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

ZULAY RODRÍGUEZ VÉLEZ; YOHAMA GONZÁLEZ MILÁN; LEILA G. GINORIO CARRASQUILLO; AND JULISSA PIÑERO *Plaintiffs,* v. **HON. PEDRO PIERLUISI URRUTIA,** in his official capacity as Governor of the Commonwealth of Puerto Rico *Defendants*.	**CIVIL No.** 21-1366 (PAD) **Jury Trial Demanded**

MOTION TO DISMISS

TO THE HONORABLE COURT:

COME NOW, Defendant **Hon. Pedro R. Pierluisi-Urrutia**, in his official capacity as Governor of Puerto Rico, without waiving any right or defense arising from Title III of *Puerto Rico Oversight, Management and Economic Stability Act* ("PROMESA"), 48 U.S.C. §§2101 *et seq*., and the Commonwealth's Petition under said Title or under this case and without submitting to the Court's jurisdiction, and through the undersigned attorney, very respectfully **STATES** and **PRAYS** as follows:

I. INTRODUCTION

As the hospitalizations and death tolls in Puerto Rico continue to dramatically spike due to the new Delta variant of COVID-19,[1] on August 16, 2021, Ms. Zulay Carrasquillo-Vélez; Ms. Yohama González-Milán; Ms. Leila G. Ginorio Carrasquillo; and Ms. Julissa Piñero

[1] This Court can take judicial knowledge that the Commonwealth's Department of Health has reported the following data: (i) 479 hospitalized adults, of which 130 are in the Intensive Care Unit ("ICU'); (ii) 35 hospitalized minors, of which 1 is in ICU; (iii) 394 confirmed cases in a day, as of August 30, 2021; (iv) 281 probable (antigen test) cases in a day; and (v) 8 deaths in a day, as of August 30, 2021. *See COVID-19 Statistics in Puerto Rico*, Department of Health, https://covid19datos.salud.gov.pr/#resumen (retrieved on August 31, 2021); *see also* Rule 201 (b) (2) of Federal Rules of Evidence ("The court may judicially notice a fact that is not subject to reasonable dispute because it: [...] can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.")

("Plaintiffs"), four public employees that work in the Commonwealth of Puerto Rico's ("Commonwealth") Department of the Family, Gaming Commission, Department of Labor and Human Resources, and the Department of Public Safety, respectively (Docket No. 11 at 15-16, ¶¶42-45), filed the instant case in an attempt to obstruct Executive Order No. 2021-058 ("Executive Order") issued by the Hon. Pedro R. Pierluisi-Urrutia, Governor of Puerto Rico ("Governor" or "Defendant"), in a compelling effort of tackling the alarming growth in positive cases of COVID-19 in Puerto Rico, resulting in hospitalization, oversaturated hospitals, and deaths.[2] Essentially, the Executive Order requires that all public employees of the Executive Branch vaccinate against COVID-19 or, alternatively, provide a weekly negative COVID-19 test result if he or she does not want to vaccinate or falls within a religious or medical exception. *See* Docket No. 11-1 at 10-11.

As to the specific arguments raised in the Amended Complaint, Plaintiffs set forth a facial and as applied challenge to the Executive Order alleging the following: (1) that by putting it into effect, the Commonwealth is being "arbitrary and capricious [for] coercing and *deceiving* its public employees into getting vaccinated without any regard to their fundamental rights to personal autonomy, religious liberty, and medical decision making," Docket No. 11 at 8, ¶17; (2) that the "so-called" religious and medical exceptions to vaccination established by the Governor are vague and unclear, *id.*, ¶20; (3) that the Commonwealth does not understand its "own orders, or … [is] purposely deceiving public employees into believing that only if they have a medical condition or religious objection may they choose to submit to weekly COVID-

[2] Plaintiffs argue that they are challenging other Commonwealth's "rolling executive orders," Docket No. 11 at 1, ¶1, but fail to identify the orders and the grounds for the constitutional challenge. Therefore, since Plaintiffs failed to plausibly plead a constitutional challenge of other specific executive orders, this Court must disregard any arguments set forth against unknown legal precepts. *See U.S. v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990) (holding that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

19 tests instead of getting vaccinated," *id.* at 9, ¶24; (4) that the Commonwealth is discriminating "against those with medical conditions and religious beliefs by imposing additional burdens," *id*. at 11, ¶27; and (5) that the Commonwealth is "willing to do anything to force the plaintiffs, and other Puerto Ricans, even by deceit, into getting vaccinated, with little regard to their fundamental right to personal autonomy, religious beliefs, and medical choice." *id*., ¶29.

Consequently, Plaintiffs allege that the Executive Order violates: (1) the U.S. Constitution Fourteenth Amendment's substantive and procedural Due Process Clause; (2) the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1 *et seq*.; (3) the Food and Drug Administration's Emergency Use Authorization statute, 21 U.S.C. § 360bbb-3; and (4) the Constitution of the Commonwealth of Puerto Rico, P.R. Const. Art. II, §§ 1 & 8. Further, in their blatant attempt to formulate the Commonwealth's public health policy regarding COVID-19 through this case, Plaintiffs propose "less intrusive means that the government can implement to attain its objective of preventing the spread of COVID-19 in government facilities without unduly burdening the plaintiffs' constitutional rights." Docket No. 11 at 12-13, ¶¶30-34.

Defendant will put this Court in position to confirm that Plaintiffs' reckless 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 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. [...] 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.*, 1:21-CV-238 DRL, 2021 WL 3073926, at *46 (N.D. Ind. July 18, 2021) ("Reasonable social policy is for the state legislatures and its authorized arms, and for the People to demand through their representatives."). Moreover, Defendant 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 employees and citizens. *See Jacobson v. Cmmw. 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, 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*, CV 20-1633 (DRD), 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).

Clearly, Plaintiffs constitutional challenges to the Executive Order are not only meritless but are a subterfuge to further their anti-vaccine agenda through a federal court. In that sense, based on the ensuing grounds, the Court will be able to conclude that the Executive Order: (i) does not violate the Fourteenth Amendment's substantive due process being that it passes either 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) does not violate the Fourteenth Amendment's procedural due process because Plaintiffs' have not been deprived of a proprietary interest; (iii) does not violate Plaintiffs' freedom to exercise their religious rights

under RFRA; (iv) does not violate the Supremacy Clause, inasmuch as it is not at odds with the federal law (EUA); and Plaintiffs' arguments under EUA are moot in light of the recent full approval of Pfizer's COVID-19 vaccine; and (v) absent a cognizable federal claim, this Court should abstain from exercising its supplemental jurisdiction as to the Commonwealth's constitutional claims; nonetheless, the pendent claims fall flat in light of the recent Puerto Rico Court of First Instance's decision on the matter. Therefore, Defendant requests that the 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 is a constitutional exercise of the Commonwealth's police powers to safeguard the health and lives of its employees and citizens, which swiftly passes any applicable constitutional standard.

II. THE SCOPE OF EXECUTIVE ORDER 2021-058

On July 28, 2021, the Governor issued the Executive Order, OE-2021-058, to address the alarming spike of positive cases, hospitalizations, and death tolls because of the Delta variant of the COVID-19. *See* Docket No. 11-1. The Executive Order requires that public employees of the Executive Branch that work in-person be vaccinated to safeguard the health and lives of their peers and of all the citizens that seek in-person services in government agencies. *See id*. Specifically, Section 1 of the Executive Order requires that all public employees that work in-person be fully vaccinated by September 30, 2021. *Id*. at 9-10. This requirement is met by simply providing a copy of the COVID-19 Vaccination Record Card or a document attesting to the completion or beginning of the vaccination process. *Id*. at 10.

