHA in Mold Clean-up and Safety after Disaster; and that in April 2019, she obtained a "certificate EPA Office of Community's Revitalization's Strategies for Food Systems, Health and Economic Development", issued by the "Center for Creative Land Recycling". She was also certified on December 2019 as a "Professional Food Manager" by "ANSI" (Docket No. 35 at 29-30, ¶¶124-127).

[9] "Although persons with SARS-CoV-2 Antibodies are largely protected, subsequent infection is possible for some persons due to lack of sterilizing immunity. Some re-infected individuals could have a similar capacity to transmit virus as those infected for the first time", Center for Disease Control, "COVID-19 Science Update released: February 5, 2021 Edition 75.
https://www.cdc.gov/library/covid19/02052021_covidupdate.html#:~:text=Although%20persons%20with%20SARS%2D,for%20the%20first%20time. (last visited on October 20, 2021)

*See Great A. & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 371 (1976) (holding that the states retain "broad power" to legislate protection for their citizens in matters of local concern such as public health). As to co-plaintiff Matos, even under the existing regulation, he was able to obtain the health certificate required by his employer, a grocery store, "but he fears that Regulation 138-A will be used to deprive him of that certificate or prevent him from renewing it" (Docket No. 35 at p. 31, ¶ 132). He has not alleged an expiration date on the certificate he already obtained, nor any kind of demand from his employer that the document be renewed periodically.

Plaintiffs further claim the existing mandates violate their rights to personal autonomy, bodily integrity, and the right to reject medical treatment. In the case of co-plaintiffs Tropical Chill and Mrs. Vega, they invoke the constitutional right to privacy of their customers and clients, since the mandates require proofs of vaccination, masking, and other unjustified impositions not narrowly tailored as constitutionally required (Docket No. 35 at p. 32, ¶¶ 140-142; 144-146). But, plaintiffs have failed to direct this Court to a single precedent from any federal court in support of the proposition that a vaccine requirement or a weekly negative qualified COVID-19 test violates the substantive due process right to bodily integrity or autonomy. The opposite rings true.

The Supreme Court and other federal courts, as well as state courts, have long validated vaccines mandates, even when not including a single exception to inoculation. *See Jacobson*, 197 U.S. at 27 (upholding a Massachusetts law that required compulsory vaccinations for adults); *Zucht*, 260 U.S. 174 (holding that a city can impose compulsory vaccination, even if there is no immediate threat of an epidemic like there was in *Jacobson*); *Klaassen v. Trustees of Indiana U.*, 7 F.4th 592 (7th Cir. 2021) (holding that State university's requirement that students either be vaccinated against COVID-19 or, if they claimed religious or medical exemption, wear masks and be tested twice a week did not violate Due Process Clause); *Workman v. Mingo County Board of Education*, 419 Fed.Appx.

348 (4th Cir. 2011) (holding that a West Virginia law requiring all school children to be vaccinated, with no exemption for religious reasons, is constitutional); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (upholding the Arkansas compulsory vaccination law); *Wright v. DeWitt School District*, 385 S.W.2d 644, 646 (Ark. 1965) (holding that it is within the state's police power "to require that school children be vaccinated and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise."); *Amadeo et al. v. Pierluisi-Urritia et al.*, Civil No. SJ2021CV04779 (P.R. Court of First Inst. 2021) (upholding a vaccine mandate for students and school employees in Puerto Rico). *See* Docket No. 18-1.

On October 19, 2021, the First Circuit decided *Does v. Mills, et al.*, No. 21-1826, attached hereto as Exhibit A. The appellate court denied plaintiffs' preliminary injunction seeking to prevent enforcement of Maine's regulation requiring vaccination of healthcare workers faced with COVID-19's virulent delta variant. For context, Maine's Center for Disease Control promulgated a regulation requiring all workers in licensed healthcare facilities to be vaccinated against the coronavirus due to low vaccination rates. *Id.* at *1.[10] On August 12, 2021, Maine HHS and Maine CDC issued an emergency rule adding COVID-19 to the list of diseases against which healthcare workers must be vaccinated. *Id.*, at *12-13. The First Circuit concluded that the COVID-19 mandate complied with said state law. *Id.* The First Circuit, in reaching said conclusion, considered that the delta variant is more than twice as contagious as previous variants and may cause more severe illness than previous variants (*Id.* at *9-10); and that Maine CDC considered that at least 90% of a population must be vaccinated to prevent community transmission of the delta variant (*Id.* at *10). It also found that

[10] The rule requires healthcare facilities to "exclude [] from the worksite" for the rest of the public health emergency employees who have not been vaccinated. … The employers may accommodate some workers' request for religious exemptions provided that the accommodations do not allow unvaccinated workers to enter healthcare facilities. *Id.*, at *13. Pursuant to state law, amended in May 2019, a healthcare worker may claim an exemption from the requirement only if a medical practitioner certifies that vaccination "may be medically inadvisable." It did not allow for religious or philosophical exemptions to any of its vaccination requirements since the 2019 Amendment.

"[S]temming the spread of COVID-19 is unquestionably a compelling interest …" and that few interests are more compelling than protecting the public health against a deadly virus. *Id.* at *22-23. The First Circuit found that strict scrutiny did not apply (*Id.,* at *22), but even if it did, Maine's rule did not fail narrow tailoring (*Id.* at pp. 23-24).

Following *Jacobson*, 197 U.S. 11, the Supreme Court upheld the government's exercise of its police powers to promote public safety in times of a public health crisis, such as the COVID-19 pandemic. To that end, it held that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. at 27. Further, it established that a state's police power "must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id*. at 25. This police power included the "authority of a state to enact quarantine laws and health laws of every description;" and such power extended to "all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states." *Id*.

