UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

TROPICAL CHILL CORP., ET AL., Plaintiffs, v. HON. PEDRO R. PIERLUISI URRUTIA, ET AL., Defendants.	Civil No. 21-1411 (RAM-MEL)

Reply to Response to R&R Objections

To the Hon. Raúl M. Arias-Marxuach, U.S. Chief District Judge:

With this Court's leave, the plaintiffs respectfully reply to the defendants' "Response in Opposition to Objection to Report and Recommendation." ECF No. 121. We make two basic points. First, the defendants' mootness argument is not only procedurally improper but also fails on the merits because the two exceptions they attempt to preempt are indeed applicable here. Second, on the substance, the defendants present glaring inaccuracies regarding the Omicron variant and Farr's law. The gist of their substantive opposition is that this Court should eschew the scientific consensus—manifested by all the scientific studies introduced by the plaintiffs—in favor of scientifically unsupported testimony. *Cf. In re MBS Mgmt. Servs., Inc.*, 690 F.3d 352, 358 (5th Cir. 2012) (noting that an expert's testimony that "rest[s] on scientific principles or theories . . . require[s] scientific substantiation"); *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 700 (9th Cir. 2010) ("The government experts' . . . unquestionably misstated the existence of a scientific consensus for treating Delusional Disorder."). Even worse, because the government's experts are the same self-interested officials who recommended and implemented the policies at issue here, this Court should give them less credence. *See, e.g.*, *Lightfoot v. MXEnergy Elec., Inc.*, 690 F.3d 352, 358 (5th Cir.2012) ("that

he was an interested expert witness, testifying on behalf of MX while also serving as its CEO, goes to the weight, not the admissibility, of his testimony").

As to the supplemental claims, it bears stressing that the defendants repeat conclusory remarks but avoid confronting the plaintiffs' objections. *See* ECF No. 114 at 55–62. For example, the implications of the existence of specific legislation, Act 81-1912, granting the Secretary of Health the power to adopt rules and regulations for health safety matters, remain unaddressed. The same holds true for the statutory background of Act 20-2017, showing the error in considering a crime the conduct prohibited by the EOs. Finally, neither the RR nor the defendants ever provided a legal explanation for the threat of criminal sanctions—incorrectly based on Act 81-1912—contained in each EO. Curiously, no one has attempted to address the simple fact that Art. 33 of Act 81-1912 contemplates only criminal punishment for failing to comply with Health Department regulations, *not* EOs.

I. The Mootness Argument Is Both Procedurally Flawed and Meritless, Given Regulation 138-A's Permanence, the Continuing "state of emergency," and the Likelihood that Recurring Legal Issues Will Avoid Judicial Review.

A. Procedural Blunder

The defendants improperly shoehorn a mootness argument—that should have been briefed in a new or supplementary motion to dismiss—into their response to Plaintiffs' objections to the R&R. Federal Rule of Civil Procedure 7(b) "requires a party to move for relief, and a request buried in a response is not a motion." *Mosquea v. Bank of Am., N.A.*, 2018 WL 3548742, at *4 (M.D. Fla. July 24, 2018); *see* D.P.R. Civ. R. 7(a) ("Unless otherwise allowed by court, *all* matters to be submitted for *consideration* by the court *shall* be *presented* by *written motion* filed with the clerk . . . ." (emphases added)). In other words, a motion cannot be included in a response. *See Alhassan v. Gonzales*, 2007 WL 1455841, at *1 n. 1 (D. Colo. May 16, 2007) (so holding); *Ibieta v. Allstate Fire & Cas. Ins. Co.*, 2020 WL 3248973, at

*5 (W.D. Tex. June 16, 2020) (same). This basic rule prevents the plaintiffs from having to answer in the first instance in a reply an argument contained neither in the R&R nor in their objections thereto.