However, the Executive Order is not an absolute mandate for public employees to be vaccinated, as it contemplates certain exceptions or "opt-out" alternatives for those that do not want to be inoculated with the COVID-19 vaccines. Docket No. 11-1 at 10-12. In that sense, Section 2

of the Executive Order establishes two exceptions or "opt-outs" available for public employees that do not want to be inoculated with a COVID-19 vaccine and that want to voluntarily state either a medical or religious motive for not complying. *Id*. at 10-11. **First**, the medical exception provides that public employees "whose immune system is compromised, are allergic to vaccines, or have a medical contraindication to the receipt of the vaccine shall be exempt from the COVID-19 vaccination requirement," but must provide a certification issued "by a physician authorized to practice in Puerto Rico." *Id*. at 10. **Second**, the religious exception provides that a public employee may voluntarily embrace that he or she cannot be vaccinated "on the basis of religious beliefs- provided that the vaccines are against the employee's religious observance," but "must furnish an affidavit of religious objection whereby the employee, together with the minister or spiritual leader of his church or religion, state under oath and under penalty of perjury that on the basis of his religious beliefs, the employee cannot receive a COVID-19 vaccine." *Id*. at 11. **In addition**, public employees that opt to invoke one of the exceptions or "opt-outs" for mandatory vaccination pursuant to Section 2 of the Executive Order, must provide a weekly negative SARS-CoV2 test (Nucleic Acid Amplification Test ("NAAT") and antigen tests) performed within a maximum of seventy-two (72) hours prior. *Id*. at 11.

Further, Section 3 of the Executive Order provides a general "opt-out" alternative for public employees that plainly refuse inoculate for any reason. Precisely, Section 3 establishes that "**[a]ny** government employee [...] who fails to furnish the COVID-19 Vaccination Record Card or document attesting to the completion or beginning of the vaccination process, **shall be responsible for furnishing on the first business day of each week -for the duration of the emergency declared in Administrative Bulletin No. OE-2020-020- a negative COVID-19 test result from a qualified virus test SARS-CoV2 (Nucleic Acid Amplification Test or NAAT and antigen tests) performed within a maximum of seventy-two (72) hours**." Docket No. 11-1 at 11 (emphasis

added). Inversely, Section 3 clearly states that "[a]ny employee who fails to furnish the COVID-19 Vaccination Record Card, the weekly negative COVID-19 test result, or the positive COVID-19 test result enclosed with the recovery documents, and who does not comply with exceptions provided in this Executive Order may not work in-person." *Id.* However, "[public employees that do not comply with the Executive Order] shall be afforded **the option** to use their compensatory time or regular leaves available as applicable. If the employee depleted any accrued leaves, the employee **may** request an unpaid leave for the duration of the emergency." *Id*. at 12 (emphasis added).

As this Court can attest, nowhere in the Executive Order does it states that public employees working in-person must be vaccinated or are obligated to embrace one of the two exceptions established in Section 2. Contrarywise, the Executive Order provides a general alternative to public employees that simply do not want to inoculate with a COVID-19 vaccine, regardless of the reason not to do so. Precisely, Section 3 of the Executive Order provides an alternative that requires that the public employee provides a negative result of qualified SARS-CoV2 virus test on weekly basis. In that sense, to suggest that public employees, including the Plaintiffs, had only two options to "opt-out" of the vaccination mandate is utterly false and misleading to the Court. Either way, at the end, both groups—exempts and not exempts—will have to get tested for COVID-19 at least 72 hours before returning to work in-person every Monday.

The Executive Order provides clear and unambiguous reasonable alternatives for public employees that refuse to be inoculated with a COVID-19 vaccine, like medical and religious exceptions, as well as a to those who do not want to be vaccinated for reasons not contemplated in said exceptions.[3] Thus, this Court will be able to conclude that, either under a rational or strict

[3] Although Plaintiffs imprecisely assert in the Amended Complaint that the Executive Order is "vague," Docket 11 at 8, ¶¶18-20, they failed to develop a plausible argument substantiating the alleged vagueness. Thus, Defendant will not further discuss an undeveloped vagueness argument because the Court must disregard any conclusory not well-pleaded facts. *See Zannino,* 895 F.2d at 17 (holding that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

scrutiny, the Executive Order: (i) is pellucidly clear and specific as to its contents; (ii) that it is to be applied generally to all public employees in the executive branch who work in-person; and (iii) that all employees have "opt-outs" to the vaccination requirements available within the Executive Order.

III. STANDARD OF REVIEW PURSUANT TO RULE 12(b)(6) OF FEDERAL CIVIL PROCEDURE

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 "construe 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.

Based on the arguments that follow and on the lack of plausibly pleaded allegations, Defendant hereby requests the Court to **DISMISS with prejudice** the Amended Complaint (Docket No. 11) because Plaintiffs' allegations fail to set forth a cognizable claim upon which relief can be granted.

IV. DISCUSSION

A. The Executive Order is a valid exercise of the Commonwealth's police powers during the COVID-19 pandemic public health emergency.

The Governor issued the challenged Executive Order pursuant to Section 5.10 of the *Puerto Rico Public Safety Department Act*, Act No. 20-2017, which empowers him to, upon declaring a state of emergency or a disaster, promulgate measures as are necessary to manage said emergency, which shall be in effect for the duration of the emergency to protect the safety, health, and property of all the citizens of Puerto Rico. *See* Act No. 20-2017, Sec. 5.10. Specifically, Act No. 20-2017, Section 5.10 (b), provides that the Governor 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. *Id.*, Sec. 5.10(b). Therefore, the Commonwealth's Legislative Assembly authorized the Governor to issue executive orders in order to address any public emergencies, such as the COVID-19 pandemic, to protect the health and safety of its population.

Consistent with the powers vested to the Governor by Act No. 20-2017, he issued the Executive Order to address an alarming spike in COVID-19 positive cases, hospitalizations, and death tolls because of the ongoing pandemic. *See* Docket 11-1. Essentially, the Executive Order requires that all public employees from the Executive Branch that work in-person be vaccinated against COVID-19. *Id*. However, the Executive Order provides three "opt out" alternatives from the mandatory vaccination requirement: (1) a medical exception (which has to be certified by a physician authorized to practice medicine in the Commonwealth); (2) a religious exception (which has to be certified by the employee's religious leader); and (3) a general "opt out" for public employees that do not fall within the medical or religious exceptions. Additionally, all public employees that opt not to inoculate with the COVID-19 vaccine must provide a weekly

negative qualified SARS-CoV2 test, performed within a maximum of seventy-two (72) hours prior to the beginning of the week.

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*, 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 v. Trustees of Indiana U.*, 7 F.4th 592 (7th Cir. 2021) (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." 7 F.4th at 592.

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 similar to the vaccine mandate upheld by the Seventh Circuit in *Klaassen,* which recognized certain exceptions.

