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**ORDER, U.S. COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
(JUNE 14, 2023)**

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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KATIE SZCZESNY; JAIME RUMFIELD;  
DEBRA HAGEN; MARIETTE VITTI,

*Appellants,*

v.

PHILIP MURPHY, in His Official and  
Personal Capacity; STATE OF NEW JERSEY,

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No. 22-2230

On Appeal from a Decision of the United States  
District Court for the District of New Jersey  
(D.C. Civil No. 3-22-cv-02314)  
District Judge: The Honorable Georgette Castner  
Before: Kent A. JORDAN, Circuit Judge.

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On June 12, 2023, counsel for the Appellees filed a letter informing the Court that the Executive Orders at issue in this appeal had been rescinded, effective immediately, and suggesting that the appeal is moot. The next day, counsel for the Appellants responded with a letter arguing that the appeal is not moot because effective relief was still possible, and further arguing that exceptions to the mootness doctrine apply,

specifically the doctrines that voluntary cessation of unlawful activity does not moot a case and that activity capable of repetition yet evading review will not be considered moot. Having considered the parties' arguments, we conclude that the appeal is indeed moot and must therefore be dismissed. We express no opinion on whether the case itself is moot. That question is for the District Court to consider on remand. Our decision is solely that this appeal, which is limited to review of the denial of a petition for preliminary injunctive relief, no longer presents a live issue for review, given the rescission of the Executive Orders in question. It is accordingly hereby ORDERED that the appeal is dismissed and the matter remanded to the District Court for further proceedings.

By the Court

/s/ Kent A. Jordan  
Circuit Judge

DATE: June 14, 2023

Tmm/cc: Dana Wefer, Esq.

Deana P. Sacks, Esq.

Daniel M. Vannella, Esq.

**OPINION, U.S. DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
(JUNE 7, 2022)**

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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KATIE SZCZESNY ET AL.,

*Plaintiffs,*

v.

THE STATE OF NEW JERSEY,  
GOVERNOR PHILIP MURPHY (in His  
Official and Personal Capacity),

*Defendants.*

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Civ. No. 22-2314 (GC)

Before: Georgette CASTNER, U.S.D.J.

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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.<sup>1</sup>

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

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<sup>1</sup> 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).

[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 COVID-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.

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 vaccina-

tions 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, EO 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)).<sup>2</sup> 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.

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<sup>2</sup> 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.

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.<sup>3</sup>

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 non-compliant covered worker into compliance as part of the disciplinary policy . . . within two weeks of the [above dates].” EO 290 ¶ 3.

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

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<sup>3</sup> 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.)

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)<sup>4</sup> 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.

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<sup>4</sup> Defendants filed their Opposition late with consent of Plaintiffs and leave of the Court. (*See* ECF No. 9.)

## 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 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.)<sup>5</sup> Plaintiffs

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<sup>5</sup> For clarity and consistency, the Court refers to the COVID-19 “vaccines” as “vaccines” throughout this Opinion. The Court still

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 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

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addresses Plaintiffs’ argument that they are not actually “vaccines” in full. *See infra* IV.B.1.

‘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. Andre 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; *WL Messina*, 2021 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.<sup>6</sup>

### **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 State also asserts that it has an interest in reducing the “risks of serious illness,”

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<sup>6</sup> 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.

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”).<sup>7</sup>

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<sup>7</sup> 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 Envt 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

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. 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

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executive order requiring healthcare workers at covered settings to be up to date with vaccinations.

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. Ferdinand, 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).<sup>8</sup> 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.

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<sup>8</sup> 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.

*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 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* 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.<sup>9</sup> 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-certified provider and thus, is subject to the CMS Rule. (*See* Hunterdon Healthcare, “Insurance Information,” Vannella Decl. Ex. 15, ECF

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<sup>9</sup> 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”)).

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.

/s/ Georgette Castner  
U.S.D.J.

Date: June 7, 2022

**EXECUTIVE ORDER NO. 283**  
**(JANUARY 19, 2022)**

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WHEREAS, on March 9, 2020, I issued Executive Order No. 103, declaring the existence of a Public Health Emergency, pursuant to the Emergency Health Powers Act (“EHPA”), N.J.S.A. 26:13-1 et seq., and a State of Emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act (“Disaster Control Act”), N.J.S.A. App A:9-33 et seq., in the State of New Jersey for Coronavirus disease 2019 (“COVID-19”), the facts and circumstances of which are adopted by reference herein; and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, which were issued each month between April 7, 2020 and May 14, 2021, the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency in effect at the time continued to exist; and

WHEREAS, New Jersey made significant progress in responding to COVID-19 and mitigating its devastating effects, in particular in light of the advent of three effective vaccines that, among other things, had significantly reduced the likelihood of both contracting and transmitting the variants of COVID-19 that were present in the United States at the time; and

WHEREAS, on June 4, 2021, in light of these developments, I signed Assembly Bill No. 5820 into law as P.L.2021, c.103, and issued Executive Order No. 244, which terminated the Public Health Emergency declared in Executive Order No. 103 (2020); and

WHEREAS, P.L.2021, c.103 sought to enable the State to bring an end to its prior Public Health Emergency while still allowing for an orderly continuation of the Administration's ability to order certain public health measures relating to COVID-19, including but not limited to vaccine distribution, administration, and management, COVID-19 testing, health resource and personnel allocation, data collection, and implementation of recommendations of the Centers for Disease Control and Prevention ("CDC") to prevent or limit the transmission of COVID-19, including in specific settings; and

WHEREAS, P.L.2021, c.103 explicitly maintained the State of Emergency declared in Executive Order No. 103 (2020), and stated it would in no way diminish, limit, or impair the powers of the Governor to respond to any of the threats presented by COVID-19 pursuant to the Disaster Control Act; and

WHEREAS, in addition to leaving the prior State of Emergency in effect, nothing in P.L.2021, c.103 prevented the Governor from declaring any new public health emergency under the EHPA, N.J.S.A. 26:13-1 et seq., should the evolving circumstances on the ground require such a declaration; and

WHEREAS, Executive Order No. 252, issued August 6, 2021, requires all covered health care and high-risk congregate settings to maintain a policy that requires all covered workers to either provide adequate proof to the health care and high-risk congregate settings that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly beginning September 7, 2021; and

WHEREAS, the Department of Health (“DOH”) issued Executive Directive 21-001 (October 7, 2021), establishing reporting protocol and extending the requirements of Executive Order No. 252 (2021) to group homes and psychiatric community homes licensed by the Department of Children and Families (“DCF”); and

WHEREAS, as the CDC has recognized, viruses can change through mutation and mutations can result in new variants of the virus, and these variants can have meaningfully distinct impacts from the original virus; and

WHEREAS, as the CDC has recognized, some variants spread more easily and quickly than other variants of the same virus, which may lead to more cases of COVID-19, increased strain on healthcare resources, more hospitalizations, and more deaths; and

WHEREAS, new variants are classified based on how easily the variant spreads, how severe its symptoms are, how it responds to treatments, and how well vaccines protect against the variant; and

WHEREAS, since Executive Order No. 244 (2021) took effect, the CDC has reported that new variants of concern of COVID-19 have been identified in the United States, particularly the B.1.617.2 (“Delta”) variant and most recently the B1.1.529 (“Omicron”) variant; and

WHEREAS, although New Jersey was able to end the prior Public Health Emergency on account of the effectiveness of vaccines in reducing transmissibility of COVID-19, the Omicron variant appears to spread more easily than other variants, including Delta; early

evidence suggests people who have received a primary series of a COVID-19 vaccine but have not yet received the recommended booster shot are more likely to become infected with this variant than prior variants and to be able to spread the virus to others; and some monoclonal antibody treatments may not be as effective against infection with the Omicron variant; and

WHEREAS, on January 11, 2022, I issued Executive Order No. 280, declaring the existence of a new Public Health Emergency, pursuant to the EHPA, N.J.S.A. 26:13-1 et seq., in the State of New Jersey due to the surge of cases and hospitalizations tied to the new variants of COVID-19; and

WHEREAS, on January 11, 2022, I issued Executive Order No. 281, extending various orders, including Executive Order No. 252 (2021), to ensure the State continues to have the necessary resources in place to respond to the new variants of COVID-19; and

WHEREAS, because vaccines are effective at preventing severe illness, hospitalizations, and death, including from the Omicron variant, the CDC has noted that the recent emergence of this variant emphasizes the importance of vaccination and boosters; and

