UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KATHLEEN WRIGHT-GOTTSHALL, *et al.*, Plaintiffs, v. THE STATE OF NEW JERSEY, *et al.*, Defendants.	Hon. Peter G. Sheridan, U.S.D.J. Hon. Douglas E. Arpert, U.S.M.J. Civil Action No. 3:21-cv-18954-PGS-DEA **CIVIL ACTION** **(ELECTRONICALLY FILED)** Motion Return Date: December 19, 2022

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs' opposition brief presents no viable responses to counteract Defendants' arguments that Plaintiffs' claims suffer from the following fatal defects: (1) several of the Defendants are immune from Plaintiffs' claims for damages; (2) Plaintiffs' prospective claims are moot; (3) the State Policies were constitutional under longstanding well-established law tracing back over a century to *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905); and (4) at minimum, Defendants have qualified immunity from liability under 42 U.S.C. § 1983 for damages.

To begin, Plaintiffs' damages claims against all defendants except individual defendants in their individual capacities for damages are either barred by sovereign immunity or moot. It is axiomatic that individuals cannot sue States and state officials in their official capacities for damages. And the State Policies that Plaintiffs challenge are no longer in effect, removing any Article III case or controversy. Plaintiffs cannot plausibly allege that similar policies reasonably can be anticipated to be enacted in the future, given that the public health landscape today is vastly different from when the former State Policies were put in place.

As for the Section 1983 damages claims against individual defendants in their individual capacities, Plaintiffs fare no better. Although Plaintiffs challenge the State Policies that public employees be vaccinated or tested regularly for COVID-19, Supreme Court precedent long ago confirmed that a vaccination requirement is

permissible during a serious public health crisis, and numerous courts within the past year have rejected legal challenges to similar vaccination/testing policies. Moreover, as shown in Defendants' moving brief, Plaintiffs' various constitutional claims are subject to rational basis review, and the challenged measures unquestionably were rationally related to the legitimate end of protecting public health. Indeed, Plaintiffs' opposition appears to recognize the futility of challenging the constitutionality of a vaccination requirement and therefore only challenges the constitutionality of the alternative, less-rigorous accommodation of periodic testing. This position defies logic, since offering an alternative to a constitutionally-permissible requirement cannot be a constitutional violation.

Thus, this Court should dismiss the Amended Complaint.

ARGUMENT

I. CLAIMS AGAINST STATE ENTITIES AND CLAIMS FOR PROSPECTIVE RELIEF ARE ALL NON-JUSTICIABLE AND MUST BE DISMISSED UNDER RULE 12(B)(1).

a. All Official-Capacity Defendants Have Sovereign Immunity From Plaintiffs' Suit For Damages.

Defendants showed in their original moving brief that public entities like the State of New Jersey, the New Jersey Supreme Court, and the New Jersey Office of Legislative Services ("NJOLS") have sovereign immunity from federal claims under § 1983 and that those entities also are not "persons" who can be sued under §1983. Dkt. 36-1 at 12-13. Those same defenses apply equally to the "official capacity"

claims against Governor Murphy, Chief Justice Rabner, and Judge Grant. Dkt. 36-1 at 14.

Plaintiffs inaptly contend that such claims are not barred because of the *Ex parte Young* doctrine. Dkt. 40 at 43; *see Ex parte Young*, 209 U.S. 123 (1908). This is wrong. First, the *Ex parte Young* doctrine does not apply to Plaintiffs' claims for money damages against officials named in their official capacities. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Moreover, the *Ex parte Young* doctrine provides an exception to sovereign immunity only when a complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring)). Notwithstanding the constitutionality of the State policies, s*ee* Point III, *infra*, Plaintiffs concede that all of the challenged policies have been rescinded. Dkt. 40 at 10. Thus, they cannot credibly argue that any alleged violation is "ongoing." *See MCI Telecomm. Corp. v. Bell Atl.-Pennsylvania*, 271 F.3d 491, 506 (3d Cir. 2001) (*Ex parte Young* permits "prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law.").

Plaintiffs alternatively argue that states "agreed to suit in the plan of the convention" when the Constitution was drafted, but Plaintiffs fail to articulate how this narrow exception could possibly apply. *See* Dkt. 40 at 43. The "plan of the

Convention" exception allows states to be sued only in certain specific actions: bankruptcy proceedings, suits by other States, and suits by the Federal Government. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2250 (2021). The instant suit—in which Plaintiffs are private citizens challenging state action—clearly does not fall "within the class of suits to which States consented under the plan of the Convention." *See PennEast*, 141 S. Ct. at 2250.