As explained before, the Executive Order provides public employees three alternatives to "opt out" of the mandatory vaccination requirement. *See* Docket No. 11-1 at 10-12. In that sense, 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, it is forceful to conclude that the challenged Executive Order requiring mandatory vaccination or a weekly negative COVID-19 qualified tests to public employees is 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.").

B. The Executive Order does not violate Plaintiff's Fourteenth Amendment's due process rights.

1. The Executive Order does not violate Plaintiffs' substantive due process rights inasmuch it addresses a compelling government interest through less onerous means.

Plaintiffs' substantive due process allegations are mostly based on their personal interpretation of random data downloaded from the internet to push, through this Court, their own COVID-19 public health policy for the Commonwealth. As previously discussed, Plaintiffs are not in charge of 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."). Defendant will not waste the Court's time by engaging on a never-ending debate regarding statistical conclusions and public policy that is

certainly not appropriate for a court of law. Thus, Defendant will only address the issues of **law** regarding substantive and procedural due process raised in Plaintiffs' Amended Complaint.

a. The Executive Order does not violate Plaintiffs' Fourteenth Amendment substantive due process rights to personal autonomy, bodily integrity or right to reject medical treatment.

Plaintiffs allege that the Executive Order "violates [their] liberty protected by the Fourteenth Amendment to the Constitution, which includes rights of personal autonomy and bodily integrity, and the right to reject medical treatment," Docket No. 11 at 41, ¶116, and their "constitutional right to decisional privacy," *id.*, ¶119. Specifically, Plaintiffs argue that "forcing citizens to have objects inserted up their noses weekly against their will is itself a personal-integrity violation." *Id*. at 47, ¶156.

Plainly, Plaintiffs are wrong and have not provided a single precedent from any federal court that has held 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 federal courts, as well as state courts, have long validated vaccines mandates, even when not including a single exception to inoculation. *See Jacobson*, 197 U.S. at 27 (upholding a Massachusetts law that required compulsory vaccinations for adults); *Zucht*, 260 U.S. 174 (holding that a city can impose compulsory vaccination, even if there is no immediate threat of an epidemic like there was in *Jacobson*); *Klaassen*, 7 F.4th 592 (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). However, even when federal and state case law consistently have refused to strike down vaccine mandates throughout the United Sates, Defendant will demonstrate that Plaintiffs cannot prevail in their challenge to the Executive Order on substantive due process grounds.

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—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.") (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).

First, Plaintiffs allege that the Executive Order forces citizens "to have objects inserted up their noses weekly against their will Docket No. 11 at 47, ¶156. Purely, Plaintiffs' argument falls flat because not a single federal court has recognized a fundamental constitutional right to not be tested for a virus before entering a place of public accommodation. *Aviles v. Di Blasio*, 20 CIV. 9829 (PGG), 2021 WL 796033, at *18 (S.D.N.Y. Mar. 2, 2021) (holding that testing regime does not violate substantive due process because it is "reasonably related to a legitimate state objective–curbing the spread of the COVID-19 virus."); *see also Webb v. Johnson*, 2021 WL 2002712 (D. Neb. Mar. 2, 2021) (D. Neb. May 19, 2021) (prisoner had no fundamental right to refuse having his temperature taken); *Wilcox v. Lancour*, 2021 WL 230113 (W.D. Mich. Jan. 22, 2021) (prisoner had no fundamental right to refuse a nasal passage test for COVID-19); *Little Rock Family Planning Servs. v. Rutledge*, 458 F. Supp.3d 1065, 1074 (E.D. Ark. 2020) (applying *Jacobson* to uphold requirement that women obtain negative COVID-19 test before medical procedure).

The Executive Order does not necessarily mandate that Plaintiffs be subjected to weekly testing, as that is merely a requirement for the exceptions or to the "opt out" alternative. Particularly, Plaintiffs can avoid the weekly test if they opt to either: (1) inoculate against COVID-19 or (2) take regular or compensatory time paid leave. *See* Docket No. 11-1. In that sense, the alleged imposition on Plaintiffs claimed right to bodily integrity and autonomy, thus, is avoidable and relatively modest, given the opt-outs available to them. *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 71 (2020) (Gorsuch, J., concurring) (stating that *Jacobson's* constitutional challenge to a vaccine mandate would still not prosper today because the alleged

bodily integrity violation "was avoidable and relatively modest [...] given the opt-outs available to certain objectors.").

Further, the Executive Order's weekly test condition is merely an exception/"opt out" alternative and does not affect the possession and control Plaintiffs' "own person, free from all restraint or interference of others," *Botsford*, 141 U.S. at 251, because it provides an exit to weekly tests and inoculation: regular or compensatory time paid leave. Even so, the weekly test required for the exceptions and "opt out" alternative would still not violate Plaintiffs' bodily integrity and autonomy rights under the substantive due process because it was adopted "by clear and unquestionable authority of law." *Id*. at 251. Simply put, the Executive Order provides multiple alternatives for Plaintiffs to avoid the weekly COVID-19 testing, but if one of the exceptions (medical or religious) or the general "opt out" is chosen by any public employee, "[they] just need to wear masks and be tested, requirements that are not constitutionally problematic." *Klaassen*, 7 F.4th at 592.

Plaintiffs clearly failed to: (1) plausibly plead a bodily integrity or autonomy right violation under the substantive due process as to the Executive Order's vaccine requirement, exceptions or "opt out" alternative, which include the weekly test; and (2) set forth federal case law that supports their theory or that has recognized that a vaccine mandate or a requirement of weekly testing for COVID-19 violates rights so "deeply rooted in this Nation's history and tradition" and so "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also Klaassen,* 2021 WL 3073926, at *39 (declining plaintiffs' invitation "to expand substantive due process rights to include the rights not to wear a mask or to be tested for a

virus."). Therefore, Plaintiffs' bodily integrity and autonomy substantive due process violation claim must be dismissed with prejudice.

Second, Plaintiffs also challenge the Executive Order under the medical treatment refusal substantive due process right by erroneously asserting that the "government is willing to do anything to force the plaintiffs, and other Puerto Ricans, even by deceit, into getting vaccinated, with little if any regard to their fundamental right to personal autonomy, religious beliefs, and medical choice." Docket No. 11 at 11, ¶29. However, it has been clearly established that the medical treatment refusal right is not absolute and can be regulated by the State. *See Jacobson*, 197 U.S. at 24-30. Plaintiffs' argument, once again, falls flat because this matter was settled by the Supreme Court. That is because *Jacobson* is essentially a substantive due process case concerning medical decisions in which the Supreme Court rejected the claim that the Constitution prevented a state from enforcing its compulsory vaccination law against an individual's will. 197 U.S. at 39; *see also Zucht*, 260 U.S at 176 (noting *Jacobson* settled that it is within the police power of a state to provide for compulsory vaccination). Further, even taking as true that immunization and/or weekly testing infringe Plaintiffs' substantive due process right to refuse medical treatment—which it does not—the Executive Order survives because it provides a non-invasive alternative: regular or compensatory time paid leave. Thus, since *Jacobson* already held that that mandatory vaccination during a public health emergency is a constitutional exercise of a state's police power and because the Executive Order provides a viable alternative to immunization and weekly testing, Plaintiffs' medical treatment challenge cannot prosper and must be dismissed with prejudice. *See Klaassen*, 7 F.4th 592 (holding that requirement to 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); *see also*

Boone v. Boozman, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002) (holding that a vaccination mandate does not violate the right to refuse medical treatment under the substantive due process).

