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**OPINION*, U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT
(APRIL 26, 2024)**

NON PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1990

KATHLEEN WRIGHT-GOTTSHALL; MELANI BORODZIUK; JILL MATTHEWS; JILL SKINNER; SANDRA GIVAS; DONNA ANTONIELLO; JENELL DECOTIIS; JENNIFER DOUGHERTY; MELISSA FARRELL; ALYSON STOUT; HEATHER HICKS; CHRISHA KIRK; DAVID TARABOCCHIA; DEBORAH ALDIERO; GINA ZIMECKI; KERI WILKES; MICHELE PELLICCIO; NATALIE RICKO; PATRICIA KISSAM; ROSEANNE HAZLET; VINCENIA ANNUZZI; JASON MARASCO; JENNIFER MESS; KIMBERLY KOPPENAAL,

Appellants,

v.

STATE OF NEW JERSEY; PHILIP DUNTON MURPHY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEW JERSEY; HON. STUART RABNER, (in his official capacity as

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Chief Justice of the New Jersey Supreme Court); HON. GLENN GRANT, in his official capacity as court administrator; NEW JERSEY OFFICE OF LEGISLATIVE SERVICES; SUPREME COURT OF NEW JERSEY.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 3-21-cv-18954)
District Judge: Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit
L.A.R. 34.1(a) February 9, 2024

Before: HARDIMAN, SCIRICA, RENDELL,
Circuit Judges.

(Filed: April 26, 2024)

RENDELL, Circuit Judge.

After COVID-19 vaccines became available to the public, all three branches of New Jersey's government announced policies requiring their covered workers to submit proof of vaccination or results of weekly tests. The Appellants, unvaccinated workers covered by the policies who were required to comply with testing protocols, sued the State of New Jersey, Governor Philip Murphy, Chief Justice Stuart Rabner, Judge Glenn Grant, the New Jersey Office of Legislative Services ("NJOLS"), and the Supreme Court of New Jersey. The Appellants raised claims for damages under 42 U.S.C. § 1983 as well as injunctive relief, alleging that the testing violated the United States Constitution. The District Court dismissed the Appellants' amended complaint with prejudice, concluding

that the claims for injunctive and declaratory relief were moot, and that the claims for damages against the individual defendants in their personal capacity were barred by qualified immunity.

We agree with the District Court's dismissal of the amended complaint, so we will affirm the District Court in part. But we will vacate the District Court's order and remand with directions to dismiss the moot claims without prejudice.

I [1]

In March 2020, in response to the pandemic, Governor Philip Murphy declared a state of emergency in Executive Order ("EO") 103. *Executive Orders*, N.J., https://nj.gov/infobank/eo/056murphy/pdf/E0-103.pdf (last visited Apr. 18, 2024).[2] In June 2021, the State legislature enacted legislation providing for the termination of the public health emergency but authorizing the Governor and heads of State agencies to issue directives relating to vaccination and testing requirements "to prevent or limit the transmission of COVID-19, including in specific settings." 2021 N.J. Laws c. 103 § 5.

In August 2021, New Jersey Supreme Court Chief Justice Stuart Rabner and court Administrative Director Glenn Grant issued a broadcast message to State judiciary staff and judges explaining a new vaccine and testing policy. The policy required that

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1 We write primarily for the parties, and so we recite only the facts necessary to decide the case.

2 We take judicial notice of "information [that] is publicly available on government websites." *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017).

employees submit proof of full vaccination or results of weekly viral tests. That month, Murphy signed EO 253, which required covered workers in public, private, and parochial schools to provide proof of vaccination or to submit to COVID-19 testing at least once weekly. In September 2021, the Director of Human Resources for NJOLS issued an email to NJOLS employees and advised them of a similar policy requiring either proof of vaccination or weekly COVID-19 PCR test results.

The Appellants allege that the weekly tests imposed under the policy caused physical discomfort, inconvenience, and feelings of degradation. They also assert that coworkers and supervisors were told vaccination status, that they were required to undergo testing in public areas, and that they were required to upload information to third-party contractors during the testing process, all in violation of their privacy.

The Appellants filed their initial complaint in October 2021 and a motion for a temporary restraining order on August 5, 2022.

While the lawsuit was pending, on August 15, 2022, Murphy issued EO 302 and rescinded EO 253, ending the executive branch policy. EO 302 noted that "New Jersey ha[d] administered over 18.4 million doses of the COVID-19 vaccine in the State . . . , with over 8 million or 93% of New Jerseyans having received at least one dose of the vaccine," and "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." App. 273. EO 302 recognized that New Jersey had "experienced stable rates on key benchmark statistics, such as the number of hospitalized patients,

patients in intensive care, and ventilators in use, and the spot positivity of COVID-19 tests." App. 274. A few weeks later, NJOLS and Rabner followed suit, announcing the end of the NJOLS and judiciary policies.

With the policies terminated, the Appellants withdrew their motion for a temporary restraining order. They filed an amended complaint, in which, as relevant to this appeal, the Appellants alleged that the policies violated the Fourth Amendment prohibition against unreasonable searches and seizures (Count I), their Fourteenth Amendment right to privacy (Count II), their Fourteenth Amendment liberty rights (Count III), the Equal Protection Clause of the Fourteenth Amendment (Count IV), and 42 U.S.C. § 1983 (Count VI). The amended complaint included personal capacity claims against Murphy, Rabner, and Grant.

The District Court dismissed the amended complaint with prejudice, holding, as relevant here, that the Appellants' claims for declaratory and injunctive relief were moot following the rescission of each of the policies and not salvaged by the voluntary cessation doctrine. *See Wright-Gottshall v. New Jersey*, No. 21-cv-18954, 2023 WL 3183288, at *4-5 (D.N.J. May 1, 2023). The District Court also held that the Appellants had failed to show a clearly established right that was violated by the challenged state policies, so Murphy, Rabner, and Grant were entitled to qualified immunity for the Appellants' claims against them in their personal capacity. *Id.* at *8-9.

The Appellants timely appealed.

II [3]

A

The Appellants argue first that the District Court erred in concluding that Murphy, Rabner, and Grant were entitled to qualified immunity. The doctrine of qualified immunity shields officials from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To assess a government official's entitlement to qualified immunity, courts inquire (1) whether a plaintiff's constitutional right was violated and (2) whether that right was "clearly established" at the time of the official's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Exercising their sound discretion, courts may resolve questions of entitlement to qualified immunity by focusing on the "clearly established" prong of the inquiry." *Id.* at 237-38. Clearly established rights may be derived from Supreme Court and binding Third Circuit precedent or from a "robust consensus of cases of persuasive authority in the Courts of Appeals." *Fields v. City of Phila.*, 862 F.3d

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[3] The District Court lacked jurisdiction over the Appellants' claims for injunctive and declaratory relief because those claims are moot, *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 475-76 (3d Cir. 2016), but for the other claims, the District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291. Because the District Court granted the defendants' motion to dismiss the amended complaint, our review is plenary, and "we must accept as true the factual allegations in the complaint and all reasonable inference that can be drawn therefrom." *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996).

353, 361 (3d Cir. 2017) (quoting *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 247-48 (3d Cir. 2016)); *see also James v. N.J. State Police*, 957 F.3d 165, 170 (3d Cir. 2020).

Courts must frame the right at issue "in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, the Appellants attempt to frame the rights they assert as "straight forward and well established: the right to be free from unreasonable search and seizure, the right to bodily integrity, the right to privacy, and the right to equal protection under the laws." Appellants' Reply Br. at 1. The Appellants' framing is the type of "broad general proposition" that does not pass muster under the qualified immunity inquiry and is too abstract to provide guidance to reasonable state officials. *Saucier*, 533 U.S. at 201.

The District Court articulated the right at issue as "the right to be free from government-mandated workplace testing of an infectious disease." *Wright-Gotshall*, 2023 WL 3183288, at *8. This articulation appropriately framed the right "beyond a high level of generality," *Thomas v. City of Harrisburg*, 88 F.4th 275, 284 (3d Cir. 2023), and characterized the issue to reflect "the specific context of the case." *Saucier*, 533 U.S. at 201.

The Appellants fail to establish that, at the time of the challenged conduct, binding precedent or a meaningful consensus of out-of-circuit authority recognized the right at issue as properly framed by the District Court. The Appellants could have demonstrated that the right was clearly established by citing "closely analogous" case law or by showing that the challenged conduct was "so patently violative of the constitu-

tional right that reasonable officials would know without guidance from a court." *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (quoting *Estate of Escobedo v. Bender*, 600 F.3d 770, 779-80 (7th Cir. 2010)). A "precise factual correspondence" with a prior case is not required, *Peroza-Benitez v. Smith*, 994 F.3d 157, 166 (3d Cir. 2021) (quoting *Kopec v. Tate*, 361 F.3d 772, 778 (3d Cir. 2004)), if "existing precedent . . . placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Appellants cite to some cases to show that the right at issue is clearly established, but none are closely analogous.[4] These cases are distinguishable

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[4] *See Missouri v. McNeely*, 569 U.S. 141, 165 (2013) (holding warrantless blood alcohol testing is not *per se* justified in drunk-driving investigations); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (declining to recognize a right to assisted suicide as a fundamental liberty interest); *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 633-34 (1989) (holding that alcohol and drug tests mandated for railroad employees were reasonable searches and seizures, even in the absence of a warrant or reasonable suspicion, in part because of the "surpassing safety interests" served by such tests); *Gruenke v. Seip*, 225 F.3d 290, 300-01 (3d Cir. 2000) (holding that a high school swim team coach violated a clearly established constitutional right when he required a student to take a pregnancy test despite lacking legitimate concerns about the health of the student); *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1143 (3d Cir. 1995) (holding that employer's need to access employee prescription records outweighed employee's interest in keeping his prescription records confidential); *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 114 (3d Cir. 1987) (concluding that police questionnaire requesting medical information that officers had little reasonable expectation of withholding did not unconstitutionally infringe on applicant privacy interests).

because, where testing was at issue, it was not for an airborne communicable disease and occurred outside of the context of a global pandemic. Thus, the individual defendants were not "on notice that their conduct violate[d] established law." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). We agree with the District Court that the Appellants assert no clearly established right here, so we need not address whether the Appellants plausibly alleged violations of their constitutional rights. *Pearson*, 555 U.S. at 236.

B

The District Court also did not err in concluding that the Appellants' claims for injunctive and declaratory relief were moot. Under Article III of the Constitution, we lack jurisdiction to review moot cases. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). Generally, a claim is moot when events following a complaint's filing preclude the court from granting effective relief. *Cnty. of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021). The Appellants argue that the voluntary cessation doctrine acts as an exception to that general rule in this appeal because the Appellees rescinded the testing policies at issue but "could reasonably be expected to engage in the challenged behavior again." *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020).

The District Court correctly held that the Appellees' rescission of the policies in August and September 2022 render the Appellants' claims for declarative and injunctive relief "facially moot" because "there is no 'effectual relief whatsoever' that this Court may grant in relation to" those claims. *Clark v. Governor of N.J.*, 53 F.4th 769, 776 (3d Cir. 2022)

(quoting *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016)). Although defendants have a heavy burden of showing mootness in voluntary cessation cases, *Hartnett*, 963 F.3d at 307, it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2007). The District Court appropriately considered whether the pandemic, as it presented itself in 2021, would occur again and whether the Appellees here would respond with similar testing policies, such that the same legal controversy would recur. *Wright-Gottshall*, 2023 WL 3183288, at *4-5 (quoting *Clark*, 53 F.4th at 777-78). As explained in EO 302, the policies ended due to high vaccination rates in New Jersey and advances in antiviral therapies that significantly reduced the likelihood of severe illness and death resulting from an infection of COVID-19. We agree that fundamental changes to the landscape of medical understanding of the disease make it absolutely clear that the same legal controversy will not recur, *Clark*, 53 F.4th at 778, so the Appellants' claims for injunctive and declaratory relief remain moot and nonjusticiable.

However, we cannot affirm the District Court's order of dismissal *in toto* because the District Court erred in dismissing the moot claims with prejudice. A dismissal with prejudice "operates as an adjudication on the merits." *Papera v. Pa. Quarried Bluestone Co.*, 948 F.3d 607, 611 (3d Cir. 2020) (quoting *Landon v. Hunt*, 977 F.2d 829, 832-33 (3d Cir. 1992)). But where dismissal is warranted due to "a lack of jurisdiction, . . . dismissal of [the] amended complaint should have been without prejudice." *Thorne v. Pep Boys*

Manny Moe & Jack Inc., 980 F.3d 879, 896 (3d Cir. 2020). Because the District Court's opinion on the moot claims halted those claims at the threshold and did not reflect a view on the merits, we will vacate the District Court's order of dismissal in part and remand to the District Court with instructions to dismiss the claims for declaratory and injunctive relief without prejudice. *See Aldossari ex rel. Aldossari v. Ripp*, 49 F.4th 236, 262 (3d Cir. 2022).

