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

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

**MOTION TO DISMISS**
**SUPPLEMENTAL PLEADINGS**

**TO THE 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 the 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 October 7, 2021, Tropical Chill Corp., a Puerto Rico corporation which operates ice cream stores in three municipalities; Ms. Eliza Llenza, a professional photographer; Ms. Yasmin Vega, the owner and operator of a short-term lodging business; and Mr. René Matos, a supermarket stock clerk (altogether, "Plaintiffs"), filed an Amended Complaint in the instant case requesting declaratory and injunctive relief 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") (altogether, "Defendants"). In essence, Plaintiffs challenged the constitutionality of Executive Orders Nos. 2021-062 through 2021-064 (altogether "Executive Orders") and Secretary of Health's Regulation No. 138-A.

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, since "[v]accination should be treated as a primary means for providing protection against severe illness or death, especially for persons at high risk […]" (Docket No. 1 at 2, ¶4). Plaintiffs posit that these additional mandates are "particularly unreasonable" (Docket No. 1 at 3, ¶8), because they view the rates of infection, hospitalization, and mortality as low and not a significant burden to the health care system of the Commonwealth. *See id*. ("…Puerto Rico's health system was never strained by COVID…," and the risk of the system being placed in jeopardy by the advent of the Delta variant is "highly unlikely" (Docket No. 1 at 19, ¶90)). Simply put, Plaintiffs' claims are based in their belief that vaccination should be voluntary and grounded on individual risk/benefit assessments, as well as moral considerations (Docket No. 1 at 9, ¶40). However, Plaintiffs are not the elected or appointed officers in charge of designing the Commonwealth's public health policy - that responsibility falls solely within the powers of the Governor and the Secretary of Health. *See, S. Bay United Pentecostal Church v. Newsom,* 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.").

Specifically, Plaintiffs claim that: (i) 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 United

States Constitution (Docket No. 1 at 27, ¶¶114-140); (ii) the existing mandates violate their rights to personal autonomy, bodily integrity, and the right to reject medical treatment; (iii) as to co-plaintiffs Tropical Chill Corp. ("Tropical Chill") and Ms. Yasmin Vega ("Ms. Vega"), they invoke the constitutional right to privacy of their customers and clients, inasmuch as the mandates require proofs of vaccination, masking, and other unjustified impositions not narrowly tailored as constitutionally required (Docket No. 1 at 32, ¶¶140-42 & 144-147).

Plaintiffs 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" (Docket No. 1 at 35, ¶156). In Count III of the Amended Complaint, Ms. Vega asserts a claim under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-2(2) ("RFRA"), because allegedly her religious beliefs compel her not to take the COVID vaccine (Docket No. 1 at 36, ¶161) 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. 1 at 35-36, ¶¶158 & 162-166). Finally, Plaintiffs assert pendent claims against the Executive Orders, claiming these lack appropriate legal basis and violate the separation of powers under Puerto Rico's Constitution and the *Puerto Rico Department of Public Safety* Act, Act No. 20-2017 (Docket No. 1 at pp. 37-39, ¶¶170; 172-180), 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. 1 at 39-40, ¶¶181-183).

On November 19, 2021, Plaintiffs filed a "Leave to Supplement Amended Complaint and to Shorten Response Deadline" and attached a "Tendered Rule 15(d) Supplemental Pleading" (Docket Nos. 65 and 65-1). There they alleged that on November 15, 2021, Governor Pierluisi issued

Executive Order No. 2021-0075 (hereinafter "EO 075") to consolidate all provisions contained in prior Executive Order. The Executive Order challenged in the Amended Complaint were repealed, but Health Regulation 138-A remained in full force. *See*, Docket No. 65-1 at 2. Plaintiffs claimed that "all the claims alleged in the amended complaint are incorporated here" (Docket 65-1 at 2), and went on to repeat how the vaccination and testing mandates in the EO 075 causes economic losses to co-plaintiff Tropical Chill; force co-plaintiff Vega to betray her faith by being complicit in the Government's "vaccination scheme," and how co-plaintiffs Vega, Llenza, and Matos "are still not allowed to go into restaurants, beauty salons, gyms, and other commercial establishments without submitting a negative COVID test result within 72 hours,.." (Docket No. 65-1 at 2).[1] They further argued that the Government's interest is "even less compelling now," the challenged mandates are "overinclusive" and "more irrational," and restated their allegations to the effect that in the new Executive Order the Governor exceeded his legal authority under the laws of Puerto Rico (Docket No. 65-1 at 3). Finally, the Supplemental Pleading contains extensive allegations to the effect that, from a statistical standpoint and from currently available public health data, the COVID situation in Puerto Rico is not as serious nor as dangerous as to merit a "State of Emergency" declaration and the ensuing vaccination and testing mandates which they challenge in this case (Docket 65-1 at 3-8).[2]

Defendants will establish that Plaintiffs' constitutional challenges to the Executive Order and Regulation No. 138-A are a subterfuge to further their own public policy agenda through a federal court and promote constitutional theories which depart from currently prevalent doctrines. The ensuing arguments will demonstrate that EO 075, Regulation No. 138-A and their requirements: (i)

[1] The new Executive Order is similar to the prior ones in that "it contains no set of goals or metrics to evaluate when infringing the public's individual rights will no longer be necessary." *See*, Docket No. 65-1 at 3).