Finally, the Court must now turn to determine whether the Executive Order's requirements are conscience-shocking. Generally, conscience-shocking is fact-specific, but the Court can take Plaintiffs' well-pleaded allegations as true—for the purpose of the motion—under a Rule 12(b)(6) standard. *Rivera*, 402 F.3d at 36. In the instant case, the Executive Order essentially requires all public employees to either immunize or provide a weekly negative COVID-19 test (whether in an exception or "opt out" context) to work in-person in any of the Executive Branch's public agencies. In that sense, not a single federal court has found that a vaccine mandate or a weekly test requirement is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," which is the standard for a substantive due process violation. *See id*. Furthermore, the Executive Order's only purpose is to protect the health and lives of all the Executive Branch's covered employees, which is far from "conduct intended to injure in some way unjustifiable by any government interest." Lewis, 523 U.S. at 118 (holding that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.").

In that sense, the only egregious, outrageous, and conscience-shocking behavior in this case is the filing of Plaintiffs' Amended Complaint (Docket No. 11), which advocates for the spread of a deadly virus among public employees in lieu of the safety of Commonwealth's citizens. Thus, since the Supreme Court's holdings in *Jacobson* and *Zucht* support the Executive Order's requirements to safeguard public health, Plaintiffs' will never be able to meet the

conscience-shocking standard of a substantive due process claim; hence, the claims must be dismissed with prejudice for failure to plead a plausible substantive due process claim.

b. The Executive Order swiftly passes the applicable rational scrutiny.

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. Should the court have this melding of history and modernity wrong in faithfully adhering to the Fourteenth Amendment's plain original meaning of "life" and "liberty," comfort should come in knowing that *Jacobson*, whether rational basis review by any other name, leads to the same result today.

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; *Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015);; *Connecticut Citizens Defense League, Inc. v. Lamont*, 465 F. Supp.3d 56, 72 (D. Conn. 2020); *Middleton v. Pan*, 2016 WL 11518596, at *7, 2016 U.S. Dist. LEXIS 197627, 20 (C.D. Cal. Dec. 15, 2016); *George v. Kankakee Cmty. Coll.*, 2014 U.S. Dist. LEXIS 161379, 8-9 (C.D. Ill. Oct. 27, 2014), *recommendation adopted*, 2014 U.S. Dist. LEXIS 160737, 1-2; *Boone v. Boozman*, 217 F. Supp.2d 938, 954 (E.D. Ark. 2002). *Klaassen*, 2021 WL 3073926 at *24.

In the instant case, Plaintiffs argue that the Executive Order's violation of their substantive due process rights "triggers not rational-basis scrutiny as in [*Jacobson*] [...], but rather a strict constitutional scrutiny." Docket No. 11 at 2, ¶3. However, as discussed in the previous section, the Executive Order did not violate any of Plaintiffs' substantive due process rights. Moreover, Plaintiffs were unable to provide the Court with any binding or persuasive case law that has declined to apply *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.").

Defendant clearly established that 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." Docket No. 11-1 at 8-9. This is a legitimate governmental interest.

See S. Bay United Pentecostal Church, 140 S. Ct. 1613, 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 Order is rationally related.

As a general matter, the Executive Order's 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. The Plaintiffs do not point to a single court holding otherwise. *See* 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 Order, 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."). So, the Executive Order itself bares a rational relation to the County's interest. Therefore, since the Executive Order swiftly passes a rational basis scrutiny, the instant case must be dismissed with prejudice.

c. The Executive Order would easily pass an inapposite strict scrutiny.

In an abundance of caution, Defendant will argue that, should the Court understand that the Executive Order should be examined under a strict scrutiny—which Defendant vehemently denies—it would easily pass said test since it is narrowly tailored to serve a compelling state interest: the health and lives of all public employees and citizens during a growing pandemic.

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." Docket No. 11-1 at 8-9. As such, it can be easily concluded that the only purpose that the Executive Order seeks is to safeguard the lives and health of all public employees and citizens 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 public employees that decide not to inoculate. Thus, the Executive Order's aggressive attempt to protect the lives and health of the Executive Branch's employees 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 Order is narrowly tailored because: (1) does not create suspect classifications, as it is of general application to **all** public employees of the Executive Branch that work in-person; (2) mandates vaccination to all employees that work in-person, but has exceptions (religious and medical) and general "opt-outs" that equally apply to **all** public employees that do not want to be immunized against COVID-19; (3) requires that **all** public

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) creates 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, as well as an unpaid leave. In that sense, the Executive Order is narrowly tailored to protect public 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 Order generally requires public 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, it is forceful to conclude that—while Defendant vehemently argues that such level of review is inapposite—the Executive Order easily passes 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.").

d. The Executive Order does not infringe Plaintiffs' "economic liberty rights."

Plaintiffs claim that having to get tested for COVID-19 weekly imposes an economic burden upon them. *See* Docket No. 11 at 19, ¶30. Nonetheless, Defendant posits that the Commonwealth's Health Department has dozens of fixed COVID-19 testing facilities throughout the Island, where Plaintiffs and other persons can get tested for COVID-19 free of charge.[4] Further, the Department of Health provides a free of charge PCR-Molecular referral or

[4] *See* El Nuevo Día, *COVID-19 tests: see the places where you can get them for free in Puerto Rico,* https://www.elnuevodia.com/noticias/locales/notas/pruebas-de-covid-19-mira-los-lugares-donde-te-las-puedes-realizar-gratis-en-puerto-rico/ (retrieved on August 29, 2021).

equally valid antigen test to all citizens, including Plaintiffs, that desire to get tested for COVID-19.[5] In that sense, since the requirement of a negative weekly COVID-19 test for public employees that decide not to immunize, for any reason, is rationally related to the Governor's interest of containing the spread of the deadly virus (and its variants) among public employees, added to the fact that the Commonwealth provides various alternatives for free testing, it must follow that the Executive Order does not violate Plaintiffs' Fourteenth Amendment's economic liberty rights. *See Mass. Food Association v. Mass. Alcoholic Beverages Control Commission*, 197 F.3d. 560 (1st Cir., 1999) ("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).

e. The Eleventh Amendment bars this Court from ordering state officer to conform their conduct to state law.

Plaintiffs also allege that the Defendant could allow them to work from their homes. *See* Docket No. 11 at 12, ¶32. The *Government of Puerto Rico Remote Work Act*, Act No. 36-2020, provided that all public agencies and public corporations must provide the alternative of remote work for its employees if they meet several parameters. The remote work option is examined by each covered agency or public corporation. Upon request, each covered entity determines the employee's eligibility based to their positions and essential duties. Nonetheless, each agency has the discretion of granting said request, and the employees would not necessarily be granted to work at home the entire week. Indeed, Plaintiffs are free to request

[5] *See*, Department of Health, *PCR COVID-19 Referral*, http://www.salud.gov.pr/Documents/Hazte%20la%20prueba/COVID19%20PCR%20Test%20Referral.pdf (retrieved on August 29, 2021).

remote work in their respective agencies—pursuant to Act No. 36-2020—but must comply with the applicable requirements and regulations of each government entity. It is important to note that remote work does not constitute an open-ended right; thus, the agency has full discretion on whether to grant or not such a request.