For this sole reason, the Court should compel the defendants to file a supplementary motion to dismiss if they want to raise their mootness claim. That way, the plaintiffs would at least have the chance to properly respond to it, as opposed to addressing a wholly new argument and doctrine via a limited reply that ought to be limited to the four corners of the R&R.

But even if this Court were to excuse the defendants' procedural error, they have fallen short of shouldering their "'heavy' burden of showing mootness," which rests "on the party raising the issue." *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 8 (1st Cir. 2021) (cleaned up). The gist of the defendants' mootness argument is that EO 2022-019 "eliminated *all* the requirements that Plaintiffs claimed violated their constitutional rights." ECF No. 121 at 5 (emphasis added). But that is an inaccurate characterization of the facts: Regulation 138-A is still in place. And the vaccine mandates are still in place for "massive events," like a baseball game. The defendants, however, neglect to make that sensible concession or disclosure. Accordingly, this Court should reject any mootness claims as to Plaintiffs Matos's and Llenza's challenges to Regulation 138-A and to the vaccine mandates related to "massive events."

The plaintiffs readily concede that the governor—cornered by this lawsuit (and now the Puerto Rico Legislature's suit for vetoing its bill regulating emergency powers), growing discontent, and social strife—repealed the Rolling EOs related to the rest of their constitutional challenges. But "even if the government withdraws or modifies a COVID restriction in the course of litigation," the Supreme Court has cautioned, "that does not necessarily moot the case." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam).

That statement applies with equal force here, where the two exceptions to mootness that the defendants tried to wave away do indeed prevail.

B. Voluntary Cessation

The voluntary cessation exception—the idea that a defendant's decision to stop the actions at issue does not moot a lawsuit challenging them—which the defendants analyze in two sentences, *see* ECF No. 121 at 9, plainly applies here, *see Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157 (1st Cir. 2021) (agreeing with plaintiffs that, although "EO 34 has been superseded by EO 57, their request for injunctive relief from the self-quarantine requirement is not moot because it pertains to an executive action that the Governor voluntarily rescinded and could unilaterally reimpose").

It bears mentioning at the outset that there is more than "some reasonable expectation of recurrences of the challenged conduct." *ACLU of Mass. V. U.S. Conf. of Cath. Bishops*, 705 F.3d 44, 55–56 (1st Cir. 2013) (reminding that "the voluntary cessation exception can be triggered only when there is a reasonable expectation that the challenged conduct will be repeated following dismissal of the case."). The defendants critically neglect to mention that their "state of emergency" remains in force; it was not altered by EO 2022-019. In *Bos. Bit Labs, Inc.*, which *preceded* the controlling *Tandon* and where the plaintiff challenged Covid-19 restrictions on casinos that were rescinded during the lawsuit's pendency, the First Circuit held that the controversy had become moot. The court nonetheless placed enormous weight on the fact that Massachusetts "eventually ended the COVID-19 state of emergency and rescinded all COVID-19 orders issued under the Civil Defense Act since the start of the (now-cancelled) emergency declaration." *Bos. Bit Labs, Inc.*, 11 F.4th at 9; *accord Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 163–64 (4th Cir. 2021) (holding that the case was moot "[w]ith the termination of the state of emergency, the . . . power to issue new executive orders involving COVID-19-related restrictions was extinguished"). That is a far

cry from Puerto Rico's indefinite "state of emergency." *See* ECF No. 121 at 9 (conceding that the "testing and vaccine mandates . . . were recently repealed . . . in favor of *less stringent measures*") (emphasis added). The defendants cannot have it both ways: They cannot leave a "state of emergency" in place and still cry mootness.

