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/MEL)**

Response in Opposition to Motion to Dismiss

The plaintiffs, Tropical Chill Corp. (Tropic Chill), Eliza Llena, Yasmin Vega, and Rene Matos (collectively, "Plaintiffs") respectfully oppose the Defendants' Motion to Dismiss the Amended Complaint, ECF No. 49 (MTD).

Setting 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, and its hospitalizations and death rates are near all-time lows.[1] Puerto Rico's success on all these metrics relative to the mainland, and

[1] On July 19, 2021, there were 128 confirmed cases (7dMA). COVID-19 En Cifras En Puerto Rico, *Casos*, https://covid19datos.salud.gov.pr/#casos. It took 28 days, August 14, 2021, to reach 623 confirmed cases (7dMA). Back on March 15, 2021, confirmed cases were at 144 (7dMA), it took 30 days, April 15, 2021 to reach 827 confirmed cases (7dMA). 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 confirmed cases has been dropping significantly in the last 72 days, with 12x less cases, from when it reached its peak at 623 cases on August 14, 2021, currently at 53 cases (October 30, 2021). Puerto Rico's "New Admissions of Patients with Confirmed Covid-19" is at its lowest with 7dMA of 2 news admissions (October 30, 2021), that is over 16x 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 46 beds (0.6% utilization) and ICU adult beds at 12 beds (1.9% utilization) (November 2, 2021), that is over 11x and over 10x 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 1.1 deaths (October 31, 2021) when at its peak, September 1, 2021, it was at 14.3 deaths. That is over 14x less deaths now. *See Defunciones*, https://covid19datos.salud.gov.pr/#defunciones.

statistical trends in a good direction for public health, were as true when the government implemented its vaccination mandates in August as they are now. And, of course, the government has already implemented what have been the Nation's most stringent Covid-related policies, which Plaintiffs are not challenging in this action, such as prohibiting access to public parks, sporting activities and events (including outdoor) to children below 12 years old, prohibiting access to unvaccinated people, even with a negative test done within 72 hours, to indoor or outdoor of activities of more than 100 people help in private places. So the question remains: given exceedingly high rates of vaccination and low rates of viral spread and lethality, why is it necessary to coerce every last Puerto Rican into getting vaccinated? Exempting Plaintiffs from unconstitutional conditions cannot seriously undermine the government's efforts to control the pandemic. Even under rational basis review, does the government get to do anything it wants to combat this pandemic? Even if its measures aren't tied to data but are on the order of "We must do something. This is something, so we must do it," does that pass constitutional muster? Even rational basis review doesn't grant a judicial carte blanche, particularly when, as here, the executive branch pursues policies that haven't been approved by the legislature.

Seeking dismissal of Plaintiff Vega's claims under the Religious Freedom Restoration Act 42 U.S.C. § 2000bb-4 42 U.S.C. § 2000bb-4 ("RFRA"), Defendants also conflate the applicable standards under the Free Exercise Clause and RFRA to arrive at the wrong conclusion. They also failed to meet their burden of at least saying that they considered less intrusive alternatives than those provided for in the Rolling EOs. Meanwhile, the MTD ignores that economic liberty is constitutionally protected. Nor does it offer any arguments on why Regulation 138-A, which shoehorns proof of vaccination into the *testing* requirements for a health certificate, is not both irrational and capricious.

As to the critical pendent claims, the nub of the MTD is that Plaintiffs lack standing to bring a separation-of-powers claim, that the authority bestowed upon the governor to issue the challenged EOs was permissibly delegated and was not excessive, and that the criminal sanctions are contemplated by existing law. But the unsupported notion that only the legislative branch is entitled to challenge an executive order in court runs head-on into a bedrock principle "that dividing power among multiple entities and persons helps protect individual liberty." *PHH Corp. v. Consumer Fin. Protec. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), abrogated by *Seila L. LLC v. Consumer Fin. Protec. Bureau*, 140 S. Ct. 2183 (2020). For "the constitutional structure of our Government is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J. concurring) (cleaned up). The same holds true for the MTD's theory of statutory authority for the Rolling EOs: it's both forced and misplaced considering the text of the statutes purportedly invoked. And its non-delegation argument is circular, as it grasps at thin air in trying to identify as statutory guidelines, the powers granted by the statute itself. Finally, the legal basis for the threat of criminal penalties under the Health Department Act (Act 81) was never explained, and Defendants stretch the statutory text in Act 20-2017 to its breaking point—an interpretative approach that runs contrary to the legality principle enshrined in criminal law.

For these reasons, and because Plaintiffs' well pleaded facts—which have not been challenged by Defendants—must be taken as true at this stage, the motion to dismiss should be denied.

I. RFRA

The MTD conflates the legal standards under the Free Exercise Clause and RFRA to argue that the vaccine mandate should be upheld because, according to the government, although

"neither the Constitution [n]or RFRA require a religious exemption 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." MTD at 26. "These opt-outs," Defendants say, "are the least restrictive means by which the defendants can achieve the purposes of the Executive Orders, contain the spread of a deadly virus." *Id.* In support of their conclusory contention, Defendants first say that Plaintiff Vega "ignores that policies requiring vaccination need not have exceptions for those who have religious objections to vaccinations." *Id.* at 24 (citing two cases in support of their proposition that under the Free Exercise Clause vaccine mandates need not have a religious exception). They add that if *Employment Division v. Smith*, 494 U.S. 872 (1990) "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." *Id.* at 24.