Later, in *Zucht v. King*, the Supreme Court reiterated *Jacobson* and held that "it is within the police power of a state to provide for compulsory vaccination." 260 U.S. 174, 176 (1922). To date, *Jacobson* and *Zucht* are still good law and have not been overruled by the Supreme Court. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 71 (2020) (Gorsuch, J., concurring) (citing *Jacobson* with approval); S. *Bay United Pentecostal Church*, 140 S. Ct. at 1613 (citing *Jacobson* with approval); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Jacobson* with approval); *Klaassen*, 7 F.4th 592 (citing *Jacobson* with approval); *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348, 353 (4th Cir. 2011) (unpublished) (citing *Jacobson* with approval).

More recently, in *Klaassen*, the Court of Appeals for the Seventh Circuit ("Seventh Circuit") held that since in *Jacobson* the Supreme Court established that a state may require all members of the

public to be vaccinated against smallpox, "there [cannot] be a constitutional problem with vaccination against SARS-CoV-2." *See, Klaassen,* 7 F.4th 592, 593 (7th Cir. 2021).[11]

Still, a century after *Jacobson* and *Zucht* were decided, and weeks after *Klaassen*, plaintiffs set forth flawed arguments and erred constitutional challenges that have been consistently rejected by federal courts. *See* ERWIN CHEMERINSKY, MICHELE GOODWIN, *Compulsory Vaccination Laws Are Constitutional*, 110 Nw. U.L. Rev. 589, 608 (2016) (stating that "the cases from courts at all levels and from all jurisdictions are unanimous: state laws requiring compulsory vaccination are constitutional"). Here, they challenged the Governor's Executive Orders, which are less restrictive than the vaccine mandates that were upheld in *Jacobson* and in *Zucht*, requiring compulsory inoculation, and like the vaccine mandate upheld by the First Circuit in *Mills* and the Seventh Circuit in *Klaassen,* which recognized certain exceptions.

Since federal and state case law have consistently refused to strike down vaccine mandates throughout the United States, plaintiffs cannot prevail in their challenge to the Executive Orders on substantive due process grounds. Current doctrine as espoused by applicable precedents referred to in this motion do not favor plaintiffs' position.

As explained, the Executive Orders provide covered individuals (employees and guests), and subject to its requisite's alternatives, the option to "opt out" of the mandatory vaccination requirement. Where more restrictive compulsory vaccine mandates have been held constitutional, it follows that a lesser restrictive vaccine requirement falls well within the broad limits of the Commonwealth's police powers to protect the health and lives of its citizens. *See Roman Catholic Diocese of Brooklyn,* 141 S. Ct. at 71 (stating that the vaccine requirement in *Jacobson* "easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs

[11] In *Klaassen,* the appellate court considered a constitutional challenge made by a group of students against a vaccine mandate issued by Indiana University. *See Klaasseen,* 7 F.4th at 593 (7th Cir. 2021).

available to certain objectors."); *see also Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (recognizing that state and federal governments have wide discretion to act in areas where there is medical and scientific uncertainty) (citing *Kansas v. Hendricks*, 521 U.S. 346, 360, n. 3 (1997)). Therefore, the challenged orders requiring mandatory vaccination or a weekly negative COVID-19 qualified tests to employees and guests of the facilities within their scope are a valid constitutional exercise of the Commonwealth's police powers.

Plaintiffs have alleged that the challenged vaccine mandates and regulation also violate the economic liberty protected by the Fourteenth Amendment (Docket No. 35 at p. 27-32). Plaintiffs' pleadings contain no specific definition nor legal standards associated with that elusive concept, nor any reference to legal authorities in support thereof. The Supreme Court of the United States has never acknowledged economic liberty as a substantial component of the individual liberties afforded protection against governmental intrusion under this Amendment. The liberties protected by its substantive due process clause do not include economic liberties. *Savage v. Mills*, 478 F.Supp.3d 16 (D. Me. 2020).[12] The notion of an economic liberty interest finds no explicit support in the text of the Constitution, but its advocates rely on a broad interpretation, allegedly grounded on historical precedents, of the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the way they wish these clauses were construed. *See* BARNETT, 35 Harv. J.L. & Pub. Pol'y at 11-12. In this mindset, *Jacobson* and the rational basis scrutiny it validated for public health vaccine requirements has become a doctrinal target for derision. Advocates of "economic liberty" support stricter limitations on governmental regulatory powers to carry out public

[12] Such protection exists, but its origin is statutory, not constitutional, and it is limited to private restraints. *See*, for example, *Mass. Food Association v. Mass. Alcoholic Beverages Control Commission*, 197 F.3d. 560 (1st Cir., 1999) (holding that "[t]he Sherman Act is a charter of economic liberty, but only against private restraints").

policy objectives, even in areas as sensitive as public health threats like the ones the world is currently facing. *See* BARNETT, 35 Harv. J.L. & Pub. Pol'y 1.

"If a precedent of the Supreme Court has direct application in a case yet appears to rest on reasons rejected in some other line of decisions, the court of Appeals should follow the case which directly controls, leaving the Supreme Court the prerogative of overruling its own decisions", *Rodríguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989); *U.S. v. McIvery*, 806 F.23d. 645, 653 (1st Cir., 2015). "Under the doctrine of stare decisis, **all lower federal courts must follow the commands of the Supreme Court, and only the Supreme Court may reverse its prior precedent**", *U.S. v. Moore-Bush*, 963 F.3d. 29, 31 (1st Cir., 2020) (emphasis added). Plaintiffs' substantive due process claim must be evaluated under *Klaassen*, notwithstanding doctrinal calls for alternative interpretations.

Having failed to identify a federally protected right breached by the Executive Orders at issue and having failed to even plea or develop in some meaningful way that defendants' conduct is "shocking to the conscience", as required by the substantive due process standard, plaintiffs' claims must be **dismissed with prejudice** at this stage of the proceedings.