This case is thus like *Bayley's Campground*, a post-*Tandon* case where the "the [Maine] Governor [did] not den[y] that a spike in the spread of the virus in Maine could lead her to impose a self-quarantine requirement just as strict as EO 34's." 985 F.3d at 157. As in *Bayley's*, the governor here has fallen short of meeting "the formidable burden" that he bears "of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 157-158 (cleaned up). History has taught us that a fifth surge, or the discovery of a new variant of concern, coupled with the gargantuan number and scope of executive orders issued, could bring the government to reinstate the challenged conduct. And because the government, as recent as February 2022, enacted new mandates for vaccine "boosters," it stands to reason that the defendants could start mandating fourth shots if so approved and recommended by the CDC. The defendants, after all, have made it clear that the door is open to the reinstatement of these or other mandates. That is why they needed to keep the two-year-plus "emergency declaration" in effect.[1] It thus follows that a ruling allowing them to do this "would run the risk of effectively insulating from judicial review an

[1]The government made that clear in out-of-court statements, too. *See* https://www.fortaleza.pr.gov/comunicados/gobernador-reduce-restricciones-tras-disminucion-en-casos-de-covid-19-en-la-isla. It is unfortunate that, although the official languages of Puerto Rico are Spanish and English, *e.g.*, *Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 363 F. Supp. 2d 47, 55 (D.P.R. 2005), aff'd and remanded, 443 F.3d 103 (1st Cir. 2006), the cited press release is unavailable in English, *see Osuji v. Departamento de la Familia*, No. 20-1545 2021 WL 6048951, at *3 (D.P.R. Dec. 21, 2021) (Arias-Marxuach, J.) (criticizing the government's failure to furnish documents in English to non-Spanish speaking resident). But because this Court need not even consider that press release to rule against the defendants, the plaintiffs (who have spent considerable resources in translations), will not be translating it now. Indeed, what matters is that the "emergency state or declaration" remains. Should this Court disagree, however, the plaintiffs respectfully request leave and a five-day enlargement to translate it and file it as an exhibit.

allegedly overly broad executive emergency response, so long as it is iteratively imposed for only relatively brief periods of time." *Bayley's Campground, Inc.*, 985 F.3d at 158.

Nor did "the challenged conduct end[] because of an event that was scheduled before the initiation of the litigation." *ACLU of Mass.*, 705 F.3d at 55. Neither the Rolling EOs nor EO 75 ever had an expiration date. *Cf. In re Fin. Oversight & Mgmt. Bd.*, 16 F.4th 954, 962 (1st Cir. 2021) (finding exception to mootness unpersuasive because the "Order 'expired by its own terms, according to criteria adopted before [the Retirement System] ever filed this litigation'").

Whether the voluntary cessation was "brought about or hastened by any action of the defendant," *ACLU of Mass.*, 705 F.3d at 55, presents a closer call. The defendants say that "the various WHEREAS sections included in the EO 2022-019 made specific reference to the improvement in the health metrics on which the challenged restrictions were originally based, and how these changes fully justified modifications in the original restrictions . . . ." ECF No. 121 at 9. But these "health metrics" were generally *better* in November 2021, when the government *expanded* its previous Rolling EOs. *See generally* ECF No. 67 and *compare* EO 75 *with* EO 2022-19.[2] So the math doesn't add up. Accordingly, this Court should give little weight to those self-serving explanations, which are also unaccompanied by an affidavit.

[2] According to the COVID-19 dashboard, on November 15, 2021, the 7dMA of total cases was 126, the adult hospitalizations were 50 and the 7dMA of deaths was 1.4, and on March 10, 2022, the 7dMA of total cases was 195, the adult hospitalizations were 39, and the 7dMA of deaths was 1.6. *See* COVID-19 Dashboard (*Casos, Sistema de Salud, Defunciones*), https://covid19datos.salud.gov.pr/. However, more revealing is that for 95 consecutive days (September 27–December 13, 2021), the 7dMA of total cases was below 200; however, by March 10, 2022, total cases had been below 200 for only two days (since March 8). *See* COVID-19 Dashboard (*Casos Totales*) https://covid19datos.salud.gov.pr/#casos. As to adult hospitalizations, for 67 consecutive days (October 17–December 23, 2021), the total adult hospitalizations were below 100, but by March 10, 2022, total adult hospitalizations had been below 100 for only 14 days (since February 25). *See* COVID-19 Dashboard (*Sistema de Salud*) https://covid19datos.salud.gov.pr/#sistemas_salud. For deaths, the 7dMA had been below two for 64 days (October 16–December 28, 2021) while by March 10 they were below two for only two days (since March 8). *See* COVID-19 Dashboard (*Defunciones*) https://covid19datos.salud.gov.pr/#defunciones.