[2] Plaintiffs were ordered to submit an Amended Complaint incorporating the supplemental pleadings. The Court later on modified that ruling. *See*, Docket Nos. 66, 67, and 74.

do not violate the Fourteenth Amendment's substantive due process rights, since they meet both a rational or strict scrutiny since, through its exceptions or "opt outs" —although not constitutionally required—, it uses 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; and (iii) 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.

Therefore, Defendants request that the instant case be **DISMISSED with prejudice** pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that, even after taking all well pleaded allegations as true, the Executive Order and Regulation No. 138-A are a constitutional exercise of the Commonwealth's police powers to safeguard the health and lives of Puerto Rico residents and visitors, which complies with any applicable constitutional standard.

## II. THE CONTENTS OF THE EXECUTIVE ORDER AND THE REGULATION

To facilitate the Court's dismissal of the case, Defendants will summarize the contents of the Health Department Regulation and the Executive Order challenged by Plaintiffs in this case.

**First**, Regulation No. 138-A amended Regulation No. 138, which generally deals with the issuing of health certificates by medical professionals in Puerto Rico.[3] The purpose of the amendment is "expressly establishing 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 2, Art. 2). To comply with the new requirement, medical doctors who issue health certificates must attest that the individual requesting it has shown evidence of

[3] Regulation 138-A was issued on August 5, 2021, in an exercise of the Secretary of Health's powers pursuant to the *Organic Law of the Department of Health*, Act No. 81 of March 14, 1912 (P.R. Laws Ann. tit. 3 § 171 *et seq*.); *Uniform Administrative Procedure Act*, Act 38-2017 (P.R. Laws Ann. tit. 3 § 2101 *et. seq.)*; and *Puerto Rico Health Certification Act*, Act No. 232-2000 (P.R. Laws Ann. tit. 29 § 411 *et seq.*).

vaccination against COVID-19, specifically the Vaccination Record Card issued by the CDC, demonstrating completion of the inoculation.

Also, Regulation No. 138-A provides exemptions to this requirement. 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 3, Art. 2). This condition must be certified by a licensed medical doctor in Puerto Rico, or by the doctor issuing the certificate, who must also certify the duration of the medical contraindication and whether it is permanent or temporary. In cases in which it is temporary, the patient must eventually comply with the vaccination requirement. In addition, the challenged regulation 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." Id. In those instances, "the doctor must certify that he was shown the sworn statement required by the Department of Health for these cases, in accordance with the Executive Orders in force." Id.

**Second**, Executive Order 2021-075 established a general vaccination requirement for Executive Branch contractors in the Government of Puerto Rico, as well as in the health and education sectors (both public and private) and in the private sector in general, including lodgings and hospitality industries.[4] Specifically, EO 2021-075 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. In addition, it sets specific deadlines to comply with this requirement (Section 6, page 17).

[4] Executive Order 2021-075 was issued on November 15, 2021, and superseded prior Executive Orders 2021-062 to 2021-064

For **healthcare workers and employees**, EO 2021-075 requires that all workers in health facilities be vaccinated, imposing on employers the duty to verify compliance with this requirement by requiring the employee's Vaccination Record Card.[5] For the **educational** sector, it requires vaccination from students to be able to attend classes personally, both in public and private schools, establishing different compliance deadlines for students younger and older than twelve (12) years of age, due to the fact that the Food and Drug Administration (FDA) approved the vaccines for these age groups on different dates.[6] For the **lodging industry**, EO 2021-075 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 (Sections 9, 10 and 11, pages 25-29). Section 9 of the Executive Order 2021-062 extends this requisite to all employers with 50 or more employees. Section 10 extends the requisite to guests of facilities in the hospitality industry.