**B. The Executive Orders and the Regulation do not breach any Fourteenth Amendment substantive due process interest under any standard of review, as applied.**

Rational basis review is the test that courts normally apply to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63, 70 (Gorsuch, J., concurring). It is less stringent than strict scrutiny. Under rational basis review, government action "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Indeed, *Jacobson* was decided before tiers of scrutiny, but it effectively endorsed—as a

considered precursor—rational basis review of a government's mandate during a health crisis. *See Jacobson*, 197 U.S. at 31; *see also Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J., concurring). In its words, if a mandate purporting to be enacted to protect public health "has no real or substantial relation to [that legitimate aim]" or if the law proves "a plain, palpable invasion of rights secured by the fundamental law," the court's job is to give effect to the Constitution. *Jacobson*, 197 U.S. at 31. Added comfort comes from the consistent use of rational basis review to assess mandatory vaccination measures. *See*, e.g., *Prince*, 321 U.S. at 166-67 (parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds" and "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death"); *see also* CHEMERINSKY & GOODWIN, 110 Nw. U.L. Rev. at 610 (concluding that vaccine mandates generally pass the rational basis test). *Zucht*, 260 U.S. at 176-77; *Jacobson*, 197 U.S. at 30-31 (The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population).[13]

[13] *See also, Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015) ("Plaintiffs' substantive due process challenge to the mandatory vaccination regime is therefore no more compelling than *Jacobson's* was more than a century ago"); *Connecticut Citizens Defense League, Inc. v. Lamont*, 465 F. Supp.3d 56, 72 (D. Conn. 2020) ("in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand") (quoting *Jacobson*, 197 U.S. at 29); *Middleton v. Pan*, 2016 WL 11518596, at *7 (C.D. Cal. Dec. 15, 2016) (quoting *Prince*); *George v. Kankakee Cmty. Coll.*, 2014 U.S. Dist. LEXIS 161379, 8-9 (C.D. Ill. Oct. 27, 2014) ("the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)") (*quoting United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982)) (Stevens, J., concurring in judgment), *recommendation adopted*, 2014 U.S. Dist. LEXIS 160737, 1-2); *Boone v. Boozman*, 217 F.Supp.2d 938, 954 (E.D. Ark. 2002)("It is well established that the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that compulsory immunization is a permissible exercise of the State's police power") (quoting *Zucht*, 260 U.S. at 176); *Klaassen*, 2021 WL 3073926 at *24 ("Given over a century's worth of rulings saying there is no greater right to refuse a vaccination than what the Constitution recognizes as a significant liberty, the court declines the students' invitation to extend substantive due process to recognize more than what already and historically exists").

Here, the Executive Orders and Regulation 138-A did not violate any of plaintiffs' substantive due process rights because the government is not forcing vaccination upon them, since the EOs have opt-outs available for those who refuse vaccination. Moreover, plaintiffs do not reference any binding or persuasive case law declining to follow *Jacobson's* rationale basis scrutiny to a vaccine mandate in favor of a strict scrutiny. Thus, the Court must apply the *Jacobson* rational basis standard, until the Supreme Court squarely overrules the same. *See In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (stating that "district court's failure to apply the *Jacobson* framework produced a patently erroneous result"). The Executive Orders spelled out specific purposes to prevent and stop the spread of COVID-19, as well as to safeguard the health, life, and safety of the residents of Puerto Rico. This is an undeniably legitimate governmental interest. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (2020) (Roberts, C.J., concurring); *Jacobson*, 197 U.S. at 37-38. Having established the Governor had a legitimate interest, defendants turn to whether the Executive Orders are rationally related. Defendants contend that they are.

As a general matter, the Executive Orders' vaccine mandate is rationally related to the Commonwealth's legitimate governmental interest. *See Jacobson*, 196 U.S. at 36 (holding that vaccine mandate was a valid exercise of the State's police power). It would be difficult to contend with a straight face that a vaccine mandate or a weekly test requirement do not bear a rational relation to protecting people's health and preventing the spread of COVID-19. Plaintiffs do not point to a single court holding otherwise. *See Am. Cruise Ferries, Inc.*, 2020 WL 7786939 at *16 (upholding governmental economic restrictions and stating that in the wake of the COVID-19 pandemic, across the nation, federal courts have reaffirmed state or local government decisions as to orders regarding to quarantines, the closing of businesses and other restrictions in their exercise of police power to control the deadly spread of the virus). Some may disagree with the Governor's Executive Orders,

but federal courts do not sit in a policy-checking capacity to second guess the wisdom of state governments' acts. *F.C.C. v. Beach Commun., Inc*., 508 U.S. 307, 313 (1993) (clarifying that federal courts do not have "a license […] to judge the wisdom, fairness, or logic of legislative choices."). Accordingly, since the Executive Orders bear a rational relation to the Government's interest, they swiftly pass a rational basis scrutiny under current constitutional standards.

Turning to Regulation 138-A, only two of the plaintiffs have alleged that its requirements constitute infringements on their substantive due process rights, claiming to have a property interest in their health certificates for which no legal authority is invoked. As to co-plaintiff Matos, he admitted that he has already obtained a health certificate, for which no expiration date was proffered. Assuming the existence of a property interest, 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 are substantially less intrusive and onerous than the ones contained in the Executive Orders, which comply with applicable scrutiny standards, as discussed. The same level of scrutiny should lead the Court to a similar conclusion as to the validity of this requirement as a rational measure to promote a compelling public interest.

But even if this Court were to apply a strict scrutiny—which Defendants vehemently deny applies—they would easily pass said the test because they are narrowly tailored to serve a compelling state interest: the health and lives of all public employees and citizens who visit and sponsor public facilities of all kinds during this crisis period.

Generally, if the government infringes on a fundamental right, the courts often apply a strict scrutiny to the government's action. *See Glucksberg*, 521 U.S. at 721. In such circumstances, the Fourteenth Amendment "forbids the government to infringe […] fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling

state interest." *Id*. (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). This is the most rigorous form of constitutional scrutiny of government action. Infringements on other rights or liberties, as in the instant case, usually must meet the rational basis review. *Id*. at 722.