III

For the foregoing reasons, we affirm the District Court's dismissal with prejudice in part, vacate in part, and remand with instructions to dismiss the claims for declaratory and injunctive relief without prejudice.

JUDGMENT, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT (APRIL 26, 2024)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1990

KATHLEEN WRIGHT-GOTTSHALL; MELANI BORODZIUK; JILL MATTHEWS; JILL SKINNER; SANDRA GIVAS; DONNA ANTONIELLO; JENELL DECOTIIS; JENNIFER DOUGHERTY; MELISSA FARRELL; ALYSON STOUT; HEATHER HICKS; CHRISHA KIRK; DAVID TARABOCCHIA; DEBORAH ALDIERO; GINA ZIMECKI; KERI WILKES; MICHELE PELLICCIO; NATALIE RICKO; PATRICIA KISSAM; ROSEANNE HAZLET; VINCENIA ANNUZZI; JASON MARASCO; JENNIFER MESS; KIMBERLY KOPPENAAL,

Appellants,

v.

STATE OF NEW JERSEY; PHILIP DUNTON MURPHY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEW JERSEY; HON. STUART RABNER, (in his official capacity as Chief Justice of the New Jersey Supreme Court); HON. GLENN GRANT, in his official capacity as court administrator; NEW JERSEY OFFICE OF LEGISLATIVE SERVICES; SUPREME COURT OF NEW JERSEY.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 3-21-cv-18954)
District Judge: Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
February 9, 2024

Before: HARDIMAN, SCIRICA, RENDELL,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit L.A.R. 34.1(a) on February 9, 2024.

On consideration whereof, it is now hereby

ORDERED AND ADJUDGED that the Judgment of the District Court on May 1, 2023, is hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** with instruction that the District Court correct the order and dismiss Appellants' claims for injunctive and declaratory relief without prejudice.

Costs shall be taxed against Appellants.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: April 26, 2024

MEMORANDUM OPINION, U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (MAY 1, 2023)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WRIGHT-GOTTSHALL, ET AL.,

Plaintiffs,

v.

STATE OF NEW JERSEY, ET AL.,

Defendants.

Civil Action No. 3:21-cv-18954-PGS-DEA

Before: Peter G. SHERIDAN,
United States District Judge.

MEMORANDUM

Twenty-three plaintiffs commenced this action against the State of New Jersey, Governor Philip Murphy (in his official and personal capacity), the New Jersey Supreme Court, Chief Justice Stuart Rabner (in his official and personal capacity), Glenn A. Grant, J.A.D. (in his official and personal capacity) and the New Jersey Office of Legislative Services (collectively, "Defendants"). Plaintiffs are government employees or contractors who chose not to be vaccinated against COVID-19 and therefore, were required to

comply with the COVID-19 testing mandates put in place by the Executive, Legislative and Judiciary branches of the New Jersey State government. By way of this action, Plaintiffs seek declaratory and injunctive relief and damages arising out of alleged violations of their constitutional rights in connection with the testing mandates. Specifically, Plaintiffs asserts violations of their First Amendment right to free exercise of religion, Fourth Amendment right to be free from unreasonable search and seizure, Fourteenth Amendment rights to liberty and privacy and the Equal Protection Clause, and rights under the New Jersey State Constitution. They also assert violations of 42 U.S.C. § 1983. Each plaintiff submitted a sworn declaration setting forth the reasons why the mandate applicable to him or her imposed a hardship or inconvenience and violated his or her constitutional rights. (ECF Nos. 34-9—34-32).

On January 18, 2022, Defendants moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6). (ECF No. 10). While that motion remained pending, on August 5, 2022, Plaintiffs filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction, which sought to enjoin Defendants from enforcing the testing mandates. (ECF No. 19). Following the termination of all three mandates, on August 29, 2022, Plaintiffs withdrew their motion. (ECF No. 29).

In addition, while Defendants' Motion to Dismiss remained pending, Plaintiffs moved for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a)(2). (ECF No. 27). The proposed amendments sought to hold Governor Murphy, Chief Justice Rabner and Administrative Director Grant (the "Individual

Defendants") liable in their personal capacity and seek damages against Defendants because "most Plaintiffs had not been damaged when the Complaint was originally filed so damages could not have been plead [sic] at that time." (ECF No. 27 at 3). The Court granted Plaintiffs' Motion for Leave and simultaneously terminated Defendants' Motion to Dismiss without prejudice. (ECF No. 33). On September 23, 2022, Plaintiffs filed an Amended Complaint, which seeks relief in the form of consequential, emotional and punitive damages. (ECF No. 34).

Thereafter, Defendants filed a Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(1) and (6), which is presently before the Court. (ECF No. 36). For the reasons set forth below, the Court will grant Defendants' Motion to Dismiss.

I.

A. The Executive Mandate

In response to the public health emergency caused by the COVID-19 pandemic, on August 23, 2021, Governor Murphy issued Executive Order 253 ("EO 253"). (Am. Compl. ¶ 14; ECF No. 34-1). EO 253 mandated that "[a]ll public, private and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools ("covered settings") . . . maintain a policy that requires all covered workers to either provide adequate proof to the covered setting that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly." (Am. Compl. ¶¶ 15-16; ECF No. 34-1). To satisfy the testing requirement, EO 253 mandated a covered worker undergo testing one to

two times per week on an ongoing basis until fully vaccinated. (Am. Compl. ¶¶ 16-17; ECF No. 34-1). "Covered workers" included "all individuals employed by the covered setting, both full-and part-time." (Am. Compl. ¶ 18; ECF No. 34-1). EO 253 went into effect on October 18, 2021. (ECF No. 34-1).

Subsequently, on August 15, 2022, Governor Murphy issued Executive Order 302 ("EO 302"), which rescinded EO 253 effective immediately.[1] (ECF No. 36-2, Ex. 5). The reasons cited in EO 302 for the recission of EO 253 included the administration of over 18.4 million doses of the COVID-19 vaccine in the State, "stable rates on key benchmark statistics, such as the number of hospitalized patients, patients in intensive care, and ventilators in use, and the spot positivity of COVID-19 tests." (*Id.*). In addition, EO 302 cited guidance from the Centers for Disease Control and Prevention ("CDC") issued on August 11, 2022 that recognized "high levels of vaccine and infection-induced immunity and the availability of effective treatments and prevention tools [that] have substantially reduced the risk for medically significant COVID-19 illness, and associated hospitalization and death." (*Id.*). EO 302 further states "in light of the CDC's updated guidance, and given the progress the State has made, the State can begin to responsibly lift certain mitigation protocols in place. As a result of EO 302, the requirement that unvaccinated covered workers

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[1] Plaintiffs make no mention of EO 302 in their Amended Complaint, however, the Court considers it as an undisputedly authentic document attached to Defendants' motion. *See Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

submit to weekly or twice weekly testing was effectively terminated.

B. The Judiciary Mandate

On August 6, 2021 and August 11, 2021, Chief Justice Stuart Rabner and Administrative Director Glenn A. Grant sent a broadcast message announcing the New Jersey Judiciary's COVID-19 vaccination and testing policy. (Am. Compl. ¶¶ 30, 36; ECF Nos. 34-2, 34-7). A memorandum from Administrative Director Grant dated August 11, 2021 set forth further details of the Judiciary's policy. (Am. Compl. ¶ 39; ECF No. 34-8). Citing worsening COVID-19 trends, including the spread of the Delta variant, and the need to prevent further illness and death, the policy required all judiciary staff and state court judges to provide proof of full COVID-19 vaccination status or the results of a weekly COVID-19 test. (Am. Compl. ¶¶ 30, 38; ECF Nos. 34-2, 34-7, 34-8). Those who chose to undergo weekly COVID-19 tests were required to do so from Saturday morning through Wednesday night each week at an approved testing facility and submit the results of the test electronically on an online portal maintained by the Judiciary no later than 11:00 a.m. on the Friday following the test. (ECF No. 34-8). Testing conducted during work hours required employees to use sick leave or request the use of vacation and/or administrative leave. (*Id.*).

Employees who did not submit a negative test result by 11:00 a.m. on Friday were excluded from the work location on the next scheduled on-site workday and could be excluded for up to 24 hours after submission of a negative result. (*Id.*). Excluded employees were required to use administrative, sick

or vacation time if remote work was not supported. (*Id.*). Upon exhaustion of available leave, the absence was considered unauthorized and unpaid. (*Id.*).

The policy took effect on August 20, 2021. (*Id.*). Effective September 1, 2022, the policy was terminated based on updated guidance from the CDC. (ECF No. 36-2, Ex. 4).

C. The Legislative Mandate

On September 20, 2021, Christin Knox, Director of Human Resources for the New Jersey Office of Legislative Services ("NJOLS") sent an email to employees detailing NJOLS's COVID-19 vaccination and testing policy. (ECF No. 36-2, Ex. 3). Effective October 25, 2021, the policy required employees to provide proof of vaccination or undergo weekly COVID-19 PCR testing. (*Id.*). Unvaccinated employees were required to test three days prior to submitting results, which were due each Monday by 10:00 a.m. (*Id.*). Failure to submit test results on time required employees to use accumulated leave time. (*Id.*). If accumulated leave was exhausted, leave was unpaid. (*Id.*).

By email dated August 22, 2022, NJOLS announced that the COVID-19 testing policy would be lifted effective September 1, 2022. (ECF No. 36-2, Ex. 6). The reasons for the termination of the NJOLS policy were not cited therein, however, the email notes that NJOLS "will continue to follow CDC guidelines on isolation, quarantine and exposure." (*Id.*). In their moving brief, Defendants assert that the termination of the policies by all three branches of government was "due to the State's consistent application of the CDC's recommendations through common-sense public

health interventions—including the vaccination and testing policies . . . .” (ECF No. 36-1 at 19).

II.

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) challenges a federal court’s subject matter jurisdiction. In deciding a Rule 12(b)(1) motion, the court must first determine “whether [it] presents a facial attack or a factual attack on the claim at issue, because that distinction determines how the pleading must be reviewed.” *Const. Party of Pennsylvania v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014) (internal quotation marks and citation omitted). A factual attack challenges the factual allegations underlying the complaint’s assertion of jurisdiction. *See Mortensen v. First Fed Say. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack challenges the sufficiency of the claim, and therefore, “the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.” *See Aichele*, 757 F.3d at 358 (internal quotation marks and citation omitted). In that regard, a facial motion is handled like a Rule 12(b)(6) motion. *See Leadbeater v. JP Morgan Chase, NA*, No. CV 16-7655 (JMV), 2017 WL 4790384, at *3 (D.N.J. Oct. 24, 2017). Here, Defendants assert the defense of immunity thereby raising a facial attack. *See Long v. Barrett*, No. 2:17-CV-5741-KM-SCM, 2018 WL 1617702, at *3 (D.N.J. Apr. 3, 2018) (construing motion to dismiss based on sovereign immunity and qualified immunity as a facial challenge to the court’s jurisdiction). Therefore, the facts alleged in the Amended Complaint are accepted as true.

Typically, on a Rule 12(b)(1) motion, the burden is on the plaintiff to demonstrate the existence of subject matter jurisdiction. *See Davis v. Wells Fargo*, 824 F.3d 333, 349 (3d Cir. 2016). However, because immunity is treated as an affirmative defense, the party asserting it bears the burden of proving its applicability. *See Garcia v. Knapp*, No. 19-17946, 2020 WL 2786930, at *3 (D.N.J. May 29, 2020); *Steele v. Cicchi*, No. CIV.A. 09-3551 MLC, 2014 WL 2168126, at *2 (D.N.J. May 23, 2014).

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). A complaint does not need detailed factual allegations. *See Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964. However, the plaintiffs "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555-56, 127 S. Ct. 1955 (internal quotation marks, brackets and citation omitted). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986) (citations omitted). Rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965. Courts may reference "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims

are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (citations omitted). "Although immunity is an affirmative defense, a complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense appears on its face." *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001) (internal quotation marks and citation omitted).

III.

As a threshold matter, Plaintiffs' claims for injunctive and declaratory relief are moot. Article III, Section 2 of the Constitution limits the jurisdiction of federal courts to cases and controversies. U.S. Const. art. III, § 2, cl. 1. "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10, 94 S. Ct. 1209, 1216, 39 L.Ed.2d 505 (1974) (citations omitted). Cases or claims for relief are moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L.Ed.2d 491 (1969) (citation omitted). In other words, "[i]f it is impossible . . . to grant 'any effectual relief whatever to the prevailing party,' then the case is moot." *Clark v. Governor of New Jersey*, 53 F.4th 769, 775 (3d Cir. 2022) (quoting *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161, 136 S. Ct. 663, 193 L. Ed.2d 571 (2016)). In light of the recission of the Executive, Legislative and Judiciary Mandates, the Court cannot effectually provide any declaratory or injunctive relief to Plaintiffs.