Executive Order 2021-075 established exemptions from compliance with these requirements, spelled out in Sections 7 and 8.[7] The first one is the 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.[8] Medical exemptions require a certification by a medical doctor licensed to practice in Puerto Rico, who must then certify the duration of the medical

[5] This requisite applies to hospitals, clinical laboratories, emergency rooms, medical service clinics, health centers, medical offices (both primary physicians and specialists), therapy centers, blood banks, drug stores, care facilities for the elderly, and medical cannabis facilities (Section 7, page 20). As the EO indicates, this list is not meant to be exhaustive.
[6] The vaccination requirement is also extensive to teaching and non-teaching staff, as well as contractors (Section 8, pages 22-23).

[7] Section 6 eliminated the medical and religious exemptions for public employees, which had been established in prior Executive Orders and validated by the Court in *Rodríguez-Vélez v. Pierluisi-Urrutia*, 2021 WL 5072017 (D.P.R., November 1, 2021).

[8] Individuals with any other kind of medical reason to justify not being vaccinated are also exempted.

condition that justifies non-compliance with the requisite, and whether it is permanent or temporary. In cases in which it is temporary, the patient must eventually comply with the vaccination requirement.[9]

The second exemption contained in the Order is for religious grounds, which applies to the educational and health sectors. 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 and the minister or leader of his religious congregation. Both would have to state in the document, under penalty of perjury, that because of their religious beliefs the individual cannot receive the COVID-19 vaccine. If the individual has no minister or congregation leader, the sworn statement will have to make specific reference to his religious convictions and beliefs. All individuals covered by Executive Order 2021-075 who invoke the exception described in Section 5 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.

In the case of employees or contractors who render services at government offices, individuals who do not qualify, comply or refuse to comply with any of the requirements or the exemption requisites described above will not be able to be physically present at their workplace. If the services of this contractor or employee cannot be rendered from a distance, supervisors will consider other measures such as cancellation of the contract, or having the employee take a leave of absence. In the case of guests at lodging facilities, they will not be able to stay at them until they fully comply with the applicable requisites previously described.

Section 11 of EO 2021-075 empowers the Department of Health, the Department of Labor and Human Resources, the Tourism Company, the Department of Commerce and Economic

[9] This exception mechanism is like the one established in Regulation No. 138-A.

Development, and the Office of Administration and Human Resources Transformation of the Government of Puerto Rico to enact and issue all necessary guides and regulations to ensure compliance with these requisites. Section 14 provides that failure to comply with the requisites and prohibitions of the Order will carry penalties and criminal sanctions as provided in Article 5.14 of Act No. 20-2017, including but not limited to a reclusion for a term not to exceed six months or penalties not to exceed $5,000.

## III. STANDARD FOR DISMISSAL UNDER RULE 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, Plaintiff's "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.

## IV. MEMORANDUM OF LAW IN SUPPORT OF DISMISSAL

Defendants respectfully request that Plaintiffs' causes of action be dismissed, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failing to state a claim for which relief may be granted by this Court. Specifically, Plaintiffs (a) failed to state a claim for violations of their substantive due process rights under the Fourteenth Amendment of the United States Constitution, since no fundamental rights and liberties are infringed by the challenged executive order; (b) even if taking as true that the mandates of the Executive Order infringes on Plaintiffs' fundamental rights

and liberties, which it does not, a compelling state interest fully justifies these restrictions because they are narrowly tailored to achieve and promote their public policy objectives; (c) plaintiff Vega fails to state a claim under RFRA, since the mandates and restrictions of the challenged executive order 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.[10]

In summary, 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 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.*, 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"). Moreover, Defendants will establish that the Executive Order is clearly a constitutional exercise of the Commonwealth's police powers to safeguard the health and lives of its citizens. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (holding that states are entitled to choose between the theory of those of the medical profession who think vaccination worthless and the opposite theory, which is in accord with common belief and is maintained by high medical authority,

[10] These legal arguments bear substantial similarity to the arguments invoked in support of the Commonwealth's Motion to Dismiss in the case *Rodríguez Vélez v. Pierluisi Urrutia*, 21-cv-01366 (PAD), which the Court granted and therefore dismissed Plaintiffs' claims. The legal theories in support thereof also bear substantial similarity to the claims set forth in this case. Counsel for Plaintiffs are the same on both cases.

and is not compelled to commit a matter of this character, involving the public health and safety, to the final decision of a court or jury); *see also Am. Cruise Ferries, Inc. v. Vázquez-Garced*, 2020 WL 7786939, at *17 (D.P.R. Dec. 17, 2020) (recognizing that the U.S. Constitution provides the Commonwealth with broad police powers to place public health restrictions in the context of the COVID-19 pandemic).

**A. The challenged legal precepts do not violate Plaintiff's 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 that sense, the First Circuit has held that a plaintiff

must bring a substantive due process claim by demonstrating a deprivation of a "fundamental" interested protected by the Fourteenth Amendment. *See Sever v. City of Salem, Mass.*, 2020 WL 948413, at *1 (1st Cir. 2020).