First, if a strict scrutiny were to be applied, the Executive Orders followed specific purposes to prevent and stop the spread of COVID-19, as well as to safeguard the health, life, and safety of the residents of Puerto Rico. Their only purpose is to safeguard the lives and health of all public employees and individuals visiting government and public facilities with the only two known alternatives to prevent the spread of the deadly COVID-19 virus and its variants: (1) immunization or (2) weekly tests for individuals that decide not to inoculate. Thus, the Executive Orders' cardinal attempt to protect the lives and health of the individuals and citizens is undeniably a compelling state interest. *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67 (holding that "[s]temming the spread of COVID-19 is unquestionably a compelling interest.").

Second, the Executive Orders are narrowly tailored because: (1) do not create suspect classifications, as they are of general application to employees and individuals in the covered facilities that work in-person, and visitors; (2) mandate vaccination to all employees that work in-person, but has exceptions (religious and medical) and general "opt-outs" that equally apply to employees that do not want to be immunized against COVID-19, and contractors who visit the locations regularly; (3) requires that **all** employees that work in-person and decide not to be immunized, either by an exception or a general "opt-out," to provide a weekly negative COVID-19 test; and (4) create an alternative for employees that do not desire to be inoculated nor be tested by allowing them to take a regular or compensatory time paid leave, or possibly an unpaid leave. In that sense, the Executive Orders are narrowly tailored to protect employees because they include the least restrictive measures available to stop the growing spread of the deadly COVID-19 virus and its variants. That is because,

while the Executive Orders generally require employees to be vaccinated, it provides less restrictive measures like religious and medical exceptions, as well as a general "opt out" for those that decide not to immunize against COVID-19, regardless of the reason, as well as regular or compensatory paid leave for those that decline to inoculate or provide a weekly negative test. Therefore, the Court must conclude that—while Defendants vehemently argue that such level of review is inapposite—the Executive Orders easily pass a strict scrutiny muster.

In short, the Executive Orders do not violate Plaintiffs' Fourteenth Amendment's economic liberty rights, because no unequivocal recognition has come from the Supreme Court as to the existence of such rights. *See 910 E Main LLC v. Edwards*, 481 F. Supp. 3d 607, 620 (W.D. La. 2020) (holding that economic rights are not fundamental and are subject to rational basis scrutiny and upholding economic restrictions established by the government in light of the COVID-19 pandemic). While Plaintiffs may put their economic interests before the health of all citizens, the Government's duty to protect the lives of its citizens cannot give during a deadly pandemic. *See Am. Cruise Ferries, Inc.*, 2020 WL 7786939, at *17 ("Although everybody is profoundly concerned with the negative effects that the determinations taken by state and local governments nationwide have had, and will continue to have, in the economy, the weighting of the factors in the context of the pandemic lead the Court to find [economic restrictions] must be upheld as a valid constitutional exercise of the Commonwealth's police power").

**C. Co-Plaintiff Vega failed to state a plausible claim under RFRA.**

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. ¶2000bb-1(a) *et seq*., provides that "Government shall not **substantially** burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)" (emphasis added). Its' purpose, as stated in subsection (b)(1), is to restore the compelling interest test as set forth in

*Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and "to guarantee its application in all cases where free exercise of religion is substantially burdened."

RFRA's Subsection (b) provides as exceptions that "Government may **substantially** burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (emphasis added). Under subsection 2000bb(a)(3), Congress found that "governments should not substantially burden religious exercise without compelling justification," and in subsection (a)(4), it stated that "in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."

Under the *Sherbert* test, government actions that substantially burden a religious practice must be justified by a compelling governmental interest. *See Sherbert v. Verner*, 374 U.S. 398 (1963). However, in *Smith*, *supra*, the Supreme Court held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability.[14] In other words, no matter how much a law burdens religious practices, it is constitutional under *Smith* so long as it does not single out religious behavior for punishment and was not motivated by a desire to interfere with religion.

Co-plaintiff Vega invites the Court to apply RFRA's strict scrutiny to the alleged violation of her freedom to exercise her religion. But as a starting point, the Executive Orders do not violate such freedom. Considering *Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 63, the Supreme Court applied the strict scrutiny in a Free Exercise Clause context, wherein plaintiffs alleged an Executive

[14] In *Smith*, the higher Court held that the Constitution does not require exceptions to general laws for religious beliefs. *See*, 494 U.S. 872 (1990). It stated that if the law is neutral, not motivated by a desire to interfere with religion and of general applicability to all individuals, it cannot be challenged based on free exercise of religion. *Id*. And in *Fulton v. City of Philadelphia*, it reaffirmed this legal test by reaffirming that "incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." 141 S. Ct. 1868, 1876 (2021).

Order dealing with the COVID-19 pandemic violated their First Amendment right of freedom to exercise their religion. There, the Court was faced with a case where the state governor—in response to the COVID-19 pandemic—issued an Executive Order imposing severe restrictions on attendance at religious services that were not equally imposed to business activities. It held that the challenged restrictions were not "neutral" and of "general applicability" and that they failed the strict scrutiny because were not narrowly tailored to serve a compelling state interest. *Id.* at 67. However, the instant case is clearly distinguishable since, contrary to the *Roman Catholic Diocese of Brooklyn's* challenged Executive Order, which targeted religious institutions, defendants' Executive Orders are to be generally applied to all contractors, employees and guests who work in-person or visit the facilities within the scope of the EOs.

Co-plaintiff Vega claims that the vaccine mandate in EO 2021-062 "burdens [he] religious beliefs… as it obligates her to participate in and condone forced vaccination," by means of alternatives that are neither the least restrictive nor narrowly tailored to achieve the government's interest (Docket No. 35 at 36, ¶¶ 163-165). But she ignores that policies requiring vaccination need not have exceptions for those who have religious objections to vaccinations. *See Jacobson*, 197 U.S. 11 (upholding a vaccine mandate that did not have a religious exception); *see also Workman*, 419 F. App'x 348 (upholding a vaccine mandate that had no religious exceptions). That is because these exemptions make it possible for anyone to circumvent the vaccine mandate.