Here, Plaintiffs seem to demand that this Court orders the Commonwealth to grant them remote work, pursuant to Act No. 36-2020, to circumvent the Executive Order. However, this Court is barred to do so. In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984), the Supreme Court established that a federal suit against state officials is, in fact, a suit against the state and is barred regardless of whether it seeks monetary damages or an injunctive relief. Further, in *Pennhurst*, the Supreme Court held that the Eleventh Amendment prohibited a federal district court from ordering state officials to conform their conduct to state law, even though only prospective injunctive relief was sought, since state was real, substantial party in interest. *Id*. at 106.

In the instant case, there is no doubt that the Commonwealth is the real and substantial party being sued. *See* Docket 11 at 17, ¶52. Moreover, the Plaintiffs filed the instant case, in part, seeking an injunctive relief that orders state officers to conform their conduct to the Commonwealth's Act No. 36-2020. Specifically, Plaintiffs are attempting to obtain an injunctive relief that orders the Governor to grant them remote work so that they can circumvent the Executive Order. In that sense, it is evident that *Pennhurst* is controlling in the instant case since the injunctive relief requested by the Plaintiffs would require this Court to order Commonwealth officers to act pursuant to Act No. 36-2020. Simply put, this Court is barred by the Eleventh Amendment from entertaining Plaintiffs' attempt to obtain an order for remote work pursuant to Commonwealth's Act No. 36-2020; hence, lacks subject matter jurisdiction

regarding that matter because, insofar as an injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override sovereign immunity of state where relief effectively is against it. *Pennhurst*, 465 U.S. 89, 113.

2. The Executive Order does not violate Plaintiffs' procedural due process rights since it does not contemplate the deprivation of a property interest and no such depravation has been alleged.

Protected property interests are created not by the Constitution, but "by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). To show constructive discharge, a plaintiff must "show that [his] working conditions were so difficult or unpleasant that a reasonable person in [his] shoes would have felt compelled to resign." *Torrech–Hernández v. Gen. Elec. Co.*, 519 F.3d 41, 50 (1st Cir. 2008) (quoting *De La Vega v. San Juan Star, Inc.*, 377 F.3d 111, 117 (1st Cir.2004)). The word "compelled" is key; it is not enough to demonstrate that a reasonable person would have wanted to quit. "[R]ather, an employee must show that, **at the time of his resignation**, his employer did not allow him the opportunity to make a free choice regarding his employment relationship." *Id*. (quoting *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1135 (10th Cir.2004)) (internal quotation marks omitted and emphasis added). "In order for a resignation to constitute a constructive discharge, it effectively must be void of choice or free will." *Id*. (citing *Exum*, 389 F.3d at 1135). Further, a state may not "discharg[e] a public employee who possesses a property interest in continued employment without due process of law." *Santana v. Calderón*, 342 F.3d 18, 23 (1st Cir.2003) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)). Generally, due process is satisfied if the plaintiff is provided with notice and a meaningful opportunity to be heard. *See Loudermill*, 470 U.S. at 542.

In the instant case, Plaintiffs allege that the "vaccine mandate [...] seems to constructively discharge those employees who do not want to get vaccinated and lack either a medical or a religious exception". Docket No. 11 at 17, ¶56. However, none of the Plaintiffs alleged to have resigned from their public employments because of the application of the Executive Order. Certainly, Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013). Therefore, since Plaintiffs have not pleaded to have suffered a constructive discharge—which is sufficient to dismiss this claim pursuant to Rule 12(b)(6)—all allegations related to a procedural due process violation must be dismissed for lack of Article III standing. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) (holding that to establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.").

On the other hand, Plaintiffs allege that the Executive Order "violates the employees' procedural due process rights under the Fourteenth Amendment, which bars the Commonwealth from discharging, without due process of law, a government employee who has a property interest in continued public employment." Docket No. 11 at 44, ¶135. Moreover, Plaintiffs argue that the Executive Order "effectively removes their property interest—by relegating them to an indefinite "unpaid leave"— [depriving them] of their continued employment." *Id*. at 45, ¶139.

Defendant, aside from Plaintiff's lack of standing, will briefly discuss—for the Court's benefit—their frivolous argument as to that the unpaid leave contemplated by the Executive Order violates the procedural due process of the Fourteenth Amendment. The Executive Order

primarily contemplates regular or compensatory **paid leave** for public employees that decide not to immunize and refuse to provide their employer with a weekly negative COVID-19 test result. Docket No. 11-1 at 13. Alternatively, the unpaid leave provision of the Executive Order offers a viable option for public employees that do not have any regular or compensatory time accrued and that decide not to comply with any of the Executive Order's requirements for in-person work. In that sense, the Executive Order does not impose an unpaid leave for public employees as a disciplinary action or a discharge, but rather as viable alternative to the Executive Order's mandates when employees do not have regular or compensatory time accrued. Further, the clearest proof that the unpaid leave provision is not a depravation of public employees' salaries is that absent regular or compensatory time accrued, they can collect their salaries by simply showing up and providing the employer with a negative COVID-19 test. Thus, since unpaid leave is a **choice** provided by the Executive Order for those public employees that decide not to immunize, not to provide a negative COVID-19 test result and that have no regular or compensatory time accrued, given all alternatives available to avoid an unpaid leave, no procedural due process plausible claim has been plausibly pleaded; hence, such claim must be dismissed with prejudice.[6] *See Bennett v. City of Boston*, 869 F.2d 19 (1st Cir.1989) (holding that a suspension without pay oftentimes does not raise due process concerns).

[6] If the Court were to determine that the unpaid leave provision of the Executive Order constitutes a depravation of a public employees' proprietary interest—which Defendant vehemently denies—a post-depravation hearing could be held after the public health emergency without infringing the procedural due process. *See Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (pre-deprivation hearing not required "where some valid governmental interest is at stake that justifies postponing the hearing until after the event.").

B. THE EXECUTIVE ORDER DOES NOT INFRINGE THE RELIGIOUS FREEDOM RESTORATION ACT.

1. The Executive Order does not impose a substantial burden in Plaintiffs free exercise of religion 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 *Employment Division v. Smith*, 494 U.S. 872 (1990), 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 the strict scrutiny to the alleged violation of their freedom to exercise religion. However, Defendant posits that the Executive Order does not violate Plaintiffs' freedom to exercise their religion of choice. The Supreme Court applied the strict scrutiny in a recent case, 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 wheregovernor Cuomo—in attention 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 public employees who work in-person within the Executive Branch's covered agencies.

Plaintiffs claim that the "vaccine mandate substantially burdens plaintiffs' exercise of religion, because it obligates them to furnish an affidavit in which both she and her 'ecclesiastical leader of their religion or sect, swear under penalty of perjury that, because of their religious beliefs, she cannot be inoculated against COVID-19." Docket No. 11 at 46, ¶149. Yet, as the previously discussed in this motion, the Executive Order does not promote a classification between employees based on any factor other than being public employees in the

Executive Branch. The Executive Order clearly states that "all public agencies of the Executive Branch shall require employees who work in-person [...]." Docket No. 11-1 at 10. Further, the Executive Order describes the applicable exceptions from the vaccination mandate: (1) "the employees whose immune system is compromised, are allergic to vaccines, or have a medical contraindication to the receipt of a vaccine shall be exempt from the COVID-19 vaccination requirement," *id*. at 10; and (2) "refusal to be vaccinated **is hereby permitted**—as an exception—on the basis of religious beliefs, provided that the vaccines are against the employee's religious observance," *id*. at 10-11 (emphasis added). Additionally, the Executive Order explains that **all** employees who choose to refuse to be vaccinated based on religious beliefs, in order to comply with said chosen exception, "must furnish an affidavit of religious objection whereby the employee, together with the minister or spiritual leader of his church or religion, state under oath and under penalty of perjury that on the basis of his religious beliefs, the employee cannot receive a COVID-19 vaccine." *Id*. (emphasis added). Finally, the Executive Order requires **all** public employees that decide not to immunize, regardless of the reason, pro provide a weekly negative COVID-19 test result. *Id*. at 11-12.