Similarly, 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). For example, 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), implicate this interest. 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 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.").

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," that "lacks the background, competence, and expertise to assess public health and is not accountable to the people."). Thus, Defendants will only address legal issues regarding substantive and procedural due process raised in their pleadings.

Plaintiffs allege that the vaccination requirements and mandates of the challenged Executive Order, whose specific details were discussed at some length in a prior section of this motion, are unconstitutional restrictions on individual liberties, and ineffective tools to deal with the crisis (Docket No. 35 at 3, ¶¶6-7, as subsequently supplemented). Specifically, 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 of the United States Constitution. *See*, Docket No. 35 at 29, 31, 32, ¶¶123, 133, 134 & 139.

As to Department of Health's Regulation 138-A, co-plaintiffs Tropical Chill and Vega did not attack the legality or constitutionality of its requirements in their pleadings. *See* Docket No. 35 at 27-32, ¶¶114-123, ¶¶134-39. As to Plaintiff Matos, his argument against Regulation 138-A is grounded on an alleged property interest in his health certificate, a legal proposition for which no authority was cited, even though this is the foundation of the constitutional attack against the regulation on Fourteenth Amendment grounds. *See* Docket No. 35 at 30-31, ¶¶128-133. Co-plaintiff Llenza claims to have natural immunity to COVID-19 because she tested positive on December 2020, 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". *See* Docket 35 at 29-30, ¶¶124-127. 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". *See* Docket 35 at 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 alleged that her natural immunity is equivalent, or stronger than the protection afforded by any vaccine", *supra*, a doubtful scientific proposition.[11] However, 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. *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 30-31, ¶ 132). Matos 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 also 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 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 32, ¶¶ 140-142, and 144-146. Plaintiffs cast doubt on the

[11] "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.

existence of a compelling government interest to justify the Executive Order 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" (Docket No. 35, at 35, ¶ 156, as subsequently supplemented).

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. Contrarywise, the Supreme Court and other state and federal 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* CFI *Amadeo* Judgment (Docket 18-1). See also Rodríguez-

*Vélez v. Pierluisi Urrutia*, 2021 WL 5072017 (D.P.R., November 1, 2021). 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 Order on substantive due process grounds. Current doctrine as espoused by applicable precedents referred to in this motion is just not on their side.

Since *Jacobson*, 197 U.S. 11, the Supreme Court has 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, the Supreme Court 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, in *Jacobson*, the Supreme Court 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*. Consequently, in *Jacobson*, the Supreme Court upheld as constitutional a vaccination requirement that lacked exceptions for adults. *See id*. at 30.

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).

Recently, in *Klaassen*, 7 F.4th 592, the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit"), addressing a constitutional challenge made by a group of students against a vaccine mandate issued by Indiana University, 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."

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, Plaintiffs challenge the Governor's Executive Order, which is less restrictive than the vaccine mandates that were upheld by the Supreme Court in *Jacobson* and in *Zucht* requiring compulsory inoculation, and like the vaccine mandate upheld by the Seventh Circuit in *Klaassen*, which recognized certain exceptions.

Our District has ruled on the proper scope of *Jacobson* and the application of its standards to vaccination mandates that bear **substantial similarity** to the ones being challenged in **this** case. This Court in *Rodríguez-Vélez v. Pierluisi-Urrutia*, supra, held that 1) *Jacobson* commands a deferential standard for analyzing Fourteenth Amendment challenges to its public health measures like the vaccine mandates at hand; b) Governor Pierluisi has a legitimate interest in protecting public health, and responding to the pandemic in order to curb the spread of the virus is a ***compelling*** state interest; c) there is no fundamental right to refuse vaccination under the Due Process Clause of the United

States Constitution; d) testing alternatives to vaccination in the challenged Executive Orders satisfy the Due Process Clause and they are subject to a deferential standard of review; e) the prerogative to refuse COVID-19 testing does not rise to the category of a fundamental constitutional right; and f) policy makers have wide discretion to act in areas where there is medical and scientific uncertainty, and considering the medical and scientific debate over vaccination, defendant acted reasonably in requiring vaccination to pursue public health and safety for its communities. This Court concluded:

> In sum, the court finds no invasion of fundamental constitutional rights rather than a reasonable exercise of governmental prerogatives in response to a public health crisis. Everything considered, the vaccination mandate together with the opt-outs, testing and availability of leaves of absence reflects a legitimate exercise of Puerto Rico's police powers and does not infringe upon the substantive component of the Due Process Clause. See, Bauer, 2021 WL 4900922 at *1, *20 (denying preliminary injunction in case of vaccine mandate with exemptions based on medical need or religious objection, including temporary deferral of mandate for any employee on extended leave of absence).