While Plaintiffs do not dispute that the testing mandates are no longer in effect, they contend that

their claims are justiciable because the voluntary cessation doctrine applies. (ECF No. 40 at 50). Under the voluntary cessation doctrine, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708, 145 L. Ed. 2d 610 (2000) (internal quotation marks and citation omitted). The focal point of the inquiry is "whether the defendant made that change unilaterally and so may return to its old ways later on." *Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 307 (3d Cir. 2020) (internal quotation marks, citation and brackets omitted). Defendants, as the party asserting mootness, bear a "heavy burden" because "it must be 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Clark*, 53 F.4th at 775 (quoting *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019)).

It is absolutely clear to the Court that there is no reasonable likelihood that a legal controversy substantially similar to the one at issue here will occur again. The Third Circuit's opinion in *Clark v. Governor of New Jersey*, 53 F.4th 769 (3d Cir. 2022) guides the Court's analysis. There, the Court reviewed a challenge to executive orders issued by Governor Murphy that restricted indoor gatherings for religious worship in response to the COVID-19 pandemic. *Id.* at 771. Although the executive orders had been rescinded, Plaintiff-Appellants asserted that the voluntary cessation doctrine applied. *See id.* at 772, 776. The district court dismissed the case as moot, and the Third Circuit affirmed. *Id.* at 774-75. The Third Court's

analysis comprised two parts: "(1) whether the same precise situation" — namely the COVID-19 pandemic — will recur; and "(2) whether the Governor will respond to that situation by imposing restrictions similar enough to those he imposed in 2020 and 2021, such that it presents substantially the same legal controversy as the one presented here." *Id.* at 777-78 (internal quotation marks and citation omitted). Several reasons — including enhanced medical knowledge and development to combat the virus and the State's track record in declining to reimpose similar restrictions when COVID-19 cases surged — led the Court to find it implausible that a challenge to another COVID-based gathering restriction would amount to the "same legal controversy" as the one before the Court. *See id.* at 778-81 (emphasis in original).

The Third Circuit's reasoning applies with equal force here. To this Court, it is absolutely clear that (1) a global crisis of the same magnitude as the COVID-19 pandemic and (2) testing mandates akin to those imposed by the State are not reasonably likely to recur. As the *Clark* Court noted, "[o]ur knowledge of the virus and its vectors of transmission, the rollout of vaccines, and the availability of therapeutic responses to infection have totally changed the nature of the disease itself, our understanding of it, and our response to it." *Id.* at 778. Indeed, the termination of the testing mandates occurred in response to those developments and CDC guidance that recognized an overall improvement in circumstances surrounding the pandemic. Accordingly, the voluntary cessation doctrine does not revive the mooted claims.

The Court's decision conforms with that of several courts in this circuit that have dealt with similar cases

against states and state actors sued in connection with COVID-related orders that ultimately were rescinded or had expired. *See, e.g., Johnson v. Governor of New Jersey,* No. 21-1795, 2022 WL 767035, at *3 (3d Cir. 2022) (challenge to expired executive order, which allowed security deposits to be applied to rent payment during the COVID-19 pandemic, was moot); *Cnty. of Butler v. Governor of Pennsylvania*, 8 F.4th 226, 230 (3d Cir. 2021), *cert. denied sub nom. Butler Cnty., Pennsylvania v. Wolf*, 211 L. Ed. 2d 482, 142 S. Ct. 772 (2022) (challenge to expired stay-at-home orders, business closure orders, and orders setting congregation limits in secular settings enacted in response to COVID-190 was moot); *Parker v. Governor of Pennsylvania*, No. 20-3518, 2021 WL 5492803, at *4 (3d Cir. Nov. 23, 2021) (voluntary cessation exception did not apply to mooted challenge of statewide mask mandate that expired by its own terms); *Livesay v. Murphy*, No. CV2017947ZNQTJB, 2022 WL 4597435, at *4 (D.N.J. Sept. 30, 2022) (challenge to executive orders that mandated masking, social distancing and virtual learning became moot because the orders had been rescinded); *Behar v. Murphy*, No. CV 20-05206 (FLW), 2020 WL 6375707, at *3 (D.N.J. Oct. 30, 2020) (challenge to stay-at-home order mooted by the recession of the order).[2]

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[2] Plaintiffs attempt to distinguish the case at hand on the basis that the mandates at issue did not expire by their own terms. The Court rejects this argument. There is no evidence that the testing mandates were terminated in response to litigation or to evade judicial review. *See, e.g., Johnson*, 2022 WL 767035, at *3; *Cray. of Butler*, 8 F.4th at 230 ("It is conceivable that the expiration of the executive orders could be opportunistically timed to avoid an unfavorable adjudication, but we have no basis to conclude that has happened here."). Moreover, the Court pre-

The dismissal of the declaratory and injunctive relief claims leaves Plaintiffs' claim for damages. The Court will address the claims against the state entities and the state officers in turn.

IV.

Eleventh Amendment sovereign immunity is rooted in this Nation's founding. It is based on the presupposition that "each State is a sovereign entity in our federal system; and . . . it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252 (1996) (internal quotation marks, brackets and citations omitted). As a general rule, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. 1347, 1356, 39 L. Ed. 2d 662 (1974); (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890)). Immunity under the Eleventh Amendment also extends to an "arm or instrumentality of the state," which enjoys the same protection as the sovereign itself. *Lewis v. Clarke*, 581 U.S. 155, 162, 137 S. Ct. 1285, 1290, 197 L. Ed. 2d 631 (2017). This is the case because in an action that seeks to recover money from the state, "the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit. . . . " *Edelman*, 415

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sumes that government entities and officials act in good faith in performing their duties. *See Parker*, No. 20-3518, 2021 WL 5492803, at *4.

U.S. at 663, 94 S. Ct. at 1356, 39 L.Ed.2d 662 (internal quotation marks and citation omitted).

Sovereign immunity is subject to three exceptions under which a suit against a state may proceed: "(1) congressional abrogation; (2) state waiver; and (3) suits against individual state officers for prospective relief to end ongoing violations of federal law." *L. Offs. of Lucas ex rel. Lucas v. Disciplinary Bd. of Supreme Ct. of PA*, 128 F. App'x 235, 237 (3d Cir. 2005) (citation omitted). The third exception refers to the *Ex Parte Young* doctrine. *Ex parte Young*, 209 U.S. 123, 155-56, 159-160, 28 S. Ct. 441, 52 L.Ed. 714 (1908).

Without any doubt, the State of New Jersey, the New Jersey Supreme Court and the New Jersey Office of Legislative Services are immune from suit. First, the State has neither consented to suit nor waived its Eleventh Amendment immunity. *See Thorpe v. New Jersey*, 246 F. App'x 86, 87 (3d Cir. 2007). Second, the New Jersey Supreme Court is an arm of the State. *See, e.g., Ehrlich v. Alvarez*, No. 21-2342, 2022 WL 1487021, at *2 (3d Cir. May 11, 2022) ("The various courts, established by the New Jersey Constitution in a unified state-based court system . . . are also entitled to immunity under the Eleventh Amendment as 'arms' of the state."); *Dongon v. Banar*, 363 F. App'x 153, 156 (3d Cir. 2010) ("[T]he state courts, its employees, and the judges are entitled to Eleventh Amendment immunity because they are part of the judicial branch of the State of New Jersey, and therefore considered arms of the state."). Lastly, the same holds true for NJOLS, which is "established in the Legislative Branch of the State Government, to aid and assist the Legislature in performing its functions." N.J.S.A. 52:11-55. NJOLS's duty is to "[p]rovide . . . legal, fiscal,

research, information and administrative services and assistance for the Legislature, its officers, committees, commissions, members and staff." N.J.S.A. 52:11-58 (emphasis added). Any recovery against the state court or NJOLS would, in essence, be funded by the State. In the absence of a waiver or a valid congressional override, sovereign immunity deprives the Court of federal subject matter jurisdiction. Accordingly, the State of New Jersey, the New Jersey Supreme Court and the New Jersey Office of Legislative Services must be dismissed.

Further, Governor Murphy, Chief Justice Rabner and Administrative Director Grant are immune from suit for damages in their official capacities. Because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . it is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989) (citations omitted); *see Durham v. Dep't of Corr.*, 173 F. App'x 154, 156 (3d Cir. 2006) (affirming dismissal of claims against individual corrections officers sued in their official capacities). Likewise, Plaintiffs' section 1983 claim, which appears to be made only against the Individual Defendants, must also be dismissed. "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will*, 491 U.S. at 71, 109 S. Ct. at 2312, 105 L. Ed. 2d 45. The claims against the Individual Defendants in their official capacity will also be dismissed.

Plaintiffs assert two exceptions to sovereign immunity apply. First, Plaintiffs contend, in a conclusory manner, that the "individual defendants

cannot claim sovereign immunity under Ex parte Young." (ECF No. 40 at 49). In *Ex parte Young*, the Supreme Court carved out a limited exception to sovereign immunity and held that "a state official is stripped of his official or representative character and thereby deprived of the State's immunity . . . when he commits an ongoing violation of federal law." *Waterfront Comm'n of New York Harbor v. Governor of New Jersey*, 961 F.3d 234, 238 (3d Cir. 2020) (internal quotation marks and citations omitted). Where a state official commits an "ongoing violation of federal law," a private plaintiff may sue the state official in his or her official capacity. *Id.* at 238. Importantly, *Ex parte Young* "has been narrowly construed" and "applies only to the precise situation of a federal court commanding a state official to do nothing more than refrain from violating federal law." *Waterfront Comm'n*, 961 F.3d at 238 (internal quotation marks and citation omitted); *see Williams ex rel. Bookbinder v. Connolly*, 734 F. App'x 813, 816 (3d Cir. 2018) (affirming dismissal of complaint that sought retroactive relief against the State).

Plaintiffs do not contest that the COVID-19 testing policies issued by the Executive, Legislative and Judiciary branches of government have been rescinded or terminated. Indeed, they acknowledged this very fact in the withdrawal of their Motion for a Temporary Restraining Order. (ECF No. 30). In light of the recission of the mandates, there is no ongoing violation of federal law, and *Ex parte Young* does not apply.

In another blanket statement, Plaintiffs cite *PennEast Pipeline Co. v. New Jersey*, —U.S. —, 141 S. Ct. 2244, 210 L. Ed.2d 624 (2021) to assert that "the

state has agreed to suit in the plan of the convention." (ECF No. 40 at 49). In that case, PennEast sought to exercise its federal eminent domain power under the Natural Gas Act, 15 U.S.C. § 717f(h), to condemn state-owned property for the construction of an interstate gas pipeline. *Id.* at 2253. The district court denied the state's motion to dismiss on sovereign immunity grounds and granted a condemnation order. *Id.* On appeal, the Third Circuit vacated and remanded the case for dismissal because it concluded that § 717f(h) did not clearly delegate to certificate holders authorized with the federal eminent domain power the right to file condemnation actions against non-consenting states. *Id.* at 2254. The Supreme Court granted certiorari and reversed. *Id.* at 2263. A nonconsenting state "may be sued if it has agreed to suit in the 'plan of the Convention,' which is shorthand for the structure of the original Constitution itself." *Id.* at 2258. Notably, the Court explained that "[t]he plan of the Convention contemplated that States' eminent domain power would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.' *Id.* at 2259 (quoting *Kohl v. United States*, 91 U.S. 367, 372, 23 L. Ed. 449 (1875)). A condemnation action by a party equipped with the power of federal eminent domain "falls comfortably within the class of suits to which States consented under the plan of the Convention." *Id.* The Court has recognized waivers of sovereign immunity under the plan of the Convention in bankruptcy proceedings, suits by other states and suits by the Federal Government. *Id.* at 2258 (citing cases). This case, which involves government-ordered medical testing prompted by a public health emergency and unprecedented

pandemic, does not even remotely fall within any recognized class of suits to which States consented under the plan of the Convention.

As none of the exceptions to sovereign immunity apply, the Court will dismiss the claims for damages against the State of New Jersey, the New Jersey Supreme Court, the New Jersey Office of Legislative Services, Governor Murphy, Chief Justice Rabner and Administrative Director Grant in their official capacity. Thus, the only remaining issue is Plaintiffs' damages claim against the Individual Defendants in their personal capacity.

V.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982) (citations omitted); *Pearson v. Callahan*, 555 U.S. 223, 244, 129 S. Ct. 808, 823, 172 L. Ed. 2d 565 (2009). Qualified immunity protects a state official "regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed.2d 1068 (2004)). While state officials may "execute their duties without the constant threat of litigation, it is 'no license to lawless conduct.'" *Peroza-Benitez v. Smith*, 994 F.3d 157, 164 (3d Cir. 2021) (quoting *Harlow*, 457 U.S. at 819, 102 S. Ct. 2727, 73 L.Ed.2d 396)). "The

standard for qualified immunity is tilted in favor of shielding government actors and 'gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'" *Zaloga v. Borough of Moosic*, 841 F.3d 170, 175 (3d Cir. 2016) (quoting *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed.2d 589 (1991)).