If *Smith* were to be applied to a vaccine mandate without a religious exception, the same would have to be upheld because vaccine mandates are the epitome of a neutral law of general applicability. That is, because it is a requirement that applies to everyone and that is not motivated by a desire to interfere with religion but to protect the lives of all citizens. *See Klaassen*, 2021 WL 3073926, at *25 ("[T]he vaccine mandate is a neutral rule of general applicability [because] [i]t

applies to all [persons], whether religious or not."). Were the Court not to agree with the application of *Smith*, a vaccine mandate without a religious exception would still be upheld because the government can infringe on religious freedom if its action is necessary to achieve a compelling interest and to safeguard the lives and health of **all** its citizens - a compelling interest. *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67 (holding that "[s]temming the spread of COVID-19 is unquestionably a compelling interest"); *see also Workman*, 419 F. App'x 348, 353 (holding that State's wish to prevent spread of communicable diseases clearly constituted compelling interest to vaccinate as condition of admission to school, and thus substantial burden on free exercise of religion through mandatory vaccination did not violate First Amendment, even if state required vaccination against diseases that were not very prevalent).

As this Court can attest, the challenged Executive Orders provide medical and religious exemptions, that may not even be constitutionally required, in which case co-plaintiff Vega has the option to require a COVID-19 negative test result to respect to the individual's free exercise of religion and provide an alternative to those whose religious dogmas prohibit vaccination. As such, the Executive Orders not only safeguard free exercise of religion but provide more rights than those constitutionally or statutorily required.

The next step of the RFRA compelling interest test is to determine if the government implemented the least restrictive means to achieve its compelling interest. Here, the government did. It has effectively established that there is no less restrictive alternative to advance its purpose. *Sherbet*, 374 U.S. at 407. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (requiring government to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion on the objecting parties"). To do so, courts that have addressed this issue have held that "the government should not be required to refute every

conceivable option in order to satisfy the least restrictive means prong of RFRA" *Armstrong v. Jewell*, 151 F.Supp.3d 242, 249 (citing *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir.2011) (listing concurring cases from other jurisdictions); *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011) (rejecting alternative restrictive means that would be "as impractical as they are insufficient"); *Olsen v. Drug Enforcement Agency*, 878 F.2d 1458 (D.C.C.1989) (rejecting proposal for restrictive use of marijuana during religious services, which required "burdensome and constant official supervision and management").

In the instant case, the Government has complied with the "least restrictive means" requirement of RFRA, being that the Executive Orders provide alternatives for Airbnb owners by conforming with Sections 5 and 6. Far from infringing the RFRA or co-plaintiff Vega's right to free exercise of religion, the Executive Orders protect religious beliefs by creating a religious exception to the vaccine mandate. The alternatives provided (requiring a negative COVID-19 test result to all guests) are the less restrictive means that the government can provide to safeguard the public health. Therefore, once again, plaintiff's arguments fall flat because, even though neither the Constitution or RFRA require a religious exception to vaccine mandates, the Executive Orders still created an alternative to short-term rental businesspersons like co-plaintiff Vega that constitute a less restrictive mean and that is narrowly tailored to advance the compelling government interest of containing the COVID-19 deadly virus from spreading. These opt-outs are the least restrictive means by which the defendants can achieve the purposes of the Executive Orders: contain the spread of a deadly virus.

It necessarily follows that the Executive Orders are narrowly tailored to promote the compelling government interest – while they mandate vaccination, they provide multiple exceptions and "opt outs" for owners of Airbnb short-term rental properties that do not wish to require a Vaccination Record Card for their guests, like co-plaintiff Vega. In this sense, the EOs are not broader

than necessary as they do not obligate covered individuals to immunize against COVID-19 if they do not desire; be it on religious, medical or any other ground. Simply put, the EOs do not place an undue burden on religion, but rather protect the individual's free exercise by allowing them to simply require a negative COVID-19 test result. Therefore, since the Executive Orders are narrowly tailored to contain the contagion of COVID-19 among all guests in Airbnb rentals, which would, in turn, avoid the propagation of the virus to their families, to school children and personnel (thousands of employees, contractors and visitors have school-age children) and to the general population, Plaintiffs' claim of violation of RFRA is misplaced, frivolous, and must be dismissed with prejudice.

**D. Pendent claims must be dismissed absent a cognizable federal claim and for failure to state a claim on the merits.**

Plaintiffs have invoked the supplemental jurisdiction of this Court to entertain its claims pursuant to the laws of the Commonwealth of Puerto Rico. "As a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims." *Rodríguez v. Doral Mortg. Corp.*, 57 F. 3d 1168, 1177 (1st Cir. 1995). In those cases where the federal claims are dismissed, "the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims". *Id*. The use of supplemental jurisdiction in these circumstances is completely discretionary and shall be determined on a case-specific basis. *See, Rodríguez Cirilo v. García*, 908 F. Supp. 85, 92 (D.P.R. 1995) ("[t]he assertion of supplemental jurisdiction over state law claims is within a federal court's discretion… [i]f federal law claims are dismissed before trial, however, the state law claims should also be dismissed").

Plaintiffs have not plausibly plead any federal cause of action warranting the exercise of this Court's supplemental jurisdiction. Given that plaintiffs' federal claims are destined to fail, the Court

must dismiss all alleged state claims. Nevertheless, in an abundance of caution and without waiving the absence of a cognizable federal claim argument, should the Court consider plaintiffs' supplemental claims, defendants will proceed to discuss the basis for the dismissal of the same on the merits.