Accordingly, sovereign immunity bars Plaintiffs' claims against the State, the Supreme Court, and NJOLS, and all individual Defendants in their "official capacities."

b. Plaintiffs' Claims For Injunctive And Declarative Relief Are Moot.

Because Plaintiffs seek only prospective relief against policies that no longer have a continuing effect, these claims are moot. Federal courts lack jurisdiction if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin*, 568 U.S. at 172. If "events have taken place during the pendency of the appeal that make it impossible for the court to grant any effectual relief whatsoever," that appeal must be dismissed. *Cnty. of Butler v. Governor of Pennsylvania*, 8 F.4th 226, 230 (3d Cir. 2021), *cert. denied* 142 S. Ct. 772 (2022) (quotation omitted). That is undeniably true here: the State Policies are no longer in effect, so any prospective relief from this Court cannot aid Plaintiffs.

Plaintiffs' reliance on the voluntary cessation doctrine fails. In a similar challenge to a COVID-19 restriction rescinded by Executive Order, the Third Circuit identified two components to the voluntary cessation analysis: whether the same precise presentation of the pandemic will occur again, and whether the State will respond by imposing restrictions similar enough to the challenged policies such that they present "substantially the same legal controversy." *Clark v. Governor of N.J.*, No. 21-2732, 2022 WL 17246445, at *6 (3d Cir. Nov. 28, 2022).

Here, as in *Clark*, neither of those components are satisfied. *Clark* at *6. First, our understanding of the virus and "the availability of therapeutic responses to infection have totally changed the nature of the disease itself, our understanding of it, and our response to it," making "the return of the same pandemic and the same restrictions unlikely." *Id*. Second, the likelihood of similar policies being re-imposed has been fatal to numerous challenges to rescinded COVID-19 policies, and is likewise fatal here. *See, e.g.*, *Butler*, 8 F.4th at 231 (holding that "public health landscape has so fundamentally changed" that no "reasonable expectation that the same complaining parties will be subject to the same orders" exists); *Parker v. Governor of Pa*, No. 20-cv-3518, 2021 WL 5492803, at *4 (3d Cir. Nov. 23, 2021) (explaining that mootness supported by fact that "[t]he government has not rescinded and then re-issued the order even once, let alone multiple times."); *Behar v. Murphy*, No. 20-cv-05206, 2020 WL 6375707, at *3 (D.N.J. Oct. 30, 2020) (noting no

evidence existed to suggest new restrictions would be implemented); *Livesay v. Murphy*, No. 20-cv-17947, 2022 WL 4597435, at *3-4 (D.N.J. Sept. 30, 2022).

Here, as in those cases, Plaintiffs are challenging orders issued in August 2021, when COVID vaccines had become available to combat the spread of a once-in-a-lifetime pandemic. Since then, the State has seen improvements in several key statistics, including increased vaccination rates, decreased hospitalizations and deaths, and the authorization and increased availability of therapeutic treatments for COVID-19. *See* New Jersey Executive Order ("EO") 302. Given these developments, there is no basis for finding that the State is likely to reimpose the same restrictions and elicit the same legal controversy. *See also ACLU of Mass. v. U.S. Conf. Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013) (noting voluntary cessation doctrine does not apply when cessation occurs for reasons unrelated to litigation).

Plaintiffs unsuccessfully attempt to distinguish *Butler* and *Parker* on the basis that the challenged polices in those cases ended by expiration rather than rescission. But it is the likelihood of the policies being re-imposed—not merely the power to re-impose the policies—that is the dispositive inquiry for the voluntary-cessation exception. *See Clark*, 2022 WL 17246445, at *20 n.15; *see also Khodara Envtl., Inc. v. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001) (noting that "changes that discontinue a challenged practice are usually enough to render a

case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed" since "the mere power to reenact a challenged law is not a sufficient basis [to] conclude that a reasonable expectation of recurrence exists").