Courts conduct a two-step inquiry to address qualified immunity claims. *Pearson*, *555* U.S. at 232; *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001). First, the court must determine "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right." *Pearson*, 555 U.S. at 232. Second, the court must determine "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985 (2012) (internal quotation marks, citations, and brackets omitted). "[T]he right allegedly violated must be established, not as a broad general proposition, . . . but in a particularized sense so that the contours of the right are clear to a reasonable official." *Id.* at 665 (internal quotation marks and citations omitted); *see also Zaloga*, 841 F.3d at 175 ("[T]he right should be framed in terms specific enough to put 'every reasonable official' on notice of it. . . . ").

Courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."

Pearson, 555 U.S. at 236, 129 S. Ct. at 818. As the Supreme Court noted, judicial resources may be conserved by bypassing the first step because "[i]n some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all." *Id.* "[U]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Oliver v. Roquet*, 858 F.3d 180, 188 (3d Cir. 2017) (internal quotation marks and citation omitted).

The Court's begins its analysis with the second factor of the *Saucier* framework — whether a right was clearly established. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Courts "typically look to Supreme Court precedent or a consensus in the Courts of Appeals to give an officer fair warning that his conduct would be unconstitutional." *Kedra v. Schroeter*, 876 F.3d 424, 450 (3d Cir. 2017). Plaintiffs assert violations of their constitutional rights under the First, Fourth and Fourteenth Amendments and the New Jersey State Constitution, however, the Court is not persuaded that the contours of these rights are sufficiently particular to the circumstances at hand such that a reasonable officer understood what he or she did violated those rights. The particular right at issue — the right to be free from government-mandated workplace testing of an infectious disease — has never been recognized, let

alone addressed by courts. The testing mandates were implemented in the throes of a rare, once-in-a-century global health crisis for which guidance has constantly evolved. It follows then that it was not sufficiently clear to a reasonable official that what he or she was doing violated that right.

Because the clearly established standard has not been satisfied, the Court need not decide whether the alleged facts make out a violation of a constitutional right.[3] *See Zaloga*, 841 F.3d at 174 (declining to conduct any analysis on the first prong where the second prong was not met). Proceeding to address the first *Saucier* factor would be an "academic exercise." *Pearson*, 555 U.S. at 237. As such, Governor Murphy, Chief Justice Rabner and Administrative Director Grant are entitled to qualified immunity from the claims made against them in their personal capacity.

VI.

For the reasons stated above, Defendants' Motion to Dismiss is granted with prejudice. Based on the grounds for dismissal, any amendment to the complaint would be futile. An appropriate Order follows.

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[3] Even if the Court were to reach that issue here, it has long been recognized that some "restraints" on liberties secured by the Constitution may be necessary for the common good. *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (upholding state's compulsory vaccination law enacted during the smallpox epidemic to protect the public health and safety). *Jacobson* has been relied upon by several courts that have upheld the constitutionality of COVID-related restrictions. *See Smith v. Biden*, No. 1:21-CV-19457, 2021 WL 5195688, at *6 (D.N.J. Nov. 8, 2021).

/s/ Peter G. Sheridan
U.S.D.J.

ORDER, U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (MAY 1, 2023)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WRIGHT-GOTTSHALL, ET AL.,

Plaintiffs,

v.

STATE OF NEW JERSEY, ET AL.,

Defendants.

Civil Action No. 3:21-cv-18954-PGS-DEA

Before: Peter G. SHERIDAN,
United States District Judge.

ORDER

THIS MATTER having come before the Court on Defendants' Motion for to Dismiss (ECF No. 36) and the Court having carefully reviewed and taken into consideration the submissions of the parties, as well as the arguments and exhibits presented therein; and for good cause shown:

IT IS on this 1st day of May, 2023,

ORDERED that Defendants' Motion to Dismiss (ECF No. 36) is GRANTED and Plaintiffs' Amended

Complaint (ECF No. 34) is DISMISSED WITH PREJUDICE; and

ORDERED that the Clerk's Office is directed to close this case.

/s/ Peter G. Sheridan
U.S.D.J.

EXECUTIVE ORDER NO. 253
(AUGUST 23, 2021)

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"); and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, issued on April 7, 2020, May 6, 2020, June 4, 2020, July 2, 2020, August 1, 2020, August 27, 2020, September 25, 2020, October 24, 2020, November 22, 2020, December 21, 2020, January 19, 2021, February 17, 2021, March 17, 2021, April 15, 2021, and May 14, 2021, respectively, the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency continued to exist and declared that all Executive Orders and Administrative Orders adopted in whole or in part in response to the COVID-19 Public Health Emergency remained in full force and effect; and

WHEREAS, in accordance with N.J.S.A. App. A:9-34 and-51, I reserve the right to utilize and employ all available resources of State government to protect against the emergency created by COVID-19; and

WHEREAS, as COVID-19 continued to spread across New Jersey, I have issued a series of Executive Orders pursuant to my authority under the Disaster

Control Act and the EHPA, to protect the public health, safety, and welfare against the emergency created by COVID-19, including Executive Order Nos. 104-133, Nos. 135-138, Nos. 140-166, Nos. 168-173, No. 175, Nos. 177-181, No. 183, Nos. 186-187, Nos. 189-198, No. 200, Nos. 203-204, No. 207, and Nos. 210-211 (2020) and Nos. 214-216, Nos. 219-220, Nos. 222-223, No. 225, Nos. 228-235, Nos. 237-244, No. 246, No. 249, and Nos. 251-252 (2021), the facts and circumstances of which are all adopted by reference herein; and

WHEREAS, on June 4, 2021, 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) but maintained the State of Emergency declared in that same Order; and

WHEREAS, P.L.2021, c.103 provided that following the termination of the Public Health Emergency declared in Executive Order No. 103 (2020), the Governor, Commissioner of the Department of Health ("DOH"), and the head of any other State agency may continue to issue Orders related to implementation of recommendations of the Centers for Disease Control and Prevention ("CDC") to prevent or limit the transmission of COVID-19 and related to vaccine distribution, administration, and management, COVID-19 testing, and data collection; and

WHEREAS, the American Academy of Pediatrics ("AAP") has emphasized that in-person learning is critical for educational and social development of children, as evidence demonstrates that remote learning has been detrimental to the educational attainment of students of all ages and has exacerbated the mental health crisis among children and adolescents; and

WHEREAS, the CDC has reported that new variants of COVID-19 have been identified in the United States, and that certain variants, particularly the B.1.617.2 (Delta) variant, are more transmissible than previous strains; and

WHEREAS, the State has experienced significant upticks in critical COVID-19 metrics over the past few months, including COVID-19 positive cases, the rate of transmission, spot positivity, and new hospitalizations, that warrant additional precautions in certain settings, especially those with a substantial number of unvaccinated individuals; and

WHEREAS, the CDC has emphasized that vaccination is a critical means to prevent spread of COVID-19 and to avoid infection of those individuals that cannot be vaccinated because their age precludes them from receiving one, and has strongly recommended vaccination of all eligible teachers and educational staff; and

WHEREAS, while over 5.4 million people in the State have been fully vaccinated against COVID-19, additional steps are necessary to ensure continued vaccinations of individuals in certain settings of concern to protect against spread of COVID-19 and to sustain the provision of full in-person instruction for New Jersey students; and

WHEREAS, on July 6, 2021, the U.S. Department of Justice's 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, requiring workers in public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools (collectively "school districts") to receive a COVID-19 vaccine or undergo regular testing can help prevent outbreaks and reduce transmission to children, including those who are not yet eligible for vaccination; and

WHEREAS, the CDC has emphasized that COVID-19 vaccines are effective, in that they can prevent individuals from getting and spreading the virus, and can prevent severe illness in individuals who do contract COVID-19; and

WHEREAS, preventing transmission of COVID-19 is critical to keeping schools open for in-person instruction; and

WHEREAS, school districts have access to multiple sources of funding to address costs associated with worker vaccination efforts and testing, including three rounds of federal Elementary and Secondary School Emergency Relief funds and Emergency Assistance for Nonpublic Schools within the Governor's Emergency Education Relief funds; and

WHEREAS, the State will continue to work closely with school districts to successfully implement the requirements of this Order; and

WHEREAS, Executive Order No. 251 (2021) requires all school districts to maintain a policy regarding mandatory use of face masks by staff, students,

and visitors in the indoor portion of school district premises; and

WHEREAS, that Order allows for exemptions from mask-wearing when "doing so would inhibit the individual's health," "when the individual has trouble breathing," and when a student's documented medical condition or disability precludes use of a face mask; and

WHEREAS, the AAP and CDC continue to emphasize the importance of universal indoor masking for teachers, staff, and students, particularly as the majority of the student population remains ineligible for vaccination at this time; and

WHEREAS, exemptions to mask wearing should be as limited as possible to maximize protections; and

WHEREAS, it is necessary and appropriate that school districts' policies regarding a medical exemption from mask wearing require individuals to submit medical documentation; and

WHEREAS, this Order is related to vaccination management, COVID-19 testing, data collection, and the implementation of CDC recommendations, and is thus authorized under P.L.2021, c.103;

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. All public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools ("covered settings"), must maintain a policy that requires all

covered workers to either provide adequate proof to the covered setting that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly. This requirement shall take effect on October 18, 2021, at which time any covered workers that have not provided adequate proof that they are fully vaccinated must submit to a minimum of weekly or twice weekly testing on an ongoing basis until fully vaccinated.

2. Covered workers may demonstrate proof of full vaccination status by presenting the following documents if they list COVID-19 vaccines currently 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. 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.

3. To satisfy the testing requirement, a covered worker must undergo screening testing at minimum one to two times each week. Where a covered setting requires an unvaccinated covered worker to submit proof of a COVID-19 test, the worker may choose either antigen or molecular tests that have EUA by the U.S. Food and Drug Administration ("FDA") or are operating per the Laboratory Developed Test requirements by the U.S. Centers for Medicare and Medicaid Services. Where a covered setting provides the unvaccinated covered worker with on-site access to COVID-19 tests, the covered setting may similarly elect to administer or provide access to either an antigen or molecular test. If the covered worker is not working on-site in the covered setting during a week where testing would otherwise be required, the covered setting's policy need not require the worker to submit to testing for that week. This requirement shall not supplant any requirement imposed by the covered setting regarding diagnostic testing of symptomatic workers or screening testing of vaccinated workers.

4. Covered settings must have a policy for tracking test results from testing required by this Order and must report results to local public health departments.

5. For purposes of this Order, "covered workers" shall include all individuals employed by the covered setting, both full-and part-time, including, but not limited to, administrators, teachers, educational

support professionals, individuals providing food, custodial, and administrative support services, substitute teachers, whether employed directly by a covered setting or otherwise contracted, contractors, providers, and any other individuals performing work in covered settings whose job duties require them to make regular visits to such covered settings, including volunteers. Covered workers do not include individuals who visit the covered setting only to provide one-time or limited-duration repairs, services, or construction.

6. For purposes of this Order, a covered worker shall be considered "fully vaccinated" for COVID-19 two weeks or more after they have received the second dose in a two-dose series or two weeks or more after they have received a single-dose vaccine. Individuals will only be considered fully vaccinated where they have received a COVID-19 vaccine that is currently authorized for emergency use by the FDA or the WHO, or that are approved for use by the same. Workers who are not fully vaccinated, or for whom vaccination status is unknown or who have not provided sufficient proof of documentation, shall be considered unvaccinated for purposes of this Order.

7. Nothing in this Order shall prevent a covered setting from instituting a vaccination or testing policy that includes additional or stricter requirements, so long as such policy comports with the minimum requirements of this Order. A covered setting may also maintain a policy that requires more frequent testing of covered workers.

8. The Commissioner of the 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 and testing data to the DOH. Actions taken by the Commissioner of the 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.

9. It is hereby clarified that the policy of public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools, regarding mandatory mask wearing in the indoor portion of school district premises, as outlined in Executive Order No. 251 (2021), must require individuals seeking a medical exemption from mask wearing under Paragraphs 1(a) – (c) of that Order to produce written documentation from a medical professional to support the exemption. Self-attestations and parental attestations are not sufficient for this purpose.

10. 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.

11. 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.

12. 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.