*Rodríguez-Vélez v. Pierluisi-Urrutia*, supra, at 43.

As previously explained, the Executive Order provides covered individuals (employees and guests) and subject to its requisite's alternatives 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 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 order 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. *See* CHEMERINSKY & GOODWIN, 110 Nw. U.L. Rev. at 595 (stating that "the government's interest in protecting [citizens] and preventing the spread of communicable disease justifies mandatory vaccinations for all [citizens] in the United States.").

Plaintiffs have alleged that the challenged vaccine mandates and regulation also violate the economic liberty protected by the Fourteenth Amendment. See Docket 35 at 26, as subsequently supplemented. 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 the Fourteenth Amendment to the United States Constitution. The liberties protected by substantive due process do not include economic liberties. *Savage v. Mills*, 478 F.Supp.3d 16 (D. Me. 2020). 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").[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

[12] The notion of a higher level of constitutional protection for economic liberty has been debated in scholar circles, but so far, no broad recognition of such right, which would subject to strict judicial scrutiny and "less onerous means" analysis any legislation or regulatory scheme over commerce and economic activity in general, has been forthcoming from the Court. *See* GEORGE THOMAS, *Economic Liberty and the Courts*, National Affairs (Summer 2010); RANDY E. BARNETT, *Does the Constitution Protect Economic Liberty?* 35 Harv. J.L. & Pub. Pol'y 1 (March 2012).

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 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.[13]

"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", *Rodriguez 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). As recently as early this month the Court of Appeals for the Seventh Circuit, when ruling upon the substantive due process challenge of a vaccination regime enacted to fight the current COVID-19 epidemic, validated the continuing applicability and binding nature of *Jacobson* and its sanctioning of vaccination

[13] For a general discussion on how the current state of the law is not predicated upon the protection of economic liberties under the United States Constitution and how applicable doctrines on this subject should be modified, See also Griffin, *Protecting Economic Liberty in the Federal Courts: Theory, Precedent, Practice*, 22 Federalist Society Review 232, 242 (2021)("The U.S. Supreme Court should restore the original law of the 14th Amendment by overruling the *Slaughter-House Cases*. The 14th Amendment protects the privilege or immunity of citizens to pursue a lawful calling, and judges are empowered to protect that right. But until the Supreme Court overturns the *Slaughter-House Cases*, Americans must turn to the Due Process and Equal Protection Clauses to protect their economic liberty. Federal courts charged with applying rational basis review to these challenges can do so in a more originalist way, respecting both the original law of the 14th Amendment and Supreme Court precedent. This method for protecting economic liberty in the federal courts can and should become the norm among judges seeking to reconcile originalism with precedent").

requirements. *See Klaassen*, 7 F.4th 592. This is the standard by which Plaintiff's substantive due process claims must be evaluated, 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' 1983 claims must be dismissed with prejudice at this stage of the proceedings.

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

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, 25 S.Ct. 358; *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"); *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); *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).[14]

This Court held in *Rodríguez Vélez v. Pierluisi*, supra, that

> Just as the law recognizes the right to determine what shall be done with our own bodies, it also recognizes that there are limitations to that

[14] See also, *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").

> right. Among these limits is society's interest in protecting the community's health and safety. That interest is paramount in the current crisis that Puerto Rico, like the United States and the rest of the world, is facing and informs EO 21-058. When the vaccination mandate was adopted and went into effect, less restrictive measures were not being effective in preventing the spread of COVID-19 with attendant hospitalizations and deaths. In this way, the mandate was added to the mix, with opt-outs to accommodate employees who did not wish to vaccinate.

*Rodríguez Vélez v. Pierluisi*, supra, at 30.

In the instant case, the Executive Order and the Department of Health's Regulation, as amended, did not violate any of Plaintiffs' substantive due process rights. Moreover, Plaintiffs did not refer in their pleadings to 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 U.S. v. Moore-Bush*, 963 F.3d. 29, 31 (1st Cir. 2020) ("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"); *see also 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 Order 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. (Docket No. 35 at 2, ¶¶ 3-4). 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, Defendant turns to whether the Executive Orders are rationally related.

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 does 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); *see also* CHEMERINSKY & GOODWIN, 110 Nw. U.L. Rev. at 610 (concluding that vaccine mandates generally pass the rational basis test). 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 Order bears a rational relation to the Government's interest, they swiftly pass a rational basis scrutiny under current constitutional standards; thus, the instant case must be dismissed with prejudice.