But Defendants' argument applies an incorrect standard. Different from a Free Exercise Clause claim challenging a law of neutral application, which indeed implicates rational basis review, a RFRA claim imposes a burden on the government to prove not only that the means are narrowly tailored to achieve the government's alleged compelling interest, but also that the government is using "*the least restrictive means* of furthering that compelling governmental interest." 42 U.S.C. § 200bb(a)(3) (emphasis added). So viewed, the MTD's invocations of *Smith* and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), are off the mark. Those were free-exercise cases, not RFRA claims.

Next, Defendants retort that they should "not be required to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA." MTD at 25-26 (quoting *Armstrong*

v. Jewell, 151 F.Supp.3d 242, 249 (D.R.I 2015)). But *Armstrong* relied on a test announced in *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir.2011), which is non-binding and predates *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. 682, 699 (2014), *Zubik v. Burwell*, 578 U. S. 403 (2016) (per curiam), and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). And the *Wilgus* test likely runs afoul RFRA since it "effectively exempts the Government from being required to prove what the statute requires, i.e., that it has employed 'the least restrictive means of furthering [its] compelling governmental interest.'" *Legatus v. Sebelius*, 988 F. Supp. 2d 794, 811 (E.D. Mich. 2013) (quoting 42 U.S.C. § 2000bb–1). In any event, that test has not been adopted by the First Circuit and has been effectively set aside by the Supreme Court.

More critically, the First Circuit has said that "to meet the least restrictive means test, [the Government] generally ought to explore at least some alternatives, and their rejection should generally be accompanied by some measure of explanation. *A blanket statement* that *all alternatives* have been *considered and rejected*, such as the one here, *will ordinarily be insufficient*." *Spratt v. R.I. Dept. Of Corrections*, 482 F.3d 33, 42 n. 11 (1st Cir. 2007) (emphasis added). But a blanket statement is precisely what Defendants through the Rolling EOs have proffered here. *See* MTD at 26 (arguing circularly that "the Government has complied with the 'least restrictive means' prong of RFRA" because its measures "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 thus follows that Defendants have not even asserted that "at least some alternatives" have been explored, and therefore they *cannot* offer "some measure of explanation" for their rejection of unidentified alternatives. *Spratt*, 482 F.3d at 42 n. 11. But even if the *Wilgus* test, which has never even been cited by the First Circuit, applied, and presuming that in Puerto

Rico, which is ranked No. 1 in vaccinated individuals per capita among U.S. states and territories, Defendants could still prove a compelling interest for broad vaccination mandates, there are certainly less-oppressive alternatives that the government must consider. Plaintiffs should at least be allowed to conduct discovery to discredit the government's blanket opposition to the contrary.

In contrast to the Defendants' theories, the proper way to evaluate a RFRA claim begins by asking, "would the mandate substantially burden [Plaintiff Vega's] exercise of Religion? Second, if the mandate would impose such a burden, would it nevertheless serve a 'compelling interest'? And third, if it serves such an interest, would it represent 'the least restrictive means of furthering' that interest?" *Little Sisters of the Poor*, 140 S. Ct. at 2389 (Alito, J., concurring). This Court need not tarry on the first question because the MTD does not challenge the fact that EO No. 62 substantially burdens Ms. Vega's religious rights by obligating her to be complicit in Defendants' efforts to compel vaccination—a practice that goes against her religious beliefs. Indeed, "it is not for [courts] to say that [a plaintiff's] religious belief are mistaken or insubstantial." *Hobby Lobby*, 573 U.S. at 725. And there can be no doubt that this EO imposes a substantial burden because non-compliance could subject Ms. Vega to a $5,000 fine and six months' imprisonment. *See* Amend. Comp. ¶ 73; *cf. Hobby Lobby*, 573 U.S. at 691 ("[if] the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price.").

The second question, whether the Government has a "compelling interest" that justifies compelling Ms. Vega to betray her faith, is dubious at this stage of the pandemic, particularly after taking all well-pleaded allegations as true and drawing all inferences in her favor. To show that it has a "compelling interest" under RFRA, Defendants must clear a high bar. Under *Sherbert v. Verner*, 374 U. S. 398 (1963), the decision that provides the foundation for the rule codified in

RFRA, "'[o]nly the gravest abuses, endangering paramount interest'" could "'give occasion for [a] permissible limitation'" on the free exercise of religion. *Id.*, at 406. But the statistical figures and scientific studies incorporated in paragraphs 94—113 of the amended complaint (ECF No. 35), coupled with the fact that Puerto Rico has the highest vaccination rate in the United States, cast serious doubts on whether the government's professed interest—"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," MTD at 19—should be deemed "compelling" in this context, in November 2021 not March 2020.