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

14. 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 23rd day of August, Two Thousand and Twenty-one, 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

MESSAGE TO JUDICIARY STAFF
(AUGUST 6, 2021)

From: Broadcast Message
Subject: All Judiciary Staff and State Court Judges to be Vaccinated or Tested Weekly for COVID-19
Date: Friday, August 6, 2021 11:35:21 AM

All Judiciary Staff and State Court Judges to be Vaccinated or Tested Weekly for COVID-19

To Judiciary Staff and State Court Judges:

The Judiciary is implementing a policy that will require all employees – including both Judiciary staff and state court judges – to provide proof that they have been vaccinated against COVID-19 or submit results of a weekly COVID-19 test.

COVID-19 Trends; Delta Variant

As you know, the Delta variant is spreading across New Jersey and the nation. After months of improvement, COVID-19 trends are worsening. The rate of transmission is substantial or high in nearly all areas of our state.

Vaccination against COVID-19 is the most effective way to prevent further illness and death. Current vaccines provide strong protection against the Delta variant of the virus, as explained in this NJ DOH flyer.

All of the vaccines approved for use in the United States are more than 90% effective in preventing severe disease. Although breakthrough cases sometimes occur, individuals who are fully vaccinated against COVID-19 are far less likely to become very sick, to require hospitalization, or to die from the virus.

NJ DOH statistics demonstrate the effectiveness of vaccines in avoiding bad outcomes from COVID-19. About 5 million New Jersey residents have been fully vaccinated against COVID-19. Recent data reveals that, of those who tested positive for the virus through late July, only 0.13% were fully vaccinated, and only half of those individuals showed symptoms. In recent months, only 0.004% of fully vaccinated individuals in New Jersey have acquired a case of COVID-19 that required hospitalization, and just 50 (or 0.001%) of the fully vaccinated have died due to COVID-related complications.

All Judiciary Staff and State Court Judges to be Vaccinated or Tested Weekly for COVID-19

In light of current COVID-19 trends, the New Jersey Judiciary is taking additional steps to support the health and safety of our workforce and all court users. To that end, the Judiciary will require all employees to submit to Human Resources either (1) proof of full vaccination against the COVID-19 virus; or (2) results of weekly viral tests for COVID-19. Human Resources will maintain the confidentiality of

all vaccination and testing records required under this policy.

- By Friday, August 20, 2021, all employees (staff and judges) will be required to submit to Human Resources either proof of vaccination or COVID-19 test results. An employee required to report to work in person who does not submit the required documentation will not be permitted to enter the workspace on Monday, August 23, and will be required to use leave time.
- Employees should not submit proof of vaccination or COVID-19 test results at this time. Detailed guidance will be provided next week.

Vaccination Facts and Resources

- According to the Centers for Disease Control and Prevention (CDC) and the NJ DOH, an individual is fully vaccinated against COVID-19 if the following criteria are met:
  - It has been at least two weeks since the individual's receipt of the second vaccination dose in a 2-dose series (such as the Pfizer or Moderna vaccines); or
  - It has been at least two weeks since the individual's receipt of a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.
- Everyone who lives or works in New Jersey can register for the COVID-19 vaccine. For the latest State of New Jersey vaccine

information, please visit https://covid19.nj.gov/vaccine. You can search for available vaccine appointments across New Jersey by visiting https://covid19.nj.gov/pages/finder.

- Eligible employees can use up to 7 hours of COVID-19 leave to get the vaccine and to recover from side effects of vaccination. Questions about COVID-19 leave for vaccination should be directed to Human Resources.

We are implementing this policy to support a safe workplace for all members of the Judiciary and for all court users. Thank you for your understanding and cooperation.

Chief Justice Stuart Rabner
Administrative Director Glenn A. Grant

NEW JERSEY JUDICIARY POLICY ON COVID-19 VACCINATION OR WEEKLY TESTING (AUGUST 11, 2021)

New Jersey Courts
Independence – Integrity – Fairness Quality Service

Administrative Office of the Courts

GLENN A. GRANT, J.A.D.

Acting Administrative Director of the Courts

Richard J. Hughes Justice Complex – P.O. Box 037 – Trenton, NJ 08625-0037 – njcourts.gov – Tel: 609-376-3000 – Fax: 609-376-3002

To: All State Court Judges and Judiciary Staff
From: Hon. Glenn A. Gran
Subj: New Jersey Judiciary Policy on COVID-19 Vaccination or Weekly Testing
Date: August 11, 2021

As previously announced, the Judiciary is implementing a policy that will require all employees to provide proof that they have been vaccinated against COVID-19 or submit results of a weekly COVID-19 test. This policy will support the health and safety of our workforce – and all court users – by reducing the risk of exposure to the virus at Judiciary locations. This memo sets forth the core provisions of the Judiciary's COVID-19 vaccination or testing policy, including definitions of key terms and initial deadlines. It also provides operational guidance for employees to comply with these provisions.

Scope

This policy applies to all state Judiciary employees, including Judiciary staff, Supreme Court Justices, Judges of the Appellate Division, Judges of the Superior Court, Judges of the Tax Court, and Municipal Presiding Judges. It also extends to all Judiciary contractors and interns. It does not apply to municipal court employees, volunteers, vendors, or external court users.

Option 1: Proof of COVID-19 Vaccination

By August 20, 2021 a Judiciary employee must submit to Human Resources proof of full vaccination[1] against the COVID-19 coronavirus. Proof of vaccination[2] is to be submitted through a secure online application developed and maintained by the Judiciary. Further guidance on use of the Judiciary vaccination and testing application will be provided. The employee must both (1) input information about their vaccination; and (2) upload a copy of their vaccination card. An employee who has previously submitted proof of

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[1] As defined by the Centers for Disease Control and Prevention (CDC), an individual is fully vaccinated against COVID-19 if the following criteria are met:

(1) It has been at least two weeks since the individual's receipt of the second vaccination dose in a 2-dose series (such as the Pfizer or Moderna vaccines); or

(2) It has been at least two weeks since the individual's receipt of a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

[2] Submission of falsified documents (including as to vaccination or testing) is a violation of the Judiciary Code of Conduct and the basis for discipline.

vaccination to Human Resources still must input information and upload documentation through the new Judiciary application. This confidential health information will be available to and accessed only by Human Resources.

Option 2: Results of Weekly Tests

As of August 20, 2021, an employee who does not submit proof of full vaccination must comply with the following ongoing conditions (unless and until they are fully vaccinated):

1. Undergo weekly viral tests (*e.g.*, polymerase chain reaction (PCR); rapid tests) for COVID-19.

    a. COVID-19 tests must be conducted by an approved testing facility, such as a pharmacy or healthcare facility. Home tests are not permitted. Information on free testing is available through the New Jersey Department of Health. Testing also is available through a variety of healthcare providers and pharmacies.

    b. COVID-19 tests must be conducted from Saturday morning through Wednesday night each week. The timeframe for testing may be adjusted based on testing availability in New Jersey.

    c. The preference is for testing to be conducted outside of working hours, if practicable. However, employees may use sick leave or request the use of vacation leave and/or administrative leave for tests taken during work hours. COVI D-

19 sick leave is not available for these purposes.

2. Submit to Human Resources the results of each weekly viral test. Test results are to be submitted via a secure online portal developed and maintained by the Judiciary. Further guidance on use of the Judiciary vaccination and testing application will be provided. This confidential health information will be available to and accessed only by Human Resources.

a. An employee must electronically submit their COVID-19 test results no later than 11 :00 a.m. on Friday following the test.

b. An employee who does not submit a negative test[3] result by 11 :00 a.m. Friday will be excluded from the work location on the next scheduled on-site workday. The employee may be excluded from the work location for up to 24 hours after submission to Human Resources of a negative test. (For example, if the employee submits negative test results on Monday morning, they may not be permitted to return to the work location until Tuesday morning.)

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[3] An employee who tests positive for COVID-19 must submit those test results to Human Resources. However, the employee will not be penalized for the positive test. In fact, in light of the continued availability of COVID-19 leave, any employee (vaccinated or unvaccinated) who contracts the virus may use COVID-19 leave. If an employee is able to work, managers and supervisors will support them in working remotely, to the extent possible, if excluded from the worksite based on a positive COVID-19 test.

c. An employee who is excluded from the worksite based on failure to submit a COVID-19 test is not on that basis entitled to work remotely. The determination to permit remote work will be based on other judiciary policy and operational needs. If remote work is not supported, the employee must use administrative, sick, or vacation leave. If other available leave has been exhausted, the absence will be considered unauthorized and unpaid.

d. Repeated failure to submit COVID-19 test results by the Friday deadline may be grounds for discipline based on chronic unscheduled absences.

e. The Judiciary will not provide, schedule, or reimburse for COVID-19 tests for an employee.

f. Additional leave time, including paid COVID-19 sick leave, will not be provided for an employee to obtain a COVID-19 test, for purposes of this policy.

Continuation of Mask and Social Distancing Requirements

All Judiciary employees at present are required to wear masks and maintain social distancing in Judiciary areas of court locations, including work areas not open to the public. Limited exceptions exist and apply equally to employees who are vaccinated and not vaccinated. This new COVID-19 vaccination or testing policy does not change those requirements.

Availability of COVID-19 Leave for Vaccination

The Civil Service Commission and the Governor's Office have advised that COVID-19 leave time remains available through December 31, 2021. This includes leave time of up to one day (7 hours) for purposes of obtaining a COVID-19 vaccine or recovering from the potential effects of vaccination. Please contact Human Resources for more information and for authorization of COVID-19 vaccine leave.

The Judiciary is not requiring employees to be vaccinated against the COVID-19 virus. The Judiciary recognizes and respects the rights of individuals to decline vaccination on religious, medical, and other grounds. Accordingly, as an organization we are providing two options — proof of vaccination or regular testing — to reduce the risks of exposure to the COVID-19 virus. Thank you in advance for your compliance and cooperation.

Questions on this memo should be directed to your local Human Resources office or to Assistant Director for Human Resources Deirdre K. Hartman at Deirdre.Hartmannicourts.gov.

cc: Chief Justice Stuart Rabner
Municipal Presiding Judges
Steven D. Bonville, Chief of Staff
Deirdre K. Hartman, Assistant Director for Human Resources
Vicinage Human Resources Division Managers

OFFICE OF LEGISLATIVE SERVICES
EMAIL TO OLS STAFF
(SEPTEMBER 20, 2021)

Bryan Lucas

From: Knox, Christin <CKnox@njleg.org>
Sent: Monday, September 20, 2021 3:50 PM
To: #OLS
Subject: Instructions for submitting proof of vaccination and test results

Good Afternoon,

Effective October 25th, OLS will require all employees to provide proof of full vaccination against COVID-19 or submit results of a weekly COVID-19 PCR test. This step is being taken in our continuous effort to maintain a safe workplace for everyone.

Please see the following instructions for submission of documents:

For Fully Vaccinated employees:

As defined by the CDC, an individual is fully vaccinated against COVID-19 when:

- It has been at least 2 weeks after their second dose in a 2-dose series, such as the Pfizer or Moderna vaccines; or
- It has been at least 2 weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

Please email a picture or scan of your vaccination card showing both dates for the Pfizer or Moderna vaccines or date for the J&J vaccine to OLSHRDOC@

njleg.org Please be sure the vaccination card clearly shows your name and date(s) of vaccination. You may start submitting your proof of vaccination now and it must be received by Monday, October 25th to avoid requiring a weekly test result to work on-site. Please note if you have previously submitted proof of vaccination as back-up documentation for using non-charged sick leave, we are asking that you resubmit your proof to OLSHRDOC@njleg.org.

For Non-Vaccinated employees or those who are not yet Fully Vaccinated:

Please email a weekly PCR test result to OLSHRDOC@njleg.org no later than each Monday at 10:00am. The test must be taken within the prior three days. For the October 25th return to on-site work date, the first weekly test result must be submitted by 10:00am Monday, October 25th for a test taken no earlier than Friday, October 22nd. If an employee is scheduled to be on leave on a Monday, test results must be submitted by 10:00am of the scheduled return date for a test taken within the prior three days. The test must be a PCR test. Rapid tests and at-home tests will not be accepted. Please ensure your test results clearly show your name, date of the test, and result.

If you do not have your test results by Monday at 10:00am, you will not be permitted on-site and must use accumulated leave time. If you are out of accumulated leave time, you will be put on leave without pay. Telework will not be permitted. Failure to comply with the requirement to timely submit test results may also be grounds for disciplinary action.

Frequently Asked Questions

Q. Do I need a booster shot to be considered fully vaccinated?

A. No. As defined by the CDC, an individual is fully vaccinated against COVID-19 when:

- It has been at least 2 weeks after their second dose in a 2-dose series, such as the Pfizer or Moderna vaccines; or
- It has been at least 2 weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine.

Q. Can I use the 7-hours of non-charged sick leave allotted for vaccination or adverse reaction to vaccination towards the booster shot?

A. Yes, if not previously exhausted employees may request this with appropriate documentation. Please note that the booster shot is not required to be considered "fully vaccinated".