As 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. One of the plaintiffs admitted that he has already obtained a health certificate, for which no expiration date was proffered. Assuming the existence of a property interest, a legal proposition for which no authority has been cited by Plaintiffs, 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 Order, which

comply with applicable scrutiny standards, as we have already 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.

Should the Court understand that the Executive Order should be examined under a strict scrutiny—which Defendants vehemently deny—they would easily pass said test since 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 Order 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 Order's aggressive 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 it is the least restrictive measure 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 Defendant vehemently argues that such level of review is inapposite—the Executive Orders easily pass a strict scrutiny muster. *See* CHEMERINSKY & GOODWIN, 110 Nw. U.L. Rev. at 615 ("Compulsory vaccination laws are unquestionably constitutional without [religious or conscience] exceptions").

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 Mass. Food Association v. Mass. Alcoholic Beverages Control Commission, supra* ("The Sherman Act is a charter of economic liberty, but only against private

restraints"); *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). 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).

In RFRA's Section 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." Also, subsection (b)(1) of RFRA sets that Congress' purpose of the statute 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." Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. However, in *Smith*, 494 U.S. 872, the Supreme Court held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability. 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.

Plaintiffs invite the Court to apply RFRA's strict scrutiny to the alleged violation of their freedom to exercise religion. However, the Executive Order do not violate Plaintiffs' freedom to exercise their religion of choice. The Supreme Court applied the strict scrutiny in a recent case, in a Free Exercise Clause context, questioning an Executive Order dealing with the COVID-19 pandemic, where plaintiffs alleged a violation to their First Amendment right of freedom to exercise their religion. Specifically, in *Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 63, the Supreme 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. The Supreme Court 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, Defendant's Executive Order is to be generally applied to all contractors, employees and guests who work in-person or visit the facilities within the scope of the Order.

Plaintiffs claim that the vaccine mandate in EO 062 "burdens Plaintiff Vega's religious beliefs—by compelling her to become the government's vaccination or COVID-19 test verifier—as it obligates her to participate in and condone forced vaccination, which go against her religious belief", by means of alternatives that are neither the least restrictive nor the narrowly tailored to achieve the Government's interest. (Docket No. 35 at 36, ¶¶ 163-165). However, co-plaintiff Vega ignores that, generally, 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.

In terms of free exercise of religion, as explained before, the Supreme Court held in *Smith* that the Constitution does not require exceptions to general laws for religious beliefs. 494 U.S. 872. In said case, the Supreme Court 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*. Recently, in *Fulton v. City of Philadelphia*, the Supreme Court 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).

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 ("The vaccine mandate is a neutral rule of general applicability [because] [i]t applies to all [persons],

whether religious or not."). However, even if the Court does not agree with said application of *Smith*, a vaccine mandate without a religious exception would still be upheld because government can infringe on religious freedom if its action is necessary to achieve a compelling interest and safeguarding the lives and health of **all** citizens is, certainly, 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 Order provide a medical and religious exemption, that may not even be constitutionally required, in which case 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. In that sense, the Executive Order not only safeguard free exercise of religion but provides more rights than those constitutionally or statutorily required. Far from infringing RFRA or free exercise of religion, the Executive Order protect religious beliefs by creating a religious exception to the vaccine mandate. The alternative provided to Plaintiff Vega of requiring a negative COVID-19 test result to all guests is 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 Order still created an alternative to short-term rental business persons like Plaintiff Vega—requiring a negative COVID-19 test result in lieu of a Vaccination Record Card—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. The RFRA claim must be dismissed with prejudice.

Nevertheless, even if, *arguendo*, the Court finds that the Executive Order substantially burdens Plaintiffs' religious practice, which is vehemently denied, it would still pass a strict scrutiny examination because it has compelling interest to do so. At the outset, the Supreme Court has already recognized that "stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 67. Clearly, stopping the spread of a deadly communicable disease is obviously a compelling interest and vaccinations are the best way to reach that goal. No one, in practicing his or her religion, has a constitutional right to endanger others. Thus, there is no question that the Executive Order was issued with a compelling interest to protect the lives and health of all employees by avoiding a spread of COVID-19 in covered workplaces.

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. In that sense, to establish that a government employed the least restrictive means in advancing a compelling government interest, the government is required to establish that no alternative, less restrictive, means exists. *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"). Recognizing the tests within difficulty of proving a negative, 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 Order provides alternatives for Airbnb owners compliance with its dispositions by conforming with Sections 5 and 6. Specifically, Section 5 of EO 2021-75 allows for guests to provide a negative COVID-19 test result of at least 72 hours to be able to check in the Airbnb if they do not get inoculated based on religious beliefs. On the other hand, Section 6 of EO 2021-62, allows for Airbnb guests to stay by providing a negative result of the COVID-19 test taken within 72 hours of their arrival, should they refuse to be inoculated. These opt-outs are the least restrictive means by which the Defendants can achieve the purposes of the Executive Order: contain the spread of a deadly virus.