It bears discussing how Defendants unsurprisingly tout (MTD at 13) the First Circuit's October 19, 2021 decision in *Does 1–6 v. Mills*, --- F. 4th ---, 2021 WL 4860328, *6 (1st Cir. Oct. 19, 2021). But *Mills* actually shows why the Rolling EOs and Regulation 138-A are unreasonable in the context of the actions challenged here. *Mills* was a Free Exercise case, not one under RFRA, which is essential to the analysis. Of critical importance to the pendent claims, Maine's *legislature*—not its governor through executive orders—responded "to declining vaccination rates by amending its law to allow for only the medical exemption" for its healthcare workers. *Id.* at *1 Indeed, Maine concluded that its mandatory vaccination was necessary because, according to the First Circuit's opinion, "vaccination rates among healthcare workers [were] too low to prevent community transmission . . . ." *Id.* But Maine, contrary to Puerto Rico, "determined that at least 90% of a population must be vaccinated to prevent community transmission of the delta variant." *Id.* at *3. In Puerto Rico, to the contrary, neither the Rolling EOs nor the Regulation 138-A, which are indefinite, speak of any such goalposts. The First Circuit also took pains to emphasize that Maine's law applied only to healthcare workers, who, according to the court, were directly exposed

to the immunocompromised. Indeed, the First Circuit found that Maine's law was not overinclusive because it limited itself to only to healthcare workers, noting that:

> health care facilities are uniquely susceptible to outbreaks of infectious diseases like COVID-19 because medical diagnosis and treatment often require close contact between providers and patients (who often are medically vulnerable). And outbreaks at healthcare facilities hamper the state's ability to care for its residents suffering both from COVID-19 and from other conditions.

Mills, 2021 WL 4860328, *3.

The challenged government actions here, by contrast, apply to virtually all Puerto Ricans who reject vaccination, and even to those who do not reject it but refuse to participate as the Government police in its implementation. And contrary to Maine's situation, the amended complaint's detailed allegations specify that Puerto Rico never "faced a severe crisis in its healthcare facilities when the delta variant hit the state." *Mills*, 2021 WL 4860328, *3. *See also See Does 1-3 v. Mills*, No. 21A90, 2021 WL 5027177, at *6 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting[2]) (questioning whether Maine's professed interest was still "compelling" noting that "[b]ack when we decided *Roman Catholic Diocese*, there were no widely distributed vaccines. Today there are three. At that time, the country had comparably few treatments for those suffering with the disease. Today we have additional treatments and more appear near."). The indefiniteness of the mandate is also problematic. *Id.* at *6-7 ("I would acknowledge that this interest cannot

[2] Although Justice Gorsuch dissented, it bears noting that he was joined by Justices Alito Thomas. And Justice Barret, joined by Justice Kavanaugh, concurred in the denial of injunctive relief noting that the factor of whether the plaintiffs were "likely to succeed on merits," "encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant" under the emergency docket standard. 595 U.S. __ (2021), Does 1-3 v. Mills, 21A90, 2021 WL 5027177 at *1. (U.S. Oct. 29, 2021). In Justice Barret's view "discretionary consideration counsels against a grant of extraordinary relief in this case, *which is the first to address the questions* presented." *Id.* So viewed, three of the Supreme Court Justices already expressed that they would reverse the First Circuit, and two additional Justices suggested that they would entertain the merits, not through the emergency docket, but in the ordinary course of the Supreme Court proceeding, including "full briefing and oral argument." *Id.*

qualify as such forever… If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.").

What's more, Maine provided non-generalized justifications for its vaccination mandate. *See Does 1-3*, 2021 WL 5027177 at *2 (Gorsuch, J., dissenting) ("unpacking" and rebutting Maine's four "justifications"). Here, in contrast, Defendants invoked only generalized justifications. No justifications can be "unpacked." So viewed, whether the government still has a compelling interest that justify the restrictions imposed upon Plaintiffs' religious liberties is questionable.

But even if the government's interest could still be deemed as "compelling," it is passing strange how requiring proof of vaccination or a negative COVID test from Airbnb guests—contrary, to say, healthcare workers—could further that interest. And that is precisely why the generality of the Government's asserted interest is a problem. "At some great height, after all, almost any state action might be said to touch on '. . . public health and safety' . . . and measuring a highly particularized and individual interest' in the exercise of a civil right 'directly against . . . these rarified values inevitably makes the individual interest appear the less significant." *Yellowbear v. Lampert*, 741 F. 3d 48, 57 (10th Cir. 2014) (cleaned up).

On this point, the government has not even alleged that people staying at Airbnbs are significantly contributing to the spread of COVID. Much less in an Airbnb such as the one operated by Plaintiff Vega, which, as the amended complaint specifies, "is situated on 1.5 acres of land, above one of the highest peaks of the mountainous city of Mayaguez, and it is completely private and isolated." ECF No. 35 ¶ 135. So, the government has not even articulated how EO 62, as applied to Ms. Vega's Airbnb operation, serves to further its asserted interest.