Clearly, the Executive Order does not create classifications among public employees that invoke an exception to work-in person. Quite the contrary, the Executive Order applies neutrally to all public employees that opt not to immunize in the same fashion. In fact, any public employee whose religious dogma prohibits him or her to immunize does not have to invoke the religious exception and can avoid the sworn declaration required by simply showing a weekly negative COVID-19 test. In that sense, the exceptions and "opt out" alternative apply neutrally to every employee that refuses to immunize by requiring **all** to show weekly negative COVID-19 test in order to work in-person. Simply put, the Executive Order does not violate

RFRA since it does not impose any undue burden on public employees 'religious practices, as they can exercise their free will and choose which of the exceptions or "opt out" alternatives they will select in order to comply with the mandate. *See* CHEMERINSKY & GOODWIN, 110 Nw. U.L. Rev. at 610 (concluding that RFRA does not provide a "basis for challenging compulsory vaccination laws."). Thus, since the Executive Order: (1) provides an exception on religious grounds for employees that do not want to immunize; and (2) the test requirement neutrally applies to all public employees that decide not to immunize, regardless of the reason, it cannot be reasonably found that the Defendant is imposing a substantial burden on Plaintiffs' religious practices. *See Smith*, 494 U.S. 872 (holding that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability); *see also* CHEMERINSKY & GOODWIN, 110 Nw. U.L. Rev. at 610 (concluding that "State statutes requiring vaccinations of all [citizens] are neutral laws of general applicability [...] [t]hey are not motivated by a desire to interfere with religion and they apply to everyone [...] [t]herefore, there is no basis for a [free exercise of religion] challenge to compulsory vaccination laws").

2. The Executive Order provides more rights that constitutionally required, as vaccine mandated are not usually required to provide religious exceptions.

Generally, policies requiring vaccination need not 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). 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 as long as 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).

Further, federal employment discrimination laws do not require a religious exception from mandatory vaccination for employees. In *Trans World Airlines vs. Hardison*, 432 U.S. 63 (1977), the Supreme Court stated that employers do not have to bear more than a "de minimus"

cost in accommodating employees' religious beliefs. Clearly, under the *Hardison* holding, it can be concluded that vaccine exemptions could impose a significant cost on employers in terms of illness and, therefore, would not be required. *See* CHEMERINSKY & GOODWIN, 110 Nw. U.L. Rev. at 611 (concluding that "under current law, there is no basis for a religious challenge--either under the Constitution or federal laws--to state laws' mandatory vaccinations for all [citizens].").

As this Court can attest, the challenged Executive Order provides a religious exception, that may not even be constitutionally required, to respect all public employees' free exercise of religion and provide an alternative to those whose religious dogmas prohibit vaccination. In that sense, the Executive Order not only safeguards free exercise of religion but provides more rights than those constitutionally or statutorily required. This Court must conclude that, far from infringing RFRA or free exercise of religion, the Executive Order protects all public employees' religious beliefs by creating a religious exception to the vaccine mandate. 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 created a religious exception to protect public employees' free exercise of religion; hence, the RFRA claim must be dismissed with prejudice.

3. The Executive Order easily passes strict scrutiny under RFRA.

Should the Honorable Court find 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 agencies.

Defendant now turns to establish that the Executive Order is narrowly tailored to promote the compelling government interest. As previously explained in this motion, the Executive Order is narrowly tailored because, while it mandates vaccination, it provides multiple exceptions and "opt outs" for employees that decide not to inoculate. Clearly, the Executive Order is not broader that necessary as it does not obligate public employees to immunize against COVID-19 if they do not desire; be it on religious, medical or any other ground. Specifically, the Executive Order provides an exception for those public employees that cannot inoculate on religious grounds. That religious exception, itself, is the narrowly tailoring required to pass a strict scrutiny since the Executive Order does not place an undue burden on religion, but rather protects public employees free exercise by allowing them to work in-person by providing a negative COVID-19 test result. It follows that that the Executive Order is narrowly tailored to contain the contagion of COVID-19 among public employees that work in-person, which would, in turn, avoid the propagation of the virus to their families, to school children and personnel (thousands of public employees have school-age children) and to the general population.[7] *See Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 744 (7th

[7] Plaintiffs recklessly allege that "[t]he logical conclusion is that the Vaccine Mandate is the government's attempt to protect the unvaccinated population, who choose to assume the risk of not getting vaccinated, from themselves." Docket No. 11 at 43, ¶130. However, the Governor is not, simplistically, protecting the voluntarily unvaccinated from themselves. Plaintiffs appear to need to be reminded that there are unvaccinated people who do not choose to assume the risk to remain unvaccinated. These groups are composed of people who simply cannot get vaccinated either because of a medical condition or because they

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 exemption required). Therefore, Plaintiffs' claim of violation of RFRA is misplaced, frivolous, and must be dismissed with prejudice.

C. THE EXECUTIVE ORDER IS NOT AT ODDS WITH THE FDA'S EUA AND THE PREEMPTION CLAIM IS ALSO MOOT IN LIGHT OF THE FDA'S FULL APPROVAL OF THE PFIZER VACCINE.

1. Plaintiff's Preemption claim is moot in light of the FDA's full approval of the Pfizer vaccine.

Plaintiffs go to great lengths to argue that Section 564 of the *Food, Drug, and Cosmetic Act*, 21 U.S.C. § 360bbb-3—which authorizes the emergency use authorization ("EUA") of a vaccine—preempts the Executive Order because the statute expressly mandates informed and voluntary consent. Docket No. 11 at 49, ¶172. However, this argument falls flat because on August 23, 2021, the FDA fully approved the Pfizer vaccine which will now be marketed as Comirnaty (koe-mir'-na-tee). *See* **Exhibit A.** The fact that Plaintiffs can choose a vaccine that is fully approved by the FDA means that there is no longer a controversy as to any preemption claim under the EUA. Specifically, the Pfizer vaccine is no longer under the authorization of the FDA's EUA. Hence, since there can be no preemption claim as to a vaccine that has advanced from the EUA into full approval, it follows that Plaintiffs preemption claim is moot.

Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. Const., Art. III, § 2. The Supreme Court has interpreted this requirement to demand that "an actual controversy … be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). "If

belong to a group age that cannot get vaccinated still and who are in constant contact with other unvaccinated people, e.g., school aged children. The Governor has the duty to protect all these citizens during this pandemic.

an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–78 (1990). A case becomes moot, however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gómez*, 577 U.S. 153, 160 (2016). Mootness is a ground which should ordinarily be decided in advance of any determination on the merits. *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 67 (1997). Further, courts are obligated to follow the doctrine of constitutional avoidance, under which federal courts are not to reach constitutional issues where alternative grounds for resolution are available. *See Mills v. Rogers,* 457 U.S. 291, 305 (1982). The case may, nevertheless, be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

In the case at hand, it is impossible for this Court to grant an effectual relief to Plaintiffs when their cause of action regarding preemption has been completely mooted due to the full approval of the Pfizer vaccine. *See Swift & Co. v. United States*, 276 U.S. 311, 326 (1928) (The purpose of an injunction is to prevent future violations). Plaintiffs cannot reconcile their preemption claim with the defunct presumption that all available vaccines were being administered under the FDA's EUA. *See* Docket No. 11 at 49, ¶170. This Court cannot provide relief for a claim that no longer exists as it stood when the complaint was filed; any other way would constitute an advisory opinion. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("[T]he federal courts established pursuant to Article III of the Constitution do not render advisory

opinions."). Further, declaratory judgment deeming past conduct illegal is generally not permissible as it would be merely advisory. *Am. Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013). Therefore, since Plaintiffs' EUA preemption claim has turned moot in light of the Pfizer vaccine approval, this Court has no alternative but to dismiss it with prejudice.

2. The preemption claim is meritless.

When Congress states expressly in its enactment which areas of state authority are to be preempted, a state law will fall if: (1) a direct conflict exists between the state and federal regulation, such that it is impossible to comply with both laws, *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, (1963); or (2) the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, (1941); or (3) when Congress "has occupied the field" in a given area so as to displace all state regulations whether compatible or hostile, *Campbell v. Hussey,* 368 U.S. 297, (1961).

In the unlikely event that this Court does not discard the preemption claims on mootness, the same must be dismiss for failure to state a claim upon which a relief can be granted. For starters, in *Klaassen*, 2021 WL 3073926, the District Court discussed that not all EUAs are created equally. Specifically, the District Court stated that:

> Because of the widespread use of a COVID-19 vaccine, the FDA informed manufacturers that it expected the same level of endpoint efficacy data as required for full approval, enough safety data to justify by clear and compelling evidence the vaccine's safety, and confirmation of the technical procedures and verification steps necessary to support full approval. In short, [...], the FDA promulgated guidance that enhanced the basis on which any COVID-19 vaccine would meet EUA approval. In setting these more stringent standards, the FDA invited EUA applications only for vaccines positioned well to receive full approval.

Klaassen, 2021 WL 3073926, at *8. The Court's reasoning is supported by the recent fully approval of the Pfizer vaccine.

Also, in *Klaassen*, District Court discussed that the EUA only applies to medical providers:

> The students admit that the informed consent requirement under the EUA statute only applies to medical providers. The university isn't directly administering the vaccine to its students; instead, it is requiring students to obtain the vaccine from a medical provider and to attest that they have been vaccinated, save for certain exemptions. The students will be informed of the risks and benefits of the vaccine and of the option to accept or refuse the vaccine by their medical providers. *See id.* Also, the university isn't forcing the students to undergo injections. The situation here is a far cry from past blunders in medical ethics like the Tuskegee Study.

2021 WL 3073926, at *25.

The same reasoning that the District Court applied in *Klaassen* can be applied in the instant case to the challenged Executive Order. The Executive Order mandates that all **agencies** must require that all their employees are vaccinated against COVID-19. However, none of the agencies in which Plaintiffs are employed administer the vaccines to its employees. In that sense, requiring vaccination and administering the vaccines are two different things. This is the same conclusion reached in the Legal Opinion issued by the United States Department of Justice, where it concluded that public and private entities can lawfully mandate that their employees receive one of the vaccines. *See* U.S. Department of Justice, *Memorandum Opinion for the Deputy Counsel to the President, Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* (July 6, 2021) at 7-13 ("OLC Op.").

Although Plaintiffs claim that the separation of powers dictates that this Court is not bound by the OLC Opinion, Docket No. 11 at 49, ¶ 177, this in no way impedes it from

considering its logical and well-supported legal conclusions. Mainly, that section 564(e)(1)(A)(ii)(III) concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs," and that "[b]y its terms, the provision directs only that potential vaccine recipients be "informed" of certain information, including "the option to accept or refuse administration of the product." *See* OLC Op. at 7.

In light of the above, the Executive Order is not contrary to the EUA and is no obstacle to the accomplishment and execution of the full purpose and objectives of Congress. Quite the opposite, there is no need to enjoin Defendant from enforcing the Executive Order because public employees are well informed by their medical providers of the risks and benefits of the vaccine, as well as of the options available to accept or refuse the vaccine. Defendant reiterates that in the case at bar none of the agencies for which Plaintiffs' work is administering COVID-19 vaccines; thus, no duty to inform is required. Therefore, besides Plaintiffs' preemption claim being moot, they failed plausibly plead a valid preemption; hence it must be dismissed with prejudice.

D. PENDENT CLAIMS MUST BE DISMISSED IN ABSENCE OF A COGNIZABLE FEDERAL CLAIM AND PROVEN MERITLESS IN LIGHT OF PR COURT OF FIRST INSTANCE'S RECENT DECISION.

"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").

Here, Plaintiffs have invoked the supplemental jurisdiction of this Court to entertain its claims pursuant to the laws of the Commonwealth of Puerto Rico. Plaintiffs, however, have not plausibly pleaded any federal cause of action, which warrants that this Court does not exercise its supplemental jurisdiction. Therefore, since Plaintiffs federal claims are destined to fail, the Court must dismiss all alleged state claims.

Alternatively, in an abundance of caution, should the Court determine to consider Plaintiffs' supplemental claims, the Defendant will proceed to discuss them in order to put it in position to dismiss the on the merits. Essentially, Plaintiffs allege that the "Vaccinate Mandate 'violates the Due Process Clause of the Fourteenth Amendment, it also runs head-on into the plaintiffs' constitutional right to decisional privacy under the Puerto Rico Constitution". Docket No. 11 at 53, ¶193. In addition, Plaintiffs allege that "[t]he Puerto Rico Supreme Court has made it clear that "it is impossible to obtain a voluntary waiver of the right of privacy, particularly if such waiver becomes a requirement for obtaining a job or for staying in it. The risk of losing a job or not getting one, and the worker's position of disadvantage vis-à-vis his employer's, impair the possibility of a really free and voluntary waiver. *Arroyo v. Rattan Specialties, Inc.*, 117 P.R. Dec. 35 (1986)." Docket No. 11 at 53, ¶ 194.

The Constitution of the Commonwealth of Puerto Rico recognizes that "[t]he dignity of the human being is inviolable." P.R. Const. Art. II § 1. Also, section eight safeguards that "[e]very person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life." P.R. Const. Art. II § 8. The Supreme Court of Puerto Rico has interpreted that the right of privacy is fundamental, but not an absolute under the Commonwealth law, and, pressing circumstances of greater weight in the absence of other effective alternatives, could justify that the State contains the necessary safeguards. For example, social public safety before a national emergency may have a more pressing need to protect social interests than the right to public of employees in their place of work. *See Arroyo*, 117 P.R. Dec. at 61. "In an employment scenario, 'the validity of intrusion into an employee's privacy rights will be examined by reference to the employer's particular interests' it is trying to protect." *Rivera-Cartagena v. Wal-Mart Puerto Rico, Inc.*, 767 F. Supp. 2d 310, 322 (D.P.R. 2011). Also, in *García Santiago v. Acosta*, 104 P.R. Dec. 321, 324 (1975), the Puerto Rico Supreme Court held that: "the intrusion into private life must only be tolerated when so required by factors that exceed public health and safety […]." *See Arroyo*, 117 P.R. Dec. at 59.

