IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-2230

KATIE SCZESNY, MARIETTE VITTI, DEBRA HAGEN, AND JAIME RUMFIELD,

Plaintiffs-Appellants

v.

GOVERNOR PHILIP MURPHY,
Defendant-Appellee,

On appeal from the United States District Court of New Jersey's denial of a temporary restraining order pursuant to *Fed. R. Civ. P.* 65

APPELLANT'S BRIEF IN SUPPORT OF REVERSE AND REMAND FOR ENTRY OF A PRELIMINARY INJUNCTION

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SUBJECT MATTER & JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the claims in this case because they concern the Fourteenth Amendment, specifically whether the liberty right to decline unwanted medical procedures includes the right to reject newly developed pharmaceuticals of questionable efficacy and safety when those pharmaceuticals have been labeled "vaccines" by the federal government.

The Court of Appeals has subject matter jurisdiction due to the Constitutional issues raised and pursuant to 28 *U.S.C.* §1292(a)(1), which provides for federal appellate jurisdiction over appeals from interlocutory orders refusing an injunction.

On June 7, 2022 Judge Castner filed an opinion and order denying Appellants' motion for a preliminary injunction and/or temporary restraining order. Joint Appendix ("JA") at 2. The Notice of Appeal was filed on July 6, 2022. JA 1.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in relying on *Jacboson v. Massachusetts* to reject strict scrutiny for Appellants' claims?
2. Whether the District Court erred in its application of rational basis review?
3. Whether the District Court erred in holding that Appellants' claims are not redressable?
4. Whether the District Court erred in denying injunctive relief?

STATEMENT OF RELATED CASES PURSUANT TO L.A.R. 28.1(a)

This case has not previously been before the Third Circuit. Appellants are not aware of any related pending cases.

STATEMENT OF THE CASE

STANDARD OF REVIEW

The standard of review on all issues is plenary because they involve solely legal questions. *Maldonado v. Houstoun*, 157 F.3d 179, 183–84 (3d Cir. 1998) (stating that "[o]n appeal, when considering the district court's grant of a preliminary injunction, we review the court's legal conclusions de novo, its findings of fact for clear error, and its ultimate decision to grant or deny the preliminary injunction for an abuse of discretion…Because this appeal presents solely legal questions…our review is plenary").

PROCEDURAL HISTORY

Plaintiffs/Appellants ("The Nurses") initiated this action through a Verified Complaint on April 18, 2022. JA 71. Contemporaneously, Appellants filed a request for a temporary restraining order and/or preliminary injunction enjoining enforcement of Executive Order 283. On June 7, 2022, the District Court entered an Order denying the Appellants' request. JA 2. The Notice of Appeal was filed on July 6, 2022. JA 1.

STATEMENT OF FACTS

On January 19, 2022, Governor Murphy signed Executive Order 283 ("EO 283"). JA 44. EO 283 requires employers in the field of healthcare and certain other "high risk congregate settings" to require their workers to be "up to date with their COVID-19 vaccinations." JA 49. "Up to date" is defined as having received "either a 2-dose series of an mRNA Covid-19 vaccine or a single dose COVID-19 vaccine, *and any booster doses for which they are eligible as recommended by the CDC."* JA 52 (emphasis added). The Mandated Pharmaceuticals are collectively referred to herein as "the Mandated Pharmaceuticals." On March 2, 2022, Governor Murphy signed Executive Order 290, which reset the deadline for employer compliance to April 11, 2022. JA 60.

On March 30, 2022 the CDC recommended a second booster for people older than 50 years and some immunocompromised people. JA 66. Because EO 283 requires people to report for vaccination when the CDC says they are eligible, these groups became required to take *two* boosters to continue working under the plain language of EO 283.

On April 13, 2022, Governor Murphy signed executive order 294 stating that people who are now eligible for the fourth shot do not have to get it *yet* because "the CDC *currently* considers a person boosted and up to date with their COVID19 vaccination after receiving their first booster dose *at this time*." JA 67. (emphasis

added). EO 294 amended Paragraph 8 of EO 283 to state that workers shall be considered "up to date" if "they have recieved a primary series…and the first booster dose for which they are eligible as recommended by the CDC." JA 68.

On or before June 6, 2022, the CDC changed the definition of "up to date" to be nearly identical to the original definition in EO 283. The CDC webpage now states: "You are up to date with your COVID-19 vaccines when you have received all doses in the primary series and all boosters recommended for you, when eligible."[1] Because Governor Murphy changed the definition of "up to date" in New Jersey through Executive Order 294, Governor Murphy and the CDC now define "up to date" differently even though Executive Order 294 is purportedly premised on the CDC's definition of "up to date."

On September 1, 2022, the CDC recommended that *all* adults take the new "bivalent" vaccine, a pharmaceutical that has completed *no* clinical tests in humans.[2] Because EO 294 is premised upon the old CDC definition of "up to date," it is not clear whether the new bivalent shots are mandatory under EO 283.

Appellants are four Nurses subject to EO 283.[3] They are all "fully vaccinated"

[1] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html
[2] https://www.cbsnews.com/news/covid-vaccine-boosters-omicron-variant-ba4-ba5-fda-cdc/
[3] At the inception of litigation, the Nurses were all employed by Hunterdon Medical Center, but during the course of litigation, all were terminated from their jobs on April 11th, except for Appellant Debra Hagen who resigned earlier in the hope that she could become reemployed if 283 is lifted or enjoined.

and were employed by Hunterdon Medical Center until they were no longer employable under EO 283 because they did not want to take boosters. Two of the Nurses, Debra Hagen and Mariette Vitti, were injured by the first series of Mandated Pharmaceuticals. JA 77 at ¶28; JA at ¶¶52-53. One Nurse, Katie Sczesny, was terminated because she did not want to take a booster dose while pregnant. JA 80 at ¶¶46-48.

Appellant Debra Hagen, MSN, FNP, RN, has been a nurse for 30 years. JA 73 at ¶9. She has a long and complicated medical history that includes seizures, recurrent shingles, serious adverse reactions to vaccines and other medications, and a history of failing to develop immunity after vaccines. *See* JA 73-76 for an outline of Ms. Hagen's complex medical history.

Ms. Hagen's neurological and immunological medical history makes her high-risk for neurological reactions and complications from medications, vaccines, and even beverages. JA 75-76 at ¶21. Ms. Hagen's requests for a religious accommodation and medical accommodation for the primary series of shots were both denied. JA 76 at ¶24. Given the CMS (federal) mandates, she felt boxed into a corner, especially because both she and her husband work in the medical field and cannot afford to be out of work with 6 children to support. *Id.* On January 26, 2022, Ms. Hagen took a chance on the J&J injection. *Id.* at ¶76.

48 hours after receiving the J&J injection, Ms. Hagen began to experience

neurological symptoms. The symptoms began with numbness, tingling, and sciatic pain through her left leg, which spread to her left arm within an hour. Her pain continued over the next several days and she developed additional symptoms including: pain, numbness, and tingling in her legs; headaches; dizziness; and severe fatigue. JA 77 at ¶26. Ms. Hagen sought medical help. Her doctor told her that she was having a reaction to the J&J shot and was presenting with symptoms of "demyelinating neuritis" that may progress into Guillen-Barre. *Id.* at ¶27.

After an EMG showed certain of Ms. Hagen's sensory nerves could not feel electric stimulation, she was diagnosed with "sensory neuropathy". Her doctor advised her that she should not receive any further covid vaccinations and signed a medical exemption form for her stating the same. *Id.* at ¶28.

Ms. Hagen's request for a medical accommodation was denied twice. She does not want to take any more of the Mandated Pharmaceuticals because she does not want to risk exacerbating her health problems. She feels that she should be free to make her own decisions about what to put into her body, considering her doctor's advice, her personal medical history, and her life circumstances. *Id.* at ¶¶29-30.

Appellant Mariette Vitti, is a surgical nurse. She is fully vaccinated, having received two doses of the Moderna Covid-19 injection in May and June of 2021. JA 80 at ¶49. After the second injection, she began having pain at the injection site, which progressed to tingling in her fingers and body aches that lasted for four days.

Her body aches were so severe that her clothing hurt when it touched her. She had to tell her husband to keep her children away from her because anything touching her caused terrible pain. *Id.* at ¶¶50-51.

Eight hours after her second shot, Ms. Vitti began experiencing heart problems. She states:

> I felt my heart pounding like it was about to come out of my chest. I told my husband I was scared, and he may have to take me to the ER. I checked my apple watch and the heart rate was 168 after doing very minimal activity... From that day forward things that require minimal activity, walking up the stairs at home, leisurely walking to my car after work, can lead to heart rates up into the 130's and 140's and significant palpitations.

Id. at ¶52. Ms. Vitti visited a cardiologist and wore a heart monitor for two weeks. The report shows that she had a heart rate of up to 160 with trigeminy (an irregular heart beat). *Id.* at ¶53.

Ms. Vitti does not want to be injected with any more of the Mandated Pharmaceuticals. Her heart is not the same since completing the first series, and she does not want to further risk her health. She wishes to make her own decisions about her healthcare and what pharmaceuticals to put into her body, just as she has done all her life *Id.* at ¶54.

Appellant Katie Sczesny is a fully vaccinated labor and delivery nurse who contracted and recovered from covid despite being fully vaccinated. JA 79 at ¶¶40-42. At the inception of litigation Ms. Sczesny was herself pregnant; she has since

given birth to her daughter. Ms. Sczesny received two doses of the Pfizer covid-19 injection in September 2021. She suffered severe spinal pain, joint aches, and a fever for 48 hours following the second shot. *Id*.

Ms. Sczesny was told by HMC that her hybrid immunity from her covid recovery and being fully vaccinated was not a legitimate reason under EO 283 to wait to get another injection. Ms. Sczesny was also told that her pregnancy was not a legitimate reason to wait. JA 79-80 at ¶¶43-47.

Appellant Jamie Rumfield is also a labor and delivery nurse. She received the Moderna injections on March 8, 2021 and April 8, 2021. After receiving the injections she experienced severe headache, body aches, chills, fever, and a red rash surrounding the injection site. JA 78 at ¶¶31-33. In December 2021, Ms. Rumfield contracted and recovered from covid. Six days after testing positive, while still symptomatic, she was told she could return to work because her symptoms were resolving. *Id.* at ¶¶34-35.

All the Nurses want to make their own medical decisions based on their individual circumstances and health. They do not want the CDC or their governor to impose irreversible healthcare decisions on them as a condition of working in their field and providing for their families.

SUMMARY OF THE ARGUMENT

The question presented in this case is whether New Jersey can require nurses to be injected with pharmaceuticals that they do not want and fear will hurt them.

Appellants are all nurses who are fully vaccinated against covid. Two, Debra Hagen and Mariette Vitti, were injured by the first series of shots. One, Katie Sczensy, was fired for not taking more Mandated Pharmaceuticals while pregnant. All the Nurses have carefully thought about their decision to stop taking covid injections. For each of them, this a private medical decision about what risks to take with their bodies. During the course of litigation, they were all separated from their jobs because they did not take a booster as required by Governor Murphy's executive order. On March 2, 2022 Governor Murphy issued Executive Order 290, which set a deadline of April 11, 2022 for all subject workers to have received a booster or else be disciplined by their employer. The Nurses were all terminated on April 11, 2022, except for Debra Hagen who resigned in advance of that date to avoid a termination on her record.

The right of free people to decline unwanted medical procedures is a fundamental right that has been explicitly acknowledged by the Supreme Court. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (right to bodily integrity is a fundamental right); *see also Cruzan by Cruzan v. Dir., Missouri Dep't of Health,* 497 *U.S.* 261, 277 (1990) (stating that "the common-law doctrine of informed

consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment"). EO 283 violates the substantive due process clause of the Fourteenth Amendment because it impermissibly intrudes on the fundamental liberty and privacy right to decline unwanted medical procedures. The government mandate makes the Nurses' eligibility to work conditional on them surrendering their constitutional right to decline medical procedures. This government-imposed condition on employment violates the doctrine of unconstitutional conditions, which prohibits the government from conditioning a privilege on the surrender of a constitutional right. *Frost v. Railroad Commission of State of California,* 271 *U.S.* 583 (1926).

EO 283 also violates the equal protection clause of the Fourteenth Amendment because these Nurses are treated unfavorable based on the exercise of their fundamental right to reject unwanted medical procedures.

Because EO 283 intrudes on fundamental rights, it is subject to strict scrutiny. *Harris v. McRae*, 448 *U.S.* 297, 312 (1980) (stating that "[i]t is well settled that...if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional"); *see also*, *Regents of Univ. of C*alifornia v. *Bakke*, 438 *U.S.* 265, 357 (1978) (stating that "a government practice or statute which restricts 'fundamental rights'…is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even

then, only if no less restrictive alternative is available").

The Executive Orders fail under strict scrutiny because the liberty to refuse unwanted medical procedures is always fundamental, but especially when the medical procedure in question involves a novel technology, has a low rate of efficacy, carries the risk of disability and death, and has hurt the individual in the past. Moreover, the EOs are not narrowly tailored.

The questions presented in this case go to the very heart of individual liberty. This *is* the slippery slope. If the state executive can unilaterally recruit private employers to make their employees take a novel pharmaceutical that carry risk and do not even work well simply because it has been labeled a "vaccine," then the government has the power to impose medical mandates for *any* substance labeled a "vaccine" by the federal government.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RELYING ON *JACOBSON V. MASSACHUSETTS* TO REJECT STRICT SCRUTINY ANALYSIS

Standard of Review

The standard of review on this issue is *de novo* because it involves solely legal questions. *Maldonado v. Houstoun*, 157 F.3d 179, 183–84 (3d Cir. 1998)

Argument

A. Strict Scrutiny is the proper level of analysis

The right of a free and mentally competent person to decline unwanted

medical procedures is well-established as essential to the ordered concept of liberty and individual right to privacy concerning one's body and important life decisions. People have the right to decline even lifesaving medical care, which the Supreme Court has recognized is concomitant with the well-established common law doctrine of the right to informed consent. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 270 (1990) (stating that "[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment").

This right is sweeping and nearly absolute. *See In re A.C.,* 573 A.2d 1235 (D.C. Court of Appeals 1990) (c-section cannot be performed without consent, even to save life of baby); *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. Ct. 1978) (patient cannot be forced to undergo amputation even if they will likely die without it). *Zant v. Prevatte*, 286 S.E.2d 715 (Ga. 1982) (prisoner right to refuse food), *Erickson v. Dilgard,* 252 N.Y.S. 2d 705 (Special term 1962) (competent adult has liberty to refuse blood transfusion even if it may cause their death). It applies no matter how unreasonable or illogical the refusal. It applies even if children will be left without a parent. *In re Osborne*, 294 A.2d 372 (D.C. Court of Appeals 1972). This right is encompassed within the common law right to informed consent and is reserved to the people, not the state.

The right to decline medical procedures is fundamental as it falls within the right to bodily integrity recognized under the Fourteenth Amendment. *Glucksberg*, 521 U.S. at 720 (stating that the liberty protected by substantive due process includes the right to bodily integrity); *see also Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 289 (1990) (stating that "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment…") (J. O'Connor concurring).

The right to exercise free will over medical decisions concerning one's body also falls within the privacy interests protected by the substantive due process clause, specifically "the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions." *Doe by & through Doe* v. *Boyertown Area Sch. Dist.,* 897 F.3d 518, 527 (3d Cir. 2018) (citing *Doe v. Luzerne County*, 660 F.3d 169, 175 (3d Cir. 2011)); *see also Cruzan*, 497 *U.S. at 342* (stating that "[t]he sanctity, and individual privacy, of the human body is obviously fundamental to liberty") (J. O'Connor concurring).