In any event, Plaintiffs plausibly plead that there are other less restrictive ways to curb the spread of COVID than compelling Ms. Vega to be complicit in enforcing the government's

mandate, which she sincerely believes betrays her faith. The use of masks and social distancing are less intrusive ways—though again, with Ms. Vega's particular business, it's unclear what these measures would accomplish. Making COVID tests readily available and affordable for the vaccinated and unvaccinated, instead of unduly burdensome and expensive, as they are in Puerto Rico as distinct from the mainland, would help in monitoring and thus reducing the spread of COVID. More specific to Ms. Vega, the government could enforce the vaccine requirement itself by, say, establishing a platform for Airbnb guests to send their vaccination or testing information directly to the government, thus enforcing the mandate on guests, not proprietors. After all, all who fly into Puerto Rico already need to provide proof of vaccination or a negative test result upon arriving at the airport.

Instead of a blanket mandate, the government could also set reasonable parameters for when proof of vaccination or negative COVID tests would be required: *e.g.*, only when the Airbnb is in a complex akin to a hotel, or when guests are not members of the same household. The government could also require that all guests, regardless of vaccination status, take a COVID test before staying at an Airbnb. Of course, this last alternative could be implemented only if the government provided readily available COVID tests free of charge for the vaccinated and unvaccinated as is the case in all jurisdictions with comparable mandates. Or perhaps it could at least allow over-the-counter Covid tests. But the government has not even attempted to explain why Puerto Rico ranks at near-bottom (second to last[3]) among U.S. jurisdictions in COVID testing per capita, and why testing is so expensive and burdensome here when compared to testing regimens on the mainland. *See*, *e.g.*, ECF No. 35, ¶¶ 19, 97 (f). Is the government's interest truly to contain the spread of COVID? Or

[3] CDC, *Data Table for Cumulative COVID-19 Nucleic Acid Amplification Tests (NAATs) Performed per 100k by State/Territory*, https://covid.cdc.gov/covid-data-tracker/#cases_testsper100k

is it to force vaccination without regard to its citizens' religious beliefs and other civil liberties? These goals may appear similar, but they aren't the same.

At bottom, dismissal is inappropriate at the pleading stage because regardless of which party has the burden of identifying alternative less restrictive means under RFRA, Defendants have the burden to support their choice of regulation and refute alternative schemes "*through the evidence presented in the record*." *U.S. v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (emphasis added). And Plaintiffs' well-pleaded allegations are sufficient to at the very least allow Plaintiffs to conduct discovery on these matters. Accordingly, and "consistent with the Rule 12(b)(6) standard," this Court should "assume[] the truth of [these] factual claims." *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63, 73 (1st Cir. 2021).

II. Substantive Due Process

A. Statistical data is relevant, some form of heightened or intermediate scrutiny is appropriate, and Defendants' proffered interest in promulgating their mandates are not "compelling."

The MTD is devoid of any empirical, statistical, or scientific data, as if such information weren't relevant to evaluating the justifications for government action, here or generally. 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. The MTD brushes off the studies, data, and statistics furnished by Plaintiffs. *See* MTD at 10 (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." *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 aimed at public safety during an indefinite state of emergency.

But the whole reason that Plaintiffs have painstakingly presented scholarly studies, data, and *the government's own statistics* is because the actions that the Defendants take must have adequate legal justification. And the amended complaint is based not on Plaintiffs' own subjective policy preferences, but on arguments that the Defendants aren't objectively justified in taking the measures they have. Plaintiffs have explained why the *Jacobson* standard, which predates modern jurisprudence, should not apply here, arguing instead for some form of heightened scrutiny.[4] Even so, Defendants seem to think that *Jacobson* is a "get out of court free" card for any pandemic-related measures. 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. When taken seriously, the science shows that Defendants aren't justified in imposing the burdens that the Rolling EOs and the Regulation 138-A impose. Indeed, even if *Jacobson* applied directly, with no intervening jurisprudence to add nuance, perspective, and 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 certain vaccine mandates, as applied to certain classes of people, pass judicial muster (*Jacobson, Klaassen*), doesn't mean that all do. Different mandates are structured differently and impose different burdens. Defendants' $5,000 fine or six-months' jail

[4] 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* ECF No. 27, p. 7 n1 (collecting such secondary sources).

time, not to mention a costly testing scheme that's uniquely burdensome in the Puerto Rico context, 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 off the uninoculated 2,643, or 46.3 per cent, had the disease." *Id*. And according to the statistics referenced in *Jacobson*, the smallpox vaccine was far deadlier than COVID. Unlike the evidence so far furnished by Plaintiffs, however, 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 was instead aimed to challenge the efficacy and potential dangers of the smallpox vaccine. *See id.* at 30. In rejecting Mr. Jacobson's proffer, 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 for 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 that 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, and (4) vaccination rates are already high, higher than any other U.S. state or territory. Moreover, the pertinent statistical data to support the mandate—which is less compelling than in *Jacobson*—has not been available for such "a long time" as to be deemed "common knowledge."