Q. Can I submit a rapid test result on Mondays at 10:00am?

A. No. The test must be a PCR test.

Q. What should I do if I receive a positive test result?

A. Do not report on-site. Contact Carly Diaz in the Human Resources Office. You may telework with management approval. If you are too ill to work, you may use non-charged sick leave. You must follow medical documentation regarding treatment and return to work. Employees who have been diagnosed with COVID-19 will not be permitted to enter the workplace until they are either medically cleared or until 10 days have

passed since they were symptomatic and 24 hours with no fever (without the use of fever-reducing medications) and other symptoms of COVID-19 are improving.

Q: What if a member of my immediate household tests positive for COVID-19 and needs to quarantine due to potential exposure to COVID-19?

A: Contact Carly Diaz in the Human Resources Office. You must provide documentation of positive test or need for quarantine. If acceptable documentation is received, the employee may telework with management approval, however modification or revocation of telework may occur based on legislative demand. If no documentation is presented, and absence from work is the personal choice of the employee, accumulated leave time must be utilized.

Q: What if I need to care for a member of my immediate household who tests positive for COVID-19?

A: You may use accumulated sick leave to care for a member of your immediate household who tests positive for COVID-19.

Q: What if I become ill during a workday while onsite and have symptoms of COVID-19?

A: If you are symptomatic, you must go home immediately and contact the Carly Diaz in the Human Resources Office. You should seek medical treatment and testing. Medical documentation must be provided to the Human Resources Office

clearing you to return to work. You may telework with management approval.

Q: What should I do if I am exposed to someone who tests positive for COVID-19?

A: Fully vaccinated employees who have been exposed to an individual who tests positive for COVID-19 are not required to self-quarantine. Unvaccinated employees or those not yet fully vaccinated who are exposed to an individual who tests positive for COVID-19 should self-quarantine for 10 days without testing or seven days after receiving a negative test result (test must occur on day 5 or later). Local public health authorities make the final decision on how long quarantine should last, based on local conditions and needs. Employees may telework with management approval. If the employee is not approved for telework or does not have enough telework to be productive for 7 hours per day, the employee must use their own accumulated leave time.

If you have any concerns about your personal situation, please contact the Human Resources Office.

Thank you,

Christin Knox, PHR, SHRM-CP, IPMA-CP
Director of Human Resources
Notary Public
Office of Legislative Services
Direct: 609.847.3393
Main: 609.847.3390
Fax: 609.633.1032
cknox@njleg.org

AMENDED VERIFIED COMPLAINT
(AUGUST 25, 2022)

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

KATHLEEN WRIGHT-GOTTSHALL, MELANI BORODZIUK, JILL MATTHEWS, JILL SKINNER, SANDRA GIVAS, DONNA ANTONIELLO, JENELL DECOTIIS, JENNIFER DOUGHERTY, MELISSA FARRELL, ALYSON STOUT, HEATHER HICKS, CHRISHA KIRK, DAVID TARABOCCHIA, DEBORAH ALDIERO, GINA ZIMECKI, KERI WILKES, and MICHELE PELLICCIO, NATALIE GRICKO, PATRICIA KISSAM, ROSEANNE HAZLET, VINCENIA ANNUZZI, JASON MARASCO, JENNIFER MESS, and KIM KOPPENAAL,

Plaintiffs,

vs.

CIVIL ACTION
Docket No. 3:21-cv-18954-GC DEA

THE STATE OF NEW JERSEY, GOVERNOR PHILIP MURPHY (in his official and personal capacity), THE NEW JERSEY SUPREME COURT, CHIEF JUSTICE STUART RABNER (in his official and personal capacity), GLENN A. GRANT (in his official and personal capacity) and THE NEW JERSEY OFFICE OF LEGISLATIVE SERVICES,

Defendants.

[AMENDED] VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Alyson Stout, Heather Hicks, Kathleen Wright-Gottshall, Kim Koppenaal, Melani Borodziuk, Chrisa Kirk, David Tarabocchia, Deborah Aldiero, Donna Antoniello, Gina Zimecki, Jason Marasco, Jenell DeCotiis, Jennifer Dougherty, Jill Matthews, Jill Skinner, Keri Wilkes, Melissa Farrell, Michele Pelliccio, Natalie Gricko, Patricia Kissam, Roseanne Hazlet, Sandra Givas, and Vincenia Annuzzi (collectively "Plaintiffs") by and through their counsel, complain against Defendants The State of New Jersey ("New Jersey"), Governor Philip Murphy ("Governor Murphy"), Chief Justice Stuart Rabner ("Chief Justice Rabner"), Glenn A Grant ("Mr. Grant") and the Office of Legislative Services ("OLS") as follows:

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief arising under the Fourteenth Amendment to the United States Constitution.

2. It concerns the constitutionality of mandates put in place by all three branches of government of the state of New Jersey. This includes an executive order promulgated by Governor Philip Murphy titled "Instituting Vaccination or Testing Requirement for All Preschool to Grade 12 Personnel and for All State Workers" (EO 253), a judiciary policy promulgated by New Jersey Supreme Court's Chief Justice Stuart Rabner and the Administrator of Courts Glenn A. Grant, which applies to all public employees who work for the judiciary ("the Judiciary Mandate"), and an OLS mandate (collectively the three mandates are referred to herein as "The Testing Mandates").

3. All The Testing Mandates require that employees who have not received one of the Covid-19 pharmaceuticals manufactured by Johnson and Johnson subsidiary Jannsen ("J&J"), Pfizer, Inc. ("Pfizer") or Moderna, Inc. ("Moderna") (collectively "the Covid-19 injections") submit to ongoing medical testing and medical surveillance.

4. The Mandates violate 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, the 4th Amendment prohibition on unreasonable search and seizure, and the procedural due process clause.

JURISDICTION AND VENUE

5. This action arises under the Fourteenth Amendment to the U.S. Constitution.

6. This Court has jurisdiction over all claims pursuant to the Declaratory Judgment Act as codified at 28 U.S.C. Sections 2201 and 2202.

7. Venue is proper under 28 U.S.C. Section 1391(b) because Defendants are located in this District and because a substantial part of the events giving rise the claim occurred in this District.

PARTIES

8. Plaintiffs are all government employees or contractors subject to EO 253 or The Judiciary Mandate.

9. Defendant State of New Jersey is the state government of New Jersey.

10. Defendant Governor Philip Murphy is the Governor of New Jersey and the person who signed Executive Order 253.

11. Defendant Chief Justice Stuart Rabner is the Chief Justice of the New Jersey Supreme Court and is responsible for The Judiciary Mandate.

12. Defendant Glenn A. Grant is the administrator and is also responsible for The Judiciary Mandate.

13. Defendant OLS is of the legislative branch of government and is forcing OLS employees who have not taken a Covid-19 injection or who decline to disclose to the government whether they have taken an injection to submit to weekly medical testing.

FACTUAL BACKGROUND

1. Executive Order 253: The State Testing Mandate

14. On August 23, 2021 Governor Murphy signed EO 253. Exhibit 1.

15. Broadly, EO 253 requires all people who work or contract in any public or private K-12 school in New Jersey to either prove that they have taken one of the Covid-19 injections or submit to frequent medical testing.

16. EO 253 requires all "covered settings" to maintain a policy that requires all "covered workers" to either provide proof of being "fully vaccinated" or submit to covid-19 testing at minimum one to two times weekly "until they are fully vaccinated." Ex A at ¶¶ 1, 5.

17. EO 253 is clear that weekly or twice weekly testing is a floor, not a ceiling, and that local districts are free to force employees to submit to more frequent testing: "a covered setting may also maintain a policy that requires more frequent testing of covered workers." *Id.* at ¶ 7.

18. "Covered workers" is defined as all full and part time employees, substitute teachers, contractors, providers, and any other person whose job requires them to make regular visit to the covered settings, including volunteers. *Id.* at ¶ 5.

19. "Covered settings" is defined as: "public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools." *Id.* at ¶ 1.

20. EO 253 does not include state workers in the definition of "covered workers," or state offices in the definition of "covered settings," but the mandate is being applied to state workers anyway.

21. EO 253 does not include legislative branch employees in the definition of "covered workers," but the mandate is being applied to them anyway as well.

22. Covered settings are required to collect employee medical data and to submit that data to the local health departments. *Id.* at ¶ 4.

23. Under EO 253, people who refuse to disclose their medical status to the government are considered "unvaccinated" and are subject to the coerced medical testing by the government. *Id.* at ¶ 6.

24. The State Director of Emergency Management, who is the Superintendent of Police, is granted

unfettered discretion to expand EO 253's scope without limitation:

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

Id. at 10.

25. The Department Of Health commissioner is 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 and testing data to the DOH" without having to comply with the requirements of the Administrative Procedures Act. *Id*. at ¶ 8.

26. Every government entity and actor in New Jersey is required to enforce Order 253. The EO states:

> [I]t 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.

Id. at 11.

27. Criminal prosecution and penalties are authorized against any government entity that takes any action in conflict with EO 253. The Order provides:

> [N]o 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.

Id. at 12.

28. Violations of EO 253 may result in up to 6 months imprisonment and a fine of up to $1,000. *Id.* at 13.

29. EO 253 is remain in effect until revoked by the governor. *Id.* at 14.

2. The Judiciary Testing Mandate

30. On August 6, 2021 the New Jersey Judiciary announced that all state court judges and staff would be required to either provide proof that they have taken one of the Covid19 injections or submit to weekly medical testing to prove they are not infected with covid. Exhibit 2.

31. The memorandum states that "the Delta variant is spreading across New Jersey and the nation" and that "Covid-19 trends are worsening." At the time the memo was written, the Judiciary stated that the "rate of transmission is substantial or high in nearly all areas of our state." *Id.*

32. However, at the time the memo was written and the weeks preceding it, transmission rates were actually moderate or low throughout the state. *See* Exhibits 3, 4, 5, 6.

33. The August 6, 2021 memo acknowledges that breakthrough infections occur. Ex. 2.

34. The memo states that according to data since late July .13% of the people who test positive for the virus were full vaccinated "and only half of those showed symptoms." *Id.* The memo states that "in recent months, only .004% of fully vaccinated individuals in New Jersey have acquired a case of Covid-19 that required hospitalization, and just .001% of the fully vaccinated have died due to Covid-19 related complications." *Id.*

35. However, the memo does not provide any numbers for people who have chosen not to take the covid-19 injections or people who have acquired natural immunity through recovery, so there is no baseline for comparison in these populations.

36. On August 11, 2021 Chief Justice Stuart Rabner sent a broadcast message to judiciary employees acknowledging that "the choice to get vaccinated is personal and private, and we recognize that it may be influenced by various factors." Exhibit 7.

37. The policy states that it "recognizes and respects the rights of individuals to decline vaccination on religious, medical, and other grounds."

38. The message stated: "The Judiciary is not mandating vaccination" but is "[i]nstead permitting employees to choose between vaccination or weekly testing so as to respect those individual choices and

also to reduce to the extent possible risks to other employees and the public." *Id.*

39. Also on August 11, 2021 Defendant Glenn A. Grant issued a memo to "All State Court Judges and Judiciary Staff." Ex. 9.

40. Collectively the memorandum and two broadcast messages are referred to herein as "The Judiciary Testing Mandate."

41. Under the Judiciary Testing Mandate, all employees of the Judiciary must either take a Covid-19 injection or submit to weekly testing.

42. The Judiciary developed an application specifically for this purpose ("the Judiciary Medical Surveillance App").

43. Employees who are not "fully vaccinated" must comply with a number of conditions "unless and until they are fully vaccinated."

44. Employees who do not take a Covid-19 injection must:

a. Undergo weekly medical tests performed by "an approved testing facility;"

b. undergo the medical testing between Saturday morning and Wednesday night of each week and submit those results no later than Friday morning at 11am; and

c. submit their tests results to Human Resources through the Judiciary Medical Surveillance App.

45. The Judiciary Testing Mandate states that its "preference is for testing to be conducted outside of working hours." Under an updated policy, employees

may undergo testing during working hours, but they must specifically request time for "covid testing" from their supervisor, thereby being compelled to disclose their medical status to their supervisor.

46. If a person's test is not uploaded to the app by 11am on Friday morning, they are excluded from the work location on the next scheduled workday and may be excluded for up to 24 hours after they have submitted the negative test. The Judiciary Testing Mandate provides an example: "if the employee submits negative test results on Monday morning, they may not be permitted to return to the work location until Tuesday morning." *Id.*

47. If an employee does not submit medical test results on time, they must take administrative, sick, or vacation time unless a determination is made by unnamed persons that "judiciary policy and operational needs" allow the employee to work remotely. *Id.* If the person is out of administrative, sick, and vacation time, "the absence will be considered unauthorized and unpaid."