Because The Executive Orders intrude on these fundamental rights, they are subject to strict judicial scrutiny. *Regents of Univ. of California*, 438 *U.S.* at 357. Here, the Executive Orders condition the Nurses' employment, and employability, on surrendering these constitutional rights. Consequently, the EOs violate the doctrine of unconstitutional conditions, which prohibits the government from

conditioning a benefit or privilege on the surrender of a constitutional right. *Frost v. Railroad Commission of State of California,* 271 *U.S.* 583 (1926); *see also Perry v. Sindermann*, 408 *U.S.* 593, 59 (1972) (internal citations omitted) (doctrine of unconditional conditions applies to conditions on employment).

B. *Jacobson v. Massachusetts* does not apply

The holding in the suddenly famous 117-year old Supreme Court Case *Jacobson v. Massachusetts,* was narrow: "[W]e hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." *Jacobson v. Massachusetts*, 197 *U.S.* at, 25. It was error for the District Court to apply *Jacobson* because *Jacobson* is distinguishable on many grounds including: 1) the vaccine at issue in *Jacobson* and the pharmaceuticals at issue here share almost nothing in common aside from both being called vaccines; 2) the Executive Order at issue here is not a direct legislative enactment; 3) The disease at issue in *Jacobson*, smallpox had a mortality rate of 30%[4] and was orders of magnitude more deadly than covid; 4) the Mandated Pharmaceuticals have existed for less than two years while the smallpox vaccine had existed for more than one hundred years when *Jacobson* was decided, a fact the Court specifically relied upon in its reasoning (*Id.* at 23-34); and 5) the "reasonable" consequences for Mr. Jacobson declining the smallpox vaccine under the Massachusetts statute was a modest fine while the EOs

[4] https://www.cdc.gov/smallpox/clinicians/clinical-disease.html

here deprive people of their means of income and make them unemployable in their field.

1. **The Mandated Pharmaceuticals do not fall within any traditional definition of the word "vaccine"**

The question of whether the Mandated Pharmaceuticals are vaccines is a threshold issue because if they are not, then *Jacobson* most certainly does not apply and the injections must be analyzed the same as other unwanted medical procedure-under strict scrutiny. It was error for the District Court to assume that *Jacobson* applies simply because the Mandated Pharmaceuticals have been labeled "vaccines" by the CDC. Both the Supreme Court and Third Circuit Court of Appeals have stated that courts must look at substance over form and are not bound by agency classifications. *Azar v. Allina Health Servs.*, 139 *U.S.* 1804, 1812 (2019) (noting that "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label."* (emphasis in original); *see also State of New Jersey v. Dep't of Health and Hum. Servs.*, 670 F.2d 1262 (3d Cir. 1981) (stating that "a court of appeals is obligated to look beyond the label the Secretary puts on his or her actions, and instead is required to conduct an independent evaluation of the underlying substance" because "[t]o do otherwise would be to elevate form over substance and...make the jurisdiction of a court of appeals contingent upon the Secretary's unfettered discretion"). Here, the District Court deferred to the CDC's determination that the Mandated Pharmaceuticals are "vaccines," and therefore held that thus

Jacobson is controlling precedent. This was error.

When judicial inquiry turns on the meaning of a word in a law, rules of statutory construction apply. Specifically, the word should be interpreted according to its meaning at the time the statute was enacted and if the term is not defined in the statute, then it should be given its ordinary meaning. *New Prime Inc. v. Oliveira*, 139 *U.S.* 532, 540 (2019)(stating that "it's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute)" (internal citations omitted). Here, the question turns not on the meaning of a word within statutory law, but rather how the word was used in case law, however, rules of statutory construction are instructive nonetheless.

a. The History of the Word Vaccine

More than 117 years separate *Jacobson* and the subsequent classification of these Mandated Pharmaceuticals as falling within that case law because they are also called "vaccines." In 1905, when Jacobson was decided, a "vaccine" was *one* specific substance, not a category of drugs. The definition was fixed and narrow:

> of or pertaining to cows; pertaining to, derived from, or caused by, vaccinia; as, vaccine virus; the vaccine disease.
> - - n. The virus of vaccinia used in vaccination.

JA 114. The word described one specific virus, the vaccinia virus, and the use of that virus to inoculate against smallpox. The Court's opinion in *Jacobson* related *only* to

the smallpox vaccine, though at the time the term "smallpox vaccine" would have been redundant.

For at least half a century after *Jacobson* the dictionary definition of "vaccine" remained largely the same. In 1954, Webster Dictionary still defined "vaccine" as relating only to smallpox:

> The substance taken from a cow with cowpox and the fluid used in inoculating the body against smallpox.

Ja 116. In 2006,[5] one hundred years after *Jacobson* was decided, Webster Dictionary Online's first definition for "vaccine" still related only to smallpox, as it had for the past century. A secondary definition expanded the word "vaccine" to include a broader class of drugs, specifically:

> a preparation of killed microorganisms, living attenuated organisms, or living fully virulent organisms that is administered to produce or artificially increase immunity to a particular disease.

JA 117. This definition ("the Microorganism Definition") became dominant and is still found in other dictionaries such as Collins English Dictionary and Chambers Dictionary (13th Edition) and the American Heritage Dictionary). JA 118, 120-122, 128-129.

[5] Archived webpages throughout were taken from archive.org, a 501(c)(3) organization "building a digital library of Internet sites and other cultural artifacts in digital form" since 1996 The website allows users to save a screenshot of a webpage in time. The about section for the organization is here: https://archive.org/about/

Few courts have grappled with the question of what constitutes a "vaccine," but of those that have, most have used the Microorganism Definition. *See Blackmon v. American Home Products Corp.,* 267 F.Supp.2d 667, 674 (S.D. Tex. 2003) (relying on definition of vaccine in Dorland's Medical Dictionary 1799 (27th ed.1988 ("a suspension of attenuated or killed microorganisms") and Webster's 9th New Collegiate Dictionary 1301 (9th ed.1991) ("a preparation of killed microorganisms, living attenuated organisms, or living fully virulent organisms"); see also *Owens Ex Rel. Schafer v. American Home Prod.,* 203 F. Supp. 2d 748, 755 (S.D. Tex. 2002) (citing the same dictionary definitions).

Within the last 15 years, technology advanced again with the invention of "subunit, recombinant, polysaccharide, and conjugate vaccines," a subcategory of vaccines that contain "specific pieces of the germ—like its protein, sugar, or capsid (a casing around the germ)." Some dictionaries have expanded the definition of "vaccine" to include this new technology and others have not. *See* e.g., Dorland's Illustrated Medical Dictionary, 1767 (32d ed 2012) (defining "vaccine" as "a suspension of attenuated or killed microorganisms. . . .or of antigenic proteins derived from them, administered for the prevention, amelioration, or treatment of infectious diseases") (as quoted in *Dean v. Secretary of Health and Human Services*, United States Court of Federal Claims, No. 16-1245V (May 29, 2018)). Washington State uses a similar definition in legislation concerning vaccines:

> a preparation of killed or attenuated living microorganisms, or fraction thereof, that upon administration stimulates immunity that protects against disease and is approved by the federal food and drug administration as safe and effective.

RCW 70.290.010(10)3. The mRNA (Pfizer and Moderna) and DNA (Jannsen) injections are excluded from this definition because they do not contain pieces of microorganisms, they contain synthetic genetic material.[6]

b. A New Definition Emerged in 2021

The technology advanced again last year with the advent of mRNA and DNA "vaccines." In a testament to how fluid the definition is, some online dictionaries changed the definition for "vaccine" overnight to bring the Mandated Pharmaceuticals within its ambit. For example, someone looking up the definition of "vaccine" on Webster's Online Dictionary on January 18, 2021 saw this definition:

> A preparation of killed microorganisms, living attenuated organisms, or living fully virulent organisms that is administered to produce or artificially increase immunity to a particular disease.

[6] The genetic material is excluded from the definition both because it is not a part of the virus structure and also because the genetic material in the pharmaceuticals is different from the actual genetic material of the virus, having been tweaked in several ways. For example, the nucleic acid uracil was swapped out for a different nucleic acid, pseudouridine to stabilize the mRNA and slow down how fast it is degraded by the body. Pedro Morais *et al.*, "The Critical Contribution of Pseudouridine to mRNA COVID-19 Vaccines," Front Cell. Dev. Biol. 2021; 9: 789427 available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8600071/.

JA 130. This definition excludes the Mandated Pharmaeuticals because they do not contain microorganisms. Someone looking up the definition of "vaccine" eight days later would have seen a secondary definition that brings the Mandated Pharmaceuticals within the vaccine category:

> A preparation of genetic material (such as a strand of synthesized messenger RNA) that is used by the cells of the body to produce an antigenic substance (such as a fragment of virus spike protein).

JA 133. Cambridge Dictionary also changed its definition of "vaccine" last year to include the new pharmaceuticals. At the beginning of 2021, the Mandated Pharmaceuticals were excluded from the Cambridge Dictionary definition of "vaccine" because they do not contain a virus or bacteria:

> A substance containing a virus or bacterium in a form that is not harmful, given to a person or animal to prevent them from getting the disease that the virus or bacterium causes.

JA 134. But by August 2021 the definition was changed to bring the Mandated Pharmaeuticals within its ambit:

> A substance that is put into the body of a person or animal to protect them from a disease by causing them to produce antibodies (=proteins that fight diseases).

JA 136.

The fact that these dictionaries had to change their definition of "vaccine" to make the Mandated Pharmaceuticals fit shows that these pharmaceuticals do not fall within a common or traditional meaning of the word "vaccine."

The definition of "vaccine" has expanded as technology progressed, resulting in a hodgepodge of definitions. Even the CDC, to which the District Court deferred, has inconsistent definitions. On the CDC webpage titled "Glossary of Vaccine Terms," the CDC defines "vaccine" as:

> A suspension of live (usually attenuated) or inactivated microorganisms (e.g. bacteria or viruses) or fractions thereof administered to induce immunity and prevent infectious diseases and their sequelae.

JA 139. This definition excludes the Mandated Pharmaceuticals because they contain genetic material, not microorganisms or pieces of microorganisms. However on another webpage the CDC drops any reference to composition and instead defines "vaccine" by its function: "[a] preparation that is used to stimulate the body's immune response against diseases." JA 140.

Notably, in the second CDC definition, the bar has also been lowered with regard to efficacy. In the glossary definition, a vaccine "prevents infectious disease." In the new definition a vaccine "stimulate[s] the body's immune response." Moreover, the second definition is so broad that it includes many substances that are definitely not considered "vaccines" under the ordinary meaning of the term, such as vitamin D, vitamin C, and allergens, all of which can be preparations that "stimulate the immune response." If the second definition is the one that governed the District Court's decision, then it follows that *Jacobson* allows the government to force people to take, for example, vitamin C or else lose their jobs.

The split in definitions on the CDC website illustrates a larger trend and demonstrates that the word "vaccine" is expanding in two different directions to the same result. On one hand the definition is expanded to bring new pharmaceutical technology into the category. Thus the composition part of the definition has gone from: the vaccinia virus → microorganisms → microorganisms or parts of microorganisms → modified genetic material that encodes for a viral protein.

Other definitions, like the second CDC one, have dropped the composition part of the definition altogether and lowered the bar for efficacy, such that anything that "stimulates" an immune response is a "vaccine." In that case, the definition went from the vaccinia virus → microorganisms generally → microorganisms or parts of microorganisms → anything that stimulates immunity.

Whether the composition part of the definition is expanded to include new technology or dropped altogether, it is clear that the word's definition is elastic and being regularly expanded to accommodate new technology that was not even conceivable in 1905 when *Jacobson* was decided.

The expansion of the word "vaccine" would be nothing more than a cultural curiosity, like how the word "phone" has come to encompass smartphones, except that if courts apply *Jacobson* to any pharmaceutical that federal government agencies categorize as a "vaccine," then every government expansion of the word "vaccine" triggers an accompanying expansion of government power to coerce

people to take new pharmaceuticals and a concomitant loss in liberty for all citizens to refuse to take the new medical pharmaceutical. Every advance in the medical technology of "vaccines" thus decreases liberty. This is far outside of *Jacobson's* holding. *Jacobson* simply does not stand for the proposition that the government can force people to take any new technology that a federal government agency categorizes as a "vaccine."

c. The smallpox vaccine in *Jacobson* and the Mandated Pharmaceuticals are nothing alike, even though they are both called "vaccines"

The smallpox vaccine that existed in 1905 bears no resemblance to the pharmaceuticals mandated by Governor Murphy, regardless of whether they both bear the name "vaccine." Some indisputable differences between the smallpox vaccine and the Mandated Pharmaceuticals include:

1. *Knowledge acquired by the passage of time.* The smallpox vaccine had already existed for generations when the Massachusetts legislature authorized $5 fines on people who declined it. *Jacobson*, 197 U.S. at 23–24. In contrast, the pharmaceuticals mandated by Governor Murphy were invented last year and are still in clinical trials.
2. *The smallpox vaccine and the Mandated Pharmaceuticals are nothing alike in terms of their composition.* The smallpox vaccine was comprised of a naturally occurring virus, call vaccinia, found in cows. It is something that humanity had lived alongside of for a long time. In

contrast, the Mandated Pharmaceuticals are comprised of synthetic genetic material that exists nowhere in nature and the genetic material is enclosed in either synthetic nanolipid particles or a genetically engineered virus, which also do not exist in nature. These drugs are nothing alike in their composition.

3. *The mechanism of action is completely different.* The smallpox vaccine and the Mandated Pharmaceuticals function in a completely different manner. The smallpox vaccine's mechanism of action was two steps: 1) expose a person to cowpox, 2) the person's immune system mounts a response against the cowpox. In contrast, the Mandated Pharmaceuticals' mechanism of action involves different and extra steps, and, unlike cowpox, the Mandated Pharmaceuticals initially must avoid triggering an immune response so they can deliver the genetic material payload to the host. Cells without being destroyed by the host immune system. The mRNA and DNA based pharmaceuticals work as follows: 1) inject a person with synthetic viral genetic material enclosed in synthetic nanolipids or a genetically modified virus; 2) the genetic material is taken up by a person's cells, 3) the person's body manufactures the foreign proteins encoded by the genetic material, 4) The foreign proteins are ejected into the body and/or displayed on the person's cells, provoking

an immune response. JA 174-176. The smallpox vaccine and Mandated Pharmaceuticals function in completely different ways.

4. *The smallpox vaccine conferred immunity.* The smallpox vaccine prevented infection and transmission while the Mandated Pharmaceuticals do not and provide, at best, personal protection.

5. *Frequency of mandated medical procedures.* The smallpox vaccine was required only once in 5 years under the statute challenged in Jacobson, while the Mandated Pharmaceuticals are now being required *at least* 3 times in less than a year.

2. *Jacobson* is factually distinguishable from The Executive Orders for a myriad of other material reasons

Jacobson is easily distinguished from the EOs on several grounds, in addition to the fact that the drugs at issue are nothing alike.

First, these Nurses are differently situated than Mr. Jacobson was. The Nurses all received a primary series of the Mandated Pharmaceuticals in the last year or so. Two women, Debra Hagen and Mariette Vitti, were injured by the pharmaceuticals and still have not recovered. Two others, Katie Sczesny and Jaimie Rumfield, have recent documented infections, fortifying their immunity against infection. In addition, Katie Sczesny was pregnant at the time she was fired. All of the Nurses were made sick by the Mandated Pharmaceuticals when they took them in the last

year. These women have compelling and well-documented reasons to want to stop taking these pharmaceuticals, unlike Mr. Jacobson.

The Executive Orders and the statute in *Jacobson* are also very different in their consequences. The consequence of declining the smallpox vaccine in *Jacobson* was a $5 fine, after the due process of a trial, which Mr. Jacobson could pay and then move on his life. In contrast, Governor Murphy's mandate derails these women's lives and careers, making them indefinitely unemployable in the field in which they are educated and licensed.