The upshot is that nothing in *Jacobson* prevents Plaintiffs from introducing, and this Court from considering, the statistical evidence set forth in the amended complaint or related and potential filings (e.g., a motion to take judicial knowledge)—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 real heavily on *Zucht v. King*, 260 U.S. 174, 176, 177 (1922), which is not only another century-old case, but involved mandatory vaccination in the school context, *see* 260 U.S. at 175. Plaintiffs are emphatically *not* challenging mandates for *all* vaccines in *all* contexts, but in any event, the *Zucht* Court did not entertain any constitutional merits 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.").

The critical point is that, with the Rolling EOs, the punishment is far more severe than in *Jacobson*. For the Rolling EOs are more restrictive and punitive than the *Jacobson* mandate. 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). 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 did. *See* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts* (Aug. 17, 2021), https://tinyurl.com/28ts4t6e, at 16-17.

According to the amended complaint, Plaintiff Matos runs the risk of losing his livelihood unless he submits to a weekly COVID test, which is neither free nor readily available as in the rest of the United States. ECF No. 35 ¶ 131. Even worse, the tests require a medical referral to have insurance pay for it. The *indefinite nature* of the costs and burdens of weekly testing, then, is more punitive than *Jacobson*'s nominal fine—and that's before we even get to fines or imprisonment. Id. ¶ 73. That problem is compounded by the fact that free testing is not as available in Puerto Rico. *Id.* ¶ 20. Indeed, Defendant Mercado 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." ECF No. 29 at 11. And while explaining that the government, but not the private sector, is having a COVID-test supply shortage, the Secretary stated that, "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). So 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, Vega and Llenza, whose lives have been upended by 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* ECF No. 29 at 12.

Defendants also say that Plaintiff's substantive due process claim must be evaluated under *Klaassen* [*v. Trustees of Indiana U.*, 7 F.4th 592 (7th Cir. 2021)]." MTD at 12. But *Klassen* involved a different mandate and different facts, too. To start, this case does not involve the education sector. And, at the time *Klaassen* was decided, 49.6 % of eligible citizens had been fully vaccinated. *Klaassen v. Trustees of Indiana U*. 2021 WL 3073926, at *10 (N.D. Ind. July 18, 2021). Today, in Puerto Rico, the rate of fully vaccinated eligible citizens is 81.2%, [5] ranking first in the nation, *see, e.g.*, Covid update: How Puerto Rico became the most vaccinated place in America - CNN. More to the point, the *students* in *Klaasen* were given the option of studying remotely or submitting to *free* COVID swab tests that were scheduled and administered on campus. Here, in contrast, free testing is scarce and burdensome. The consequences here are different as well: Plaintiff Llenza, for example, can't secure a health certificate, which in turn makes it impossible for her gain meaningful employment. ECF No. 35 ¶ 127.

According to Defendants, rational basis is the proper level of scrutiny to apply here 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

[5] Departamento de Salud COVID-19 Dashboard, *Vacunacion*, https://covid19datos.salud.gov.pr/, (last seen on Nov. 4, 2021)

scrutiny. Thus, [the argument goes,] the Court must apply *Jacobson*'*s* [antiquated proto-rational basis standard], until the Supreme Court squarely overrules the same." MTD at 17 (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)). Plaintiffs readily concede that there is no precedent superseding *Jacobson*, but there simply hasn't been a widespread pandemic in the modern era, at least not one that touches American law. Still, as explained above, the facts in *Jacobson* differ significantly from the facts presented here. 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). And even in that situation, the government must show that it considered less burdensome alternatives. *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"). At the very least the government here should be required to show that its asserted interests supersede the plaintiffs' liberty interest, *Cruzan by Cruzan v. Dir., Missouri Dept. of Health*, 497 U.S. 261, 262 (1990) ("[W]hether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."), which entails more than simply establishing a rational basis for the action.

The government here has not asserted concrete and specific interests to justify the different prohibitions and burdens contained in each of the Rolling EOs. Instead, it asserted an abstract interest to justify them all: curbing the spread of COVID. This is probably because "[t]he more abstract the level of inquiry, often the better the governmental interest will look." *Yellowbear*, 741 F. 3d at 57. Indeed, "almost any state action might be said to touch on 'public health and safety' and measuring a highly particularized and individual interest' in the exercise of a civil right

'directly against these rarified values inevitably makes the individual interest appear the less significant." *Id*. (cleaned up).

On this point, it bears noting that all the Rolling EOs are of indefinite duration, and none of them include parameters or specific objectives—*e.g.*, until we reach certain rates of vaccination, cases, hospitalizations, or deaths—that could hint when the government's overreaches will stop. And "civil liberties face grave risks when governments proclaim indefinite states of emergency." *Mills*, 2021 WL 5027177, at *3 (Gorsuch, J. dissenting); *see also* note 2, above. Moreover, the government is employing a process—mandatory testing—whose means to further the stated end is questionable. This is because the government lacks a sufficient supply of free and readily available tests to impose its draconian measures. And Defendants' inability to explain the low amount of COVID testing in Puerto Rico and the substantial burdens imposed on citizens trying to obtain a free COIVD test undermines its asserted interest of decreasing the spread of COVID through the vaccine mandate. *See* ECF No. 35 at 96. Frequent testing among the whole population is indispensable to properly track the spread of COVID and respond to outbreaks. Readily available and easily accessible free COVID testing, as in all jurisdictions with similar mandates, would certainly further the government's professed interest. But the government has been mum on that subject—which means that the vaccine mandate is being implemented in an arbitrary and capricious manner to compel citizens to succumb to vaccination and forego their religious and substantive due process rights. By mandating and at the same time making it extremely difficult to obtain a COVID test, the government is purposely cornering citizens, or as the governor said, "closing the fence" on citizens that Plaintiff who choose to exercise their constitutionally protected rights to bodily integrity and medical informed consent, by refusing vaccination. *See* Gobernador sigue "cerrando el cerco" para combatir el COVID-19 - Videos - Primera Hora,