WHEREAS, 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

WHEREAS, although the COVID-19 vaccines remain effective in preventing severe disease, recent data suggests their effectiveness at preventing infection or severe illness wanes over time; and

WHEREAS, 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 hospitalizations and death; and

WHEREAS, the CDC has advised that expedient and additional public health action is necessary to prevent severe impacts on the health of individuals and the health care system due to the rapid spread of the Omicron variant; and

WHEREAS, the CDC has confirmed that the rapid increase of infections is due to the increased transmissibility of the Omicron variant and its increased ability to evade immunity conferred by past infection or vaccination; and

WHEREAS, the State has thus far administered approximately 13.2 million doses of COVID-19 vaccines, with over 7.4 million New Jerseyans having received at least one dose of a vaccine and over 6.5 million having received the primary series of a vaccine; and

WHEREAS, as of December 2021, according to the data provided by licensees to the State, about 88 percent of health care workers, 87 percent of long-term care workers, and 73 percent of workers in high-risk congregate settings licensed by the Department of Human Services and DCF that are subject to Executive Order No. 252 (2021) and DOH Executive Directive 21-001 (October 7, 2021) have received their primary series of the COVID-19 vaccination; and

WHEREAS, as of January 18, 2022, only 48 percent of eligible individuals statewide have received their booster shot; and

WHEREAS, while over 75 percent of people in the State have received the primary series of a COVID-19 vaccine, the booster rates remain significantly lower and additional steps are necessary to ensure continued vaccinations, especially boosters, of individuals to protect against spread of COVID-19; and

WHEREAS, on July 6, 2021, the U.S. Department of Justice, Office of Legal Counsel issued an opinion concluding that Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 does not prohibit public or private entities from imposing vaccination requirements while vaccinations are only available pursuant to Emergency Use Authorization (“EUA”); and

WHEREAS, on November 5, 2021, the federal Centers for Medicare & Medicaid Services (“CMS”) issued the Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (CMS-3415-IFC) (“CMS Rule”), which was upheld by the United States Supreme Court on January 13, 2022, requiring most Medicare and Medicaid-certified providers’ and suppliers’ staff to be vaccinated against COVID-19 in order to participate in the Medicare and Medicaid programs; and

WHEREAS, in order to comply with the CMS rule, providers in New Jersey subject to the rule must require their staff to have received their first dose of the vaccine by January 27, 2022 and all doses to complete a primary series of the vaccine by February 28, 2022; and

WHEREAS, 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; and

WHEREAS, it is necessary to rapidly increase the number of health care workers who are up to date with their COVID-19 vaccinations; and

WHEREAS, the CDC has repeatedly emphasized the importance of heightened mitigation protocols in certain congregate and health care settings because of the significant risk of spread and vulnerability of the populations served; and

WHEREAS, requiring workers in those congregate and health care settings to be up to date with their COVID-19 vaccinations can help prevent outbreaks and reduce transmission to vulnerable individuals who may be at a higher risk of severe disease; and

WHEREAS, the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:24 and all amendments and supplements thereto, confer upon the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. Covered health care settings 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 according to the following schedule:

a. Unvaccinated covered workers must obtain their first dose of the primary series of a

COVID-19 vaccination by January 27, 2022; and

- b. All covered workers must provide adequate proof that they are up to date with their COVID-19 vaccination by February 28, 2022; provided however, that as to having received a booster dose, covered workers must provide adequate proof that they are up to date with their COVID-19 vaccinations by February 28, 2022, or within 3 weeks of becoming eligible for a booster dose, whichever is later.
2. Covered health care settings not subject to the CMS rule and covered high-risk congregate settings must maintain a policy that requires covered workers to provide adequate proof that they are up to date with their COVID-19 vaccinations according to the following schedule:
  - a. Unvaccinated covered workers must obtain their first dose of the primary series of a COVID-19 vaccination by February 16, 2022; and
  - b. All covered workers must provide adequate proof that they are up to date with their COVID-19 vaccination by March 30, 2022; provided however, that as to having received a booster dose, covered workers must provide adequate proof that they are up to date with their COVID-19 vaccinations by March 30, 2022, or within 3 weeks of becoming eligible for a booster dose, whichever is later.
3. The policies adopted by covered health care settings and covered high-risk congregate settings (collectively “covered settings”) pursuant to this Order

must require covered workers currently submitting to COVID-19 testing pursuant to Executive Order No. 252 (2021) to continue undergoing once or twice weekly testing until they submit adequate proof that they are up to date with their vaccination pursuant to the schedules set forth in paragraphs 1 and 2 of this Order.

4. The policies adopted by covered settings pursuant to this Order must include a disciplinary process for covered workers' noncompliance, which may include termination of employment.

5. Covered workers may demonstrate adequate proof they are up to date with their COVID-19 vaccinations by presenting the following documents if they list COVID-19 vaccines authorized for EUA in the United States and/or the World Health Organization ("WHO"), along with an administration date for each dose:

- a. The CDC COVID-19 Vaccination Card issued to the vaccine recipient by the vaccination site, or an electronic or physical copy of the same;
- b. Official record from the New Jersey Immunization Information System (NJIIS) or other State immunization registry;
- c. A record from a health care provider's portal/medical record system on official letterhead signed by a licensed physician, nurse practitioner, physician's assistant, registered nurse or pharmacist;
- d. A military immunization or health record from the United States Armed Forces; or

- e. A Docket mobile phone application record or any state specific application that produces a digital health record.

Covered settings collecting vaccination information from covered workers must comport with all federal and state laws, including but not limited to the Americans with Disabilities Act, that regulate the collection and storage of that information.

6. For purposes of this Order, consistent with the definition provided by Executive Order No. 252 (2021) and DOH Executive Directive 21-001 (October 7, 2021), covered settings shall be defined as follows: “Health care settings” shall include acute, pediatric, inpatient rehabilitation, and psychiatric hospitals, including specialty hospitals, and ambulatory surgical centers; long-term care facilities; intermediate care facilities; residential detox, short-term, and long-term residential substance abuse disorder treatment facilities; clinic-based settings like ambulatory care, urgent care clinics, dialysis centers, Federally Qualified Health Centers, family planning sites, and Opioid Treatment Programs; community-based healthcare settings including Program of All-inclusive Care for the Elderly, pediatric and adult medical day care programs, and licensed home health agencies and registered health care service firms operating within the State. “High-risk congregate settings” include State and county correctional facilities; all congregate care settings operated by the Juvenile Justice Commission, which includes secure care facilities and residential community homes; licensed community residences for individuals with intellectual and developmental disabilities (“IDD”) and traumatic brain injury (“TBI”); licensed community residences for adults with mental illness; certified day programs for

individuals with IDD and TBI, and group homes and psychiatric community homes licensed by DCF.

7. For purposes of this Order, consistent with the definition provided by Executive Order No. 252 (2021), “covered workers” shall include employees, both full- and part-time, contractors, and other individuals working in covered settings, including individuals providing operational or custodial services or administrative support.

8. For purposes of this Order, a covered worker shall be considered “up to date with their COVID-19 vaccinations” if they have received a primary series, which consists of 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. Covered workers will only be considered up to date with their vaccinations where they have received a COVID-19 vaccine that is currently authorized for emergency use by the U.S. Food and Drug Administration (FDA) or the WHO, or that are approved for use by the same. Covered workers who are not up to date with their vaccinations, or for whom vaccination status is unknown or who have not provided sufficient proof of documentation, must be considered noncompliant for purposes of this Order.

9. Nothing in this Order shall prevent a covered setting from instituting a vaccination policy that includes additional or stricter requirements, so long as such policy comports with the minimum requirements of this Order.

10. The policies adopted by covered settings pursuant to this Order 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. The policies adopted by covered settings pursuant to this Order must require covered workers that receive an exemption pursuant to this paragraph to continue weekly or twice weekly testing as required by Executive Order No. 252 (2021).

11. The Commissioner of DOH is hereby authorized to issue a directive supplementing the requirements outlined in this Order, which may include, but not be limited to, any requirements for reporting vaccination data to the DOH. Action taken by the Commissioner of DOH pursuant to this Order shall not be subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

12. Any provision of Executive Order No. 252 (2021) that is inconsistent with this Order is superseded.

13. The State Director of Emergency Management, who is the Superintendent of State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to the terms of this Order.

14. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with

any Administrative Orders issued pursuant to this Order.