The Executive Orders and *Jacobson* are also distinguishable because they involve different diseases. Smallpox was orders of magnitude more deadly than covid.

Finally, the Executive Orders and *Jacobson* are distinguishable because they involve different branches and levels of government. In *Jacobson*, the smallpox vaccination requirement was explicitly authorized by the state legislature and the ultimate decision of whether people would need to be inoculated was made at the local municipal level, where officials are most easily held accountable. In contrast, Governor Murphy's mandate is an executive branch order, issued under general emergency powers, with no explicit authorization from the legislature. Under the Executive Orders, the ultimate decision of whether people need to get the shots is

made by either an inaccessible federal government official, the CDC director, or an inaccessible state official, the governor.

Comparing the two, it is clear that the Executive Orders do not fall within *Jacobson's* ambit because the actual product the government seeks to force people to take and the other factual circumstances are too different. Because the Executive Orders do not fall within *Jacobson's* ambit, they are subject to strict scrutiny, which is the established level of analysis when government wishes to intrude on the fundamental right to decline medical procedures.

II. EXECUTIVE ORDER 283 IS UNCONSTITUTIONAL UNDER STRICT SCRUTINY ANALYSIS BECAUSE IT IMPERMISSIBLY INTRUDES ON THE NURSES' PRIVACY AND LIBERTY TO MAKE THEIR OWN MEDICAL DECISIONS AND IS ALSO NOT NARROWLY TAILORED

To survive strict scrutiny, the government must demonstrate a compelling government interest and show that the government action is necessary and narrowly tailored to achieve that interest. *Glucksberg*, 521 *U.S.* at 721 (stating that "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") (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)).

The government's asserted interests must be balanced and weighed against the seriousness of the intrusion on the Nurses' liberty and privacy. *Wisconsin v.*

Yoder, 406 U.S. 205, 214 (1972) (stating that with balancing, the government interest must be "of sufficient magnitude to override the interest claiming protection"). Here, the Nurses' liberty to make their own medical choices about their bodies far outweighs the government's asserted interest.

A. The Government's Asserted Interests

New Jersey set forth, and the District Court recognized, the following state interests concerning the Executive Orders:

1. Reducing risks of serious illness (opinion pg. 19);
2. Reducing transmission of the virus to others (opinion page. 19);
3. Decreasing the risk of hospitalization (opinion pg. 19);
4. Protecting health and safety during the pandemic (opinion pg. 29);
5. An interest in "the health and safety of its most vulnerable residents (opinion pg. 29); and
6. Maintaining a safe environment for its workforce and the effective and continued operation of essential health services.

An interest is not compelling if the government action purportedly taken in pursuit of the interest undermines the interest or does not address the interest fully. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (stating that "[i]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves

appreciable damage to that supposedly vital interest unprohibited") (internal citations omitted). Moreover, to be compelling, an asserted government interest must have a strong basis in evidence showing the action is necessary. *See Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (stating that under strict scrutiny, a race-based classification must specifically identify the discrimination that must be addressed and there must be a "strong basis in evidence to conclude that remedial action was necessary"). What liberty is infringed matters in determining whether a government interest is compelling. For example, the Supreme Court has taken for granted that, in the context of a government intrusion on medical decisions, even the government's interest in the preservation of human life is not compelling enough to override the individual right to make their own medical decisions. *See Cruzan*, 497 *U.S.* at *287* (J. Connor concurring) (stating *"*I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions and that the refusal of artificially delivered food and water is encompassed within that liberty interest") (internal citations omitted).

Here, the government's asserted interests are not compelling, for a variety of reasons. Some of the government's assert interests rest on the assumption that the pharmaceuticals prevent infection and transmission and some rest on the assumption that the pharmaceuticals provide personal protection for the person who took the pharmaceutical. The state does not have a compelling interest to force people to take

a medicine for their own personal protection, such as reducing risk of serious illness or hospitalization. There is no legal precedent suggesting such an interest. On the contrary, there is legal precedent holding that even the government interest in preserving life cannot outweigh the liberty to refuse unwanted medical treatment.

To the extent the government's proffered interests rest on the incorrect assumption that the pharmaceuticals prevent infection and transmission to others, it lacks a factual basis because it is now well-known that they do not prevent infection or transmission, regardless of how many times an individual takes them. Moreover, the Executive Orders actually undermine any asserted interest in promoting the effective and continued operation of healthcare services because the Nurses have been terminated despite being no greater risk to their patients than someone who took all the pharmaceuticals mandated by Governor Murphy. For these reasons, the interests cannot be compelling.

Two years ago, before the Mandated Pharmaceuticals had even been invented, the Supreme Court stated that "California undoubtedly has a compelling interest in *combating the spread* of COVID–19 and protecting the health of its citizens." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (emphasis added). That interest is not present here because the pharmaceuticals do not prevent the spread. Moreover, even if the government did have that compelling interest in this case, it has diminished since *S. Bay United Pentecostal Church* was decided

during the height of the pandemic in light of new treatments, the existence of prophylactics, and much being learned about the virus in the two years.

Regardless of whether New Jersey has a compelling interest or not, the Nurses' liberty to reject unwanted medical procedures involving a novel technology that carries the risk of disability and death far outweighs the government interest.

B. The Nurses' liberty and privacy rights are stronger and more compelling than the government's interests and The Executive Orders are not narrowly tailored

Weighing the government's interests against the serious intrusion on the Nurses' liberty and privacy right to make their own medical decisions compels the conclusion that The Executive Orders are unconstitutional.

1. The Advisory panels of *both* the CDC and the FDA recommended against authorizing booster shots for healthcare workers under 50

The CDC has an advisory committee on immunization. The committee, comprised of doctors and vaccine experts, voted *against* recommending boosters for healthcare Nurses, teachers, and others whose jobs put them at risk. JA 141-142. The advisory committee stated that people under 50 "should only get a third dose if the benefits outweigh the risks...a personal consideration to discuss with their doctor." *Id.* One committee member, Dr. Oliver Brooks, chief medical officer of Watts Healthcare Corporation, stated: "I'm really concerned about the data for boosters in general."

CDC Director Rochelle Walensky overruled the committee and unilaterally decided to recommend additional doses for all adults. Thus, the CDC's recommendation that people under 50 receive a third covid shot is based on the opinion of just one federal government official and was *against* the opinion of the expert committee that advises the CDC. Between Executive Order 283's original definition of "up to date" and Governor Murphy's changing of the definition of "up to date" in Executive Order 294 to be in line with the CDC's definition, and the CDC's subsequent change of its definition of "up to date," it is not clear whether the Nurses would be required to take the new covid shots or not. The only thing that *is* clear is that the power to make that choice concerning their bodies has been taken away from them and will instead be made by either Director Walensky or Governor Murphy.

Notably, the FDA advisory panel *also* voted against recommending third injections for everyone, instead only recommending them for people above retirement age. PBS reported that the vote was 16-2 against "with members expressing frustration that Pfizer had provided little data on the safety of extra doses." JA 144. The New York Times reported that two high profile regulators, Dr. Marion Gruber, the director of the FDA's vaccines office, and her deputy, Dr. Philip Krause, resigned from the FDA over this issue. Specifically:

> Neither believed there was enough data to justify offering booster shots yet, the people said, and both viewed the

> announcement, amplified by President Biden, as pressure on the F.D.A. to quickly authorize them.

JA 148.

Like the CDC, the FDA authorized third injections for everyone over the overwhelming objection of its expert advisors. It is not clear who in the FDA made the decision.

The fact that the FDA and CDC expert advisory panels both rejected additional injections for people like the Nurses due to doubts about safety and efficacy weighs strongly in favor of the Nurses' right to stop being injected with them.

2. The fact that the Mandated Pharmaceuticals carry serious health risks and that two of the Nurses have already been injured by them weighs in favor of the individual liberty to stop taking them

Two Nurses are now unable to work because they do not want to take any additional doses of a pharmaceutical that caused them bodily injury and harm the last time they took it. Appellant Debra Hagen was diagnosed with demyelinating neuropathy, which her doctor has said was induced by the pharmaceutical. She and her doctor both feel that her medical history and conditions put her at an increased risk of further injury if her body is injected with any more of the Mandated Pharmaceuticals. This is a personal and potentially life-changing medical decision that should be between her and her doctor. Appellant Mariette Vitti is now suffering heart palpitations and an irregular heartbeat after receiving two injections. Her daily

activities are substantially limited and even mild activity, like walking to her car after work, triggers a fast heart rate and palpitations. It has completely changed her life. Appellant Katie Sczesny was pregnant and is sustaining the life of her daughter with her body through breastfeeding. There have been no clinical studies on third injections and their effect on pregnant or nursing women or their babies. Whether to be injected with a pharmaceutical is a decision that should be between a woman and her doctor, free of government coercion or interference.

As part of informed consent, people who take the Mandated Pharmaceuticals are given a "Fact Sheet for Recipients and Caregivers." The Fact Sheets for the Pfizer and Moderna injections list several risks, including myocarditis and pericarditis. The Fact Sheet for the J&J pharmaceutical warns that "[b]lood clots involving blood vessels in the brain, lungs, abdomen, and legs along with low levels of platelets," and Guillian Barre syndrome have occurred in some people. JA 167. The fact sheets for all the Mandated Pharmaceuticals state that "[s]erious and unexpected side effects may occur" and that the drug is "still being studied in clinical trials." *See Fact Sheets* for Pfizer (JA 154-155); Moderna (JA 161); and Janssen (JA 167-168).

Notably, the serious injuries of myocarditis, pericarditis, and blood clots were discovered *after* the Mandated Pharmaceuticals had already been administered to people and people had suffered those injuries. The "other serious side effects [that] may occur" will be discovered by unlucky people in the same manner. There are

known and unknown physical risks.

The Vaccine Adverse Event Reporting System ("VAERS") was created by Congress in 1990 as "a national early warning system to detect possible safety problems in U.S.-licensed vaccines."[7] In the past year and a half since the Mandated Pharmaceuticals have been available, more injuries have been reported to VAERS as a consequence of these pharmaceuticals than all other injuries for all vaccines-combined. There are more than 1,385,398 reports as of August 12, 2022, including 30,347 deaths and 56,734 people permanently disabled.[8]

It is indisputable that these pharmaceuticals carry the risk of heart damage, disability, and even death. Two Appellants have already by injured by them. Governor Murphy not only requires that the Nurses assume the risk of bodily harm, but requires that they *ignore and disregard* information that the government requires they be provided with concerning the risks.

Pharmaceutical companies are required by law to inform people of the risks of their products, but Governor Murphy's Mandate requires that The Nurses ignore that information and not consider it in their decision making (because the decision has been removed from their power). Similarly, the government is required to

[7] https://vaers.hhs.gov/about.html
[8] Current compilations of data concerning VAERS reports can be found at https://www.openvaers.com/. It is a website that downloads data from VAERS and reports it exactly as it is on the VAERS website in a more readable format. https://openvaers.com/faq

maintain a Vaccine Adverse Event Reporting System as a database where adverse reactions can be recorded, but Governor Murphy requires that the Nurses ignore that data as well. It is illogical that the government can, on the one hand, require that people be informed about potential risks of a pharmaceutical, and on the other hand, force people to disregard those risks.

If the government wishes to compel people to take the risk of serious injury or death, the government interest must be compelling enough to override the individual liberty to avoid the risk of injury or death. None of the government's asserted interest is. Moreover, the urgency of the individual liberty to avoid this health risk is heightened because there is no recourse against the product manufacturers or the government if a person is injured because the manufacturers have been granted legal immunity for harm caused by their product under the PREP Act[9] and the government likely has sovereign immunity.

3. The Mandated Pharmaceuticals are of questionable efficacy

Neither the pharmaceutical companies, nor the government know how efficacious the pharmaceuticals are or how long protection lasts. The fact sheet for each pharmaceutical states: "the duration of protection against Covid-19 is currently unknown." *See* Facts Sheet for Pfizer (JA 154), Fact sheet for Moderna (JA 161), and Fact Sheet for Janssen (JA 167). The uncertainty is even greater now that the

[9] 42 U.S.C. § 247d-6d

virus has quickly mutated into various and multiple strains with varying evasion of infection- and vaccine-acquired immunity.

Neither does the government know how long any immunity from the Mandated Pharmaceuticals lasts or their efficacy against new variants. Information is coming out in real time and government officials have made claims about efficacy that are now clearly wrong. For example, in April 2021, CDC Director Dr. Rochelle Walensky stated that data suggests "[v]accinated people do not carry the virus — they don't get sick." JA 234 (quoting CDC Director Rochelle Walensky). Two months later, the CDC announced that vaccinated and unvaccinated people carry similar viral loads, which "suggest[s] an increased risk of transmission."[10] Now, it is now commonly known that people who received third and even fourth injections can still contract, and therefore transmit, covid, including Governor Phil Murphy, Dr. Anthony Fauci, and President Joseph Biden. Indeed, the New York Times has reported that protection from the booster "wanes within 10 weeks."[11]

The fact that it is now well-known that the pharmaceuticals do not prevent infection, and that any protection conferred, may be measured in mere weeks,

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[10] *Statement from CDC Director Rochelle P. Walensky, MD MPH on Today's MMWR* available at https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html

[11] Emily Anthes, Booster protection wanes against symptomatic Omicron infections, British data suggests, New York Times (December 23, 2021) available at https://www.nytimes.com/2021/12/23/health/booster-protection-omicron.html

weighs heavily in favor of the Nurses' liberty to stop being injected with them. The lack of efficacy also greatly undermines any government interest in coercing people to take them and shows that the EO is not narrowly tailored.

4. The novel nature of the Mandated Pharmaceuticals and the technology they use weighs in favor of the Nurses' liberty to stop taking them

The pharmaceutical New Jersey is mandating that these Nurses be injected with are *still in clinical trials.* The clinical trials will not end until December 2022 for Moderna[12] and March 2023 for Pfizer.[13] There are no long term studies on these pharmaceuticals because not enough time has elapsed to complete them. There are no studies on the safety of third doses in pregnant women, unborn babies, nursing babies, people who recently recovered from covid, people with seizure disorders, or people who were injured by them before. The CDC and FDA did not conduct any studies on the safety of booster doses, and CDC and FDA advisory panel experts specifically stated that there was not enough data when rejecting a third dose for working-age adults.

In addition to the pharmaceuticals being novel and still in clinical trials, they also use a novel technology. DNA (Janssen) and mRNA (Moderna & Pfizer) therapies use a person's own cellular machinery to transcribe and translate synthetic

[12] Moderna clinical trial available at https://www.clinicaltrials.gov/ct2/show/NCT04470427

[13] Pfizer clinical trial https://clinicaltrials.gov/ct2/show/NCT04848584

genetic material to manufacture a foreign protein. *See* JA 173-180, *How the Johnson and Johnson Vaccine Works.* DNA and mRNA gene therapeutics are an emerging technology with great promise, but this is the first time they have been tested on or used for healthy people.

Governor Murphy and the state of New Jersey do not have the moral or legal authority to condition the Nurses' ability to work on their being injected with a novel technology that carries the risk of injury and death. The right to stop taking experimental pharmaceuticals is an inviolable human right and is essential to ordered liberty.

5. The fact that the Mandated Pharmaceuticals are more likely than not to make individuals ill in the short term weighs in favor of the Nurses' liberty to stop taking them

CDC data shows that *most* people experience symptoms of illness after the injections including headache, fatigue, fever, muscle ache and chills. 82.8% of the participants between the ages of 18 and 55 in Pfizer's clinical trials experienced at least one of these symptoms, 81.9% of the Moderna, and 61.5% of the J&J participants in that age range. *See* CDC Reports on "Vaccine Reactions and Adverse Events" for Pfizer (JA 185-192), Moderna (JA 194-198), and Janssen (JA 199-201).