See D.P.R. Civ. R. 7(b) ("Any opposition shall include . . . affidavits and other documents setting forth or evidencing facts on which the objection is based.").

It also bears noting that, by "delegat[ing] on the Secretary of the Department of Health the management of the COVID-19 pandemic through administrative orders," ECF No. 121 at 5, EO 2022-019 did exactly what the plaintiffs have been saying since the onset of this lawsuit. *See, e.g.*, ECF No. 114 at 56 (arguing that "while the governor issues the proclamation, the measures must be taken by the Health Secretary"). Alas, the able magistrate judge concluded otherwise. The defendants' sudden change of heart supports the reasonable inference that they ceased or corrected their conduct to moot the plaintiffs' claims.

Because it is far from clear that the defendant's challenged conduct "could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), the voluntary cessation doctrine applies here.

C. Capable of Repetition Yet Avoiding Judicial Review

Finally, the defendants are also wrong that the controversy is not capable of repetition yet evading review. This exception has two requirements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Thomas R.W., By and Through Pamela R. v. Massachusetts Dept. of Educ.*, 130 F.3d 477, 479–80 (1st Cir. 1997) (citations omitted).

The plaintiffs readily meet the first requirement. The Rolling EOs were repealed in three months by EO 75, which was in turn repealed in a little over three months by EO 2022-019. In those six months, a plethora of other EOs have tweaked, expanded, or otherwise repealed some of those requirements. *See, e.g.*, ECF No. 99 at 5 ("Granting Plaintiffs a second supplemental pleading, as requested, will be a futile exercise because mandates could be so changing as the Covid-19 pandemic worsens or improves."). As this lawsuit has

demonstrated, three months is insufficient. *Cf.* ECF No. 119 (complaining about the government's unreasonable request for enlargement of time). And the First Circuit has recognized as much. *See United States v. Chin*, 913 F.3d 251, 257 (1st Cir. 2019) (finding that "three months elapsed between the verdict and sentencing in Chin" was "'too short' to complete litigation, given that the appeal process often takes longer than a few months"). Because of the slow pace of legal process relative to the government's changing actions, the plaintiffs have been forced to play litigation whack-a-mole.

The same holds true for the second requirement. As discussed in subsection B, the government could reinstate any of the challenged mandates that for now are not in place. Indeed, the defendants have given no indications, assurances, or promises that the challenged conduct is unlikely to reoccur. This case is thus distinguishable from *Pietrangelo v. Sununu*, which challenged New Hampshire's allegedly discriminatory plan to deal with limited Covid-19 vaccine supplies in early 2021—that is, at the outset of vaccine availability. *See* 15 F.4th 103, 105 (1st Cir. 2021). After explaining why it would be almost impossible to expect "New Hampshire [to] face a vaccine supply crunch in the future," *id.* at 106, the First Circuit held that the controversy was not capable of repetition. Here, by contrast, the government has made it clear that it could reinstate any of the plethora of vaccine mandates, say, in the rather plausible and possible scenario of a fifth surge. *See* ECF No. 121 at 10 (conceding that "to fight any new version [of the virus] will require different measures and mandates, if any"). *See also Williams v. Pritzker*, No. 20-3231, 2021 WL 4955683, at *1 (7th Cir. Oct. 26, 2021) ("Given today's uncertain landscape, we cannot safely say the Governor's new [Covid] orders moot Williams's challenge to the old ones."). This controversy is capable of repetition *by the government's own admission*, and yet the government seeks to avoid judicial review. We are, again, at the antithesis of mootness.