Essentially, plaintiffs allege that the EOs constitute a violation of the separation of powers doctrine by exercising non-delegated legislative powers, grounded in that Article 5.10 of Act No. 20-2017 does not bestow upon the Governor the authority to issue these types of executive orders, despite the COVID-19 emergency declaration (Docket No. 35). In the alternative, they argue that if Article 5.10 delegates such authority, then, it constitutes an unconstitutional delegation of power under the non-delegation doctrine. Id. Lastly, plaintiffs support the EOs should be declared null and void because they encompass unlawful criminal threats not contemplated in Article 5.14 of Act No. 20-2017 nor Article 33 of Act No. 81 of March 14, 1912, as amended (Act No. 81-1912). Id. at pp. 36-42. The ensuing discussion will show that plaintiffs are wrong in all three pendent claims arguments.

1. Plaintiffs lack standing to bring a claim under the separation of powers doctrine.

At the threshold, to gain access to federal courts, a plaintiff has the burden of establishing that he or she has standing. *Clapper v. Amnesty Int. USA*, 568 U.S 398, 411-12 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A federal court must satisfy itself as to its jurisdiction, which requires it to primarily evaluate if a plaintiff has Article III standing to sue, before addressing specific claims. *See Orr v. Orr*, 440 U.S. 268, 271 (1979); *Juidice v. Vail*, 430 U.S. 327, 331 (1977); *see also Warth v. Seldin*, 422 U.S. 490, 498 (1975) (explaining that standing is a threshold issue in every federal case). The standing inquiry is both plaintiff-specific and claim-specific and its requirement "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst*., 555 U.S. 488, 492–93 (2009); *Warth v. Seldin*, 422 U.S. 490 (1975); *Pagán v. Calderón*, 448 F.3d 16, 26 (1st Cir. 2006). Only if a particular plaintiff

has standing to pursue a particular claim will the court proceed to assess them. *See Pagán*, 448 F.3d at 26. Thus, a court must determine whether each plaintiff is entitled to have a federal court adjudicate each claim that he or she asserts as the standing issue is tied to its jurisdiction. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Donahue v. City of Boston*, 304 F.3d 110, 116 (1st Cir. 2002). To have Article III standing, Plaintiffs' alleged injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010); *Lujan*, 504 U.S. at 560–61.

Clearly, the Legislative Branch is the only party that has standing to set forth a challenge to the Executive Orders claiming a violation of the separation of powers. That is because if there is a violation to the separation of powers, the party that suffers a cognizable harm for such violation is the government's branch that is entitled to the power that the other branch is usurping. Thus, since there is no controversy between the Executive and the Legislative branches on this matter, the Judicial branch is not required to intervene in the matter and serve as a mediator. *See Goldwater v. Carter*, 444 U.S. 996 (1979) (Powell, J., concurring) ("The Judicial Branch should not decide issues affecting the allocation of power between the [Executive Branch] and [Legislative Branch] until the political branches reach a constitutional impasse."). Here, the Court is not faced with a dispute between two branches of the Commonwealth's Government regarding the allocation of power, but merely against an allegation of individual citizens that attempt to step into the Commonwealth Legislative Branch's shoes. That simply cannot be.

In the instant case, the Executive Orders did not usurp the Legislative Assembly's constitutional power to legislate, and that branch has not expressed itself challenging the authority of the Governor in adopting COVID-19 public policy. *See* W. Vázquez Irizarry, *Los poderes del Gobernador de Puerto Rico y el uso de Ordenes Ejecutivas*, 76 Rev. Jur. UPR 951, 1047 (2007)

(explaining that the 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).[15] The Governor has stayed within his boundaries and has not seized the legislative role by issuing the Executive Orders challenged here If the Legislative Assembly believed that the Governor's executive orders overstepped his constitutional boundaries, it would have already filed a complaint. But it has not. In such a scenario, plaintiffs do not have standing to raise a separation of powers violation.

2. The Executive Orders are a valid exercise of the Governor's constitutional duties that do not violate the separation of powers doctrine.

Defendants have established that plaintiffs do not have standing to raise a separation of powers claim, but—in an abundance of caution—they will discuss the merits of the arguments to put this Court is position to dismiss them on the merits. In *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018), the Supreme Court examined the constitutional doctrine of separation of powers and found that "the Constitution creates three branches of Government" that each branch "exercise[s] ... the powers appropriate to its own department," and that no branch can "encroach upon the powers confided to the others." This system prevents "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands," *Id.* at 904-905 (*citing Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881)).

Under the separation of powers doctrine, even when a branch does not arrogate power to itself, it must not impair another in the performance of its constitutional duties. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 500 (2010) (citing *Loving v. United States*, 517 U.S. 748, 757 (1996)). Note, however, that "[t]he Constitution does not establish three branches with precisely

[15] It should be noted that the Judicial Branch should only intervene between the political branches when there is a conflict between their constitutional powers. In other words, only when the political branches reach an impasse, should the courts intervene to define their limits. *See Goldwater*, 444 U.S. at 996.

defined boundaries." *I.N.S. v. Chadha*, 462 U.S. 919, 962, (1983). Consequently, "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving v. United States*, 517 U.S. at 773.

It should be noted that federal jurisprudence on the separation of powers is not mandatory to resolve Puerto Rico separation of powers controversies. *See Noriega v. Hernández Colón*, 135 P.R. Dec. 406, 473-74 (1994). "The separation of powers in Puerto Rico is expressly enshrined in Art. I, Sec. 2 of the Constitution of the Commonwealth of Puerto Rico." *Colón-Cortés v. Pesquera*, 150 P.R. Dec. 724, 2000 P.R.-Eng. 424,713, P.R. Offic. Trans. (2000).[16]

In addressing plaintiffs' separation of powers claim, the Court must consider that Puerto Rico, along with the rest of the world, is still under a public health emergency. The Governor has to use all his constitutional powers to face the everchanging pandemic. The Governor has continued to label COVID-19 as a public health emergency.[17] On August 30, 2021, seven destinations, including our jurisdiction, moved up from the Level 3: COVID-19 High list to Level 4: Azerbaijan, Estonia, Guam, North Macedonia, Puerto Rico, Saint Lucia and Switzerland. *See CDC adds 7 destinations to 'very high' Covid-19 travel risk list, including Puerto Rico and Switzerland*, https://edition.cnn.com/travel/article/cdc-very-high-risk-travel-destinations-august-30/index.html (last visited on September 15, 2021). The CDC's evolving list of travel notices ranges from Level 1

[16] Art. I, Section 2, of the Puerto Rico Constitution states that "[t]he government of the Commonwealth of Puerto Rico shall be republican in form and its legislative, judicial and executive branches as established by this Constitution shall be equally subordinate to the sovereignty of the people of Puerto Rico." Puerto Rico Const. Art. I, § 2.