This tracks with the Nurses' experiences. All of them report being ill after the first series of injections. JA 78 at ¶ (Mariette Vitti experienced such severe body aches after injection that her clothes hurt against her skin); JA at ¶33 (Jamie

Rumfield experienced severe headache, body aches, chills, fever, and a rash after her second injection); JA 79 at ¶41 (Katie Sczesny experienced spinal pain, join aches, and fever following her second injection); JA 77 at ¶26 (Debra Hagen experienced onset of her ongoing injury 48 hours after injection).

The fact that an individual is more likely than not to experience symptoms of illness after being injected with the pharmaceuticals favors the individual right to refuse to be injected. It is impossible that the Constitution forbids the government from forcing an ill person to take something that will make them well, but allows the government to force someone who is well to take something that will more likely than not make them ill. That would be a logical and moral absurdity.

6. The fact that the Mandated Pharmaceuticals are designed, manufactured, and sold by corporations with either extensive criminal records or, in the case of Moderna, no track record at all weighs in favor of the individual right to not be injected with their products

Pfizer, J&J, and their subsidiaries have pled guilty to an astonishing range of civil violations and felony and misdemeanor crimes, including violations of the Food, Drug and Cosmetics Act, the False Claims Act, and the Foreign Corrupt Practices Act. A jury also found that Pfizer violated the Racketeering Influenced and Corrupt Organizations Act. Pfizer's underlying criminal and unethical actions include: feloniously misbranding drugs with the intent to defraud or mislead, illegally promoting drugs, submitting false claims to the government, paying kickbacks to doctors, withholding evidence about faulty medical products, falsifying

records to cover up unsafe manufacturing practices, and testing an experimental drug on children in Nigeria. JA 202-209 (DOJ press releases and newspaper articles describing Pfizer's legal troubles). In addition to criminality, Pfizer has been the subject of many high-profile drug safety scandals, most famously Bextra and Celebrex, which were both recalled due to fraud and safety issues.[14]

J&J and its' subsidiaries' record of criminality and deception includes: causing children's medicine contaminated with metal to enter commerce and covering up the contamination without informing the public, obstructing justice and "corruptly persuading others" to shred evidential documents, numerous instances of illegally marketing drugs, submitting false claims to the government, and paying illegal kickbacks to doctors, pharmacists, and nursing homes. JA 210-223 (government press releases describing J&J's legal troubles).

The shocking criminal backgrounds of these corporations weighs in favor of the Nurses' liberty to reject having their bodies injected with products these corporations manufacture.[15]

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[14] Randsdell Pierson, *Pfizer to settle Bextra, Celebrex lawsuits*, Reuters (October 17, 2008), available at https://www.reuters.com/article/us-pfizer-bextra-idUSTRE49G43220081017

[15] Moderna, a company that has existed for 12 years, has no track record at all having never successfully developed any marketable pharmaceutical product before the one at issue in this case. *See* Matthew Johnson, "How Moderna Makes Money," (March 2, 2022) available at https://www.investopedia.com/how-moderna-makes-money-5179565 (stating "Moderna first began recording product sales in Q4 FY 2020 after its COVID-19 vaccine received emergency approval from the FDA and Health

7. The fact that the federal agency tasked with ensuring pharmaceutical safety is plagued by scandals and failures directly related to the agency's failure to protect the public from unsafe pharmaceuticals favors the individual liberty to stop taking the Mandated Pharmaceuticals

Whistleblowers, industry experts, and even U.S. Senators have been warning the public for more than a decade that the FDA is not working properly to protect the public from dangerous pharmaceuticals. Well-publicized drug recalls, class actions, and jury verdicts have made this a high-profile public issue.

Fifteen years ago, Senator Chuck Grassley testified before the House Oversight Committee outlining systemic issues within the FDA that he discovered as Chairman of the Senate Finance Committee. The Senator testified:

> First, scientific dissent is discouraged, quashed, and sometimes muzzled inside the Food and Drug Administration. Second, the FDA's relationship with drug makers is too cozy. The FDA worries about smoothing things over with industry much more than it should with its regulatory responsibilities. Third, inside the FDA there's widespread fear of retaliation for speaking up about problems. And fourth, the public safety would be better served if the agency was more transparent and forthcoming about drug safety and drug risks.

JA 225.

The corruption of the pharmaceutical industry and failures of the FDA are so notorious that the Edmund J. Safra Center for Ethics at Harvard University

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Canada in December 2020").

sponsored a fellowship for Dr. David W. Light that specifically focused on researching "the historical roots of institutional corruption in the development of prescription drugs and its consequences." JA 228. Dr. Light wrote prolifically on corruption in the pharmaceutical sector and FDA. In one article penned during his fellowship, titled "Risky Drugs: Why The FDA Cannot Be Trusted," Dr. Light explains that one in every five drugs approved by the FDA end up causing "serious harm" and that "evidence indicates why we can no longer trust the FDA to carry out its historical mission to protect the public from harmful and ineffective drugs." JA 229. Dr. Light attributes FDA failures to ensure pharmaceutical safety to financial conflicts of interest. *Id.* at 229-230. Dr. Light closes the article with advice "not to take a new drug approved by the FDA until it is out for 7 years, unless you have to, so that evidence can accumulate about its real harms and benefits." *Id.* at 231.

Enough information about FDA dysfunction has percolated to the surface of public that it is reasonable for people to distrust the FDA's ability to keep people safe from harmful pharmaceuticals. The pertinent question here is not whether Senator Grassley and Dr. Light are correct about the FDA, but rather whether people are free to believe they are correct and make decisions about their own bodies accordingly. Are they free to follow Dr. Light's advice? People have the liberty to distrust the FDA in their minds and should not be coerced by the government to submit their bodies against their will based on the assurances of the very federal

agency they distrust.

8. Executive Order 283 is not narrowly tailored because it is underinclusive, ovebroad, and vague

Both Executive Orders 283 and 294 are specifically linked to CDC "recommendations," which the EO 283 purports to make mandatory, but which is confused by EO 294's modified definition of "up to date." Under the plain language of EO 283, the Nurses must submit to being injected with additional, and different, pharmaceuticals for covid whenever the CDC recommends that they should, unless 294 remains controlling despite the CDC having changed the definition of "up to date" as describe in that EO. In short, it is not clear whether the decision as to whether the Nurses must get more and different pharmaceuticals rests with the CDC or Governor Murphy; it is only clear that the power to make that decision has been taken away from them.

The Nurses' liberty is egregiously infringed by the fact that their current and future healthcare decisions have been removed from their power and now rests in the sole discretion of either the head of the CDC or the governor. This is the opposite of narrowly tailored and is, in fact, so broad, that it is not even clear what is required.

9. EO 283's failure to account for any type of immunity shows that it is not narrowly tailored

It is notable that the entire concept of immunity is absent from the Executive Orders. In fact, the words "immune" and "immunity" do not appear in the Orders at all, yet they rely on the premise that the so-called vaccines will confer immunity.

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The fact that people who recover from a virus develop natural immunity is so well-established that in 1997, a New Jersey District Court acknowledged, under a section the Judge titled "Basic Principles of Virology" that

> When a higher organism such as an animal or human is exposed to a virus and its cells become viral hosts, the animal or human develops a natural immunity. This immune response operates at two levels: first, at the initial stage of the infection before the virus has invaded the host and second, after the virus has invaded. When the virus stimulates certain specialized cells, these cells produce antibodies which prevent future infection.

Boehringer Ingelheim Animal Health, Inc. v. Schering-Plough Corp., 984 F. Supp. 239, 243 (D.N.J. 1997). Government-funded studies have found that people who recover from covid develop robust and broad immunity that protects them from reinfection. A study funded by the National Institute of Health and National Cancer Institute and published in the journal Science found that "more than 95% of people who recovered from COVID-19 had durable memories of the virus up to eight months after infection." JA 241 (NIH, *Lasting immunity found after recovery from COVID-19*). The government's failure to consider immunity to covid, whether derived from exposure to a "vaccine" or exposure to the virus, severely undermines its asserted interests. Moreover, the fact that the pharmaceuticals confer limited immunity, which appears to wane quickly, shows that the mandates are not narrowly tailored.

To the extent that the virus has mutated to evade immunity from recovery, the same is true of any immunity conferred by taking the shots, so the Executive Orders are overbroad and therefore not narrowly tailored.

10. The wide range of treatments available for Covid-19 undermines the government's interests and shows that EO 283 are not narrowly tailored

For all the above reasons, the Nurses' liberty to exercise control over what medical procedures are done to their bodies far outweighs the government's asserted interests. The Mandate is unconstitutional. Most people who contract covid require no treatment and are given no treatment. For people who need treatment, there are no fewer than eight FDA authorized treatments available.[16] The availability of multiple treatments undermines the government's interest in mandating a prophylactic pharmaceutical of questionable efficacy that carries serious risks and renders the EOs not narrowly tailored.

III. THE DISTRICT COURT ERRED IN ITS APPLICATION OF RATIONAL BASIS ANALYSIS

Rational basis analysis is not the proper level of analysis for these Executive Orders because: 1) the executive orders intrude on fundamental liberties, and 2)

[16] A list of currently authorized treatments is available on the FDA, Emergency Use Authorization Website (listing authorized therapeutics under Drug and Biological Therapeutic Products, available at https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#Coviddrugs (last accessed September 7, 2021).

Jacobson did not apply rational basis analysis because it predated tiered constitutional analysis. There is *no* precedent that the government can require workers to undergo medical procedures for their own personal protection. Regardless, even if rational basis were the proper level of analysis, these executive orders are still unconstitutional.

Rational basis analysis asks whether a government action is rationally related to a legitimate government purpose. *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992). A government action is not rationally related to its purported purpose if the facts upon which it is based are wrong. The Third Circuit has recognized that "under rational basis review, the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.* at 1271. Here, EO 283 is predicated on the fact that it was believed the shots would prevent infection and transmission, but that fact is now known to be incorrect. It is common knowledge, and the government's own documents show, that the Mandated Pharmaceuticals do not prevent infection and transmission of covid to any measurable or known degree. EO 283 cannot pass rational basis analysis for this reason.

A policy will also fail rational basis analysis if it classifies people differently to achieve a government interest, but the classification cannot advance the government interest. For example, in *Jimenez v. Weinberger*, the Supreme Court

analyzed a social security regulation that barred illegitimate children of disabled parents from filing claims for their parent's social security. The proffered government interest for the regulation was to prevent spurious claims by children who were not qualified to receive their parents' social security because they were not dependent on the disabled parent. The Court noted a disconnect between the government's classification of people and the government's interest because a child's ability to submit a spurious claim is independent of their status as legitimate or illegitimate. *Jimenez*, 417 U.S. 628, 637 (7th Cir. 1975). The court noted that the policy was both "overinclusive in that it benefits some children who are legitimate...but who are not dependent on their disabled parent" and "underinclusive in that it conclusively excludes some illegitimates...who are, in fact, dependent upon their disabled parent". *Id.* The regulation was held to be unconstitutional under rational basis analysis.

The disconnect in *Jiminez* is analogous to the Executive Orders here because the state's interest in stemming the spread of covid is disconnected from EO 283's requirement that people keep taking doses of pharmaceuticals that do not prevent the spread of covid. A person's ability to get and transmit covid is independent of their status as "fully vaccinated" or "boosted." As the government's own documents show, both the "fully vaccinated" and "the boosted" can become infected with and transmit covid. Just as in *Jiminez*, the policy is overinclusive because fully

vaccinated people who also recovered from infection are not allowed to work under EO 283 even though they may be the least likely to become infected with covid. It is also underinclusive because people who are boosted can still spread covid, but are allowed to work. Finally, to the extent that EO 283 relies on the CDC and to the extent that the CDC now requires more than one dose to be "up to date," and to the extent EO 294 promulgates a new definition of "up to date," EO 283 cannot even accomplish what it is intended to, which is to ensure healthcare workers are "up to date" on these shots. The entire scheme is irrational and cannot advance the government's purported interests.

IV. The District court erred in holding that the Nurses' claims were not redressable

The CMS mandate requires healthcare workers to be fully vaccinated, not any version of "up to date." The District Court erred in holding that enjoining EO 283 would not redress these Nurses' harm. The Nurses were all terminated in accordance with the EO's deadline of April 11, 2022 and Katie Sczesny was specifically told that her exemption requests were denied because of EO 283. Regardless, the Nurses would not have even had to apply for exemptions but for EO 283. Enjoining EO 283 would allow the Nurses to return to work.

Additionally, it is anathema to the Constitution to allow a government officials to recruit and order private employers to do something which he himself

cannot do and then hold that the action cannot be addressed by enjoining the government official. The source of the harm is the Executive Order and it is that which must be enjoined.

V. Granting the injunction will preserve the status quo, prevent irreparable harm to the Nurses, will not result in irreparable harm to the President or the government, and will serve the public good

An injunction would simply preserve the status quo while the constitutionality of EO 283 is considered by the federal courts. It should be granted here because it will prevent irreparable harm to the Nurses and will not result in irreparable harm to the government. There is no irreparable harm to the government in enjoining EO 283 because "the Government does not have an interest in the enforcement of an unconstitutional law." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Moreover, there are alternative and constitutional methods that the government has at its disposal to achieve its interest of stopping the spread of Covid.

In contrast, the likelihood of irreparable harm to the Nurses is immense. EO 283 require the Nurses to undergo an irreversible medical procedure that carries risk or lose their jobs and become effectively unemployable in New Jersey in their field. Either outcome constitutes irreparable harm because both violate the doctrine of unconstitutional conditions, which prohibits government coercion. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (recognizing that the issue in constitutional conditions cases is "coercion"). The coercion is the harm.

If the Nurses submit to the government coercion, what is done to their bodies cannot be undone. If an individual submits to the coercion and is injured by the pharmaceuticals, which do carry risk, any route of monetary recovery leads to actors that are immunized from liability. In addition, if the Mandate is later found to be unconstitutional, there is no adequate remedy at law for the harm done from the coercion and having been forced to comply with an unconstitutional intrusion on their bodies and privacy.

Enjoining EO 283 is also in the public interest. EO 283 create two classes of people based on medical status, and then relegate the disfavored class into an underclass for which it is difficult to earn a livelihood. Allowing this caste system to go into effect would constitute irreparable harm, not just to the Nurses, but to the country. The public interest is served in preserving the status quo. *See Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.,* 42 F.3d 1421, 1427 (3d Cir. 1994) (noting that "[a]s a practical matter, if a Appellant demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the Appellant").

CONCLUSION

The Executive Orders mandating that these Nurses undergo a novel medical procedure that carries risk of injury and death is a massive intrusion on Nurses' rights

to liberty and privacy, recognized by the substantive due process clause of the Fourteenth Amendment. Under strict scrutiny they are plainly unconstitutional.

The Executive Orders have already worked irreparable harm and will continue to work irreparable harm as long as they continue because an unconstitutional condition imposed on individuals is itself irreparable harm.

For the foregoing reasons, it is respectfully requested that the Court enter an order reversing the District Court's denial of the Nurses' request for a preliminary injunction and remanding to enjoin Hunterdon Medical Center, Governor Murphy, and the State of New Jersey from enforcing the Executive Orders.

Respectfully submitted,

Law Offices of Dana Wefer, LLC
Attorney for the Nurses

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: September 6, 2022

COMBINED CERTIFICATIONS

I, Dana Wefer, counsel for the Plaintiffs/Appellants hereby certify as follows:

1) I am a member of the Bar of the Third Circuit Court of Appeals;

2) The brief complies with the word county and typeface requirements set forth in Federal Rule of Appellate Procedure 27. The word count of this electronic brief is 12,135 words exclusive of the Table of Authorities and Table of Contents and is typed in Times New Roman font, 14-point type.
3) The brief and joint appendix will be served on the government contemporaneously by filing with ECF;
4) The electronic brief and paper copies of the briefs are identical;
5) This brief and all associated documents were run through Windows Security Virus & Threat detection software on September 6, 2022 before uploading. No threats were found.