48. Even if the employee uses available administrative, sick, or vacation time, they still may be subject to discipline for "chronic unscheduled absences" for repeated failure to submit medical test results by the Friday deadline. *Id.*

49. Employees subject to The Judiciary Testing Mandate are required to schedule and pay for their own medical testing.

50. Additional leave time, including Covid-19 sick leave, cannot be used for time taken out to undergo the medical test or time lost because they were not able to upload the results in time. *Id.*

3. The Plaintiffs

51. Plaintiffs represent every branch of government. They represent employees of public schools, private schools, executive agencies, the judiciary, and independent consultants who are engaged by schools and the state to provide services.

52. Plaintiff Kathleen Wright-Gottshall is a kindergarten teacher in her 37th year as a teacher. She is eligible for retirement, but loves her chosen career and wants to continue teaching. However, Plaintiffs' religious beliefs prevent her from complying with EO 253, so she may be forced to leave. She applied for a religious exemption, but it was denied as an undue hardship due to "security" issues. Exhibit 9, Decl. of Kathleen Wright-Gotshall at ¶ ¶ 5-7. A true and accurate copy of the denial for Ms. Gottshall's religious exemption request is annexed hereto as Exhibit 10.

53. Ms. Wright-Gottshall's privacy and right to bodily autonomy are also intruded on by EO 253. She is very conscious of her health and has lived a vegan lifestyle for a decade to provide her body with long term health benefits. She is concerned about the safety of both the covid-19 injections and the nasal swabs. *Id.* at ¶ ¶ 10, 12.

54. Plaintiff Melani Borodziuk is an administrative assistant. She is immune to covid through recovery. Exhibit 11, Decl. of Melani Borodziuk at ¶ ¶ 5-6.

55. Ms. Borodziuk's school district is requiring her to be tested on her own time and at her own expense. She must take the test on a Friday, Saturday, or Sunday to submit her results by a Monday deadline. *Id.* at ¶ ¶ 8-9.

56. Ms. Borodziuk is concerned about the privacy of her medical information. She asked her superintendent who has access to her vaccination status and he said that only he and the nurse did. However, shortly thereafter, he emailed Ms. Borodziuk asking her to collect the coaching staff's vaccination cards, information to which she should not have access, which makes her suspect about privacy controls. *Id.* at ¶ 11.

57. Ms. Borodziuk has been treated for two separate cancers, including one on her nose. She does not want to be exposed to the known carcinogen ethylene oxide, which is used to sterilize the testing swabs. *Id.* at 13.

58. The Injection/Medical Testing ultimatum has taken a severe emotional toll on Ms. Borodziuk. She is a mother of two young children, and she is afraid that she will develop cancer from repeated exposure to the swabs, especially in the same place where she already had cancer. She is losing sleep and her appetite from the fear and stress EO 253 has caused her. *Id.* at ¶ 13.

59. Plaintiff Jill Matthews has been a teacher for 18 years. She has been working in person since October of 2020 and was never subjected to medical testing in that time. Ms. Matthews is immune to covid from recovery. She has been tested twice for antibodies and both times the test came back positive. Exhibit 12, Decl. of Jill Matthews at ¶ ¶ 5-7.

60. Ms. Matthews has been subjected to mandatory testing since September 2, 2021. She has experienced painful and lingering effects from the medical tests. She has never been the type of person who got headaches, but she has been developing severe headaches since beginning testing. On Monday

September 6th, she developed a headache after testing that lasted for an entire week. She began to rinse her nostrils out after she has the medical test, and that has lessened the severity of the headaches, but not eliminated them altogether. She is believes that it is the medical testing causing the headaches because when she missed two tests in a row, her headache subsided. When she resumed testing again, the headache came back. She is "basically living life with an ongoing low grade headache" now and takes over the counter pain medication to dull the pain each day. In addition to the headache, Ms. Matthews has suffered two nosebleeds since beginning testing. *Id.* at ¶¶ 12-13.

61. Plaintiff Kim Koppenaal is a teacher at a private high school. She has been working in person since Fall of 2020 with the exception of a few virtual weeks. She was not required to submit to medical testing through the pandemic. Exhibit 13, Decl. of Kim Koppenaal at ¶¶ 15-6.

62. Ms. Koppenaal is immune to covid through recovery. *Id.* at ¶ 18.

63. Her religious beliefs prohibit her from taking any of the covid-19 injections. *Id.* at 7.

64. The medical testing regime at her school requires her to present herself for testing every Friday. If the school is closed on a Friday, then she is required to take time during the day to undergo medical testing at her own time and expense that Friday, Saturday, or Sunday and submit the results of the medical test by Monday morning. *Id.* ¶¶ 9-10.

65. Plaintiff Jill Skinner is a Speech Language Therapist in the Newark Public schools. She is immune

to covid from recovery and has measurable antibodies. Exhibit 14, Decl. of Jill Skinner at ¶¶ 5-6.

66. She has been working in person since April 2021 and was not subject to testing until September 6, 2021. *Id.* at ¶¶ 7-8.

67. The testing regime in Ms. Skinner's district requires her to upload her medical test results by Sunday at 7pm and she must have been undergone the medical test no earlier than 7pm on Thursday. *Id.* at ¶ 9.

68. One Monday Ms. Skinner was sent an email telling her that she was not permitted to work despite a negative test result because her medical test had been a few hours before 7pm on Thursday. *Id.* at ¶ 10.

69. Another week Ms. Skinner underwent medical testing on Friday and the results did not come in time. She called the lab to find out why the results had not come and was told that the test was stuck on step 1 of 5 in their process. She was sent home and made to take a personal day. She was told that she cannot use a sick day "because the superintendent knows [she] is not sick and [is] just waiting for [her] test results." *Id.* at ¶¶ 13-14.

70. Ms. Skinner was able to obtain a free saliva test from the county where she lives. She now uses the half hour she gets for lunch on Fridays to do the saliva test. She is required to get on a zoom call with a stranger. While the stranger watches she is required to open the test and then drip/spit saliva into the test tube until it reaches the proper line. Then she closes and seals the container. She then rushes to a UPS so she can mail the test results in a timely manner and then returns to school to continue working. *Id.* at ¶ 12.

71. On days that the schools are closed on Monday, like Columbus Day, Ms. Skinner is required to upload her medical test results by Monday at 7pm. Because the test can be no earlier than 72 hours before, this requires her to undergo the medical testing after 7pm on Friday night or over the weekend. *Id.* at ¶ 15.

72. Ms. Skinner's medical status has been brought up and discussed in front of coworkers by her superiors. She had a meeting with the principal and other members of the Child Study Team. At the meeting, the principal pulled out a list of people who had not uploaded proof of their vaccination and stated in front of her colleagues that she was the only person in the room who had not uploaded her proof. The principal told Ms. Skinner the process for medical testing and then made Ms. Skinner repeat it back to her. The experience of having her private medical information and decisions discussed in this manner has left Ms. Skinner anxious at work. *Id.* at ¶¶ 16-17.

73. Plaintiff Sandra Givas is an operational assistant at public high school. She worked in person through the pandemic all last year and this year without being required to undergo medical tests. Decl. of Sandra Givas, Exhibit 15 at ¶¶ 5, 12.

74. Ms. Givas is extremely health conscious because since 1987 she has suffered from a health anxiety disorder, for which she is treated. She attests:

> There is nothing in life that I take more seriously, and put more effort into, than my physical, mental, and emotional health. My life is greatly affected by my health anxiety. I have lived a vegan lifestyle . . . I exercise

> regularly and am very careful about what I put into my body.

Id. at ¶¶ 7-10.

75. Medical testing is very hard for Ms. Givas due to her health anxiety. She has to prepare for medical tests weeks in advance and her doctors are aware of her disorder and know that she requires extra time to go over every number with her. She attests: "It's a very intense process." While waiting on the results of a medical test, she is "unable to focus on anything else due to the anxiety." She is "almost incapacitated" until she receives a negative result. The Testing Mandate has inflicted a serious emotional toll on Ms. Givas and is likely to lose her livelihood if it is not enjoined. *Id.* at ¶¶ 9-11.

76. Plaintiff Deborah Aldiero is a school nurse at a private school for autistic children. She has been working in person since September 2020, through the peak of the pandemic in December 2020/January 2021 and was not subjected to medical testing in that time. Exhibit 16, Decl. of Deborah Aldiero at ¶¶ 5-6.

77. Plaintiff Alyson Stout is a physical therapist and early intervention specialist who contracts with four school districts directly through her business and also contracts with private entities who contract with the state. She loves her work and has been doing it for 25 years. Exhibit 17, Decl. of Alyson Stout at ¶¶ 5-9.

78. Ms. Stout is immune to covid through recovery. *Id.* at ¶ 11.

79. She was required to start testing on September 7, 2021 and it has been a hugely intrusive and emotionally trying experience for her. It has disrupted

her personal life in a significant way. She tried to fit the government mandated medical testing into her schedule after work, but her evenings are devoted to cooking dinner for her family, walking her dogs, exercise, and just generally living her normal evening life. Instead she has had to incorporate the medical testing into her weekend. She has found the best time for her to get an appointment and go is on Sundays after church. After she undergoes the medical test, she goes straight home and sets up the appointment for the following week because she's found that if she waits longer than that, the appointments fill up before she can secure one. One Sunday, she had to leave her stepdaughter's birthday party early to undergo the government mandated medical testing and was not able to find another appointment. It was frustrating having to leave the family event and embarrassing having to explain to her family that she has to go get a medical test. *Id.* at ¶ ¶ 15-17, 19.

80. Ms. Stout worries about going away for a vacation, or even for a weekend, for fear of missing a medical test and not being able to work. She worries she may have to find a place to test while she is away on vacation. The government mandated medical testing is taking an emotional and mental toll on Ms. Stout. She attests:

> The weekly testing requirement is taking a huge toll on my mental and emotional well-being. Rather than being able to use my non-working time to relax and enjoy family time, I find myself becoming anxious about getting an appointment for testing, going for the testing appointment, and then stressing every day waiting for my results to come via email,

> not because I am worried I have covid, but because I am worried the results will not come back in time for me to work.

Id. at ¶ 18.

81. Ms. Stout also has found the actual process of testing invasive and upsetting. It is embarrassing having to go through testing in a public place and the weekly testing had caused her sinuses to become very irritated. Before being forced to submit to weekly medical testing Ms. Stout rarely had allergy or sinus issues, but not she has to use sinus rinses and saline to calm her sinuses. *Id.* at ¶ ¶ 21-22.

82. Adding further indignity to the government's imposition on Ms. Stout, she is required to cover the cost of the medical tests she does not want. *Id.* at ¶ 23.

83. Because Ms. Stout works for four different school districts and two state agencies it is conceivable that once they all announce their testing policies she will be forced to undergo government medical testing even more frequently if they require test results to be submitted on different days. *Id.* at 25.

84. Free testing is offered by Rite-Aid, but the free testing is done through a program called "Project Baseline," which sends her private medical information to the government and other unidentified third parties. This violates her privacy so she will not test there. *Id.* at ¶ 24.

85. Ms. Stout knows that her private medical information is being shared and will be shared throughout government entities and among the people who work there. She will have to report her medical information to each of the four districts with which she con-

tracts and she is already required to share her information with the private entities with which she contracts. She is required to email her medical information to employees at the agencies. She does not know what they do with her medical information after she emails it to them. She does not like reporting her private medical information to strangers in this way. It is invasive of her privacy. *Id.* at 26.

86. Plaintiff Vincenia Annuzzi has been a French teacher for 11 years. Her school district required her to begin medical testing on September 15, 2021. If she does not wish to pay for the testing herself, she must avail herself of the on-site district testing, which is only available on Wednesdays between 7:30 am and 8am. Her position requires her to be in the classroom at 7:50. Exhibit 18, Decl. of Vincenia Annuzzi at ¶ 8.

87. Ms. Annuzzi's privacy is invaded by the testing process. On the first day her district required medical testing, she and other staff members who are forced to undergo the testing were told to present themselves in the school conference room and were then walked out into the hallway to another room where the medical tests are performed. Everyone who is congregated there and anyone who walks by is essentially made aware of her medical status just by virtue of her having to be there. Ms. Annuzzi's privacy is further invaded because she is forced to sign forms consenting to the disclosure of her information. *Id.* at ¶¶ 9-10.

88. Plaintiff Roseanne Hazlett is employed by the State of New Jersey as a probation officer. She is subject to the Judiciary Testing Mandate. Under the policy she is required to be tested between Saturday and Wednesday and to upload a negative test result

by Friday at 11am. Under the Judiciary Testing Mandate Ms. Hazlett is required to do a nasal swab test, spit tests are prohibited. Exhibit 19, Decl. of Roseanne Hazlett at ¶ 6.