15. No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement.

16. Penalties for violations of this Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and -50.

17. This Order shall take effect immediately and shall remain in effect until revoked or modified by the Governor.

GIVEN, under my hand and seal this 19th day of January, Two Thousand and Twenty-two, and of the Independence of the United States, the Two Hundred and Forty-Sixth.

[seal]

/s/ Philip D. Murphy  
Governor

Attest:

/s/ Parimal Garg  
Chief Counsel to the Governor

**EXECUTIVE ORDER NO. 294  
(APRIL 13, 2022)**

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WHEREAS, on March 9, 2020, I issued Executive Order No. 103, declaring the existence of a Public Health Emergency, pursuant to the Emergency Health Powers Act (“EHPA”), N.J.S.A. 26:13-1 et seq., and a State of Emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act (“Disaster Control Act”), N.J.S.A. App. A:9-33 et seq., in the State of New Jersey for Coronavirus disease 2019 (“COVID-19”), the facts and circumstances of which are adopted by reference herein; and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, which were issued each month between April 7, 2020 and May 14, 2021, the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency in effect at the time continued to exist; and

WHEREAS, New Jersey made significant progress in responding to COVID-19 and mitigating its devastating effects, in particular in light of the advent of three effective vaccines that, among other things, had significantly reduced the likelihood of both contracting and transmitting the variants of COVID-19 that were present in the United States at the time; and

WHEREAS, on June 4, 2021, in light of these developments, I signed Assembly Bill No. 5820 into law as P.L.2021, c.103, and issued Executive Order No. 244, which terminated the Public Health

Emergency declared in Executive Order No. 103 (2020); and

WHEREAS, P.L.2021, c.103 sought to enable the State to bring an end to its prior Public Health Emergency while still allowing for an orderly continuation of the Administration's ability to order certain public health measures relating to COVID-19, including but not limited to vaccine distribution, administration, and management, COVID-19 testing, health resource and personnel allocation, data collection, and implementation of recommendations of the Centers for Disease Control and Prevention ("CDC") to prevent or limit the transmission of COVID-19, including in specific settings; and

WHEREAS, P.L.2021, c.103 explicitly maintained the State of Emergency declared in Executive Order No. 103 (2020), and stated it would in no way diminish, limit, or impair the powers of the Governor to respond to any of the threats presented by COVID-19 pursuant to the Disaster Control Act; and

WHEREAS, in addition to leaving the prior State of Emergency in effect, nothing in P.L.2021, c.103 prevented the Governor from declaring any new public health emergency under the EHPA, N.J.S.A. 26:13-1 et seq., should the evolving circumstances on the ground require such a declaration; and

WHEREAS, on July 6, 2021, the U.S. Department of Justice, Office of Legal Counsel issued an opinion concluding that Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 does not prohibit public or private entities from imposing vaccination requirements while vaccinations are only available pursuant to Emergency Use Authorization (EUA); and

WHEREAS, on November 5, 2021, the federal Centers for Medicare & Medicaid Services (“CMS”) issued the Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (CMS-3415-IFC) (“CMS Rule”), which was upheld by the United States Supreme Court on January 13, 2022, requiring most Medicare and Medicaid-certified providers’ and suppliers’ staff to be vaccinated against COVID-19 in order to participate in the Medicare and Medicaid programs; and

WHEREAS, on December 29, 2021, CMS issued guidance for the CMS Rule clarifying the timeframes for compliance and the enforcement actions to which facilities will be subject if their vaccination rates are less than 100 percent by the deadlines set forth therein and are therefore considered non-compliant; and

WHEREAS, on January 11, 2022, due to the surge of cases and hospitalizations tied to the new variants of COVID-19, I signed Executive Order No. 280, declaring the existence of a new Public Health Emergency, pursuant to the EHPA, N.J.S.A. 26:13-1 et seq., and continuing the State of Emergency declared in Executive Order No. 103 (2020) pursuant to the Disaster Control Act, N.J.S.A. App. A:9-33 et seq., in the State of New Jersey; and

WHEREAS, on January 19, 2022, I signed Executive Order No. 283, requiring all covered health care and high-risk congregate settings to maintain a policy that requires all covered workers to provide adequate proof to the health care and high-risk congregate settings that they are up to date with their COVID-19 vaccinations, including any booster shots for which they are eligible; and

WHEREAS, on February 10, 2022, I signed Executive Order No. 288, which declared that the Public Health Emergency declared in Executive Order No. 280 (2022) continued to exist and that all Executive Orders issued, in whole or in part in response to the COVID-19 Public Health Emergency, including Executive Order No. 283 (2022), remain in full force and effect; and

WHEREAS, on March 2, 2022, I issued Executive Order No. 290, clarifying and extending the timeframes within which covered settings must require their covered workers to comply with the vaccination and booster requirements set forth in Executive Order No. 283 (2020); and

WHEREAS, on March 4, 2022, I issued Executive Order No. 292 terminating the public health emergency declared in Executive Order No. 280 (2022) effective March 7, 2022, while continuing the State of Emergency declared in Executive Order No. 103 (2020); and

WHEREAS, Executive Order No. 292 (2022) stated that Executive Order Nos. 283 and 290 remain in full force and effect pursuant to the Disaster Control Act, N.J.S.A. App. A:9-33 et seq.; and

WHEREAS, because vaccines are effective at preventing severe illness, hospitalizations, and death, including from the Omicron variant, the CDC has noted that the recent emergence of this variant emphasizes the importance of vaccination and boosters; and

WHEREAS, according to the CDC, studies show that 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 partic-

ular due to transmissibility and severity of different variants circulating at different times; and

WHEREAS, although the COVID-19 vaccines remain effective in preventing severe disease, recent data suggests their effectiveness at preventing infection or severe illness wanes over time; and

WHEREAS, 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 hospitalizations and death; and

WHEREAS, the CDC has advised that additional public health action is necessary to prevent severe impacts on the health of individuals and the health care system due to the spread of the Omicron variant as well as other new variants; and

WHEREAS, the CDC has confirmed that the Omicron variant and other new variants have increased transmissibility and an increased ability to evade immunity conferred by past infection or vaccination; and

WHEREAS, on March 29, 2022, the Food and Drug Administration (“FDA”) issued an updated emergency use authorization for a second mRNA booster dose; and

WHEREAS, on March 30, 2022, the CDC updated their guidance to allow certain populations to receive a second booster dose to increase their individual protection; and

WHEREAS, the CDC advised that all people 50 years of age and older, people 12 years of age and older

who are moderately or severely immunocompromised, and people 18 through 49 years of age who received a Johnson & Johnson/Janssen primary series and a Johnson & Johnson/Janssen first booster are eligible for a second mRNA booster dose at least four months after their first booster dose; and

WHEREAS, as of March 30, 2022, the CDC advised that, while some individuals are eligible to get a second booster dose, the CDC currently considers a person boosted and up to date with their COVID-19 vaccination after receiving their first booster dose at this time; and

WHEREAS, 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, and to ensure the flexibility to act consistently with the most current and appropriate scientific research, it is appropriate to clarify the requirements for compliance set forth in Executive Order No. 283 (2022) and further revised in Executive Order No. 290 (2022) to limit the definition of "up to date" to include only one booster dose and to clarify that a second booster dose is not required; and

WHEREAS, the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A:9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:24 and all amendments and supplements thereto, confer upon the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the

authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. Covered health care settings subject to the CMS Rule must maintain a policy pursuant to Executive Order No. 283 (2022) that requires covered workers to provide adequate proof that they are up to date with their COVID-19 vaccinations according to the following schedule:
  - a. Unvaccinated covered workers must obtain their primary series of a COVID-19 vaccination pursuant to the timeframes set forth by CMS; and
  - b. All covered workers must provide adequate proof that they have received their first booster dose by April 11, 2022, or within 3 weeks of becoming eligible for their first booster dose, whichever is later.
2. Covered health care settings not subject to the CMS Rule and covered high-risk congregate settings must maintain a policy pursuant to Executive Order No. 283 (2022) that requires covered workers to provide adequate proof that they are up to date with their COVID-19 vaccinations according to the following schedule:
  - c. Unvaccinated covered workers must obtain their first dose of the primary series of a COVID-19 vaccination by February 16, 2022; and
  - d. All covered workers must provide adequate proof that they are up to date with their COVID-19 vaccination by May 11, 2022; provided however, that as to having received

their first booster dose, covered workers must provide adequate proof that they are up to date with their COVID-19 vaccinations by May 11, 2022, or within 3 weeks of becoming eligible for their first booster dose, whichever is later.