II. The Defendants' Errors in Discussing Scientific Evidence

The defendants failed, once again, to consider the severity and lethality *vel non*, of Omicron, focusing instead *only* on its contagiousness, the total number of cases. When presenting the Omicron-related hospitalizations and deaths, they do so in absolute numbers, not as a percentage of total cases, which is statistically required to demonstrate Farr's law. They say, for example, that "on December 13, 2021, Puerto Rico had 1 adult hospitalized for COVID-19, 1 adult in ICU for COVID-19, and 1 patient in PICU; on January 16, 2022, there were 12 adults, hospitalized for COVID-19, 25 adults in ICU, 5 children hospitalized for COVID-19, and 3 patients in PICU." ECF No. 121 at 18-19.

That is, Covid-related hospitalizations went from three on December 13 to 45 on January 16. But, according to the COVID-19 dashboard, during that same period, there were 247,330 cases of COVID—meaning that the hospitalization rate for COVID was 0.17%. That included hospitalizations "with COVID" along with the "for COVID", which as described in the Objections to the R&R, with Omicron, most of the hospitalizations reported as "for Covid" are actually hospitalizations of patients that were admitted for other reasons and just happened to test positive after admission, with no Covid-related symptoms. ECF No. 114 at 11 (citation omitted).

As to deaths, the same situation applies. The defendants say that on

> December 13, 2021, there was 1 death for COVID-19; on December 30, 2021, there were 7 deaths for COVID-19; on January 5, 2022, there were 19 deaths for COVID-19; on January 15, 2022, there were 32 deaths for COVID-19; on January 21, 2022, there were 32 deaths for COVID-19; on January 23, 2022, there were 28 deaths for COVID-19; on January 29, 2022, there were 17 deaths; on February 4, 2022, there were 15 deaths for COVID-19; on February 10, 2022, there were 13 deaths for COVID-19; and on February 22, 2022, there were 8 deaths for COVID-19.

ECF No. 121 at 19. According to the COVID-19 dashboard, however, during that same period (December 13, 2021–February 22, 2022), there were 281,261 cases of COVID and 835 deaths,

meaning that the death rate related to COVID was 0.29%. *See* COVID-19 Dashboard, (*Casos, Acumulado*) https://covid19datos.salud.gov.pr/#casos; (*Defunciones, Acumulado*), https://covid19datos.salud.gov.pr/#defunciones.

The upshot is that using the dates and numbers provided by the defendants, even when including "with COVID" along with the "for COVID", Omicron-related hospitalization and death rates were 0.2% and 0.3%, respectively. As elaborated in the Objections to the R&R, the hospitalization rates for the previous three surges were significantly higher, Beta (13.1%), Alpha (4.8%), and Delta (3.6%), and the deaths rates also were much higher, Beta (1.7%), Alpha (0.8%), and Delta (1.5%) demonstrating with empirical evidence that the Farr's law principles—more contagious and less lethal, *see* ECF No. 114 at 11—are on full display.

Conclusion

For the reasons stated, this Court should grant the plaintiffs' motion for preliminary injunction.

Dated: March 29, 2022 Respectfully submitted,

B&D LLC */s/* José R. Dávila-Acevedo jose@bdlawpr.com USDCPR No. 231511 1519 Ponce de Leon Ave. Ste. 501 San Juan, PR 00909 787-931-0941	**Puerto Rico Institute for Economic Liberty** */s/ Arturo V. Bauermeister* Arturo V. Bauermeister bauermeistera@ilepr.org USDCPR No. 302604 P.O. Box 363232 San Juan, PR 00936-3232 Tel: 787.721.5290 Fax: 787.721.5938
	/s/ Ilya Shapiro D.C. Bar. No. 489100 (admitted *pro hac vice*) 600 N.J. Ave. NW Washington, DC 20001 202-577-1134

Counsel for Plaintiffs