https://www.primerahora.com/noticias/gobierno-politica/videos/gobernador-sigue-cerrando-el-cerco-para-combatir-el-covid-19-273899/.

The same holds true with the government's failure to recognize natural immunity after 90 days (or at all in the case of Regulation 138-A) as an alternative to vaccination. As plausibly alleged, *see* ECF No. 35, ¶¶ 87-89, natural immunity provides more robust and longer-lasting protection than two doses of any available vaccine. So there is no rational basis to decline to exempt from testing those citizens who have recovered from COVID. And this is relevant not only to Ms. Llenza's claims, but also to the substantive due process claims of all Plaintiffs. If the Government has an unidentified goal—*e.g.,* a certain percentage of people immunized to achieve herd immunity—that needs to be reached before it rescinds the use of its indefinite emergency powers, natural immunity should be taken into account in determining whether the government has reached its goal and thus infringement on constitutional rights are no longer justifiable.

Here, the government must prove at the very least that the already-high and still-increasing vaccination and natural-immunity rates, plus the low percentage of COVID infections, hospitalizations, and deaths, are insufficient (and remain so more than two months after the mandates) to achieve its asserted objective. Otherwise, the government's infringement on the Plaintiffs' rights isn't warranted—or no longer is if it once was. And even if the government were to provide some evidence to support its overinclusive and purposely burdensome mandate, Plaintiffs would still be entitled to conduct discovery to challenge that evidence. So at this stage, well-pleaded allegations—none of which the government calls "conclusory," because they're based on data—are sufficient to survive the MTD.

B. Regulation 138-A

The MTD completely ignores the core of Plaintiff Matos's arguments, namely that Regulation 138-A is arbitrary and capricious. Recall that Plaintiff Matos and Llenza plausibly pleaded that that requiring proof of vaccination to obtain a health certificate (which entitles them to work) is wholly irrational. One, after all, can be vaccinated and still get and spread Covid. *See Mulero-Carrillo v. Roman-Hernandez*, 790 F.3d 99, 107 (1st Cir. 2015) ("[W]hen 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"). As a result, if anything, a negative Covid test would make more sense. Defendants conveniently ignore Plaintiffs' argument that the vaccination requirement is part of the "tests" needed to obtain a health certificate, which is a circular argument further suggesting the irrationality of Regulation 138-A. Contrast this arbitrary rule to Maine's emergency rule—discussed in *Mills*—adding covid to vaccine *law* related to healthcare workers. After all, proof of COVID vaccination is not a "test." ECF No. 35 ¶ 48. To cinch matters, there are no exceptions for natural immunity. And this makes it impossible for Defendants to prevail in their motion to dismiss, at least against Ms. Llenza, who has natural immunity. Taking as true Ms. Llenza's allegations that natural immunity is stronger and longer lasting than any vaccine, which Plaintiff Llenza not only avers but provides support for, it's plausible that the government had no rational basis to impose burdens on the constitutionally protected rights of naturally immune citizens, who are more protected from contracting (and therefore spreading) COVID than vaccinated individuals.

Tellingly, Defendants do not argue to the contrary. They simply say that Ms. Llenza's allegations are a "doubtful scientific proposition." MTD at 11. But the Court cannot choose Defendants' conclusory statement and disregard Plaintiffs' well-pleaded facts when deciding a

motion to dismiss. Further, the Defendants try so support their conclusory allegation by quoting a February 5, 2021 CDC statement that "*[s]ome* re-infected individuals have a similar capacity to transmit virus as those infected for the first time." *Id.* n. 9 (citation omitted). But so too those who are fully vaccinated. And those with natural immunity are less likely to transmit than those who are fully vaccinated. Contrary to the studies presented in the amended complaint's paragraphs 87-89, the study referenced in the CDC's statement proffered by Defendants did not compare the effectiveness of natural immunity against full vaccination—much less with the advent of the Delta variant which is precisely what triggered the Rolling EOs. In any event, even if Plaintiffs' contention is "doubtful," it should still survive the MTD. The short of it is that the government has not even argued that Plaintiffs' factual allegations fail to meet the plausibility standard.

Defendants also 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." MTD at 11. And they assume for argument's sake that Plaintiffs Matos and Llenza have a "property interest" in their certificates. *Id.* at 20. This assumption *arguendo* is crucial. Health certificates, after all, are necessary for regular people, particularly those who need occupational licenses, to earn their livelihoods. *Cf. Allgeyer v. State of La*., 165 U.S. 578, 589 (1897) (holding that "the term [liberty] is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; . . . to live and work where he will; . . .; [and] to pursue any livelihood or avocation").