Plaintiffs further inaptly contend that the State Policies ended "only when Plaintiffs' were pressing for a judicial decree." Dkt. 40 at 46-47. It is plain, however, that the State Policies were rescinded due to the State's significant progress in combating COVID-19, which was demonstrated by objective verifiable data noted by the State when the State Policies were discontinued. *See* Dkt. 40 at 9; New Jersey EO 302 at 7-9 (explaining that CDC's updated guidance, the decrease in statistics such as number of hospitalized patients, and availability of treatments led to lifting of mitigation protocols). Plaintiffs' unsupported contention that it was their lawsuit, and not the change in external circumstances, that caused the discontinuation of the State Policies replaces reality with self-serving conjecture. *See Butler*, 8 F.4th at 230-31 (noting that courts "generally presume that government officials act in good faith," and there is no basis to "depart from that practice"). After all, the State maintained the policies for many months while this litigation was pending, and rescinded the Policies only after revised CDC guidelines were issued in August 2022. *See* EO 302, at 7-9.

Plaintiffs' attempt to manufacture a live controversy by suggesting that the virus may return with similar virulence and may trigger a similar government

response is speculative and cannot overcome mootness. *See Clark*, 2022 WL 17246445, at *18 (holding that "New Jersey's acknowledged medical progress militates against a reasonable likelihood of a recurrence of the same pandemic" and similar policies).

II. PLAINTIFFS' DAMAGES CLAIM REGARDING THE TESTING ALTERNATIVE IS CONFUSED AND MUST BE DISMISSED UNDER RULE 12(B)(6).

In an effort to salvage their Amended Complaint, Plaintiffs' opposition pivots to an assault on the "Medical Test Mandates," presenting them as freestanding requirements, rather than what they are—a less rigorous option to the undeniable power of the State to require vaccination. Plaintiffs' argument obscures that the State Policies that Plaintiff's challenge are, fundamentally, vaccination policies.

The most significant fact about the testing requirements at issue are that they were an *alternative* for people who do not want to get vaccinated. This distinction is key because, as noted in Defendants' moving brief, numerous courts have already held that vaccination requirements adopted as a condition of employment in response to the COVID-19 crisis are reasonable and rationally related to the State's interest in reducing the risk of serious illness, hospitalizations, and deaths. Br. at 21-22. Indeed, under the weight of this sizable (and growing) legal consensus, Plaintiffs forgo any effort to dispute the constitutionality of *vaccination* requirements.

But this gambit, attempting to challenge the testing alternatives in isolation, is unavailing. Manifestly, because courts have already held that mandatory vaccination policies accord with constitutional principles, it must necessarily be the case that the reasonable alternatives to vaccination offered within those policies – *i.e.*, testing – also satisfy constitutional principles. *See, e.g.*, *Kheriaty,* No. 21-cv-01367, 2022 WL 17175070, at *1 (noting U.S. Supreme Court upheld "a much more onerous vaccine requirement" in *Jacobson v. Massachusetts*). In other words, as this court has recognized in *Messina v. College of New Jersey*, 566 F. Supp. 3d 236 (D.N.J. 2021), in upholding a school's requirement for either vaccination or testing for persons who did not wish to be vaccinated, the greater includes the lesser. Because the State could have gone further by requiring vaccination without alternatives, the more permissive regime clearly survives.

Plaintiffs also do not appear to contest that they do not have a constitutional right to continued public employment. Nor can they, as the Supreme Court has specifically rejected the existence of any fundamental right to continued government employment. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) ("This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental."). Correspondingly, courts have repeatedly and specifically held that vaccination policies adopted in response to the COVID-19 pandemic do not burden or violate any right to continued government employment.

See, e.g., Norris v. Stanley, 567 F. Supp. 3d 818, 820-21 (W.D. Mich. 2021) (explaining that if employees choose not to get vaccinated, they do not have right to remain employed); *Smith*, 2021 WL 5195688, at *8 (holding that federal employees were "presented with a choice and [were] not being coerced to give up a fundamental right since there is no fundamental right to refuse vaccination"). Accordingly, testing as an alternative requirement for maintaining their jobs cannot be a violation of their constitutional rights.

III. EVEN IF THE TESTING ALTERNATIVE WERE REVIEWED AS A STAND-ALONE REGULATION, CLAIMS AGAINST DEFENDANTS SHOULD STILL BE DISMISSED UNDER RULE 12(B)(6).

a. Defendants Are Entitled To Qualified Immunity.