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: September 6, 2022

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-2230

KATIE SCZESNY, MARIETTE VITTI, DEBRA HAGEN, AND JAIME RUMFIELD,

Plaintiffs-Appellants

v.

Governor PHILIP MURPHY,

Defendant-Appellee,

On appeal from the United States District Court of New Jersey's denial of a temporary restraining order pursuant to *Fed. R. Civ. P.* 65

JOINT APPENDIX VOLUME I

Pages 1-37

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KATIE SCZESNY, JAMIE RUMFIELD, DEBRA HAGEN, and MARIETTE VITTI, Plaintiffs, vs. THE STATE OF NEW JERSEY, GOVERNOR PHILIP MURPHY (in his official and personal capacity) Defendants.	IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CIVIL ACTION

Notice of Appeal

Notice is hereby given that Plaintiffs in the above named case hereby appeal to the United States Court of Appeals for the Third Circuit.

Appellants include: Katie Sczesny, Jamie Rumfield, Debra Hagen, and Mariette Vitti.

Order appealed: Opinion & Order Denying Injunction (ECF 20), entered in this action on June 7, 2022.

Respectfully Submitted,

Dated: July 6, 2022

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

KATIE SCZESNY *et al.*, Plaintiffs, v. THE STATE OF NEW JERSEY, GOVERNOR PHILIP MURPHY (in his official and personal capacity), Defendants.	Civ. No. 22-2314 (GC) **ORDER**

CASTNER, District Judge

For the reasons stated in this Court's Opinion on this same day,

IT IS on this 7th day of June 2022,

ORDERED that Plaintiffs' Application for a Temporary Restraining Order and/or Preliminary Injunction (ECF No. 2) is **DENIED**; and it is further

ORDERED that Defendants shall respond to the Complaint by no later than July 5, 2022.

Georgette Castner
GEORGETTE CASTNER, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

KATIE SCZESNY *et al.*, Plaintiffs, v. THE STATE OF NEW JERSEY, GOVERNOR PHILIP MURPHY (in his official and personal capacity), Defendants.	Civ. No. 22-2314 (GC) **OPINION**

CASTNER, District Judge

THIS MATTER comes before the Court on the Verified Complaint and Brief in Support of Application for a Temporary Restraining Order and/or Preliminary Injunction (the "Application"), filed by Dana Wefer, attorney for Plaintiffs Katie Sczesny, Jamie Rumfield, Debra Hagen, and Mariette Vitti (collectively, "Plaintiffs"). (ECF Nos. 1, 2.) On May 9, 2022, Defendants State of New Jersey and Governor Philip Murphy (collectively, "Defendants") opposed the Application. (ECF No. 10.) On May 13, 2022, Plaintiffs filed a Reply. (ECF No. 13.) The Court has decided the Application based on the written submissions of the parties and without oral argument, pursuant to Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the reasons stated herein, Plaintiffs' Application is **DENIED**.

I. BACKGROUND

A. The Parties

This case involves a constitutional challenge to Executive Orders 283, 290, and 294 issued in January, March, and April 2022, respectively (the "Executive Orders"). Plaintiffs are "current employees of Hunterdon Medical Center" and are subject to the Executive Orders. (Verified Compl. ¶ 7, ECF No. 1.) Defendants are the State of New Jersey ("the State") and New Jersey Governor Philip Murphy, in his official and personal capacity ("Governor Murphy"). (*Id.* ¶ 8.) Hunterdon Medical Center ("Hunterdon") is not a party to this action.[1]

Plaintiffs assert that, taken together, the Executive Orders "require[] Plaintiffs to receive a 'booster' shot as a condition of working in healthcare in New Jersey," (*id.* ¶ 2), which violate the doctrine of unconstitutional conditions, and the due process and equal protection clauses of the Fourteenth Amendment, (TRO Appl. 2, ECF No. 2). Plaintiffs seek an order "enjoining [Executive Order] 283 and enjoining [Hunterdon] and Governor Murphy from enforcing it in any way." (*Id.* at 40; *see also* Proposed Order 1–2, ECF No. 2-2.)

B. The Executive Orders

On January 19, 2022, Governor Murphy issued Executive Order 283. *See* Executive Order 283 (2022) (hereinafter, "EO 283"). EO 283 requires "covered health care settings" to "maintain a policy that requires 'covered workers' to provide adequate proof that they are up to date with their COVD-19 vaccinations," including boosters for which they are eligible. *Id.* ¶¶ 1–2, 8. EO 283 provides schedules by which workers must be "up to date with their COVID-19 vaccinations." *Id.* ¶¶ 1–2.

[1] While Plaintiffs appear to have served Hunterdon, (Certificate of Service, ECF No. 4), and seek relief against Hunterdon, (Verified Compl. ¶ 100), Plaintiffs do not identify Hunterdon in the caption or as a party in the Verified Complaint, (*id.* ¶¶ 7–8).

Covered health care settings include "acute, pediatric, inpatient rehabilitation, and psychiatric hospitals, including specialty hospitals, and ambulatory surgical centers," and "Federally Qualified Health Centers." *Id.* ¶ 6. Covered workers include full- and part-time employees at covered settings. *Id.* ¶ 7. Covered workers are "up to date with COVID-19 vaccinations" when they have received "a primary series, which consists of either a 2-dose series of an mRNA COVID-19 or a single dose COVID-19 vaccine, and any booster doses for which they are eligible as recommended by the CDC." *Id.* ¶ 8.

On March 2, 2022, Executive Order 290 updated the schedules for covered workers to provide proof of "up to date vaccination," including a booster dose. *See* Executive Order 290 (2022) (hereinafter, "EO 290").

On April 13, 2022, Executive Order 294 clarified the definition of "up to date" with COVID-19 vaccinations to include only the first booster for which the covered worker is eligible, and not the second booster "because the CDC has not recommended that a second booster dose is necessary to be up to date with the COVID-19 vaccination at this time[.]" *See* Executive Order 294 (2022) (hereinafter, "EO 294").

Accordingly, taken together, EOs 283, 290 and 294 require covered settings to institute policies requiring covered workers to get vaccines, including the first booster for which they are eligible, in accordance with the schedules set forth in EO 290. There are two different schedules: one for covered settings subject to the "CMS Rule" and the other for covered settings not subject to the "CMS Rule." *See* EO 283 ¶¶ 1–2, EO 290 ¶¶ 1–2. The "CMS Rule" is a rule that Centers for Medicare & Medicaid Services ("CMS") issued on November 5, 2021, requiring most Medicare- and Medicaid-certified providers to establish COVID-19 vaccination requirements for staff because vaccination of healthcare workers was "necessary for the health and safety of

individuals to whom care and services are furnished." *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022) (citing Interim Final Rule, 86 Fed. Reg. 61561, 61616–61627 (Nov. 5, 2021)).[2] On January 13, 2022, the United States Supreme Court upheld the CMS Rule by staying injunctions of it imposed by lower courts. *Id.* at 653–55.

Covered settings subject to the CMS Rule must maintain a policy requiring covered workers to provide adequate proof that they are up to date with COVID-19 vaccinations, including the first booster for which they are eligible by April 11, 2022, or within three weeks of becoming eligible for the booster, whichever is later. EO 283 ¶ 1; EO 290 ¶ 1. Covered settings not subject to the CMS Rule must maintain a policy that requires covered workers to provide adequate proof that they are up to date with their COVID-19 vaccinations, including the first booster for which they are eligible by May 11, 2022, or within three weeks of becoming eligible for a booster dose, whichever is later. EO 283 ¶ 2; EO 290 ¶ 2.[3]

Pursuant to the Executive Orders, covered settings "must include a disciplinary process for covered workers' noncompliance, which may include termination of employment." EO 283 ¶ 4. A covered setting must take "the first step toward bringing a noncompliant covered worker into compliance as part of the disciplinary policy . . . within two weeks of the [above dates]." EO 290 ¶ 3.

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[2] In promulgating the CMS Rule, CMS made findings that these vaccine requirements were necessary for the safety of patients based on data showing how quickly COVID-19 can spread among healthcare workers to patients, particularly if the healthcare worker was unvaccinated. *Id.* at 651.

[3] Additionally, the Executive Orders provide schedules for unvaccinated covered workers to receive their primary series of a COVID-19 vaccination. (EO 283 ¶¶ 1.a., 2.a.; EO 290 ¶¶ 1.a., 2.a.) The Court does not consider these sections in its analysis because Plaintiffs have already received their primary series of a COVID-19 vaccination. (TRO Appl. 1.)

A covered setting may institute a "vaccination policy that includes additional or stricter requirements so long as such policy comports with the minimum requirements of this Order." EO 283 ¶ 9. And, a covered setting must provide "appropriate accommodations, to the extent required by federal and/or state law, for employees who request and receive an exemption from vaccination because of a disability, medical condition, or sincerely held religious belief, practice, or observance." *Id.* ¶ 10.

C. Plaintiffs' Alleged Injuries

Plaintiffs do not want to receive a booster dose because they "want to make their own decisions with regard to what is injected into their bodies, based on their individual circumstances and health." (TRO Appl. 10.) Each plaintiff submits a sworn declaration explaining personal reasons for not wanting the booster. (*See* Verified Compl., Hagen Decl. Ex. A; Rumfield Decl. Ex. B; Sczesny Decl. Ex. C; Vitti Decl. Ex. D.)

Hagen avers that she is "neurologically . . . high risk," and experienced "pain, numbness, and tingling [in her legs], headaches, dizziness, inability to concentrate and severe fatigue" after her single-dose vaccine. (Hagen Decl. ¶¶ 16, 19.) On February 5, 2022, Hagen submitted a medical exemption form to Hunterdon's "occupational health" department, which denied her request on February 6, because Hagen's "exact reaction was not described and that a reaction to the J&J vaccine does not excuse [her] from receiving one of the MRNA boosters." (*Id.* ¶ 21.) Hagen also sent a letter to the head of occupational health at Hunterdon, requesting a "temporary medical exemption" and citing "articles explaining the reaction [she was] having [to the vaccine] and that [the vaccine] has been found to be an auto-immune response to the spike protein in the vaccines, which causes 'Long Covid' symptoms in certain people." (*Id.* ¶ 24.) Hunterdon denied

that request on April 12, 2022, stating that "they reviewed [her] case, that [they] contacted the CDC[,] and that they cannot grant [her] exemption." (*Id.* ¶ 25.)

Rumfield avers that she experienced a "severe headache, body aches, chills, fever, and a red rash surrounding the injection site" after her two-dose mRNA vaccine. (Rumfield Decl. ¶ 5.) She caught COVID-19 after receiving the vaccination. (*Id.* ¶ 6.) Rumfield submitted a request for an extension to get the booster 90-days after her positive test, which both Hunterdon and her primary doctor denied, stating that "the booster can be administered as soon as [Rumfield] recovered from COVID-19 and completed the required isolation period." (*Id.* ¶ 9.) She also requested a "religious exemption," which Hunterdon denied on February 16, 2022, on the grounds that "an accommodation for [her] religious beliefs [could not] be granted without creating an undue hardship on the organization." (*Id.* ¶ 10.)

Sczesny is pregnant and does not want to get the booster while pregnant. (Sczesny Decl. ¶¶ 4, 14.) She requested an extension for the deadline to get a booster, to which she claims Hunterdon is giving her "the runaround." (*Id.* ¶ 16.) She states that Hunterdon "cite[s]" "Governor Murphy's executive order . . . as the reason [she] must receive the booster or lose [her] job." (*Id.*)

Vitti avers that, after receiving the second dose of her vaccine, she experienced heart palpitations. (Vitti Decl. ¶¶ 6, 7.) She fears that "taking more of the COVID-19 shots will hurt [her]." (*Id.* ¶ 10.) Vitti does not allege whether she sought a medical or religious exemption from Hunterdon.

According to Plaintiffs, they were "slated to be fired from their jobs on April 24, 2022 because Governor Phil Murphy ha[d] ordered their employers to discipline them if they refuse to be injected again." (TRO Appl. 1.) Hagen allegedly "resigned on Friday to avoid the termination on her record, but wishes to return to work immediately if Executive Order 283 is enjoined." (*Id.*

1 n.1.) Rumfield avers that she is "being suspended/terminated 4/12/22" for her refusal to get the booster. (Rumfield Decl. ¶ 11.) Sczesny avers that she "was informed that [she had] until April 11, 2022 to get the booster, as per the state mandate set in place by Governor Murphy." (Sczesny Decl. ¶ 9.)

On April 21, 2022, Plaintiffs filed a Verified Complaint and Application in this Court seeking a preliminary injunction from enforcement of the Executive Orders. In addition to their declarations, Plaintiffs submit exhibits. (ECF Nos. 1, 2-1.) The exhibits include dictionary definitions of "vaccine," articles relating to Plaintiffs' arguments, and the Executive Orders. (*See* Wefer Decl., ECF No. 2-1.) On May 9, 2022, Defendants filed an Opposition that also included exhibits. (ECF No. 10.)[4] The exhibits include articles and data regarding the spread of COVID-19 and vaccine effectiveness, the Executive Orders, and information on Hunterdon. (Vannella Decl., ECF No. 10-1.) On May 13, 2022, Plaintiffs filed a Reply. (ECF No. 13.) The Application is currently before the Court.

II. PARTIES' ARGUMENTS

A. Plaintiffs' Application and Reply

Plaintiffs primarily argue that the Executive Orders are unconstitutional under the substantive due process clause of the Fourteenth Amendment because they interfere with the fundamental rights of privacy and "declin[ing] unwanted medical procedures." (TRO Appl. 11–12.) In support of their claims, Plaintiffs cite to *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (acknowledging the fundamental right to "bodily integrity"); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 277 (1990) (noting that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse

[4] Defendants filed their Opposition late with consent of Plaintiffs and leave of the Court. (*See* ECF No. 9.)

medical treatment"); and *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 527 (3d Cir. 2018) (discussing the "individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions") (internal quotation marks and citations omitted). (TRO Appl. 11–12.)

Plaintiffs assert that these cases establish that there is a fundamental right to refuse the COVID-19 vaccines and booster and that the Supreme Court case, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a vaccine requirement for smallpox, does not apply here. (*Id.* 11–13.) Plaintiffs' principal argument distinguishing *Jacobson* is that the COVID-19 "vaccines" are not truly "vaccines" as was the smallpox vaccine in *Jacobson*. (TRO Appl. 14–21.)[5] Plaintiffs also argue that the factual differences between EO 283 and the regulation at issue in *Jacobson* are so great that *Jacobson* does not apply. Specifically, Plaintiffs argue that COVID-19 is not as deadly as smallpox; that the COVID-19 vaccines have existed for less than two years unlike the smallpox vaccine that was a century old; that Jacobson was issued a modest fine as punishment for refusing the vaccine whereas, here, Plaintiffs would become unemployable; and that EO 283 is an executive action with no explicit authorization as opposed to the legislative action in *Jacobson*. (TRO Appl. 12–13; Reply 6–12, ECF No. 13.)