3. Paragraph 8 of Executive Order No. 283 (2022) is hereby modified as follows: For purposes of this Order, a covered worker shall be considered “up to date with their COVID-19 vaccinations” if they have received a primary series, which consists of either a 2-dose series of an mRNA COVID-19 vaccine or a single dose COVID-19 vaccine, and the first booster dose for which they are eligible as recommended by the CDC. Covered workers will only be considered up to date with their vaccinations where they have received a COVID-19 vaccine that is currently authorized for emergency use by the FDA or the World Health Organization (WHO), or that is approved for use by the same. Covered workers who are not up to date with their vaccinations, or for whom vaccination status is unknown or who have not provided sufficient proof of documentation, must be considered noncompliant for purposes of this Order.

4. The Commissioner of the Department of Health (“DOH”) is hereby authorized to issue a directive supplementing the requirements outlined in this Order, which may include, but not be limited to, any requirements for reporting vaccination data to the DOH. Action taken by the Commissioner of DOH pursuant to this Order shall not be subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

5. Paragraphs 1, 2, and 8 of Executive Order No. 283 (2022) and Paragraphs 1 and 2 of Executive Order No. 290 (2022) are hereby superseded to the extent they are inconsistent with this Order.

6. The State Director of Emergency Management, who is the Superintendent of State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to the terms of this Order.

7. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.

8. No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement.

9. Penalties for violations of this Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and -50.

10. This Order shall take effect immediately and shall remain in effect until revoked or modified by the Governor.

GIVEN, under my hand and seal this 13th day of April, Two Thousand and Twenty-two, and of the Independence of the United States, the Two Hundred and Forty-Sixth.

[seal]

/s/ Philip D. Murphy  
Governor

Attest:

/s/ Parimal Garg  
Chief Counsel to the Governor

**EXECUTIVE ORDER NO. 332  
(JUNE 12, 2023)**

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WHEREAS, on March 9, 2020, I issued Executive Order No. 103, declaring the existence of a Public Health Emergency, pursuant to the Emergency Health Powers Act (“EHPA”), N.J.S.A. 26:13-1 et seq., and a State of Emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act (“Disaster Control Act”), N.J.S.A. App A:9-33 et seq., in the State of New Jersey for Coronavirus disease 2019 (“COVID-19”), the facts and circumstances of which are adopted by reference herein; and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, which were issued each month between April 7, 2020 and May 14, 2021, the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency in effect at the time continued to exist; and

WHEREAS, New Jersey made significant progress in responding to COVID-19 and mitigating its devastating effects, in particular in light of the advent of several effective vaccines that, among other things, had significantly reduced the likelihood of both contracting and transmitting the variants of COVID-19 that were present in the United States at the time; and

WHEREAS, on June 4, 2021, in light of these developments, I signed Assembly Bill No. 5820 into law as P.L.2021, c.103, and issued Executive Order No. 244, which terminated the Public Health Emergency declared in Executive Order No. 103 (2020); and

WHEREAS, Section 4 of P.L.2021, c.103 provides that “[t]he termination of the public health emergency declared by the Governor in Executive Order No. 103 (2020), as extended, shall in no way diminish, limit, or impair the powers of the Governor” pursuant to the Disaster Control Act, and that the State of Emergency declared in Executive Order No. 103 (2020) pursuant to that Act “shall remain in effect until terminated by the Governor”; and

WHEREAS, Section 5 of P.L.2021, c.103 specifically provides that “[f]ollowing the termination of the public health emergency declared by the Governor in Executive Order No. 103 (2020), as extended, the Governor, Commissioner of the Department of Health (“DOH”), and the head of any other State agency may issue orders, directives, and waivers pursuant to P.L. 2005, c.222 (C.26:13-1 et seq.) related to (1) vaccination distribution, administration, and management, (2) COVID-19 testing, (3) health resource and personnel allocation, (4) data collection, retention, sharing, and access, (5) coordination of local health departments, and (6) implementation of any applicable recommendations of the Centers for Disease Control and Prevention (“CDC”) to prevent or limit the transmission of COVID-19, including in specific settings”; and

WHEREAS, on August 6, 2021, I issued Executive Order No. 252, which requires certain health care and high-risk congregate settings (collectively, “covered settings”) to maintain a policy that requires all covered workers to either provide adequate proof to the covered settings that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly beginning September 7, 2021; and

WHEREAS, in addition to leaving the prior State of Emergency in effect, nothing in P.L.2021, c.103 prevented the Governor from declaring any new public health emergency under the EHPA, N.J.S.A. 26:13-1 et seq., should the evolving circumstances on the ground require such a declaration; and

WHEREAS, as the CDC has recognized, viruses can change through mutation and mutations can result in variants of the virus, and some variants can spread more easily and quickly than other variants of the same virus, which may lead to more cases of COVID-19, increased strain on healthcare resources, more hospitalizations, and more deaths; and

WHEREAS, since Executive Order No. 244 (2021) took effect, the CDC identified several additional variants of concern of COVID-19 in the United States, including the B.1.617.2 (Delta) variant and the B1.1.529, BA.1, BA.1.1, BA.2, BA.3, BA.4, and BA.5 lineages of the Omicron variant (“Omicron”); and

WHEREAS, although New Jersey was able to end the initial Public Health Emergency on account of the effectiveness of vaccines in reducing transmissibility of COVID-19, the Omicron variant spread more easily than other variants and required additional action to protect the public; and

WHEREAS, on January 11, 2022, I issued Executive Order No. 280, declaring the existence of a new Public Health Emergency, pursuant to the EHPA, N.J.S.A. 26:13-1 et seq., and continuing the State of Emergency declared in Executive Order No. 103 (2020) pursuant to the Disaster Control Act, N.J.S.A. App. A:9-33 et seq., in the State of New Jersey due to

the surge of cases and hospitalizations tied to the new variants of COVID-19; and

WHEREAS, on January 11, 2022, I issued Executive Order No. 281, extending various orders to ensure the State continues to have the necessary resources in place to respond to the new variants of COVID-19; and

WHEREAS, on January 19, 2022, I issued Executive Order No. 283, requiring covered settings to maintain a policy that requires all covered workers to provide adequate proof to the covered settings that they are up to date with their COVID-19 vaccinations, including a booster dose when eligible; and

WHEREAS, on February 10, 2022, I issued Executive Order No. 288, which declared that the Public Health Emergency declared in Executive Order No. 280 (2022) continued to exist; and

WHEREAS, on March 2, 2022, I issued Executive Order No. 290, clarifying and extending the timeframes within which covered settings must require their covered workers to comply with the vaccination and booster requirements set forth in Executive Order No. 283 (2022); and

WHEREAS, as a result of significant emergency measures taken, the State made considerable progress in combating COVID-19 variants and decreasing key statistics, such as the number of hospitalized patients in the State, the number of daily positive COVID-19 cases, spot positivity, and the rate of transmission; and

WHEREAS, in light of these developments, on March 4, 2022, I issued Executive Order No. 292

terminating the Public Health Emergency declared in Executive Order No. 280 (2022) effective March 7, 2022, while continuing the State of Emergency declared in Executive Order No. 103 (2020); and

WHEREAS, Executive Order No. 292 (2022) stated that Executive Order Nos. 111, 112, and 207 (2020), Nos. 252, 253, 264, and 271 (2021) and Nos. 283 and 290 (2022) remain in full force and effect pursuant to the Disaster Control Act, N.J.S.A. App. A:9-33 et seq., except that Paragraphs 11 and 13 of Executive Order No. 264 (2021) were rescinded; and

WHEREAS, on April 13, 2022, consistent with the authority I retained under the Disaster Control Act and Section 5 of P.L.2021, c.103, I issued Executive Order No. 294, clarifying the vaccination and booster requirements applicable to workers in certain covered settings as set forth in Executive Order No. 283 (2022) and Executive Order No. 290 (2022); and

WHEREAS, throughout the course of the COVID-19 pandemic, and even as federal emergency declarations relating to COVID-19 have subsequently been rescinded, the U.S. Food and Drug Administration (“FDA”) has continually evaluated data regarding both the safety and continued effectiveness of the COVID-19 vaccines; and

WHEREAS, according to the CDC, various treatments and FDA-authorized therapeutics for COVID-19, such as antiviral medications and monoclonal antibodies, that can reduce the likelihood of severe illness and death have become widely available; and