Even if the testing requirement were evaluated as a standalone challenge, Plaintiffs' claims seeking damages against Governor Murphy, Chief Justice Rabner, and Judge Grant in their personal capacities are all precluded by the doctrine of qualified immunity. In their opposition, Plaintiffs fail to carry the burden necessary to overcome this unassailable defense. In fact, Plaintiffs incorrectly shift the burden onto Defendants, arguing that for qualified immunity to apply, "Defendants would have to show that the Medical Test Mandates were reasonable for the entire time they were in place." Dkt. 40 at 16.

The opposite is true. Once a defendant raises the defense of qualified immunity, a plaintiff has the burden of establishing: "(1) that the official violated a

statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Michaels v. New Jersey*, 50 F. Supp. 2d 353, 362 (D.N.J. 1999).

Plaintiffs do not make such a showing. They cite no binding Third Circuit or Supreme Court cases demonstrating that the State Policies violated any clearly-established right at the time of the challenged conduct. *See Kedra v. Schroeter*, 876 F.3d 424, 449-50 (3d Cir. 2017) (explaining courts in Third Circuit "typically look to Supreme Court precedent or a consensus in the Courts of Appeals" to determine if official had "fair warning that his conduct would be unconstitutional"). Instead, they argue only generally that Defendants violated their "clearly established constitutional rights," without precisely defining the right at issue. Dkt. 40 at 16. But simply alleging generalized constitutional rights does not suffice for purposes of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Michaels*, 50 F. Supp. 2d at 363 (noting "qualified immunity would be a worthless defense if a plaintiff could simply invoke a broad constitutional right … [like] 'due process' … to overcome the hurdle").

Indeed, as noted already and shown in Defendants' moving brief, to the extent that legal precedent involving similar facts existed at the time that the State Policies were implemented, that authority *supported* the conclusion that requiring vaccination was constitutional. Indeed, numerous courts, including this one, have

affirmed that vaccination and testing policies adopted as a condition of employment in response to the COVID-19 crisis were constitutional because they were reasonable and rationally related to the State's interest in reducing the risk of serious illness, hospitalizations, and deaths. Dkt. 36-1 at 20-21.

Because Plaintiffs have not shown that clearly established law existed to inform Governor Murphy, Chief Justice Rabner, and Judge Grant that imposing and/or that enforcing the State Policies would violate Plaintiffs' constitutional or statutory rights, Plaintiffs claims against those Defendants fail.

b. The State Policies' Testing Alternatives Did Not Violate Any Of Plaintiffs' Constitutional Rights.

Even if this Court were inclined to consider the merits of Plaintiffs' constitutional claims, it would quickly discover that there are none. As Defendants have shown, the State Policies were rationally related to the legitimate and essential government interest in mitigating the spread of a deadly disease during an ongoing public health crisis, which is more than sufficient to pass constitutional muster, no matter which constitutional protection Plaintiffs contend was violated.

i. *Plaintiffs Fail To State A Cognizable Search And Seizure Violation Under Either The Federal Or New Jersey Constitutions*.

Plaintiffs' Fourth Amendment claims (Counts I and VII) fail because rights under that Amendment are not absolute; because Plaintiffs opted to be subjected to Defendants' requirements for unvaccinated workers in lieu of the constitutionally-

permissible requirement to be vaccinated, and because they have no constitutional right to continued government employment.

First, the State Policies did not require covered employees to get tested; they simply created employment requirements. Plaintiffs had alternatives available to avoid testing—getting vaccinated or seeking employment elsewhere. Case law makes clear that no constitutional right to continued employment exists; so employer vaccine requirements cannot be claimed to "force" Plaintiffs to forgo privacy and bodily autonomy rights. *See* Point III.b.ii, *infra.*

Moreover, reviewing the Fourth Amendment claim under the traditional framework, Plaintiffs' claims fail. The touchstone of Fourth Amendment analysis is reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citation omitted). The reasonableness of a search or seizure under the Fourth Amendment is determined "by balancing [the allegedly unconstitutional conduct's] intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

The State Policies' testing requirements for unvaccinated employees easily meet this reasonableness standard. First, testing—by submitting a nasal swab or saliva sample—is not a significant intrusion on privacy interests, a conclusion other federal courts have reached, and to which Plaintiffs have no responsive answer. *See Streight v. Pritzker*, No. 21-cv-50339, 2021 WL 4306146, at *6 (N.D. Ill. Sept. 22,

2021) ("[T]he requirement for weekly, no-cost, saliva-based testing is also negligible."); *Aviles v. Blasio*, No. 20-cv-9829, 2021 WL 796033, at *22 (S.D.N.Y. Mar. 2, 2021) (privacy intrusion of COVID-19 testing is "minimal in nature."). This minimal intrusion was reasonably calculated to reduce the spread of an airborne virus like COVID-19. Thus, several courts have held that it was rational for government employers to impose similar testing requirements on unvaccinated employees. *See, e.g.*, *Maniscalco*, 563 F. Supp.3d 33, 41 (E.D.N.Y. 2021); *Mass. Corr. Officers Federated Union v. Baker*, 567 F. Supp. 3d 315, 327 (D. Mass. 2021).