Accordingly, Plaintiffs argue that the Court should apply strict scrutiny when reviewing the Executive Orders because *Jacobson* does not apply, and the Executive Orders involve the fundamental right of bodily integrity. (*See* TRO Appl. 11–12.) Plaintiffs assert several reasons why the Executive Orders are not "narrowly tailored to achieve the [State's] asserted interest" of combatting the spread of COVID-19, (*id.* 22): (1) the advisory panels of the CDC and FDA

[5] For clarity and consistency, the Court refers to the COVID-19 "vaccines" as "vaccines" throughout this Opinion. The Court still addresses Plaintiffs' argument that they are not actually "vaccines" in full. *See infra* IV.B.1.

recommended against third shots, (*id.* 24); (2) the vaccines carry serious health risks, (*id.* at 26); (3) the vaccines are of "questionable efficacy," (*id.* 29); (4) the vaccines are "investigatory and experimental," (*id.* 30); (5) most people "experience symptoms of illness after the injections," (*id.* 31); (6) the corporations manufacturing the injections have "extensive track records of criminality, fraud, and product safety issues," (*id.* 32); (7) the "FDA is not working properly to protect the public from dangerous pharmaceuticals," (*id.* 34); (8) the Executive Orders put "Plaintiffs on a 'vaccine' schedule mandated by a single federal government bureaucrat," the director of the CDC, (*id.* 35–36); (9) the Executive Orders fail to account for natural immunity, (*id.* 37); (10) there are several "FDA authorized treatments available" for COVID-19, (*id.* 38); and (11) COVID-19 has a "low infection fatality rate even without treatment," (*id.*). Alternatively, Plaintiffs argue that EO 283 also fails under rational basis review because the "government's asserted interest, combatting the spread of [COVID-19], is not rationally related to EO 283 since the pharmaceuticals do not prevent the spread of [COVID-19]." (*See* Reply 2, 12–14.)

Plaintiffs also argue that the Executive Orders violate their rights under the equal protection clause because they treat Plaintiffs differently based on their exercise of their fundamental right to decline the vaccines. (TRO Appl. 2.) Moreover, Plaintiffs argue that the Executive Orders deprive them of the ability to use their licenses without due process of law. (*Id.*)

With respect to Plaintiffs' request for immediate injunctive relief, Plaintiffs argue that the factors—irreparable harm to the moving party, harm to the non-moving party, and the public interest—favor granting the preliminary injunction because "government coercion" is "irreparable harm *per se*" and the government has no interest in enforcing an unconstitutional policy. (*Id.* 39–40.) Plaintiffs further assert that a preliminary injunction is necessary to "preserve the status quo" while the federal courts litigate the constitutionality of the Executive Orders. (*Id.* 39.)

B. Defendants' Opposition

Defendants first note that the Eleventh Amendment bars this lawsuit against the State of New Jersey and thus, the lawsuit may move forward only against Governor Murphy in his individual capacity and only with respect to prospective injunctive relief. (Opp'n 10 n.6, ECF No. 10.) Defendants also argue that a preliminary injunction is inappropriate because Plaintiffs' lawsuit will ultimately not prevail on the merits and the remaining equitable factors for preliminary injunction do not favor granting an injunction. (*Id.* 10–11, 19–22.)

As to the merits, Defendants assert that *Jacobson* applies to the Executive Orders. (*Id.* 11 (citing *Messina v. Coll. of New Jersey*, 2021 WL 4786114, at *6 (D.N.J. Oct. 14, 2021)).) Defendants argue that, because *Jacobson* controls, the Court should review the Executive Orders under rational basis review, which they "easily" pass. (*Id.* 12–14 (collecting cases and quoting *Smith v. Biden*, 2021 WL 5195688, at *7 (D.N.J. Nov. 8, 2021)).) Defendants also argue that Plaintiffs failed to show irreparable harm, (*id.* 19–20), and that public interest favors allowing the State to enforce its policies, (*id.* 21–22).

III. LEGAL STANDARD

Injunctive relief is an "extraordinary remedy," which courts should grant "only in limited circumstances." *Westchester Fire Ins. Co. v. Glob. Real Constr., LLC*, 2009 U.S. Dist. LEXIS 3481, at *3 (D.N.J. Jan. 16, 2009) (citing *Kos Pharms Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)). The decision to grant preliminary injunctive relief is within the sound discretion of the district court. *See id.*; *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), *as amended*, (June 26, 2017).

To obtain a preliminary injunction, a party must show (1) a likelihood of success on the merits, (2) that it will suffer irreparable harm if the injunction is denied, (3) that granting preliminary relief will not result in even greater harm to the nonmoving party, and (4) the public

interest favors such relief. *See Reilly*, 858 F.3d at 177, 179; *Perez v. Pena*, 2020 U.S. Dist. LEXIS 126415, at *5 (D.N.J. July 17, 2020). First, the moving party must meet the first two "most critical" factors: "that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Reilly*, 858 F.3d at 179 (internal citations omitted). Second, if the moving party meets "these gateway factors," the court "then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*

Courts in this district have interpreted an application for a temporary restraining order ("TRO") under the same framework as an application for the issuance of a preliminary injunction. *Perez*, U.S. Dist. LEXIS 126415, at *5; *see also NutraSweet Co. v. Vit-Mar Enters., Inc.*, 112 F.3d 689, 693 (3d Cir. 1997) (noting that the "Supreme Court [has] held that [a] [TRO] should be treated as a preliminary injunction").

IV. DISCUSSION

A. Sovereign Immunity

As a threshold matter, Defendants raise the issue of sovereign immunity as a bar to suit against the State. (Opp'n 10 n.6.) Plaintiffs do not contest this argument.

Plaintiffs bring the Verified Complaint against the "State of New Jersey, Governor Philip Murphy (in his official and personal capacity)." The Eleventh Amendment bars suits against states. U.S. CONST. amend. XI; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 697 (3d Cir. 1996). However, a plaintiff may sue a state official for prospective injunctive relief. *Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254–55 (2011); *Blanciak*, 77

F.3d at 697–98. Accordingly, the Court does not consider Plaintiffs' claims against the State as sovereign immunity would bar these claims and assesses only Plaintiffs' request for an injunction preventing Governor Murphy from enforcing the Executive Orders.

B. Likelihood of Success on the Merits

The Court turns to Plaintiffs' arguments in favor of a preliminary injunction. Plaintiffs assert a number of counts in the Verified Complaint, (Verified Compl. ¶¶ 68–97), but raise only due process, equal protection, and doctrine of unconstitutional conditions claims in the Application, (*id.* ¶¶ 68–78; TRO Appl. 2). The Court assesses the likelihood of success on the merits of these claims.

1. *Substantive Due Process – Fundamental Rights*

Given the United States Supreme Court precedent and persuasive authority from other Circuit and district courts, Plaintiffs fail to demonstrate likelihood of success on the merits of their claim that the Executive Orders violate their liberty rights under the due process clause of the Fourteenth Amendment. Plaintiffs argue that the Executive Orders encroach on their fundamental right to "decline unwanted medical procedures" and thus strict scrutiny review applies to the Executive Orders. (TRO Appl. 11–12.) To make this argument, Plaintiffs assert that *Jacobson* does not apply to the Executive Orders. (*Id.* 12–13.) For the following reasons, the Court finds that *Jacobson* and rational basis review apply to the Executive Orders, and the Executive Orders are constitutional under rational basis review.

a. Applicability of *Jacobson*

In *Jacobson v. Massachusetts*, the United States Supreme Court upheld the constitutionality of a state law requiring members of the community to get smallpox vaccines when the "board of health" of the community recommended vaccination. 197 U.S. at 12, 39. Pursuant

to the state law, the city of Cambridge adopted regulations requiring the "vaccination or revaccination of all inhabitants of Cambridge." *Id.* at 12. Jacobson, a resident of Cambridge, refused the vaccine and the state criminally charged him. *Id.* at 13. After a jury found him guilty under the statute and the court ordered him to pay $5 pursuant to the statute, Jacobson appealed to the Massachusetts Supreme Court and ultimately the United States Supreme Court. *Id.* at 14, 22. He argued that the state statute requiring the smallpox vaccination violated his Fourteenth Amendment rights to "life, liberty, or property," and "equal protection under the laws." *Id.* at 14.

The Supreme Court rejected Jacobson's argument and upheld the vaccine requirement. The Court emphasized that the "liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* at 26. Rather, the Court recognized that "[t]here are manifold restraints to which every person is necessarily subject for the common good," *id.*, including the "safety of the general public," *id.* at 29, and a community's "right to protect itself against an epidemic of a disease which threatens the safety of its members," *id.* at 27.

Applying these principles to the Massachusetts law, the Supreme Court used a deferential standard to review state legislative action that aimed to "protect the public health, public morals, or the public safety" during the smallpox epidemic. *Id.* at 30–32. In doing so, the Court stated that it would strike down such a regulation only if it had no "real or substantial relation to those objects" or if it amounted to "a plain, palpable invasion of rights secured by fundamental law." *Id.* at 31. Courts interpret the review applied in *Jacobson* as "rational basis review." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J. concurring) (noting that the *Jacobson* court "essentially applied rational basis review" to the Massachusetts state law); *Smith*,

2021 WL 5195688, at *6–7 (interpreting *Jacobson* to apply "rational basis" review to the smallpox vaccine mandate).

Plaintiffs argue that the Executive Orders are distinguishable from the Massachusetts law and thus *Jacobson* does not control this case. (TRO Appl. 12–13.) Plaintiffs assert: (1) the COVID-19 "vaccine" plus booster is not a vaccine; (2) the "consequence[]" for refusing the vaccine in *Jacobson* was a "modest fine" while the Executive Orders make Plaintiffs "unemployable in their field of work;" (3) COVID-19 is not "as deadly as smallpox;" (4) the COVID-19 "vaccines" "have existed for less than 2 years and are still in trials," and (5) the legislature in *Jacobson* "explicitly authorized" the local regulation while here the Executive Orders are "executive action with no explicit authorization." (*Id.* 13–14.)

First, Plaintiffs argue that the COVID-19 "vaccine" plus booster are not true vaccines because the mRNA and DNA COVID-19 "vaccines" contain "synthetic gene material" and not "pieces of microorganisms." (*See* Wefer Decl. Ex. Nos. 4–13, ECF No. 2-1 (attaching dictionary definitions of "vaccine" indicating that prior definitions of "vaccine" include "pieces of microorganisms" in the definition); TRO Appl. 14–21.) Plaintiffs also enclose a Centers for Disease Control and Prevention ("CDC") "glossary," dated October 29, 2021, defining the term "vaccine" as "a suspension of live (usually attenuated) or inactivated microorganisms (e.g., bacteria or viruses) or fractions thereof administered to induce immunity and prevent infectious disease and their sequelae." (*See* Centers for Disease Control and Prevention, Glossary, Wefer Decl. Ex. 14, ECF No. 2-1.)

Defendants submit the position of the CDC indicating that the Pfizer-BioNTech, Moderna, and Janssen "vaccines" are "approved or authorized vaccines" to prevent COVID-19. (Centers for Disease Control and Prevention, "Stay Up to Date with Your COVID-19 Vaccines," Vannella

Decl. Ex. 6, ECF No. 10-2.) In defining "up to date with [] COVID-19 vaccines," the CDC includes "all doses in the primary series and one booster when eligible." (*Id.*)

Following its review of the parties' submissions, the Court finds that the CDC opines that the primary dose and booster, when eligible, are "vaccines." (*See id.*; *see also* Centers for Disease Control and Prevention, "What You Need to Know About Variants," Vannella Decl. Ex. 5, ECF No. 10-2 (noting that "[p]eople who are up to date on vaccines, including booster doses when eligible[,] are likely to have stronger protection against COVID-19 variants"). The Court defers to "the expertise of the CDC and its guidance with respect to COVID-19," including its definition of "vaccine." *Messina*, 2021 WL 4786114, at *8 (deferring to the CDC for the definition of "vaccine"); *see also Jacobson*, 197 U.S. at 28 (noting that the Court cannot "usurp the functions" of the board of health's determination that the vaccine was necessary "in order to protect the public health and secure the public safety"). Thus, the Court rejects Plaintiffs' argument that the COVID-19 "vaccines," including the first booster when eligible, are not vaccines. *See Smith*, 2021 WL 5195688, at *6; *Messina*, 2021 WL 4786114, at *8.

Second, Plaintiffs argue that the law in *Jacobson* is distinguishable from the Executive Orders because it imposed only a "modest fine" for refusing vaccination, while Plaintiffs face the decision between termination from their jobs and receiving an unwanted booster dose. (*See* TRO Appl. 13.) The Court first notes that the punishment for refusing to get the smallpox vaccine in *Jacobson* was more than a "modest fine," but rather, a fine and criminal prosecution. *See* 197 U.S. at 25–26. Further, the Executive Orders require covered settings to provide workers "exemption[s]" from vaccination to the extent required by state or federal law, due to disabilities, medical conditions, or sincerely held religious beliefs, practices, or observances. EO 283 ¶ 10. By requiring exemptions, the Executive Orders do not go as far as the regulation at issue in

Jacobson, which "lacked exceptions for adults," and thus imposed only the possibility of prosecution for noncompliance. *See Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (2021) (upholding a state university policy requiring vaccination but allowing exemptions).

Third, regarding Plaintiffs' arguments that COVID-19 is not as "deadly as smallpox" and that the vaccines are not effective, it is not this Court's function to assess the deadliness of COVID-19 or "determine the most effective method to protect the public against COVID-19." *Messina*, 2021 WL 4786114, at *8; *see also Jacobson*, 197 U.S. at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease.") However, the Court will note that COVID-19 has had a widespread and deadly impact. Pursuant to Defendants' submission, in the United States approximately 995,000 people have died from COVID-19, (Centers for Disease Control and Prevention, COVID Data Tracker, Vannella Decl. Ex. 1, ECF No. 10-2), and in New Jersey, approximately 30,500 people have died from COVID-19, (State of New Jersey, Department of Health, COVID-19 Dashboard, Vannella Decl. Ex. 2, ECF No. 10-2). The Court rejects Plaintiffs' attempt to distinguish *Jacobson* on the grounds that COVID-19 is less deadly than smallpox and the COVID-19 vaccines are not as effective as the smallpox vaccine.

Finally, Plaintiffs argue that, unlike in *Jacobson*, where the city of Cambridge had "explicit authorization" from the state to institute a vaccine mandate, here, Governor Murphy did not have explicit authorization to issue the Executive Orders. (TRO Appl. 13.) This argument is unfounded. The Executive Orders cite New Jersey's Emergency Health Powers Act, N.J.S.A. 26:13-1 *et seq.*, and Civilian Defense and Disaster Control Act, N.J.S.A. App. A:9-33 *et seq.*, as authoritative bases. New Jersey courts have upheld this exercise of authority. *See New Jersey State Policemen's Benevolent Ass'n v. Murphy*, 271 A.3d 333, 339–40 (App. Div. 2022) (finding that "[i]t is beyond

rational dispute that the Governor possessed the authority to issue Executive Order 283 under the Civilian Defense and Disaster Control Act" and also noting that, "[a]lthough unnecessary to our determination, we find the Governor was also empowered by the Emergency Health Powers Act").

Further, executive orders issued within a governor's expressly granted authority in the Civilian Defense and Disaster Control Act carry the force of law. *See* N.J.S.A. App. A:9-45 (granting the governor authority to issue executive orders and stating that "[a]ll such orders, rules and regulations having to do with the conduct of persons which shall be adopted by the Governor and promulgated as provided herein shall be binding upon each and every person within this State"). Here, Governor Murphy acted within the express delegation of authority by the New Jersey Legislature. Therefore, the Executive Orders carry the force of law. Accordingly, Plaintiffs have not demonstrated that the Executive Orders are distinct from the regulations at issue in *Jacobson*.

The Court joins numerous other courts, both in this district and across the country, to conclude that *Jacobson* established that there is no fundamental right to refuse vaccination in the context of COVID-19 and thus rational basis review applies to vaccine requirements. *Messina*, 2021 WL 4786114, at *9 (citing *Jacobson* and noting, "[a]lthough Plaintiffs have a right to refuse unwanted medical treatment, that right is not absolute"); *Smith*, 2021 WL 5195688, at *6 (noting that "every court that has considered the constitutionality of a COVID-19 vaccine mandate by an employer or university has deemed *Jacobson* controlling, rejected claims of a fundamental right to refuse a vaccine, and applied a rational basis standard of review"); *Klaassen*, 7 F.4th at 593 ("Given *Jacobson v. Massachusetts*, which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2") (internal citation omitted); *Norris v. Stanley*, 2021 WL 4738827, at *2 (W.D.