WHEREAS, on August 11, 2022, the CDC issued updated and consolidated COVID-19 guidance for the general population which recognized that high levels

of vaccine and infection-induced immunity and the availability of effective treatments and prevention tools have substantially reduced the risk for medically significant COVID-19 illness, and associated hospitalization and death; and

WHEREAS, the CDC's general population guidance observed that as a result of improved circumstances and the availability of multicomponent prevention measures, public health efforts to minimize the impacts of COVID-19 can be tailored to individual and societal health factors, with a focus on reducing medically significant illness and minimizing the strain on the health care system; and

WHEREAS, in the months that followed, the FDA issued amended Emergency Use Authorizations ("EUAs") for the bivalent Moderna and Pfizer-BioNTech COVID-19 vaccines, which target the original COVID-19 strain as well as Omicron and its subvariants, thereby offering stronger protections against severe illness and death from COVID-19 than the original monovalent COVID-19 vaccines; and

WHEREAS, around the same time, the CDC began issuing additional guidance for specific settings to consider in determining which COVID-19 prevention and mitigation protocols to use and when; and

WHEREAS, on September 23, 2022, the CDC issued updated guidance for health care settings and health care personnel, including long-term care and home health settings, which recommended the use of COVID-19 infection prevention and control measures based on facility- and population-specific factors, and other risk factors for transmission; and

WHEREAS, the CDC's updated infection prevention and control guidance continues to encourage health care settings and personnel to remain up to date with all recommended COVID-19 vaccine doses, but expressly states that routine COVID-19 screening testing is no longer recommended in health care settings; and

WHEREAS, in light of the CDC's updated infection prevention and control guidance for health care settings, and given the State's ability to maintain stable rates on key benchmark statistics, such as the number of hospitalized patients in the State, the number of daily positive COVID-19 cases throughout the winter months of 2023, and other metrics, on April 3, 2023, I issued Executive Order No. 325, which, in pertinent part, lifted the COVID-19 testing requirements for health care settings, as had been required pursuant to Executive Order No. 252 (2021) and Nos. 283, 290, and 294 (2022), and Paragraph 2 of Executive Order No. 281 (2022); and

WHEREAS, due to ongoing concerns with the vulnerability of our State's health care workforce and infrastructure, and the continued application of the federal Centers for Medicare & Medicaid Services ("CMS") Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (CMS-3415-IFC) ("CMS Rule") requiring most Medicare and Medicaid-certified providers' and suppliers' staff to be vaccinated against COVID-19, Executive Order No. 325 (2023) maintained the requirement that health care settings in New Jersey maintain a policy requiring covered workers to provide adequate proof that they are up to date with their COVID-19 vaccinations; and

WHEREAS, Executive Order No. 325 (2023) incorporated the definition of “up to date” as set forth in Executive Order No. 294 (2022), providing that covered health care workers are considered “up to date” with their COVID-19 vaccinations if they have received a primary series, which consists of either a 2-dose series of an mRNA COVID-19 or protein subunit vaccine, or a single dose viral vector COVID-19 vaccine, and the first booster dose for which they are eligible as recommended by the CDC; and

WHEREAS, the phrase “up to date” with COVID-19 vaccinations, as set forth in Executive Order No. 325 (2023), was also qualified and informed by the scope of EUAs for the COVID-19 vaccines as authorized and amended by the FDA over time; and

WHEREAS, shortly after issuing Executive Order No. 325 (2023), on April 18, 2023, the FDA issued amended EUAs of the COVID-19 vaccines EUAs to remove authorization of monovalent Moderna and Pfizer-BioNTech COVID-19 vaccines, and to clarify that most individuals, regardless of prior vaccination status, may receive a single-dose Moderna or Pfizer-BioNTech COVID-19 bivalent mRNA vaccine; and

WHEREAS, in addition, on May 1, 2023, President Biden announced intentions to wind down certain remaining COVID-19 vaccination requirements to coincide with the May 11, 2023 termination of the federal public health emergency, citing a 95% decline in COVID-19-related deaths and a 91% decline in COVID-19-related hospitalizations nationally; and

WHEREAS, on June 5, 2023, CMS issued a Final Rule to formally rescind the CMS Rule, thereby lifting the requirement of most Medicare and Medicaid-

certified providers' and suppliers' staff to be vaccinated against COVID-19 in order to participate in Medicare and Medicaid programs; and

WHEREAS, the Final Rule sets forth an effective date of 60 days from the date of its publication, which will occur on August 4, 2023, but provides that CMS will cease enforcement of the staff vaccination requirements against covered health care facilities immediately; and

WHEREAS, in place of the COVID-19 vaccination requirements, the Final Rule will use quality reporting and value-based incentive programs to encourage ongoing COVID-19 vaccinations in health care settings; and

WHEREAS, given the FDA's amended EUAs of the COVID-19 vaccines, as well as CMS's withdrawal of COVID-19 vaccination requirements for CMS-covered health care facilities and other CDC guidance, it is necessary to update and streamline the State's policy requiring COVID-19 infection prevention and control in health care settings, as the State continues the next phase of the COVID-19 response; and

WHEREAS, New Jersey has achieved high levels of vaccine and infection-induced immunity, and our health care systems are equipped with multicomponent strategies to prevent and mitigate the impacts of COVID-19, including through COVID-19 vaccinations and authorized therapeutic medications, and targeted COVID-19 testing and isolation strategies; and

WHEREAS, while health care settings remain encouraged to promote COVID-19 vaccinations amongst their staff, visitors, and patient populations, the CDC's latest guidance supports a flexible approach of

COVID-19 infection prevention and control that allows health care facilities to adapt their policies as needed based on individual circumstances; and

WHEREAS, given the State's progress in substantially reducing the strain on our health care infrastructure and workforce, and for other reasons set forth herein, the State can responsibly lift the requirement that health care settings maintain a policy requiring covered workers to provide proof that they are up to date with their COVID-19 vaccinations; and

WHEREAS, consistent with CMS's decision to lift COVID-19 vaccination requirements while encouraging COVID-19 vaccinations and other hospital quality reporting, New Jersey must continue to monitor for COVID-19 cases, coverage, clusters, and outbreaks in health care settings in order for DOH to understand and track COVID-19, as the State continues the next phase of the COVID-19 response; and

WHEREAS, the Constitution and statutes of the State of New Jersey, including P.L.2021, c.103, N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:24, and all amendments and supplements thereto, confer upon the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. The COVID-19 vaccination requirements for health care settings, as required or extended by Executive Order No. 252 (2021), Executive Order Nos. 283, 290, and 294 (2022), Paragraph 2 of Executive

Order No. 281 (2022), and Executive Order No. 325 (2023) are hereby rescinded.

2. Nothing in this Order shall prevent covered settings from choosing to maintain a COVID-19 vaccination or testing policy, including but not limited to, one implemented pursuant to Executive Order No. 252 (2021), Executive Order Nos. 283, 290, and 294 (2022), Paragraph 2 of Executive Order No. 281 (2022), and Executive Order No. 325 (2023), or from establishing a COVID-19 vaccination or testing policy that includes additional or stricter requirements.

3. The Commissioner of DOH is hereby authorized to issue a directive related to the terms outlined in this Order, which may include, but not be limited to, any requirements for reporting COVID-19 vaccination data to DOH.

4. For purposes of this Order, consistent with the definition provided by Executive Order Nos. 252 (2021) and 283 (2022), covered settings shall be defined as follows: “Health care settings” shall include acute, pediatric, inpatient rehabilitation, and psychiatric hospitals, including specialty hospitals, and ambulatory surgical centers; long-term care facilities; intermediate care facilities; residential detox, short-term, and long-term residential substance abuse disorder treatment facilities; clinic-based settings like ambulatory care, urgent care clinics, dialysis centers, Federally Qualified Health Centers, family planning sites, and Opioid Treatment Programs; and community-based healthcare settings including Program of All-inclusive Care for the Elderly, pediatric and adult medical day care programs, and licensed home health agencies and registered health care service firms operating within the State.

5. For purposes of this Order, consistent with the definition provided by Executive Order Nos. 252 (2021) and 283 (2022), “covered workers” shall include employees, both full- and part-time, contractors, and other individuals working in covered settings, including individuals providing operational or custodial services or administrative support.

6. Any provisions of Executive Order No. 252 (2021), Executive Order Nos. 281, 283, 290, and 294 (2022), and Executive Order No. 325 (2023) that are inconsistent with this Order are superseded.

7. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.

8. No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement.

9. This Order shall take effect immediately and shall remain in effect until revoked or modified by the Governor.

GIVEN, under my hand and seal this 12th day of June, Two Thousand and Twenty-three, and of the Independence of the United States, the Two Hundred and Forty-Seventh.

[seal]

/s/ Philip D. Murphy  
Governor

Attest:

/s/ Parimal Garg  
Chief Counsel to the Governor

**LETTER FROM NEW JERSEY ATTORNEY  
GENERAL ASSERTING MOOTNESS  
(JUNE 12, 2023)**

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STATE OF NEW JERSEY  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
25 Market Street, PO Box 112  
Trenton, NJ 08625-0112

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Philip D. Murphy  
Governor  
Sheila Y. Oliver  
Lt. Governor  
Matthew J. Platkin  
Attorney General  
Michael T.G. Long  
Director

**Via Electronic Filing (CM/ECF)**  
Patricia S. Dodszuweit, Clerk of Court  
United States Court of Appeals for the Third Circuit  
601 Market Street  
Philadelphia, PA 19106-1790

Re: *Katie Sczesny, et al v. Philip Murphy, et al*,  
No. 22-2230 Letter in Further Response to  
3/6/23 Order

Dear Ms. Dodszuweit:

As the State advised in its March 10, 2023 letter (Dkt. 52), the State wishes to update the Court about

a post-argument change affecting EO 283. Today, the Governor issued Executive Order (“EO”) 332,<sup>1</sup> which immediately lifted EO 283’s remaining vaccination requirement for employees in health care settings. That is, the vaccination requirement being challenged by Appellants in this matter is no longer in effect.

As the EO explains, due to recent developments—including the federal Centers for Medicare & Medicaid Services’s (“CMS”) announcement that it will lift its own Health Care Staff Vaccination Interim Final Rule (CMS-3415-IFC) as of August 4, 2023—and New Jersey’s continued “progress in substantially reducing the strain on our health care infrastructure and workforce,” New Jersey “can responsibly lift” the vaccination requirement. EO 332, at pp. 7-9.

With this development, the appeal is now moot, as this Court has recognized in a chorus of decisions addressing analogous rescinded COVID-19 requirements. *See Stepien v. Gov. of N.J.*, No. 21-3290, 2023 WL 2808460, \*1-4 (3d Cir. Apr. 6, 2023); *Clark v. Gov. of N.J.*, 53 F.4th 769, 776-80 (3d Cir. 2022); *Johnson v. Gov. of N.J.*, No. 21-1795, 2022 WL 767035, \*2-3 (3d Cir. Mar. 14, 2022); *Doe 1 v. Upper St. Clair Sch. Dist.*, No. 22- 1141, 2022 WL 2951467, \*1 (3d Cir. Mar. 1, 2022); *Parker v. Gov. of Pa.*, No. 20-3518, 2021 WL 5492803, \*4 (3d Cir. Nov. 23, 2021); *Cty. of Butler v. Gov. of Pa.*, 8 F.4th 226, 230-32 (3d Cir. 2021).

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<sup>1</sup> A copy of EO 332 is enclosed. It also is publicly available at <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-332.pdf>.

Respectfully submitted,

MATTHEW J. PLATKIN  
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Daniel M. Vannella  
Assistant Attorney General

Enclosure

cc: All Counsel of record (via ECF)

**VERIFIED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF  
(APRIL 18, 2022)**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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KATIE SZCZESNY, JAMIE RUMFIELD,  
DEBRA HAGEN, and MARIETTE VITTI,

*Plaintiffs,*

v.

THE STATE OF NEW JERSEY,  
GOVERNOR PHILIP MURPHY (in His  
Official and Personal Capacity),

*Defendants.*

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CIVIL ACTION

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Plaintiffs Katie Sczesny (“Ms. Sczesny”), Jamie Rumfield (“Ms. Rumfield”), Debra Hagen (“Ms. Hagen”), and Mariette Vitti (“Ms. Vitti”) (collectively “Plaintiffs”) by and through their counsel, complain against Defendants, The State of New Jersey, Governor Philip Murphy in his official and personal capacity, as follows:

## **Introduction**

1. This is a civil action for declaratory and injunctive relief arising under the Fourteenth and Fourth Amendments to the United States Constitution.
2. It concerns the constitutionality of Executive Order 283 (“EO 283”), which requires Plaintiffs to receive a “booster” shot as a condition of working in healthcare in New Jersey.
3. EO 283 violates the liberty and privacy rights protected by the Fourteenth Amendment to the U.S. Constitution, including the right to refuse medical procedures and the right to not be medically surveilled by government actors. It also violates the Equal Protection clause of the 14th Amendment, and the Fourth Amendment prohibition of unreasonable search and seizure, and the procedural due process clause.

## **Jurisdiction and Venue**

4. This action arises under the Fourteenth Amendment and Fourth Amendment to the U.S. Constitution.
5. This Court has jurisdiction over all claims pursuant to the Declaratory Judgment Act as codified at 28 U.S.C. Sections 2201 and 2202.
6. Venue is proper under 28 U.S.C. Section 1331(b) because Defendant is located in this District and because a substantial part of the events giving rise to the claim occurred in this District.

## **Parties**

7. Plaintiffs are all current employees of Hunterdon Medical Center subject to Executive Order 283.

8. Defendant Philip Murphy (“Governor Murphy”) is the governor of the State of New Jersey and is responsible for Executive Order 283.

## **Factual Background**

### **I. The Plaintiffs**

9. Plaintiff Debra Hagen has been a nurse for 30 years and employed by Hunterdon Medical Center for 16 years. Exhibit A.

10. Ms. Hagen has a long and complicated medical history that includes seizures and serious adverse reactions to vaccines and medications.

11. At the age of 14 she was diagnosed with a seizure disorder due to hormones related to puberty. She developed reactions to the initial medications used to treat her seizures. At the age of 23 she weaned off the seizure medications because her neurologist believed her hormones were stable enough for her to do so. Declaration of Debra Hagen at ¶ 5.

12. For the next 15 years Ms. Hagen continued to suffer neurological symptoms, including migraines and vertigo, but no additional seizures, to her knowledge. *Id.* at ¶ 6.

13. However, in 2009 when pregnant with her fourth child, she developed shingles four times prior to giving birth and suffered a seizure when her son was 5 months old. An EEG showed that she had persistent seizure activity in her brain and she was referred to an epileptologist. *Id.* at ¶ 7.

14. Unfortunately, Ms. Hagen suffered reactions to available seizure medications and was not able to tolerate many of them. She was instructed to manage

her seizure condition to the best of her ability with strict lifestyle guidelines. She states: "I have been very careful with any medications, treatments, beverages, and anything else that I put into my body because I know that triggering another seizure would mean loss of my driver's license and likely my job." She avoids alcohol, certain medications, and strictly monitors and limits caffeine intake. She must be careful to get regular and sufficient sleep, to eat frequent meals, and avoid stressful situations to avoid seizure breakthroughs. *Id.* at ¶ 8.

15. Her body is susceptible to neurological and immune issues and she continues to develop Shingles 2-3 times per year when she has times of increased stress. *Id.* at ¶ 9.

16. In January 2016, Ms. Hagen fell down a flight of stairs and suffered a concussion. Her recovery was prolonged and she suffered post-concussion symptoms of brain fog, headaches, fatigue, and lack of concentration. Her doctor treated these symptoms with Adderall, which allowed her to go back to work, but puts her at an increased risk for another seizure, especially as she suffers from tachycardia (increased heart rate) as a side effect of the medication. *Id.* at ¶ 11.

17. In 2019, Ms. Hagen underwent titer testing for measles, mumps, rubella, and varicella (chicken pox). Despite having had 3 MMR vaccines in the past, she did not show immunity to measles. Neither did she show immunity to chicken pox, despite the fact that she had chicken pox and suffers from regular shingles because she has had chicken pox. *Id.* at ¶ 13.

18. Ms. Hagen received a fourth MMR vaccine and still did not develop immunity to measles. *Id.*

19. Ms. Hagen received another chicken pox vaccine and developed two back-to-back cases of shingles within 2 weeks of having received the vaccine and another case of shingles six months later. Shingles is a known adverse event following the chicken pox vaccine *Id.*

20. Ms. Hagen's seizures have always been linked to her hormones and she is currently perimenopausal, which puts her at an even more increased risk of seizures. *Id.* at ¶ 14.