[17] *See A Letter on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/a-letter-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/ (last accessed September 15, 2021); *see also*, the Governor's EOs 2021 062-064, declaring a state of emergency.

("low") to Level 4 ("very high"). Id.[18] Thus, the Governor is more than entitled to use his powers to deal with the emergency.

Plaintiffs allege that because Puerto Rico's constitutional structure emulates the federal design, including a government that is organized pursuant to the doctrine of separation of powers, the power to enact laws for the protection of the life, health, and the general welfare of the people rests with the Legislative Branch (Docket No. 35 at p. 36, ¶168). However, plaintiffs' claim lack merit altogether because aside from lacking standing, the EOs are a valid exercise of the Governor's constitutional authority.

In addition, they also argue that Article 5.10 of the *Puerto Rico Department of Public Safety* Act, Act 20-2017, P.R. Laws Ann., tit. 25, § 3550, *et seq.*, cannot be construed to authorize the Governor to declare an emergency of a completely different nature (that is not a hurricane or an earthquake) such as learning how to grapple with COVID (Docket No. 35 at pp. 38-39, ¶¶175-177). In this regard, defendants bring to the attention of this Court to *Amadeo, supra,* which upheld a vaccine mandate for students and school employees in Puerto Rico. *See,* Docket No. 18-1. The complaint questioned the authority of the Governor and the Secretary of the Health Department to issue, respectively, executive orders and administrative orders to address the state of emergency. Importantly, the CFI explained that Article 5.10[19] of Act No. 20-2017, "constitutes a clear example in which the Legislative Assembly conferred to the Governor ample faculties to act in protection of public interest in cases of emergency." *Id.* at 17.

[18] The referenced CNN article explains that "Destinations that fall into the 'Covid-19 Very High' Level 4 category have had more than 500 cases per 100,000 residents in the past 28 days, according to CDC criteria."

[19] Note that article 6.10 of Act No. 20-207 was amended by Act 135 of September 1, 2020, and renumbered as article 5.10. When the CFI mentions article 6.10, it is referring to article 5.10.

According to plaintiffs, "[t]he 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" (Docket No. 35 at p. 36, ¶169). However, plaintiffs omit that Act No. 157 of May 10, 1938, expressly recognizes the authority of the Governor to act in an epidemic through executive orders. "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. In *Amadeo*, the CFI clarified that article 5.10 of Act. No. 20-2017,

> is not the only statutory provision that shows the Governor's authority to manage an emergency like the one caused by the COVID-19 pandemic. In fact, **Act No. 157 of May 10, 1938 expressly recognizes the authority of the Governor to act in an epidemic through executive orders and specifically appoints the Secretary of the Health Department as the civil servant of the executive power who will have in his charge the governmental response upon the declaration of epidemic decreed by the First Executive.** Particularly, that law establishes that, "[w]hen an epidemic is declared in one or several municipalities, by proclamation of the Governor of Puerto Rico, immediately upon the declaration of the epidemic the Secretary of the Health Department will take charge of the health of the affected municipality or municipalities. 24 LPRA sec. 354.

*See* Docket No. 18-1.[20]

It is preposterous that, as part of their anti-vaccine claim, plaintiffs attempt to undermine the use of executive orders by arguing that, instead of using them, the Department of Health should adopt legislation to address the health emergency that complies with the UAPA, which provides for citizen participation through a written comments period and in the case of the Department of Health, even a public hearing" (Docket No. 35 at pp. 39-40, ¶181). The COVID-19 pandemic has proven to be difficult for governments, including Puerto Rico, because new challenges appear daily. These changes

[20] Note that article 6.10 of Act No. 20-207 was amended by Act 135 of September 1, 2020 and renumbered as article 5.10. When the CFI mentions article 6.10, it refers to article 5.10. The quoted paragraph of the Judgment said article 6.10.

require agility from the Governor and his executive branch, which includes the Health Department. The idea that citizen participation, through written comments and public hearings, would have to be incorporated to try to tackle the COVID-19 pandemic is unrealistic. Particularly, with the surge in the pandemic because of the spread of the Delta variant. "Delta is currently the predominant strain of the virus in the United States." *See Delta Variant: What We Know About the Science*, https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html (last accessed September 15, 2021). As expected by the increasing number of cases, the 'Delta variant is highly contagious, more than 2x as contagious as previous variants.'" *Id. United States of America, v. Parker H. Petit*, No. 19-CR-850 (JSR), 2021 WL 4060361, at *2 (S.D.N.Y. Sept. 7, 2021).

3. The nondelegation doctrine is inapposite because article 5.10 provides an intelligible principle to guide the Governor's use of discretion.

In *Mistretta v. United States*, 488 U.S. 361, 371 (1989), the Supreme Court explained that "[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." The Court has long "insisted that the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. 361, 372 (1989) (internal quotations and citations omitted). However, the Supreme Court has also recognized "that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Id.* Importantly, *Mistretta* clarifies that "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 372 (internal quotations, alterations, and citations omitted).

In determining whether a statutory delegation of authority by Congress violates the Constitution's assignment of all legislative power to Congress, the nondelegation inquiry always begins and often almost ends with statutory interpretation, because the constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion, and the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. *Gundy v. United States*, 139 S. Ct. 2116, 2123, *reh'g denied*, 140 S. Ct. 579 (2019). However, it should be highlighted, that since 1935 the Supreme Court "has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Gundy*, 139 S. Ct. at 2130–31, *reh'g denied*, 140 S. Ct. 579, (2019) (Alito, J. concurring in the judgment).