Unquestionably, the Executive Order narrowly tailored to promote the compelling government interest. As previously explained in this motion, the Executive Order narrowly tailored because, 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 Plaintiff Vega. In that sense, the Executive Orders 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. The Executive Order provide an exception for those who cannot inoculate on religious grounds and that, itself, is the less restrictive mean—subsumed within the narrowly tailoring—required to pass a RFRA strict scrutiny. Simply put, the Executive Orders 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. *See Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 744 (7th Cir. 2015) ("A benefit to religion does not disfavor religion in violation of the Free Exercise Clause."); *see also Smith*, 494 U.S. at 888 (Scalia, J.) (no religious exemption required).

**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. The exercise of this jurisdiction will be determined on a case-specific basis. *See Dibbs v. Gonsalves*, 921 F. Supp. 44, 51 (D.P.R. 1996) (restating *Rodríguez*, 57 F. 3d at 1177); *see also 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 pleaded any federal cause of action warranting the exercise of this Court's supplemental jurisdiction. Since 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 determine to 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 Rolling EOs (EO 2021 062-064) constitute a violation of the separation of powers doctrine by being an exercise of 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. In the alternative, Plaintiffs allege that if Article 5.10 delegates such authority, then, it constitutes an unconstitutional delegation of power under the non-delegation doctrine. Lastly, Plaintiffs allege that the Rolling 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). (Docket No. 1 at 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 particular 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.

Importantly, here, no case challenging the Executive Order 2021-075 has been filed by the Commonwealth's Legislative Branch, in state or federal court, claiming a violation of the separation of powers. Clearly, the Legislative Branch is the only party that has standing to set forth such a challenge, if any. 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 Order 2021-075 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). 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. The Governor has stayed within his boundaries and has not seized the legislative role by issuing executive orders 2021-062 to 064 and subsequently 075. If the Legislative Assembly believed that the Governor's executive orders overstepped his constitutional boundaries, they would have already filed a complaint. But they have not. In such a scenario, Plaintiffs do not have standing to raise a separation of powers violation because, in this scenario, the Legislative Assembly would be the only part that would have standing to do so.

**2. The Executive Order 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 of the United States examined the constitutional doctrine of separation of powers. First, "the Constitution creates three branches of Government and vests each branch with a different type of power" and '[b]y vesting each branch with an exclusive form of power, the Framers

kept those powers separate. *Id.* Each branch "exercise[s] ... the powers appropriate to its own department," and 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 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* at 773. "When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *Chadha*, 462 U.S. at 951 (1983) (citing *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)). The Supreme Court of the United States "has been mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental co-ordination.'" *Chadha*, 462 U.S. at 962 (1983) (citing *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 406 (1928)).

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). Article I, Section 2, of our 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. In *Rivera Schatz v. ELA y C. Abo. PR II*, 191 P.R. Dec. 791, 802 (2014), the Supreme Court of Puerto Rico ("P.R. Supreme Court") explains that the doctrine of separation of powers aspires to establish the responsibilities of the constitutional branches of government and to frame their scope of action. *See Rivera Schatz v. ELA y C. Abo. PR II*, 191 P.R. Dec. 791, 802 (2014). However, the model of the division of powers into three (3) branches, Legislative, Executive and Judicial, does not intend to define in an absolute and inflexible way the scope of power that corresponds to each of these branches. *Id*.

In addressing Plaintiffs' separation of powers claim, the Court must 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. Both, the President of the United States, Joseph R. Biden, and the Governor of Puerto Rico, Pedro R. Pierluisi, have continued to label COVID-19 as a public health emergency.[15] Moreover, since the instant complaint was filed on August 27, 2021, the number of COVID-19 cases has risen. 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 accessed September 15, 2021). The CDC's evolving list of travel notices ranges from Level 1

[15] *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 EO 2021 062-064, declaring state of emergency.

("low") to Level 4 ("very high")[16]. *Id*. 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. 1 at 36, ¶173. Specifically, Plaintiffs argue that "[a]n executive order of general application constitutes a state act of a legislative nature which, without an appropriate legal basis, constitute a violation of the separation of powers." *Id*. at ¶175. Moreover, they argue that "the Governor does not possess the power to issue executive orders abridging fundamental rights or that contravene an act of the Legislature." *Id*. at ¶176. However, Plaintiffs' claim lack merit altogether because aside from lacking standing, the Rolling EOs are a valid exercise of the Governor's constitutional authority. Plaintiffs 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. 1 at 38-39, ¶¶181-183.