21. Ms. Hagen's complex neurological and immunological medical history makes her high-risk for neurological reactions and complications from medications, vaccines, and even beverages. She was nervous about taking any of the Covid-19 injections authorized for emergency use in the United States because she became aware of reports and data that people were suffering neurological side effects such as headaches, brain fog, fatigue, and Guillen-Barre syndrome. These are symptoms that Ms. Hagen could not risk because she is already being treated to control these symptoms. *Id.* at 15.

22. Shingles is also a suspected adverse event for some people following the Covid-19 shots.

23. Ms. Hagen tried everything she could to avoid getting any of the Covid-19 injections authorized for use in the United States, hoping that she would be able to get the Novavax vaccine instead because it has a safer side effect profile and does not use fetal cells, which goes against Ms. Hagen's religious beliefs. *Id.* at ¶¶ 15-16.

24. Ms. Hagen's requests for a religious accommodation and medical accomodations were both denied.

Given Governor Murphy mandate and the CMS (federal) mandate, 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.* at ¶¶ 15-16.

25. Ms. Hagen took a chance on the J&J injection, which she received on January 26, 2022. *Id.* at ¶ 17.

26. 48 hours after receiving the J&J injection, she began to experience neurological symptoms. The symptoms began with numbness, tingling, and sciatic pain through her entire 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 right leg; headaches; dizziness; severe fatigue, and an inability to concentrate. *Id.*

27. She sought medical help and was told by her doctor 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.*

28. Ms. Hagen received an EMG on February 4, 2022, which showed that certain sensory nerves could not feel the electric stimulation. She was diagnosed with “sensory neuropathy” and her doctor told her that she should not receive any further covid vaccinations and signed a medical exemption form for her stating the same. *Id.* at ¶ 18.

29. Ms. Hagen’s request for a medical accommodation was denied twice. *Id.* at ¶¶ 19-20.

30. Ms. Hagen does not want to take any more of the Covid-19 injections because she does not want to risk exacerbating her health problems further.

She feels that she needs to be able 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 ¶ 24.

31. Plaintiff Jaime Rumfield is a labor and delivery nurse at Hunterdon Medical Center. Exhibit B, Declaration of Jaime Rumfield at ¶ 4.

32. She received the Moderna Covid-19 injections on March 8, 2021 and April 8, 2021. *Id.* at ¶ 5.

33. After receiving the injections she experienced severe headache, body aches, chills, fever, and a red rash surrounding the injection site. *Id.* at ¶ 5.

34. She tested positive for Covid-19 on December 31, 2021. She experienced headache, head congestion, runny nose, body aches, sore throat, and extreme exhaustion. *Id.* at ¶ 6.

35. Six days after testing positive, while still symptomatic and likely still contagious, she was told she could return to work because her symptoms were resolving. *Id.* at ¶ 7.

36. Ms. Rumfield requested a 90 day extension on her deadline to take the booster after testing positive, but was told by HMC that she was eligible to receive the booster 5 days after testing positive for Covid-19. *Id.* at ¶¶ 8-9.

37. Ms. Rumfield submitted a request for a religious exemption, but it was denied on the basis that accommodating her would pose an undue burden on the hospital. *Id.* at ¶ 10.

38. Ms. Rumfield will not take any more Covid-19 injections because she has natural immunity, does

not need her immunity to Covid-19 boosted due to her recent acute infection, and because it would violate her sincerely held religious beliefs. *Id.* at ¶ 11.

39. Ms. Rumfield wants to make her own decisions with regard to her body, especially what is injected into her body. She feels that there is risk to the Covid-19 injections. *Id.* at ¶ 12.

40. Plaintiff Katie Sczesny is a nurse employed by HMC. She is pregnant. Declaration of Katie Sczesny at ¶ 4, Exhibit C.

41. Ms. Sczesny received two shots of the Pfizer Covid-19 injection in September, 2021. She had severe spinal pain, joint aches, and a fever for 48 hours following the second shot. *Id.* at ¶ 7.

42. Three months later, in December 2021, she became infected with Covid-19. *Id.* at ¶ 8.

43. Ms. Sczesny was told by HMC that her recent Covid-19 infection and being fully vaccinated was not a legitimate reason to wait to get the booster. *Id.* at ¶ 10.

44. Ms. Sczesny was told that her pregnancy was not a legitimate reason to wait to receive her booster. *Id.* at ¶ 11.

45. Ms. Sczesny underwent IVF to become pregnant with the baby she is currently carrying. *Id.* at ¶ 13.

46. Ms. Sczesny does not want to get the booster while pregnant. She does not want to take any risks with her baby and feels should have the right to make that decision for herself and her baby. *Id.* at ¶ 14.

47. HMC has denied Ms. Sczesny's request to wait to get her booster, despite a note from her doctor. *Id.* at ¶ 15.

48. Ms. Sczesny has been told by multiple people at HMC that Executive Order 283 is the reason she must receive the booster or lose her job. *Id.* at ¶ 16.

49. Plaintiff Mariette Vitti, RN, BSN-BC is board certified in Medical Surgical Nursing. She received two doses of the Moderna Covid-19 injection in May and June of 2021. Declaration of Mariette Vitti at ¶ 5, Exhibit D.

50. After receiving the second shot, she began having pain at the injection site, which progressed as the day went on to tingling in her fingers and then body aches for four days. *Id.* at ¶ 6.

51. The body aches were so severe that her clothing hurt to touch her. She had to tell her husband to keep her children away from her because anything touching her caused terrible pain. *Id.* at ¶ 6.

52. However, her scariest and most severe side effect was rapid heart palpitations and her heart skipping beats, which appeared about 8 hours after her second shot. Ms. Vitti describes the experience thusly:

I was putting clothes from the washer into the dryer and walked up the stairs and 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. I felt the need to lay down so I layed down on the couch and tried to bare down to

decrease my heart rate down to 128 but no lower. 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.

53. Ms. Vitti visited a cardiologist and her ECG was found to be normal. She wore a heart monitor for two weeks. The report from her time wearing the monitor shows that she had a heart rate of up to 160 with trigeminy (an irregular heart beat). *Id.* at ¶¶ 8-9.

54. Ms. Vitti does not want to take any more of the Covid-19 shots. She feels she was injured by the first one and does not want to further risk her health. She wishes to make her own decisions about what pharmaceuticals to put into her body.

## **II. Executive Order 283**

55. In January 2022, Governor Murphy signed Executive Order 283, which requires all covered workers in covered settings to be “up to date” on Covid-19 “vaccination” as a condition of continued employment. Exhibit E, Executive Order 283.

56. “Covered workers” is defined as: “employees, both full- and part-time, contractors, and other individuals working in covered settings, including individuals providing operational or custodial services or administrative support.”

57. “Covered settings” is defined as:

Health care settings” shall include acute, pediatric, inpatient rehabilitation, and psychiatric hospitals, including specialty hospitals, and

ambulatory surgical centers; long-term care facilities; intermediate care facilities; residential detox, short-term, and long-term residential substance abuse disorder treatment facilities; clinic-based settings like ambulatory care, urgent care clinics, dialysis centers, Federally Qualified Health Centers, family planning sites, and Opioid Treatment Programs; community-based 9 healthcare settings including Program of All-inclusive Care for the Elderly, pediatric and adult medical day care programs, and licensed home health agencies and registered health care service firms operating within the State. “High-risk congregate settings” include State and county correctional facilities; all congregate care settings operated by the Juvenile Justice Commission, which includes secure care facilities and residential community homes; licensed community Residences for individuals with individuals with intellectual and developmental disabilities (“IDD”) and traumatic brain injury (“TBI”); licensed community residences for adults with mental illness; certified day programs for individuals with IDD and TBI, and group homes and psychiatric community homes licensed by DCF.

58. “Up to date” is defined as having received “a primary series, which consists of 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.”

59. On or around March 2, 2022, Governor Murphy signed Executive Order 290, which modified the time requirements set forth in Executive Order 283. Exhibit F, Executive 290.

60. This was necessary because the CDC changed its recommendations for time between first and second mRNA shots from six weeks to eight weeks.

61. Upon information, belief, and local reporting, the extended deadline was also necessary to prevent staffing shortages because a significant percentage of healthcare workers had chosen not to get a third Covid-19 shot.

62. On April 13, 2022, Governor Murphy signed executive order 294 changing the definition of “up to date” in Executive Order 283. This was necessary because on March 29th the FDA issued an updated emergency use authorization for a second “booster” dose and on March 30, 2022 the CDC advised that all people 50 years or older and all people 18-29 who received two Janssen shots are eligible for a second “booster.” Exhibit G.