Here, Plaintiffs' reference to the Supreme Court of Puerto Rico's *Arroyo* is out of context, but it gives to this Court a basis of Puerto Rico courts' interpretation regarding the privacy claims raised. In *Arroyo*, the Supreme Court of Puerto Rico discussed the violation of constitutional rights within the context of a private employment relationship and the discipline standards of the employer regarding the refusal of an employee to take a polygraph exam as a condition of employment. *See Arroyo*, 117 P.R. Dec. at 65. Contrary to the facts in *Arroyo*, the instant case has "special circumstances of a real threat to our national security, or a serious danger to social order, or any other compelling interest of the State have been demonstrated

that justify the restriction of this important and fundamental right [privacy right]". *See id*. at 61.

In the case at bar, Defendant has a compelling interest because of the quicky rising COVID-19 pandemic. This emergency has created the need for the Commonwealth to enforce policies in aid of the public health, lives, and safety of all its public employees. One of these policies is the vaccination requirement established in the Executive Order for all covered public employees to detain the spiking COVID-19 contagion. Although these requirements could be taken by some as an interference to the right to privacy of public employees, there is no question that the Defendant's compelling interest to protect the lives and health of public employees constitutes a compelling interest to act upon said right. Further, even though the Supreme Court of Puerto Rico has recognized a constitutional privacy right under the Constitution of Puerto Rico in the context of the decision making of a medical treatment, this right is not absolute. *See Lozada Tirado v. Testigos de Jehová*, 177 P.R. Dec. 893, 900 (2010) ("[W]e recognize that the right to refuse medical treatment is not absolute and may be limited in the presence of certain interests of the State.").

In Puerto Rico "this right is recognized, not only as part of the doctrine of informed consent, but also as part of the right to privacy expressly guaranteed in our Constitution as a fundamental right." *Id.* at 930. In *Lozada*, the Supreme Court of Puerto Rico emphasized that, "like all constitutional rights, the right to refuse medical treatment is not absolute" and recognized that "in *Cruzan v. Director, Missouri Dept. of Health*, [497 U.S. 261 (1990),] the Federal Supreme Court ruled that, when faced with the refusal of a patient to certain medical treatment, the courts must balance that right with certain interests of the State. In the case it was recognized, based on what was decided by state jurisprudence, that the State may have an

interest in the preservation of life, the prevention of suicide, protecting innocent third parties and maintaining the integrity of the medical profession." *Lozada Tirado*, 177 P.R. Dec. at 916. This interest is the one most often invoked in court in the context of refusal of medical treatment cases. The protection of innocent third parties take—in most cases—two aspects, namely: the State's interest in protecting minors who may be abandoned by the death of their parents and in which citizens undergo certain treatment doctor during a public health crisis. *See id*; *see also Warner Lambert Co. v. Tribunal Superior*, 101 P.R. Dec. 378, 393 (1973) (holding that the state's "broad powers to approve reasonable measures for the purpose of safeguarding the fundamental interests of the people and promoting the common good.").

Recently, the Puerto Rico Court of First Instance of San Juan addressed a similar controversy as the one raised by Plaintiffs. In *Amadeo et al. v. Pierluisi-Urritia et al.*, Civil No. SJ2021CV04779 (P.R. Court of First Inst. 2021) ("Exhibit B"), where it dismissed a challenge Commonwealth's vaccine mandates for schools and universities by concluding that the existence of a compelling interest in protecting the public health created by the COVID-19 pandemic passed strict scrutiny under the Constitution of Puerto Rico.[8] *See* **Exhibit B** at31-32. In addition, the Court of First Instance held that the Commonwealth had shown that the vaccine mandates questioned were necessary and were the less onerous way to promote the governmental interest. *See* **Exhibit B** at 32. Accordingly, the Court decided that the Vaccinate Requirement does not violate the Due Process Clause of the Fourteenth Amendment and does not interfere with the constitutional right to privacy under the Constitution of Puerto Rico. *See* **Exhibit B** at 30-34.

[8] A certified English translation of *Amadeo et al.* is being filed with the instant motion as Exhibit B, so that the Court can take into consideration the Puerto Rico Court of First Instance's grounds to upheld vaccine mandated in schools and universities pursuant to the Constitution of Puerto Rico.

Therefore, it is pellucidly clear that, in light of the Commonwealth's compelling interest to mitigate the effects of a public health crisis provoked by the pandemic of COVID-19, the Executive Order would pass a strict scrutiny for alleged violation to privacy under the Constitution of Puerto Rico. *See* **Exhibit B**. In that sense, even if this Court decides to exercise it supplemental jurisdiction, the result must be that the Executive Order is a constitutional exercise of Defendant's police powers under the Constitution of Puerto Rico. Therefore, all supplemental claims raised by Plaintiffs must be dismissed with prejudice.

III. CONCLUSION

For all the above discussed, Defendant has clearly established that the Executive Order is a constitutional exercise of its as police powers granted to prevent and stop the spread of the deadly COVID-19 virus throughout the population of Puerto Rico. The U.S. Supreme Court has consistently upheld vaccine mandates. *See Jacobson*, 197 U.S. 11; *see also Zucht*, 260 U.S. 17. Further, the fact that the Executive Order is of general application among all public employees of the Executive Branch that work in-person, trumps any due process or RFRA arguments raised by Plaintiffs. Also, the Executive Order passes the applicable rational basis test, as well as the inapposite strict scrutiny under the U.S. Constitution and the Constitution of Puerto Rico. Finally, the Executive Order is not preempted by any federal law, much less by the EUA statute. Therefore, since Defendant has established that the Executive Order is well within the confinements of the Constitution and does not violate any federal statute, the instant case must be **DISMISSED with prejudice**.

WHEREFORE, based on the preceding arguments, Defendant respectfully requests that the instant case be **DISMISSED with prejudice** pursuant to Rule 12(b)(6) of the Rules of Federal Civil Procedure for failing to state a claim upon which relief can be granted.

In San Juan, Puerto Rico, this 31st day of August 2021.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that the undersigned attorney electronically filed the foregoing with the Clerk of the Court, which will send notification of such filing to the parties subscribing to the CM/ECF System.

DOMINGO EMANUELLI-HERNÁNDEZ
Secretary of Justice

SUSANA PEÑAGARÍCANO-BROWN, ESQ.
Deputy Secretary in Charge of Litigation

s/Juan C. Ramírez-Ortiz
JUAN C. RAMÍREZ-ORTIZ
Deputy Undersecretary in Charge of Litigation
USDC-PR No. 306507

DEPARTMENT OF JUSTICE
COMMONWEALTH OF PUERTO RICO
Federal & Bankruptcy Litigation Division
PO Box 9020192
San Juan, PR 00902-0192
Tel. 787-721-2900, Ext. 1421

s/ Idza Díaz-Rivera
IDZA DÍAZ-RIVERA
Director of Legal Affairs
USDC-PR Bar No. 223404