Here, Plaintiffs allege that article 5.10 of the *Puerto Rico Department of Public Safety* Act, Act No. 20-2017's "delegation of power is excessively vague and overbroad and should be declared unconstitutional" (Docket No. 35 at p. 41, ¶193).[21] But "territorial legislators may exercise the legislative power of the Territories without violating the nondelegation doctrine". *Fin. Oversight & Mgmt. Bd. For Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659, 207 L. Ed. 2d 18 (2020). 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**

[21] Article 5.10 of Act No. 20-2017 provides, in pertinent part, that the Governor:

> (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.

**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 Legislative Assembly supplied an intelligible principle to guide the Governor's use of discretion. In fact, Article 5.10 itself sets forth the boundaries of the authority delegated by the Legislative Assembly to the Governor by enumerating the Governor's powers and the events during which he can take those actions: emergencies and disasters.

Plaintiffs turn to *Domínguez Castro v. ELA*, 178 P.R. Dec. 1, 92-94 (2010), when they assert that "[t]he non-delegation doctrine equally applies to separation-of-powers controversies under Puerto Rico law" (Docket No. 35 at p. 41, ¶188).[22] In *Domínguez Castro* clarified that nothing prevents the Legislature from establishing general norms that are broad and that leave the administrator an adequate margin of freedom to complement the legislative norms using a specialized judgment, which can be developed according to an administrative analysis, appreciation and discretion that has a reasonableness basis. *Domínguez Castro v. E.L.A.*, 178 P.R. Dec. 1, 94, 2010 TSPR 11 (2010);

The current doctrine, as espoused by applicable precedents referred to in this motion, are not on plaintiffs' side, nor support their prayer for relief. Therefore, this Court must inevitably conclude that plaintiffs do not adequately allege a violation of the non-delegation doctrine, since Article 5.10 Act No. 20-2017 is not vague and overbroad, and it includes an intelligible principle to guide the Governor's use of discretion.

[22] In *Domínguez Castro*, the constitutionality of Act No. 7 was challenged by the government employees that were terminated by the implementation of Act No. 7, which was geared to reduce the size of the government, as an emergency fiscal measure under Act No. 7. See, 178 P.R. Dec. 1, 92-94 (2010).

4. Article 5.14 of Act 20-2017 provide for penalties, they are correctly applied in the Executive Orders 2021 062-064, and the population has been warned about them.

Plaintiffs allege that the "EOs include a direct threat of criminal sanctions for failing to comply with its provisions, " that "[t]his threat of criminal penalties lacks a legal basis and should be declared null and void by the Court," and that "[n]either Art. 5.14 of Act 20-2017 nor Art. 33 of the Health Department Act (Act 81) provides for such penalty" (Docket No. 35 at p. 42, ¶194-196). Those arguments are incorrect, for Article 5.14 of Act 20-2017, as amended, does provide for penalties and they are correctly applied in the EOs.[23] Specifically, Article 5.14 provides, in pertinent part, that any person who persists on 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 an Executive Order is in effect, shall be punished by imprisonment for a term 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. 25 L.P.R.A. § 3654.

There should be no question that we are in a state of emergency and that the population has been warned about the penalties included in the executive orders. When the executive orders are issued, they are well publicized in newspapers, radio, television, and social media. They are also made public on the website of the Department of State.[24] Thus, the challenged Executive Orders are a valid exercise of the Governor's constitutional duties that do not violate the separation of powers. Thus, the plaintiffs' pendent claims should be dismissed with prejudice.

[23] Note that articles 6.10 and 6.14 of Act No. 20-207 were amended by Act 135 of September 1, 2020 and renumbered as articles 5.10 and 5.14, respectively.

[24] The Executive Orders 20021 062-064 were all published on the Puerto Rico Department of State's website and are available at: https://www.estado.pr.gov/en/executive-orders.

## V. CONCLUSION AND PRAYER FOR RELIEF

The COVID-19 pandemic is a high-risk threat to general populations and health care systems around the world. No amount of theoretical tinkering with vaccination statistics, infection, mortality, and hospital utilization rates will seriously undermine this proposition. Vaccination is and should be treated as a primary means for providing protection against severe illness and death, especially for persons at high risk. The vaccination requirements have been given constitutional approval, under the most lenient standards of scrutiny, and would comply with even the more rigorous ones. Plaintiffs have not articulated a plausible RFRA claim as required by statute. No one, in practicing his or her religion, has a constitutional right to endanger others and no belief can trump the health and lives of the citizens of Puerto Rico. Further, no economic interest disguised as an "economic liberty" can deviate the Government's compelling interest of saving the lives of its citizens.

The promulgation of the Executive Orders is clearly a constitutional exercise of the Commonwealth's police powers to safeguard the health and lives of its citizens. On all these grounds, this motion should be granted, and plaintiffs' case should be dismissed with prejudice at this stage of the proceedings. Granting the remedies that plaintiffs pray for would tie the Commonwealth's hands in facing this public health crisis in ways impossible to determine—even costing lives. Plaintiffs' invitation to the Court to travel down the road full of unforeseen consequences should be declined as too risky for Puerto Rico's population. In these circumstances, the Amended Complaint should be dismissed with prejudice.

**WHEREFORE**, it is respectfully requested from this Honorable Court to GRANT this motion and DISMISS the Amended Complaint WITH PREJUDICE.

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed a digital copy of this document with the Clerk of the Court, who will automatically notify of such filing to all parties officially registered in the CM/ECF System.

In San Juan, Puerto Rico, this 21st day of October, 2021.

**DOMINGO EMANUELLI-HERNÁNDEZ**
Secretary of Justice

**SUSANA PEÑAGARÍCANO-BROWN**
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