Mich. Oct. 8, 2021), *appeal dismissed*, 2021 WL 6803021 (6th Cir. Nov. 24, 2021) (noting that "[o]ver the last year and a half, courts have looked to *Jacobson* to infer that a rational basis applies to generally applicable vaccine mandates"); *Williams v. Brown*, 2021 WL 4894264, at *3, 8 (D. Or. Oct. 19, 2021) (applying *Jacobson* and rational basis review to state health department rules requiring "healthcare providers and healthcare staff who work in a healthcare setting" to be fully vaccinated); *Johnson v. Brown*, 2021 WL 4846060, at *13 (D. Or. Oct. 18, 2021) ("As *Jacobson* reveals, the right to refuse vaccination is not deeply rooted in this nation's history."); *Mass. Corr. Officers Fed. Union v. Baker*, 2021 WL 4822154, at *6 (D. Mass. Oct. 15, 2021) ("Since *Jacobson*, courts have rejected the idea of a fundamental right to refuse vaccination.").

Thus, the Court analyzes the Executive Orders under rational basis review.[6]

b. Rational Basis Review

"Under rational basis review, the action of the government 'need only be rationally related to a legitimate government interest.'" *Smith*, 2021 WL 5195688, at *7 (quoting *Wilce v. Dir., Off. of Workers' Comp. Programs*, 144 F. App'x 223, 226 (3d Cir. 2005) (citing *Heller v. Doe*, 509 U.S. 312, 319–320 (1993))). "Governmental action is rationally related to a legitimate goal unless the action is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare." *Williams*, 2021 WL 4894264, at *8 (quoting *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1193 (9th Cir. 2013)) (internal quotation marks omitted).

The State's interests are stemming the spread of COVID-19, ensuring "the health and safety of [its] most vulnerable residents," and "maintaining a safe environment for its workforce and the effective and continued operation of essential health care services." (Opp'n 1, 14.) The

[6] The Court need not address Plaintiffs' strict scrutiny arguments (TRO Appl. 22–39) because it has determined that *Jacobson* and rational basis review apply to its review of the Executive Orders.

State also asserts that it has an interest in reducing the "risks of serious illness," reducing the "transmission of the virus to others," and "decreas[ing] the risk of hospitalization." (*Id.* 1.)

Here, "there can be no serious question that the government has a legitimate interest in preventing the spread of COVID-19," *Smith*, 2021 WL 5195688, at *7, and "protecting the health of its citizens," *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., Gorsuch, J., and Thomas, J., dissenting). The Supreme Court has characterized this interest as "compelling." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67 ("Stemming the spread of COVID–19 is unquestionably a compelling interest . . ."); *S. Bay United Pentecostal Church*, 140 S. Ct. at 1614 (Kavanaugh, J., Gorsuch, J., and Thomas, J., dissenting). And, for the purpose of their Application, Plaintiffs assume that the State has a compelling interest. (TRO Appl. 22.) Additionally, courts have found that a state's interests in "slowing the spread of COVID-19, protecting [the state's] citizens, . . . and preserving healthcare resources and protecting patients" are legitimate interests. *See Williams*, 2021 WL 4894264, at *9; *see also, e.g.*, *Johnson*, 2021 WL 4846060, at *14.

The remaining question is whether the Executive Orders are rationally related to the State's interests in stemming the spread of COVID-19, reducing the risk of serious illness or hospitalization, protecting its most vulnerable residents, and maintaining a safe environment for the continued operation of healthcare services. (*See* Opp'n 1, 14); *Smith*, 2021 WL 5195688, at *7. The Court finds such a rational relationship exists. First, numerous other courts have "easily conclude[d] that such a rational relationship exists—vaccines are a safe and effective way to prevent the spread of COVID-19." *Id.* In the context of COVID-19 vaccines as a requirement of employment, "[c]ourts have repeatedly refused to enjoin an employer's COVID-19 vaccine mandate, provided they contain legally required exemptions, finding that they pass muster under

the rational basis test." *Id.*; *see also, e.g.*, *Maniscalco v. New York City Dep't of Educ.*, 563 F. Supp. 3d 33, 39–40 (E.D.N.Y. 2021), *aff'd*, 2021 WL 4814767 (2d Cir. Oct. 15, 2021), *cert. denied*, 142 S. Ct. 1668 (2022); *Norris*, 2021 WL 4738827, at *3; *Johnson*, 2021 WL 4846060, at *16; *Mass. Corr. Officers Fed. Union*, 2021 WL 4822154, at *7; *Harsman v. Cincinnati Children's Hosp. Med. Ctr.*, 2021 WL 4504245, at *3–4 (S.D. Ohio Sept. 30, 2021). Courts have also upheld such policies as a requirement for university attendance. *E.g.*, *Messina*, 2021 WL 4786114, at *9; *Klaassen*, 7 F.4th at 593; *Harris v. Univ. of Mass., Lowell*, 557 F. Supp. 3d 304, 313–14 (D. Mass. 2021).

Second, in the context of an executive agency requiring vaccines for healthcare workers, the Supreme Court has endorsed similar mandates. *See Biden v. Missouri*, 142 S. Ct. 647, 653–55 (2022) (staying injunctions of CMS Rule requiring "covered staff" at Medicare- and Medicaid-participating healthcare centers to get vaccinated). In staying lower courts' injunctions of the CMS Rule, the Supreme Court noted that, "ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm." *Id.* at 652; *see also id.* at 653 (acknowledging that "healthcare workers and public-health organizations overwhelmingly support the [CMS Rule]," which "suggests that a vaccination requirement under these circumstances is a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose"); *see also State of Fla. v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1288, 1291–92 (11th Cir. 2021) (denying injunction of the CMS Rule and noting the agency's

finding that "it is the very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19").[7]

Third, courts have denied preliminary injunctions of similar state executive orders requiring covered settings to institute policies requiring healthcare workers to get vaccinated. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293–94 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021) (finding that plaintiffs were unlikely to succeed on the merits of the claim that the state's "emergency rule" directing hospitals and other identified healthcare entities to "continuously require" employees to be fully vaccinated was unconstitutional under the due process clause); *Does 1-6 v. Mills*, 2021 WL 4783626, at *1, *12 (D. Me. Oct. 13, 2021), *aff'd*, 16 F.4th 20 (1st Cir. 2021), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022) (denying preliminary injunction of Maine rule requiring employees of designated health centers to be vaccinated against COVID-19); *Andre-Rodney v. Hochul*, 2021 WL 5050067, at *6–7 (N.D.N.Y.

[7] While in *Biden v. Missouri* and *State of Florida v. Department of Health and Human Services*, the Supreme Court and Eleventh Circuit reviewed the CMS Rule in the context of whether it fell within the agency's rulemaking authority and whether it survived the "arbitrary and capricious" standard of review of an agency's rule under the Administrative Procedure Act, courts have drawn parallels between "rational basis" and "arbitrary and capricious" standards of review. *See Sierra Club v. United States Env't Prot. Agency*, 972 F.3d 290, 298 (3d Cir. 2020) (articulating that an agency's regulation is "arbitrary and capricious" when the agency "offer[s] only a 'conclusory statement' which 'fail[s] to articulate a rational basis for its conclusion'") (quoting *W.R. Grace & Co. v. U.S. E.P.A.*, 261 F.3d 330, 342 (3d Cir. 2001)); *Chemung Cnty. v. Dole*, 781 F.2d 963, 971 (2d Cir. 1986) (on review of agency decision, noting that "[t]he standard of review—rational basis or arbitrary and capricious—is determined by statute"); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974) (on review of Interstate Commerce Commission decision, noting that "the 'arbitrary and capricious' test does not require more" than the agency having a "rational basis" for its decision). Thus, while this Court reviews the Executive Orders under a different standard of review (constitutional rational basis) from the Supreme Court's and Eleventh Circuit's review of the CMS Rule (within the agency's statutory authority, and arbitrary and capricious), the Court still finds the decisions in *Biden v. Missouri* and *State of Florida v. Department of Health and Human Services* helpful in determining whether to uphold an executive order requiring healthcare workers at covered settings to be up to date with vaccinations.

Nov. 1, 2021) (denying preliminary injunction of state order requiring "covered entities," including hospitals, to "continuously require personnel to be fully vaccinated against COVID-19").

In *Williams*, the court stated that it "ha[d] no trouble concluding that the vaccine mandates [were] rationally related to a legitimate state interest" when the executive orders set forth the history of COVID-19 in Oregon, noted the efficacy of the vaccines, and concluded that the vaccine mandate was necessary to control the spread of COVID-19. 2021 WL 4894264, at *9; *see also Andre-Rodney*, 2021 WL 5050067, at *7 (finding that "[s]temming the spread of COVID-19 is unquestionably a compelling [state] interest . . . and requiring those who work in healthcare settings to be vaccinated is rationally related to the furtherance of that interest") (internal citations omitted); *Johnson*, 2021 WL 4846060, at *16 ("The decision to require vaccination among state executive agency employees, and critical populations such as healthcare workers and providers and education workers and volunteers, is a rational way to further the State's interest in protecting health and safety during the COVID-19 pandemic."); *Does 1-6*, 2021 WL 4783626, at *12 (finding that "[t]he State defendants have provided ample support demonstrating a rational basis for their adoption of the COVID-19 vaccine as a requirement that furthers the government's interest in protecting public health, healthcare workers, vulnerable patients, and Maine's healthcare system from the spread of COVID-19").

In this case, the Executive Orders outline the CDC's findings that the COVID-19 booster prevents further spread, that the Omicron variant has "increased transmissibility," and that "expedient and additional public health action is necessary" to prevent further spread and to prevent severe impacts on the health of individuals and the health care system due to the rapid transmissibility of the Omicron variant. EO 283 at 4 (noting that "according to the CDC, studies show after getting the primary series of a COVID-19 vaccine, protection against the virus and the

ability to prevent infection may decrease over time, in particular due to changes in variants;" and that "the CDC has reported that vaccinated people who receive a COVID-19 booster are likely to have a stronger protection against contracting and transmitting COVID-19, particularly the Omicron variant, and stronger protection against serious illness, including hospitalization and death").

The Executive Orders also cite data regarding the vaccination status of the general population and of healthcare workers, note that there are lower rates of people who have received the booster, and acknowledge that there is "waning immunity" against the virus for those without the booster. *Id.* at 4–5 (noting that "only 48 percent of eligible individuals statewide have received their booster shot" and "waning immunity among health care workers increases their susceptibility to the virus and can place further strain on the State's health care workforce, threatening the State's ability to provide critical care to individuals").

Plaintiffs argue that the Executive Orders are not rationally related to the State's interest because the Executive Orders were "predicated on the fact that it was believed that the shots [vaccines] would prevent infection and transmission, but that fact is now known to be incorrect." (Reply 12.) Plaintiffs rely on *Schumacher v. Nix*, 965 F.2d 1262 (3d Cir. 1992) to support the proposition that, "under rational basis review, the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (*Id.* (quoting *Shumacher*, 965 F.2d at 1271) (internal quotation marks omitted).)

In *Schumacher*, the plaintiffs challenged Pennsylvania's Bar Admission Rule, which prohibited graduates of unaccredited law schools to sit for the Pennsylvania bar examination unless they were in good standing of the bar of a reciprocal state and had practiced law there for five

years. 965 F.2d at 1263–64. The Bar Admission Rule "intended to secure for Pennsylvania attorneys who decide to relocate, the advantage of favorable terms of admission to another state's bar by offering the same advantage to attorneys of such other state that will reciprocate." *Id.* at 1270 (internal quotation marks omitted).

The plaintiffs graduated from an unaccredited law school and had practiced for more than five years in California, which did not have reciprocity with Pennsylvania; thus, they could not sit for the Pennsylvania bar exam and were ineligible to practice in Pennsylvania. *Id.* at 1263–64. The plaintiffs argued that the rule did not pass muster under rational basis review because Pennsylvania's reciprocal states allowed only graduates of accredited schools to waive in without taking the bar examination. *Id.* at 1272. Thus, the plaintiffs argued that, as applied, the rule did not further Pennsylvania's interest in securing favorable terms of admission to reciprocal states for attorneys who likewise graduated from unaccredited law schools. *Id.* at 1265, 1271–72. The Third Circuit agreed that, in practice, the rule may not have furthered Pennsylvania's interest in ensuring reciprocity for Pennsylvania attorneys from unaccredited schools; however, the court determined that the plaintiffs framed Pennsylvania's interest too narrowly because Pennsylvania had a legitimate interest in securing mutual treatment for *all* of its attorneys, whether they were graduates of accredited or unaccredited law schools. *Id.* at 1272. The Third Circuit determined that, "even if the [Rule] [did] not promote Pennsylvania's reciprocity interest as to its attorneys who are graduates of unaccredited law schools, . . . the Rule would pass rational basis review if it furthered the state's reciprocity interest as to its attorneys who are graduates of accredited law schools." *Id.* Accordingly, the court held that it "[would] not second guess the manner in which Pennsylvania has chosen to implement [the] Rule [], where that Rule bears at least some reasonable

relation to Pennsylvania's interest in securing mutual treatment for its attorneys seeking admission to bars of other states." *Id.* at 1273.

Plaintiffs also argue that the Executive Orders are "irrational" because the State's interest "in stemming the spread of [COVID-19] is disconnected from EO 283's requirement that people keep taking doses of pharmaceuticals that do not prevent the spread of [COVID-19]." (Reply 13). Plaintiffs cite *Jimenez v. Weinberger*, 417 U.S. 628 (1974) for the proposition that a policy is irrational if it classifies people differently to achieve a government interest, but the classification does not advance the government interest. (Reply 13–14.) In *Jimenez*, the plaintiff challenged, on equal protection grounds, the constitutionality of a social security provision denying benefits to illegitimate children. 417 U.S. at 631–32. The asserted state interest was the "prevention of spurious claims." *Id.* at 636. The Court determined that, while preventing spurious claims was a legitimate state interest, the provision was unconstitutional because it created two subclasses of illegitimate children—those who were deemed entitled to receive benefits without any showing that they were in fact dependent upon their disabled parent and those who were conclusively denied benefits even though they were dependent upon their disabled parent. *Id.* at 635–36. The Court concluded that the "two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws[.]" *Id.* at 637.

The Court does not find Plaintiffs' arguments persuasive. Similar to *Schumacher*, Plaintiffs frame the State's interest too narrowly by claiming that the State's sole interest in issuing the Executive Orders was to prevent infection and transmission and that in practice the Executive Orders do not accomplish that goal. Plaintiffs cite to articles that highlight the debate around

recommending boosters for health care workers, specifically that some medical professionals and policymakers disagreed with this recommendation. (*See* Apoorva Mandavilli and Benjamin Mueller, *C.D.C. Chief Overrules Agency Panel and Recommends Pfizer-BioNTech Boosters for Workers at Risk*, THE NEW YORK TIMES (Sept. 24, 2021, updated Oct. 21, 2021), Wefer Decl. Ex. 16, ECF No. 2-1 (noting that the debate surrounding the CDC's determination to recommend the first booster to frontline workers was "close" because, while CDC director believed it would "best serve the nation's public health needs," other CDC advisers "disagreed that the doses were needed by so many healthy people"); *WATCH: FDA panel shows frustration in booster dose debate*, PBS NEWS HOUR (Sept. 17, 2021), Wefer Decl. Ex. 17 (discussing the debate of "the value of mass boosters"); Emily Anthes, *Booster protection wanes against asymptomatic Omicron infections, British data suggests*, THE NEW YORK TIMES (Dec. 23, 2021), Wefer Decl. Ex. 22 (noting that early data suggest that "booster protection against asymptomatic Covid caused by the Omicron variant wanes within 10 weeks" but that "experts believe the shots will continue to provide significant protection against hospitalization and death").