It should be noted that the Puerto Rico Department of Public Safety unlike public instrumentalities or corporations, is an "arm of" the Commonwealth of Puerto Rico. *Puerto Rico Dep't of Pub. Safety v. Tracfone Wireless, Inc.*, 514 F. Supp. 3d 400, 402 (D.P.R. 2021). Regarding the use of executive orders to deal with the current state of emergency, Defendants bring to the attention of this Court, the August 6, 2021, Judgment by the Puerto Rico Court of First Instance ("CFI") in *Amadeo, et al. v. Pierluisi-Urritia et al.*, Civil No. SJ2021CV04779 (P.R. Court of First

[16] 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."

Inst. 2021), upholding a vaccine mandate for students and school employees in Puerto Rico. *See* Exhibit I - CFI *Amadeo* Judgment. 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[17] of the Puerto Rico Public Safety Department Act, 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.

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. 1 at 36, ¶174 (citing Proclamation of Epidemics Act, P.R. Laws Ann. tit. 24, § 354 and Act No. 81-1912, which delegates to the Secretary of Health the power to quarantine sick individuals during times of pandemic.). 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

[17] 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.

> 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.

Exhibit I - CFI *Amadeo* Judgment at 17. (Emphasis in original).[18]

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 rulemaking process established by the Puerto Rico Uniform Administrative Procedure Act (LPAU), Act. 38-2017, P.R. Laws Ann., tit. 3, §§ 9601-9713, which provides for citizen participation through a written comments period and in the case of the Department of Health, even a public hearing" Docket No. 1 at 39-40, ¶187. The COVID-19 pandemic has proven to be difficult for governments, including Puerto Rico, because new challenges appear daily. These changes 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.**

[18] 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.

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).

The reason why the Supreme Court has rejected nondelegation arguments since 1935 gives weight to the argument of legal scholars like Eric A. Posner and Adrian Vermeule, who affirm that "Courts shouldn't enforce a nondelegation doctrine for the simple reason that there is no constitutional warrant for that doctrine." ERIC A. POSNER & ADRIAN VERMEULE, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1723 (2002). In *Interring the Nondelegation Doctrine*, Posner and Vermeule argue that "there is no such nondelegation doctrine: A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power. Agents acting within the terms of such a statutory grant are exercising executive power, not legislative power." *Id*. at 1721. "Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn't clearly adopted by the Supreme Court until 1892, and even then only in dictum." *Id*. at 1722 (citing *Marshall Field & Co. v. Clark*, 143 US 649, 692 (1892), claiming that Congress cannot delegate legislative power to the president, but stating that the act in question "is not inconsistent with that principle").

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. 1 at 41, ¶199. 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. Since Act No. 20-2017 is a local statute, it should be noted that "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 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. 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 cite the P.R. Supreme Court opinion of *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. 1 at 41, ¶194. "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." *Vaquería Tres Monjitas, Inc. v. Comas*, 980 F. Supp. 2d 65, 81 (D.P.R. 2013). It should be noted that *Domínguez Castro* clarifies 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). Therefore, it is forceful to 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.

**4. Article 5.14 of Act 20-2017 provide for penalties, and they are correctly applied in the executive order 2021-075 and that the population has been warned about the penalties included in the executive order.**

Plaintiffs also allege that "each Rolling EOs include a direct threat of criminal sanctions for failing to comply with its provisions" (Docket No. 1 at 42, ¶200), that "[t]his threat of criminal penalties lacks a legal basis and should be declared null and void by the Court" (Docket No. 1 at 42, ¶201), 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. 1 at 42, ¶202. On the contrary, Article 5.14 of Act 20-2017, as amended,[19] does provide for penalties and they are correctly applied in the executive orders 2021 062-064, as well as in 2021-075. 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.[20] Thus, the challenged Executive Orders 2021-062 to 064, and subsequently 075 are a valid exercise of

[19] 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.

[20] 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/

the Governor's constitutional duties that do not violate the separation of powers. Thus, the Plaintiffs' pendent claims should be dismissed with prejudice.

## 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 the standards required by the 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. 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.

**WHEREFORE**, it is respectfully requested from this Court that this Motion be granted, and that Plaintiffs' claims and supplemental pleadings be DISMISSED 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 8th day of December, 2021.

**DOMINGO EMANUELLI-HERNÁNDEZ**
Secretary of Justice

**SUSANA PEÑAGARÍCANO-BROWN**
Secretary in Charge of Litigation

**MARCIA I. PEREZ-LLAVONA**
Director of Legal Affairs
Federal Litigation and Bankruptcy Division

**DEPARTMENT OF JUSTICE OF PUERTO RICO**
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