Plaintiffs' efforts to shoehorn the State Policies into cases about employee drug-testing policies or testing of prisoners for sexually-transmitted infections ("STIs") are inapt. Although drug testing of public employees or testing prisoners for STIs serve valid government interests, those policies were not designed to address an emergent public health crisis on the scale of COVID-19, which, unlike drugs or STIs, is communicable through the air and is responsible for millions of deaths and serious complications. That necessitates a different weighing in the reasonableness inquiry. Also relevant to the inquiry is the nature of the intrusion, which is a simple nasal or saliva swab in this case, and more intrusive and privacy-infringing in the drug or STI context. Viewing the gravity of the threat posed by COVID-19 against the minimal intrusion worked by testing, the State Policies were undoubtedly reasonable. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Most glaringly, Plaintiffs' opposition is wholly predicated on the ascientific fallacy that because the vaccines are not one hundred percent effective at preventing COVID-19, they have no utility as a public health intervention. This argument ignores the numerous publicly-available government findings based on data showing that the available COVID-19 vaccines are highly effective at preventing transmission of COVID-19, resulting in fewer cases of severe illness, fewer hospitalizations, and fewer deaths. By way of illustration, for the period between April 3, 2022, and October 1, 2022, unvaccinated individuals were 3.2 times more likely to test positive for COVID-19 and 14.9 times more likely to die from COVID-19 compared to vaccinated-and-boosted persons. *See* CDC, Rates of COVID-19 Cases and Deaths by Vaccination Status, https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status (last visited Dec. 12, 2022).

Because any privacy intrusion from COVID-19 testing was minimal and the testing advanced Defendants' legitimate interest in mitigating transmission of COVID-19, Plaintiffs' Fourth Amendment claims fail.

ii. *The State Policies Do Not Violate Plaintiffs' Privacy Or Substantive Due Process Rights Under the Fourteenth Amendment.*

Plaintiffs argue that the State Policies impinge on their substantive due process rights by violating their right to bodily integrity and their right to privacy. Contrary to Plaintiffs' assertions, the State Policies do not impact any fundamental

rights. Plaintiffs argue that a "right to be free from unwanted medical testing" is encompassed by the right to bodily integrity and is therefore a fundamental right warranting strict scrutiny under the Fourteenth Amendment. Dkt. 40 at 33. But they draw this unwarranted connection from cases that only briefly mention bodily integrity in the context of Fourth Amendment searches. *See id.* Plaintiffs provide no caselaw to support their assertion that a minimally-invasive testing requirement, imposed as an alternative to a constitutionally-proper employment condition, implicates a protected right to refuse unwanted medical treatment.

On the contrary, the Supreme Court has held there is no fundamental right against vaccination in light of a public health emergency in *Jacobson v. Massachusetts*, 197 U.S. 11, 27, 31 (1905), which confirmed that the community has the right to protect itself against an epidemic of disease which threatens the safety of its members" so long as the law in question has a "real and substantial relation" to the "protection of the public health and the public safety." That the mandatory measure upheld in *Jacobson* was vaccination *without* any alternatives does not help Plaintiffs. Nothing in *Jacobson*'s logic turned on whether the regulation was a mandatory inoculation or a momentary nasal swab, nor on whether the disease is smallpox or COVID. Instead, the baseline logic is that there is no evidence that refusing testing for an airborne contagious disease in a deadly pandemic is one of

the "fundamental rights found to be deeply rooted in our legal tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

As set forth in Defendants' moving brief, because Plaintiffs have no fundamental right to refuse vaccination, nor any fundamental right to be free from testing, the State Policies are subject only to rational basis review. Dkt. 36-1 at 18-25. Thus, the Policies need only be "rationally related to a legitimate government interest." *Sameric Corp. of Del., Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998). This standard is easily satisfied here—both vaccination and/or periodic COVID-19 testing requirements bear a rational relationship to the legitimate government interest of protecting the workforce and public from COVID-19. *See Mass. Corr. Officers*, 567 F. Supp. 3d at 327 (finding vaccination requirement for employees to be a rational measure to stem spread of COVID-19).