Next, Defendants argue that "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*. But this rejoinder is off the mark. To begin with, Plaintiffs Matos and Llenza don't qualify for any of the so-called "exceptions." That is because the health certificate has neither a general opt-out nor an option to submit a negative test result, the latter of which, as just noted, would make some sense. Nor, as also noted, does it permit an exception for those with natural immunity. In the context of the health certificate, Regulation 138-A is, simply put, irrational. Even worse, neither Regulation 138-A nor the MTD attempted to explain why all employees who are required by law to obtain a health certificate are more likely to spread COVID than employees or individuals for whom the health certificate is not required.

In short, because Defendants marshalled 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 rational basis review. A fortiori, then, it survives Defendants' 12(b)(6) challenge.

C. Economic Liberties

The government says (MTD at 16) that economic liberties aren't protected by the Fourteenth Amendment. That's laughably wrong, but it's no laughing matter in a place with high rates of poverty and inequality for the government to take away the right to earn an honest living on a whim, or "just in case." Individual liberties include "the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *U.S. v. Topco Assoc.*, 405 U.S. 596, 611 (1972). To be sure, since the New Deal, economic regulations are subject to rational basis review. *See United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938). But that doesn't mean that economic rights don't exist at all or aren't protected under the Fourteenth Amendment. Contrary to the government's assertions, there have been plenty of

modern cases upholding economic-liberty claims. *See, e.g.*, *Merrifield v. Lockyer*, 547 F. 3d 978 (9th Cir. 2008) (licensing requirement for pest control workers lacked a rational basis); *Craigmiles v. Giles*, 312 F. 3d 220 (6th Cir. 2002) (finding licensing requirement for coffin-makers lacked a rational basis); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (certificate of necessity law for moving companies unconstitutionally excluded competition). As in any area of contested law, the scope of those protections and what counts as a rational basis for regulation is much in dispute, of course, *compare Merrifield*, 547 F.3d 991 n.15 (using licensing solely to protect existing firms against competition is unconstitutionally irrational) *with Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (using licensing for protectionism is constitutional), but it's flatly inaccurate to say that economic-rights claims are never upheld.

And it's unclear how mandating each of the plaintiffs—especially an Airbnb owner who never meets customers—stops viral spread and is thus rationally related to any governmental interest. As detailed in other briefing in this case, the Rolling EOs severely restrict the economic liberties of all Plaintiffs. At this plaintiff friendly stage, the following well-pleaded facts must be taken at true. Tropical Chill's sales have tanked by more than 20%, when compared to the month before the Rolling EOs went into effect. *See* ECF No. 35, ¶ 122. Mr. Matos has a legitimate fear of not being able to work once his current health certificate expires. Ms. Vega cannot operate her isolated Airbnb without betraying her faith or being potentially subject to a $5,000 and six-months imprisonment.

The government feels that assorted restrictions are necessary to stop viral spread, even as there's no indication that vaccine mandates do so *in these specific contexts given Puerto Rico's high level of vaccination and low level of viral spread and hospitalizations*. Even under rational basis review, the government can't act in an arbitrary manner, waving its hands in the general

direction of coercive actions that somehow approximate good public policy. For example, EO 063 nowhere explains why a 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. But a 50% capacity limit on ice cream shops or other culinary establishments is arbitrary. Why not 75 or 25%? After all, previous EOs have imposed different thresholds, OE-2021-032, on May 6, 2021, imposed 30% occupancy on businesses and OE-2021-043, on June 3, 2021, imposed 75% occupancy on businesses.[6] 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 the Plaintiffs. On the government's logic, vaccine mandates (and any other measures) that burden economic liberties are always and forever justified, just by invoking the magic words "public health." That can't be right—and fails even the laxest application of rational basis review. *Cf. Windsor v. United States*, 699 F.3d 169, 180 (2d Cir.2012) (cleaned up) ("While rational basis review is indulgent and respectful, it is not meant to be 'toothless.'").

III. Supplemental Claims

A. Standing

To argue, as Defendants intimate, that only the "injured" constitutional branch possesses standing in separation of powers controversies is distorted and mistaken as a matter of constitutional law. And 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.

[6] Puerto Rico State Department, *Executive Orders* (OE-2021-032, OE-2021-043), https://www.estado.pr.gov/en/executive-orders/ (imposing 30 % and 75% limits on restaurants)

Mitchell, 330 U.S. 75, 91 (1947)). As the Court remarked in *Bond* v. *U.S.*, "[s]eparation-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' unprecedented 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 a preposterous result violates both precedent and sound legal analysis.

For one thing, caselaw clearly recognizes that individuals can raise separation of powers claims in court. *See, e.g.*, *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. *See, e.g.*, *Sheila Law LLC* v. *CFPB*, 140 S.Ct. 2183 (2020); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Clases A, B y C* v. *PRTC*, 183 P.R. Dec. 166 (2011); *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 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 the Puerto Rico Supreme Court invalidated an executive order by the governor in a case *not filed* by the legislative power.