The Executive Orders, however, make clear that the State's interest is not only to prevent infection and transmission, but also to "protect[] against serious illness, including hospitalizations and death[,] and "increase the number of health care workers who are up to date with their COVID-19 vaccinations[.]" EO 283 at 4–5. The State submitted evidence indicating that the vaccines were "associated with high short-term protection against SARS-CoV-2 infection" but that "this protection waned considerably after 6 months," thereby warranting the need for boosters. (*See* V. Hall, *et al.*, "Protection against SARS-CoV-2 after Covid-19 Vaccination and Previous Infection," New Eng. J. Med. (Vol. 386, No. 13) (Mar. 31, 2022), Vannella Decl. Ex. 7, ECF No. 10-2 (noting that the "[s]trategic use of booster doses of vaccine to avert waning of protection . . . may reduce

infection and transmission in the ongoing response to Covid-19"); *see also* Jill M. Ferdinands, Ph.D., *et al.*, "Waning 2-Dose and 3-Dose Effectiveness of mRNA Vaccines Against COVID-19-Associated Emergency Department and Urgent Care Encounters and Hospitalizations Among Adults During Periods of Delta and Omicron Variant Predominance—VISION Network, 10 States, August 2021–January 2022," MMWR (Vol. 71, Feb. 18, 2022), Vannella Decl. Ex. 8, ECF No. 10-2 ("These findings underscore the importance of receiving a third dose of mRNA COVID-19 vaccine to prevent both COVID-19-associated [emergency department/urgent care] encounters and COVID-19 hospitalizations among adults.").

In *Jacobson*, Jacobson submitted evidence that some medical professionals believed that there was "little or no value to vaccination as a means of preventing the spread of smallpox," or "that vaccination cause[d] other diseases of the body." 197 U.S. at 30–31. There, the Supreme Court noted that it was the role of the legislature, and not the court, to weigh "opposing theories" when making its determination to mandate the vaccine. *Id.* at 31–32. Thus, in reviewing the submissions of the parties, the Court does not evaluate the efficacy or safety of the vaccine, or the best way to prevent the spread of COVID-19, but rather looks to see whether the State has asserted a rational basis for the Executive Orders. *See Messina*, 2021 WL 4786114, at *8–9. Based on the State's submissions, the State has set forth a strong likelihood that the Executive Orders have a "real or substantial relation" to the "legitimate interest" of stemming the spread of COVID-19 and protecting the public health. *See Jacobson*, 197 U.S. at 32; *Smith*, 2021 WL 5195688, at *7. While Plaintiffs' articles suggest that there may have been different viewpoints as to recommending boosters for health care workers, Plaintiffs do not demonstrate that the Executive Orders are "irrational."

In sum, "[t]he decision to require vaccination among state executive agency employees, and critical populations such as healthcare workers and providers and education workers and volunteers, is a rational way to further the State's interest in protecting health and safety during the COVID-19 pandemic." *See Johnson*, 2021 WL 4846060, at *16. Accordingly, the Court finds that the Executive Orders are rationally related to the State's asserted interests in "the health and safety of [its] most vulnerable residents," and "maintaining a safe environment for its workforce and the effective and continued operation of essential health care services." (*See* Opp'n 1, 14). Accordingly, Plaintiffs have not met their burden of likelihood of success on the merits of their substantive due process claim.

2. *Procedural Due Process*

Plaintiffs also fail to show a likelihood of success on the merits for their procedural due process claim. They address this argument in a single sentence, stating that the Executive Orders have "deprived them of the ability to use their licenses without due process of law." (TRO Appl. 2.)

The Due Process Clause of the Fourteenth Amendment provides that a State may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "Procedural due process requires notice and an opportunity to be heard before a person is deprived of a protected interest, except for 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Speth v. Goode*, 2010 WL 4669714, at *4 (D.N.J. Nov. 9, 2010) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 n.7 (1972). "In analyzing a procedural due process claim, 'the first step is to determine whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment.'" *B.K. v. Grewal*, 2020 WL 5627231, at *7

(D.N.J. Sept. 21, 2020), *appeal dismissed sub nom. Doe v. Att'y Gen. of New Jersey*, 2020 WL 9259657 (3d Cir. Nov. 25, 2020) (quoting *Shoats v. Horn*, 213 F.3d 140, 143 (3d Cir. 2000)). "If the asserted interest falls within the protections of the Due Process Clause, the second step is to determine whether the plaintiff was afforded all of the process he was due." *Id.*

Plaintiffs' procedural due process claim is unlikely to succeed for several reasons. First, Plaintiffs do not cite authority to support their assertion that they have protected property or liberty interests in their ability to use their licenses. *See B.P. by & through L.P. v. N. Allegheny Sch. Dist.*, 2022 WL 114075, at *5 (W.D. Pa. Jan. 12, 2022) (rejecting procedural due process claim when plaintiffs cite no case showing that they had a protected property interest).[8] And, even if the Court determines that Plaintiffs' licenses to practice are protected property interests, Plaintiffs have not set forth evidence to demonstrate that they will in fact lose their licenses due to the Executive Orders. *See Andre-Rodney*, 2021 WL 5050067, at *7 (rejecting procedural due process claim when plaintiffs "cite[d] no authority for [the] proposition [that they possessed a property interest in their jobs] and provide[d] no facts which might otherwise support a finding that they have a protected property interest in their continued employment").

Further, as noted above, Governor Murphy issued the Executive Orders pursuant to delegated legislative authority and the Executive Orders carry the force of law. *See supra* IV.B.1. Accordingly, the Executive Orders are more similar to "rules of general applicability," which do not require notice and a hearing. *See Harris*, 557 F. Supp. 3d at 312 (rejecting procedural due process argument because the vaccine policy at issue "is generally applicable to all students and formulated prospectively toward the fall semester, i.e., a legislative rule rather than an

[8] And the Court has previously determined that Plaintiffs are unlikely to succeed on the merits that they have liberty interests in refusing the vaccine. *See supra* IV.B.1.

adjudication"); *Williams*, 2021 WL 4894264, at *5–6 (rejecting plaintiffs' procedural due process claim and noting that a governor's executive orders and health department regulations requiring vaccines are more comparable to laws of general applicability or "legislative" acts). To the extent any process is required, the Executive Orders provide a process for an employee to request individual exemptions for medical or religious reasons through their employer. *See Williams*, 2021 WL 4894264 at *6 (rejecting plaintiffs' procedural due process challenge to vaccine mandate and noting that the ability to apply for exemptions to the vaccine mandates provides some process).

3. *Equal Protection*

Plaintiffs also fail to show a likelihood of success on the merits of their equal protection claim. Plaintiffs raise their equal protection challenge in a single paragraph in the Application. (TRO Appl. 2.) They argue that the Executive Orders violate "the equal protection clause of the Fourteenth Amendment because [they] treat[] Plaintiffs differently based on the exercise of their fundamental rights . . ." (*Id.*)

In evaluating equal protection claims, the "first step . . . is to determine the standard of review." *Smith*, 2021 WL 5195688, at *8 (citing *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993). Plaintiffs' claims do not involve a suspect class or fundamental right, and thus, the same rational basis standard of review applies. *Id.*; *Williams*, 2021 WL 4894264, at *9 ("As with substantive due process, courts have routinely rejected the argument that vaccine mandates will trigger heightened scrutiny under the Equal Protection Clause and have instead applied rational basis review.") Accordingly, for the reasons set forth above, Plaintiffs are not likely to succeed on the merits of this claim. *See Does 1-6*, 2021 WL 4783626, at *16 (rejecting equal protection claim by employees related to employer's COVID-19 mandate under rational basis review).

4. *Doctrine of Unconstitutional Conditions*

Finally, the Court addresses Plaintiffs' argument that the Executive Orders violate the doctrine of unconstitutional conditions. (TRO Appl. 2.) Plaintiffs assert that the booster requirement "violates the doctrine of unconstitutional conditions, which prohibits the government from conditioning a privilege on the surrender of a constitutional right." (*Id.* (citing *Frost v. R.R. Comm'n of State of California*, 271 U.S. 583 (1926)).) However, Plaintiffs have not demonstrated a likelihood of success on their claims that the Executive Orders violate their constitutional rights, *see supra* IV.B.1.–3., and thus, the Court rejects their unconstitutional conditions argument. *See Smith*, 2021 WL 5195688, at *8 (rejecting unconstitutional conditions argument because there is no fundamental right to refuse the COVID-19 vaccine); *Norris*, 2021 WL 4738827, at *3 (same).

C. Irreparable Injury to Plaintiffs

Nor have Plaintiffs made a "clear showing of immediate irreparable injury." *See Perez*, 2020 U.S. Dist. LEXIS 126415, at *5. Plaintiffs assert that the Executive Orders cause "irreparable harm" because they amount to "government coercion" and "require[] Plaintiffs to undergo an irreversible medical procedure that carries serious risk or lose their jobs." (TRO Appl. 39.)

On the Court's review of Plaintiffs' submissions, Plaintiffs fail to demonstrate immediate and irreparable injury. First, Plaintiffs delayed bringing their claims. Plaintiffs had notice of the April 11 deadline for the booster requirement as of the issuance of EO 290, which occurred on March 2, 2022. EO 290 ¶¶ 1.b, 2.b. (requiring covered workers to provide "adequate proof that they received a booster dose by April 11, or within three weeks of becoming eligible for the booster"). They had even earlier notice of the booster requirement generally, despite the changes in schedules, as of the issuance of EO 283 on January 19, 2022, *see* EO 283 ¶¶ 1.b., 2.b., 8, and as of the initial denials of Hagen's and Rumfield's exemption requests in February 2022, (Hagen

Decl. ¶ 21; Rumfield Decl. ¶¶ 9–10). The fact that Plaintiffs waited to bring this challenge until April 21, 2022, weighs against the "immediacy" of the harm. *See Smart Vent Prods. v. Crawl Space Door Sys.*, 2016 U.S. Dist. LEXIS 108052, at *35 n.16 (D.N.J. Aug. 15, 2016) (noting that "any delay in seeking [] relief [] necessarily informs the irreparable harm inquiry"); *Nat'l Ass'n v. Murphy*, 2020 U.S. Dist. LEXIS 125567, at *3 (D.N.J. July 14, 2020) (denying temporary restraints when plaintiffs sought injunction of Governor Murphy's executive orders closing movie theatres due to COVID-19 because plaintiffs had opportunities to request a TRO after the initial executive order and subsequent modifications).

Second, Plaintiffs assert that they face immediate and irreparable injury because they would lose their jobs on or around the date range of April 11, 2022, through April 24, 2022.[9] However, the Executive Orders do not, on their own, require termination, but rather require covered settings to have "disciplinary process[es]" that "may include" termination. EO 283 ¶ 4. They also permit covered settings to impose "additional or stricter requirements." *Id.* ¶ 9. Plaintiffs do not assert specific facts that demonstrate that Hunterdon's disciplinary policies pursuant to the Executive Orders actually necessitate these terminations and/or suspension dates. Indeed, Plaintiffs have not provided a copy of Hunterdon's policy with their submissions.

Third, Plaintiffs have not asserted that the requested relief of enjoining Governor Murphy would redress their alleged injuries. Plaintiffs do not specify whether Hunterdon is subject to the CMS Rule. Defendants submit exhibits that suggest that Hunterdon is a Medicare- or Medicaid-

[9] The Court bases this date range on Plaintiffs' arguments in the Application, (*see* TRO Appl. 1, 1 n.1 (stating that Plaintiffs were "slated to be fired on April 24, 2022" and that Hagen "resigned on Friday to avoid the termination on her record")), and Plaintiffs' individual declarations (*see* Rumfield Decl. ¶ 11 (averring that she was "suspended/terminated 4/12/22"); Sczesny Decl. ¶ 9 (averring that she "was informed that [she had] until April 11, 2022 to get the booster, as per the NJ state mandate set in place by Governor Murphy")).

certified provider and thus, is subject to the CMS Rule. (*See* Hunterdon Healthcare, "Insurance Information," Vannella Decl. Ex. 15, ECF No. 10-2 (listing "Medicare" as an insurance provider); Hunterdon Healthcare, "Clinical Quality," Vannella Decl. Ex. 16, ECF No. 10-2 (noting that Hunterdon leads hospitals for its quality medical care, as indicated by CMS measurements).) If Hunterdon is subject to the CMS Rule, enjoining the enforcement of the Executive Orders may not alter whether Plaintiffs must be "up to date" with their vaccinations. And, even if Hunterdon was not subject to the CMS Rule, Plaintiffs have not demonstrated that enjoining the State's enforcement of the Executive Orders would prevent Hunterdon from maintaining a policy requiring its employees to get boosters on its own. Indeed, it was Hunterdon, and not the State, that reviewed and denied Plaintiffs' exemption applications. (*See* Hagen Decl. ¶ 21; Rumfield Decl. ¶¶ 8–10; Sczesny Decl. ¶ 16.)

Finally, to the extent that Plaintiffs request the Court to enjoin Hunterdon, a non-party, from enforcing its policies pursuant to the Executive Orders, the Court declines this request. (*See* Proposed Order 1–2.) The Court will not issue a TRO or preliminary injunction to a non-party. *See* Fed. R. Civ. P. 65(d)(2)(A) (restricting courts' issuance of injunctions and restraining orders to "parties" and other individuals not applicable in this case).

The Court should grant injunctive relief only in "limited circumstances" where doing so would prevent immediate and irreparable injury. *See Westchester Fire Ins. Co.*, 2009 U.S. Dist. LEXIS 3481, at *3. This lack of redressability weighs against the Court granting Plaintiffs' requested relief for their alleged injuries.

In sum, the Court finds that Plaintiffs have not demonstrated immediate and irreparable injury that warrants a preliminary injunction.

D. Remaining Preliminary Injunction Factors

Plaintiffs' failure to demonstrate likelihood of success on the merits and irreparable harm precludes injunctive relief because those are "gateway factors" of the Court's preliminary injunction inquiry. *Reilly*, 858 F.3d at 179. However, the Court notes that the remaining two factors—harm to the non-moving party and the public interest—also favor denying the Application.

"The third and fourth factors for the issuance of injunctive relief merge when the government is the opposing party." *Smith*, 2021 WL 5195688, at *9 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). While Plaintiffs argue that "the Government does not have an interest in the enforcement of an unconstitutional law," (TRO Appl. 40 (quoting *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (internal quotation marks omitted), the Court has determined that Plaintiffs are not likely to succeed on the claim that the Executive Orders are unconstitutional under the due process and equal protection clauses, *see supra* IV.B. Further, the State faces harm when an injunction prevents it from enforcing a "duly enacted statute." *Maryland v. King*, 567 U.S. 1301, 1303 (2012). Here, where the Executive Orders carry the force of law, the State has an interest in their enforcement.

The public interest would also suffer if the Court granted Plaintiffs' requested relief. *See Messina*, 2021 WL 4786114, at *10 ("Enjoining the Mandate would not serve the public interest in preventing the spread of COVID-19, a virus that has taken the lives of many New Jersey residents."). Where the stated purpose of the Executive Orders is to keep healthcare workers "up to date with their COVID-19 vaccinations," in light of the "significant risk of spread and vulnerability of the populations served" in health care settings, the public interest is served in allowing the continued enforcement of the Executive Orders. *See* EO 283 at 5–6; *see also Smith*,

2021 WL 5195688, at *9 (finding that, where executive order's goal was to maintain the health of the federal workforce, and prevent the spread of COVID-19, the public interest factor weighed against enjoining the executive order).

In sum, the Court finds that Plaintiffs have failed to demonstrate likelihood of success on the merits and irreparable injury, and the remaining preliminary injunction factors weigh against granting the Application.

V. CONCLUSION

Accordingly, for the foregoing reasons, Plaintiffs' Application for a Temporary Restraining Order and/or Preliminary Injunction (ECF No. 2) is **DENIED**. An appropriate Order will follow.

Date: June 7, 2022

GEORGETTE CASTNER, U.S.D.J.