Relatedly, Plaintiffs incorrectly maintain that the State Policies violate their right to maintain the privacy of their medical information by requiring them to disclose their vaccination status and COVID-19 test results to their employers and supervisors. Dkt. 40 at 34-35. Again, although the Third Circuit has recognized a privacy right in medical records, records of prescription medication, and other personal medical information in certain circumstances, it has also made it clear that this right "not absolute." *Doe v. SEPTA*, 72 F.3d 1133, 1137 (3d Cir. 1995). Plaintiffs fail to acknowledge or appreciate this. The Third Circuit has made clear that "[e]ven

material which is subject to [constitutional] protection must be produced or disclosed upon a showing of a proper governmental interest." *United States v. Westinghouse*, 638 F.2d 570, 577 (3d Cir. 1980).

Here, balancing Plaintiffs' privacy expectations against the State's interests in preventing COVID-19 transmission by requiring vaccination or testing, Defendants plainly had sufficient justification (avoiding potential spread of a highly-contagious and often deadly airborne virus) for the minimal privacy intrusions worked by the testing alternative. *See P.F. v. Mendres*, 21 F. Supp. 2d 476, 483 (D.N.J. 1998) (noting that courts must "balance the individual's privacy expectation ... against the governmental interest in disclosure") (citation omitted).

Moreover, as already explained in Defendants' moving brief, the fact that Plaintiffs allegedly had to undergo testing in front of other employees is of no moment. Dkt. 40 at 36; Dkt. 36-1 at 30. Observing the administration of a COVID-19 test is not itself a "medical record" sufficient to trigger any analogous privacy protection, and the only "information" that could be inferred from seeing Plaintiffs appear for testing is that the employee being tested: (1) may be unvaccinated; or (2) may have potential symptoms of infection.[1]

[1] And although Plaintiffs also express myriad concerns about the submission and storage of their vaccination status and test results, *see* Dkt. 40 at 37-38, none support a constitutional claim, as Plaintiffs have not plausibly alleged any facts indicating that the State or its vendors are unable to secure the materials.

iii. *Plaintiffs Have Failed To State Cognizable Equal Protection Claims*.

Plaintiffs' Equal Protection claims also fail as a matter of law because: (1) as demonstrated previously, the State Policies do not impact any fundamental rights; and (2) the State Policies do not involve any "suspect class" or persons who are subject to the policies. Dkt. 40 at 38-39. As noted *supra* and in Defendants' original moving brief, no fundamental constitutional right exists to avoid vaccination or testing. Dkt. 36-1 at 24-27. Further, it is well-established that vaccination status is not a suspect class, and government policies that treat vaccinated persons differently than unvaccinated persons, including those with natural immunity, do not implicate suspect classification. *See Bauer v. Summey*, 568 F. Supp. 3d 573, 597 (D.S.C. 2021) (finding that government policies that treat unvaccinated persons different than vaccinated persons by subjecting only former to potential termination do not implicate suspect class); *Kheriaty v. Regents of Univ. of California*, 2021 WL 4714664, at *7 (C.D. Cal. Sept. 29, 2021) (rejecting heightened scrutiny based on classification of "individuals who have vaccine-induced immunity and individuals who have infection-induced immunity").

Because the alleged classification is not suspect, and because Plaintiffs present no authority to show that any court has found a similar classification to be suspect or quasi-suspect, any equal protection claim is subject to rational-basis review. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)

(holding that, if no suspect class at issue, differential treatment presumed valid if "rationally related to a legitimate state interest"); *Klaassen v. Trustees of Indiana Univ.*, 549 F. Supp. 3d 836, 871 (N.D. Ind. 2021) (applying rational basis review to masking/testing requirements for unvaccinated students).

As noted numerous times previously, the State Policies here were a rational method to reduce the spread of COVID-19 and to protect the health and welfare of both covered employees and the community. Consequently, Plaintiffs have failed to plausibly state equal protection claims.[2]

CONCLUSION

This Court should dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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Dated: December 12, 2022

[2] Notably, Plaintiffs' opposition provides no defense of their First Amendment claim, which fail for the reasons in the State's opening brief. Dkt. 36-1 at 31-35.