Finally, while discussing standing, Defendants try to make an argument of legislative acquiescence with the 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. MTD at 29-30, In support of their argument, Defendants cite 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. True enough, 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). But Defendants neglect to also mention the citation that Professor Vazquez included in support of his affirmation. Footnote 292 of the law review 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.[7] By contrast, here Defendants attempt to apply that doctrine to legislative silence or inaction since

[7] "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).

March 2020—barely for two years. Their reliance on this portion of that secondary source is misplaced.

B. Lack of statutory authority

It bears highlighting at the outset 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 31. Such statement might be appropriate for the preamble of the Rolling 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 on Art. 6.10 of Act 20-2017. They say that Plaintiffs' position is that Article 6.10 of Act 20-2017 is applicable only in scenarios such as hurricanes or earthquakes. 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 shift gears. They invoke Act No. 157 of May 10, 1938, arguing "expressly recognizes the authority of the Governor to act in an epidemic through executive orders." And that may be true so far as it goes. But Defendants avoid engaging in what exactly is the governor authorized to do under that statute. Act 157-1938 provides, "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.

It bears highlighting that in *Jacobson*, the precedent upon which Defendants rely to justify their actions, the mandatory vaccination policy was expressly established by statute. The Revised Laws of the Commonwealth of Massachusetts specifically established that "the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit $5." *Jacobson,* 197 U.S. at 12. So, whatever we might argue about the extent of police power after Jacobson, that police power was expressly exercised through clear statutory authority. That is not the case here.

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." ECF No. 35 ¶ 180. 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 government officers, 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 P.R. Dec. 72 (2011). If Defendants knew this, their position is an exemplary *argumentum in terrorem*.

Finally, Defendants invoke a recent decision by the Puerto Rico Court of First Instance, San Juan Part, in the case of *Amadeo Ocasio et al. v. Pierluisi et al*., Civil No. SJ2021CV04779, where the court referenced to Article 5.10 as an example of legislative delegation of ample emergency powers to the governor in the Covid-19 context. But the court's expression in *Amadeo* about Article 5.10 is inapposite. In *Amadeo*, a group of civilians, mainly parents of children the age of 12 to 18, sued the government to challenge the Health Secretary's Administrative Order 058 and 059 regarding COVID-19 vaccine mandates for children 12 years and older to attend school, among other restrictions. The *Amadeo* plaintiffs argued that the governor's delegation to the Health Secretary of the power to establish guidelines, directives, protocols, and recommendations to respond to the COVID-19 emergency through Executive Order 2021-054, contravened the separation of powers doctrine. *See* ECF No. 18-1. In other words, the main controversy in *Amadeo* was whether the governor could delegate broad powers to the Health Secretary through executive orders, including the power to mandate vaccines in certain contexts, absent any legislative expression or legal basis for said delegation. But the Court in *Amadeo* did not reach the question of whether said legislative acts were constitutional. While the plaintiffs argued that there was a lack of legal basis for the governor's delegation of powers to the Health Secretary, they did not challenge the constitutionality of Article 5.10 for being overbroad and excessively vague. Nor did

they argue that it lacked any intelligible principle necessary for its validity under the non-delegation doctrine, as here. In any event, this Court is not bound to follow the non-binding *Amadeo*.

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 Legislature 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*, 178 P.R. Dec. 1 (2010), 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. They claimed that, by granting authority to the governor to issue executive orders taking all measures "necessary and convenient" to cutback expenses, an unconstitutional delegation of powers occurred. 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 *powers 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 well-pleaded allegations make clear that, while the Rolling EOs make an explicit threat of penalty under criminal law in case of non-compliance with the Rolling EOs, the truth is that neither Art. 5.14 of Act 20-2017 nor Art. 33 of the Health Department Act (Act 81) provides for such penalties. But Defendants 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, are uncontested.

As to Art. 5.14, Defendants are threatening Plaintiffs with the possibility of facing criminal charges for not complying with the challenged EOs. Defendants say that this possibility of criminal responsibility rests on 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 37. Plainly, however, the statutory text cited lacks 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 Rolling EOs is endangering lives. So, the according goes, the Rolling 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. Their reading of the statute is neither the best nor the most reasonable one. It bears understanding 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. 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 Puerto Rico Legislature decided to keep as punishment worthy. But a simply and straight disobedience to an executive order is not one of those, as was the case under the previous statute.

Finally, it bears noting that this Court is dealing with a criminal statute here. Defendants cannot pretend to make intricated statutory constructions when discussing criminal law. In Puerto Rico, as in the United States, this is prohibited by the principal of legality (*nullum crimen, nulla poena sine lege*) 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 P.R. Dec. 276, 281-83 (2017). This requirement of fair warning has obvious constitutional ramification. *See U.S. v. Lanier*, 520 US 259, 266 (1997) ("due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly

disclosed to be within its scope"). 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.

Conclusion

For the reasons stated, this Court should grant deny the defendants' Motion to Dismiss the Amended Complaint.

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