63. Executive Order 294 states “Whereas, as of March 30, 2022, the CDC advised that, while some individuals are eligible for a second mRNA booster dose, the CDC currently considered a person boosted and up to date with their Covid-19 vaccination after receiving their first booster dose at this time.”

64. Executive Order 283 requires any covered workers who are not “up to date” on their Covid-19 shots to test weekly or twice weekly until they “submit adequate proof that they are up to date with their vaccination.”

65. EO 283 requires all covered settings to include a disciplinary process for “noncompliance,” which New Jersey says may include termination of employment.

66. Executive Order 283 requires covered settings to allow for medical and religious exemptions to vaccination, however the State of New Jersey itself has mass-denied religious exemptions in state institutions, stating that accommodating people with religious exemptions would constitute an “undue burden” on the state because the employees with religious objections to the Covid-19 injections are a “threat” to the safety of others.

67. The Superintendent of Police is given full “discretion to make additions, amendments, clarifications, exceptions, and exclusions to the terms” of Executive Orders 283, 290 and 294.

### **Constitutional Claims**

#### **I. Executive Order 283 Violates Plaintiffs’ 14th Amendment Rights to Liberty and Privacy**

68. Plaintiffs repeat and reallege each of the preceding paragraphs.

69. People have a strong liberty and privacy interest and right in exercising sovereignty over their body and declining unwanted medical procedures like the Covid-19 injections.

70. Plaintiffs have strong liberty and privacy rights to decline medical procedures that have injured them or made them ill when they have taken them before.

71. The state's interest in stemming the spread of Covid-19 through requiring people to undergo an unwanted medical procedure must be weighed against the individual right to decline medical procedures that are novel, have hurt them in the past, and that carry known and unknown risks.

72. The individual's right to decline further injections with the Covid-19 pharmaceuticals outweighs the state's interest when:

- a. It is common knowledge that the injections do not prevent infection and transmission and that people who have received the injections can still become infected with and transmit Covid-19;
- b. There are known and unknown risks of taking the pharmaceuticals;
- c. The person being mandated to take the pharmaceuticals has taken them in the recent past and been hurt by them;
- d. There are no long-term studies on the pharmaceuticals and long-term effects are unknown;
- e. The person being mandated to take the pharmaceuticals has taken in the past and the pharmaceuticals did not work to prevent them from getting sick;
- f. The targeted disease has a low mortality rate overall and a very low mortality rate for the individual;

- g. There are a wide range of treatments available for people who do become sick with the virus;
- h. the individual who the government wishes to compel to take the pharmaceutical has been advised by their doctor not to take the pharmaceutical;
- i. The medical procedure the government wishes to compel is novel and experimental with unknown long-term effects;
- j. The medical procedure was invented by and is manufactured by corporations with criminal track records or no track record at all;
- k. The FDA advisory committee voted 16-2 to NOT recommend the medical procedure citing safety concerns;
- l. The CDC advisory panel on immunizations voted against recommending the procedure for adults under 50;
- m. The federal agency tasked with oversight of public safety (FDA) is plagued by scandals and high profile failures and acted contrary to its own advisory committee's recommendations;
- n. The medical procedure involves a new technology that has never before been approved for or used in healthy humans, never mind three doses in less than a year period;
- o. It does not account for immunity gained through infection and recovery.

73. The Mandate is unconstitutional.

## **II. The Mandate Violates the Equal Protection Clause of the 14th Amendment**

74. Plaintiffs repeat and reallege each of the preceding paragraphs as if set forth at length herein.

75. Plaintiffs are subject to a disciplinary process based on their assertion of their fundamental rights to liberty and privacy.

76. Plaintiffs are subject to search and seizure of their bodily fluids based on their assertion of fundamental rights to liberty and privacy.

77. The unequal treatment is not narrowly tailored to serve a compelling government interest.

78. The unequal treatment is based on the exercise of a fundamental right and violates the constitution.

## **III. Executive Order 283 Violates Plaintiffs' Right to Due Process Under the 14th Amendment to the U.S. Constitution**

79. Plaintiffs all attended college to obtain their nursing degrees.

80. Plaintiffs all passed board examinations to obtain their nursing licenses.

81. Plaintiffs Debra Hagen and Mariette Vitti have obtained higher degrees, certifications, and licenses to practice their profession.

82. Plaintiffs all have property interests in their degrees, certifications, and licenses.

83. Executive Order 283 essentially regulates Plaintiffs out of practicing in the healthcare field in

New Jersey unless they surrender their bodies for injection with another Covid-19 shot.

84. Plaintiffs have all been *de facto* barred from using their licenses and degrees in New Jersey without due process of law.

85. Executive Order 283 deprives Plaintiffs of liberty and property rights without due process of law.

86. Executive Order 283 violates the due process clause of the 14th Amendment to the United States Constitution.

#### **IV. Executive Order 283 Is an Unconstitutional Taking Without Compensation Under the Fifth Amendment, Applied to New Jersey Through the 14th Amendment**

87. Plaintiffs all have property interests in their degrees, certifications, and licenses.

88. Executive Order 283 essentially regulates Plaintiffs out of practicing in the healthcare field in New Jersey unless they surrender their bodies for injection with another Covid-19 shot.

89. Plaintiffs have all been *de facto* barred from using their licenses and degrees in New Jersey without due process of law.

90. Executive Order 283 takes away Plaintiffs' ability to practice in their chosen professions and purports to do so for the public good.

91. Executive Order 283 violates the takings clause of the 5th Amendment because it regulates Plaintiffs out of the healthcare field, purportedly for the public good, and without compensation for the loss

of property rights inherent in their degrees and licenses.

**V. The Mandatory Medical Testing Violates Plaintiffs' Right to Be Free from Unreasonable Search and Seizure**

92. The medical testing that is required of Plaintiffs if they remain employed and do not receive a booster is an unreasonable search and seizure.

93. It requires Plaintiffs to surrender their bodily fluids for analysis without any particularized suspicion, without a warrant, and without due process.

94. The medical testing requires Plaintiffs to surrender and report personal information about their health status without any particularized suspicion, without a warrant, and without due process.

95. The medical testing violates the 4th Amendment.

**VI. Violation of 42 U.S.C. § 1983**

96. Plaintiffs repeat and reallege each of the preceding paragraphs as if set forth fully herein.

97. Governor Philip Murphy has, while acting under the color and authority of law, deprived Plaintiffs of their constitutional rights.

**Prayer for Relief**

Wherefore, Plaintiffs request the following relief:

98. Declare Executive Orders 283, 290 and 294 unconstitutional;

99. Declare Executive Order 283, 290, and 294 unconstitutional as applied to each Plaintiff;

100. Enjoin HMC and the State of New Jersey from enforcing the Mandate;

101. Grant Plaintiffs their costs and attorneys' fees under 42 U.S.C. Section 1988 and any other applicable authority; and

102. Grant any and all other such relief as this Court deems just and equitable.

Respectfully submitted,

/s/ Dana Wefer, Esq. \_\_\_\_\_

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*Attorney for Plaintiffs*

Dated: April 18, 2022

**Complaint Verification**

Each of the Plaintiffs has sworn in the attached and incorporated Declarations that all facts pertaining or relating to them are true under penalty of perjury.

**Certification Pursuant to L. Civ. R. 11.2**

The matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

/s/ Dana Wefer, Esq.

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*Attorney for Plaintiffs*

Dated: April 20, 2022

**OFFICE OF HUMAN RESOURCES  
ADMINISTRATION – DIRECTIVE 2023-2  
(JUNE 15, 2023)**

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State of New Jersey



**STATE OF NEW JERSEY  
DEPARTMENT OF HUMAN SERVICES**

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**To:** All Developmental Center HR Managers  
**From:** Denise Meckel, Assistant Commissioner  
**Subject:** DC COVID-19 Vaccination Policy

In accordance with Executive Order 332, the Human Resources Policy, COVID-19 Immunization Requirement for Staff at Developmental Centers, which was most recently reissued on March 3, 2022, is hereby rescinded effective immediately. The Department of Human Services reserves the right to implement a new COVID-19 vaccine requirement in the future depending on health guidance.

A handwritten signature in cursive ink that reads 'Denise Meckel'.

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Denise Meckel, Assistant Commissioner  
Office of Human Resources