89. Ms. Hazlett was originally required to be tested on her own time at her own expense. She is still required to be tested at her own expense, but the Judiciary has updated its policy to allow employees to take time during work to undergo the medical test. However, to do this she must disclose to her immediate supervisor that she is subject to the Testing Mandate and the time is coded on her time sheet as "covid test." Further, she is required to submit proof that the time she underwent the medical test is the same time that she was granted time to go test, but the medical testing facility she uses to undergo the test does not time stamp, so she cannot comply with this. *Id.* at ¶ 7.

90. Ms. Hazlett's vacation time was ruined by the Judiciary Medical Testing Mandate. She took off of work from September 20, 2021 to September 24, 2021 to relax at home. However, to be able to return to work the following Monday, she was required to undergo government mandated medical testing on Wednesday September 22nd, in the middle of her vacation. The results to her test did not come in time, for reasons beyond her control. She spent the last weekend of her vacation stressed and anxious waiting for the test results so she could return to work. She did not want to lose another day of work and day of her vacation time because she was not sick. On Monday when the test results still had not come in, she called her job and was told that she would not be permitted to work that day and would have to take "admin" time. Usually she reserves admin time for

days when it is snowing because she does not drive in the snow. When the results still had not come in by Monday morning, she drove 80 miles to get a rapid test so she could return to work on Tuesday. The rapid test showed what she already knew; she was not sick. *Id.* at ¶ 9.

91. Ms. Hazlett has to direct a significant amount of personal time and mental energy toward complying with the Judiciary Medical Testing Mandate. Two times CVS has cancelled her test at the last moment and she has to direct her energy toward scrambling to find a rapid test so she can work. She attests: "I am so stressed all the time now because I know I have to have these test results back. I have to plan my whole week around this." *Id.* at ¶ 10.

92 In addition to intruding on her personal time and mental well-being, the medical testing is affecting Ms. Hazlett physically. She suffers from a burning and runny nose after the medical tests. *Id.* at ¶ 12.

93. Ms. Hazlett worked through the entire pandemic in the field without any stop and was never required to undergo any medical testing even through the peaks of the pandemic. *Id.* at ¶ 11.

94. Plaintiff Patricia Kissam is a special education teacher at an elementary school, working with students in grades 1 through 5. She is in her 24th year of teaching. She cannot take any of the covid-19 injections because it conflicts with her sincerely held religious beliefs. In addition, she is immune to covid through recovery. Exhibit 20, Decl. of Patricia Kissam at ¶¶ 5-7.

95. Ms. Kissam was tested for covid last December after she was exposed. It was a horrible experience.

She experienced severe pain and felt like her brain was being stabbed. She developed a severe headache that did not go away for a week. *Id.* at ¶ 8.

96. The Testing Mandate has taken an emotional toll on Ms. Kissam. She attests:

> The testing mandate has been very upsetting.
>
> I am healthy and do not want to undergo weekly testing to prove my health. I worry about this all the time. I am chewing my nails and cuticles to pieces over my anxiety. I am despondent that I will lose my job of 24 years and will not have any pension vest if I do not submit to weekly medical testing that I do not want. I am unable to sleep with anxiety and worry.

Id. at ¶ 9.

97. Plaintiff Natalie Gricko has been a supervisor of special education in the same school for 28 years. Ms. Gricko has dedicated herself to her job and has received tenure in three different positions in her district. She is immune to covid through recovery. Exhibit 21, Decl. of Natalie Gricko at ¶¶ 4,5,15.

98. Ms. Gricko has not been subjected to the government mandated medical testing yet, but already her privacy has been invaded. She was required to disclose to her school district whether she had taken any of the covid-19 injections. There was no option not to disclose. In addition, she knows that her private medical information is being shared among employees of the school because her boss told her "We know who's vaccinated and who's not." *Id.* at ¶¶ 10-11.

99. Plaintiff Michele Pelliccio is a Paralegal with the State of New Jersey Department of Children and Families and is purportedly subject to EO 253. Exhibit 22, Decl. of Michele Pelliccio at ¶¶ 5-6.

100. The Testing Mandate is taking a severe toll on Ms. Pelliccio. She suffers from a severe case of white coat syndrome. Her blood pressure goes up very high and any medical intervention or procedure, including testing, causes her extreme anxiety. She loves her job and has earned outstanding evaluations. She intended to continue working for another ten years in her position, but she will not submit to the weekly testing and does not know what she is going to do. She sincerely does not wish for her career to end like this. *Id.* at ¶ 11.

101. Plaintiff Jenell De Cotiis is a special education teacher for kindergarten and first grade students. She has been a teacher for 21 years. The students in her care have multiple disabilities and require intensive hands on care. Exhibit 23, Decl. of Jenell De Cotiis at ¶¶ 5-6.

102. Ms. De Cotiis loves her job and worked through the peaks of the pandemic without undergoing medical testing or missing one day due to illness. *Id.* at ¶¶ 5,7.

103. Ms. De Cotiis is unable to take any of the covid-19 injections because it would conflict with her sincerely held religious beliefs. The ongoing medical testing also conflicts with her sincerely held religious beliefs. *Id.* at ¶¶ 9-10.

104. If Ms. De Cotiis is forced to undergo the government mandated medical testing, she will have to do it on her own time in the evening and at her own

expense because the time for free testing offered by the school would make it impossible for her to meet her son when he gets off the bus from school. *Id.* at ¶¶ 11-12.

105. Plaintiff David Tarabocchia is a full time bus driver and part time custodian. He has worked through the entire pandemic non-stop. He worked through both peaks of the pandemic in March/April 2020 and December/January 2021. He worked all summer long when neither he nor the children were wearing masks. He was not forced to undergo medical testing during any of this time. Exhibit 24, Decl. of David Tarabocchia at ¶¶ 5-6.

106. Mr. Tarabocchia will not take any of the covid-19 injections because it would conflict with his sincerely held religious beliefs. He feels the forced testing is a violation of his privacy and religious beliefs. *Id.* at ¶¶ 7-8.

107. Mr. Tarabocchia has serious privacy concerns about the forced medical testing. He is required to download a phone application onto his personal phone. He is required to use this phone application to upload his medical test results to the school and he is required to hand in a physical copy to his supervisor. He does not feel comfortable sharing his medical records with his supervisor and he is not comfortable using a phone application to upload his medical records. *Id.* at ¶ 9.

108. Mr. Tarabocchia is also required to pay for his own medical testing, which he cannot afford. *Id.* at ¶ 10.

109. The Medical Testing Mandate is taking a toll on Mr. Tarabocchia and his family. He cannot sleep at

night knowing that his job is forcing him to undergo medical testing that religious and physically he does not feel safe doing. *Id.* at ¶ 11.

110. Plaintiff Jason Marasco is a health and physical education teacher as well as a wrestling coach. Mr. Marasco suffers from epilepsy and takes 9 pills a day to control his condition. He will not take any of the covid-19 injections because they have not been tested on people with epilepsy and he fears that they will harm him. Mr. Marasco is immune to covid through recovery. Exhibit 25, Decl. of Jason Marasco at ¶¶ 5,7,14.

111. Mr. Marsco's school district has been back in person since September 2020. He was out on disability from October 2020 to March 2021. All other periods he has worked full time in person and was not subjected to any medical testing in that time. *Id.* at ¶ 6.

112. Mr. Marasco's school district has already required him to start undergoing medical testing two days a week. To make it to work on time, he has to leave his house 20 minutes earlier on both testing days, which is stressful and essentially lengthens his working week by 40 minutes. *Id.* at ¶ 11.

113. In addition to robbing him of 40 minutes normally devoted to family time each week, the Testing Mandate has also intruded on Mr. Marasco's time with his family. On Columbus Day his children's school was closed, but his was not. He took the day off to be with and care for his children, but his school district requires him to be tested on Mondays or be subject to discipline. Consequently, he had to go in the morning on his day off to undergo the government mandated medical testing. *Id.* at 12.

114. Mr. Marasco is affected physically, emotionally, and mentally by the medical testing and The Testing Mandate. He has suffered from two nosebleeds and the process is painful. He has to pull away and it makes his eyes water. *Id.* at ¶ 13.

115. Plaintiff Donna Antoniello is a school nurse at a public school. Both the covid-19 injections and the medical testing conflict with her sincerely held religious beliefs. She has never taken a Covid-19 test and has specifically declined testing on multiple occasions. Exhibit 26, Decl. of Donna Antoniello at ¶ ¶ 5,6,10-11.

116. Under the Testing Mandate, Ms. Antoniello would be required to undergo the medical testing in her personal time on the weekends. *Id.* at ¶ 8.

117. Plaintiff Chrisha Kirk has been an English language arts teacher in a New Jersey public school for 17 years. Ms. Kirk has declined to receive a Covid-19 injection due to her sincerely held religious beliefs, and is therefore mandated to undergo weekly medical testing under EO 253. Exhibit 27, Decl. of Chrisha Kirk at ¶ ¶ 5, 7.

118. Ms. Kirk's school district began mandating medical testing before EO 253 went into effect and had to pay $200 out of her own pocket for those tests. *Id.* at ¶ 11.

119. Ms. Kirk is subject to discrimination not faced by her peers who have opted for the injection. If she is identified as a "close contact" of a person who has tested positive for Covid-19, she is automatically excluded from school for 10 days and she is required to use sick days during this time. *Id.* at ¶ ¶ 15-17.

120. The Testing Mandate and its effect is taking an emotional and mental toll on Ms. Kirk. She attests: "I am healthy, but I am being treated by the government and my employer like I am diseased." *Id.* at ¶ 17.

121. Plaintiff Melissa Farrell has been a special education teacher at a New Jersey public school for 16 years. Both the covid-19 injections and the medical testing conflict with her sincerely held religious beliefs. She has never been undergone testing for covid infection. Exhibit 28, Decl. of Melissa Farrell at ¶¶ 5,6,7,9.

122. Ms. Farrell is immune to Covid-19 due to a previous infection, and confirmed by a recent blood antibody test showing measurable antibodies. *Id.* at ¶ 8.

123. Ms. Farrell is extremely wary of using supposedly "safe products" on her body, having had serious health issues in the past with medical devices placed inside her body that had been declared "safe" by the FDA. *Id.* at ¶ 18.

124. The Testing Mandate is exactly an emotional and mental toll from Ms. Farrell. She is physically and mentally drained by the fact that she may be forced to leave her students, about whom she cares deeply, due to the forced medical testing. *Id.* at ¶ 14.

125. Plaintiff Keri Wilkes has been a math teacher at a New Jersey public school for 25 years. In all that time she has never been disciplined, and was teacher of the year in 2011. Both receiving a covid-19 injection and the forced medical testing conflict with her sincerely held religious beliefs. Exhibit 29, Decl. of Keri Wilkes at ¶¶ 5,7-8.

126. Ms. Wilkes has worked in person since September 2020, through the peak of the pandemic in December 2020/January 2021 and was not subjected to any medical testing during that time. *Id.* at ¶ 6.

127. Ms. Wilkes avoids all chemical intake as per her religious beliefs, including aspirin, Tylenol, etc. and does not want to be subjected to the chemicals on the testing swabs. She had requested a religious exemption due to her beliefs, but after waiting four weeks her request was denied. *Id.* at ¶¶ 8-10.

128. Ms. Wilkes has endured so much stress from the medical testing mandate that she loses sleep, her hair is falling out, and she has developed skin rashes. She considers the testing requirement to be a violation of her religious beliefs and bodily autonomy. Due to her religious beliefs, and she will never be "fully vaccinated" per the Executive Order. *Id.* at ¶¶ 12-13.

129. Plaintiff Jennifer Dougherty works in the New Jersey Office of the State Auditor, part of the Office of Legislative Services, which is of the legislative branch of government. She has never taken a Covid-19 test, but OLS has said she is required to undergo invasive medical testing that uses materials she does not trust to keep her job. Exhibit 30, Decl. of Jennifer Dougherty at ¶¶ 5, 9.

130. Plaintiff Heather Hicks is an elementary teacher in a New Jersey public school who has been working in person since September 2020, including through the entire summer with no masks. She was not required to undergo medical testing during this period. Ms. Hicks is immune to covid through recovery. Exhibit 31, Decl. of Heather Hicks at ¶¶ 5,6,7.

131. Ms. Hicks has declined to receive a Covid-19 injection and does not want to undergo weekly medical testing. Ms. Hicks strongly believes that the testing violates her right to make medical decisions for herself, as well as her medical privacy. She is required to fill out a daily health screening form on Google, which gives her anxiety on a daily basis. She is considering moving out of state and out of the town she grew up in to avoid the testing mandate and take back control over her own medical decisions and bodily autonomy. Since Ms. Hicks will never receive a Covid-19 injection, she will never become "fully vaccinated" per the Executive Order, and will be subjected to testing indefinitely. *Id.* at ¶¶ 9-11.

132. Plaintiff Gina Zimecki is a Kindergarten teacher at a public school. She has been a teacher for 25 years. Ms. Zimecki has been working in person since October 2020 and through the peak of the pandemic in December 2020/January 2021. She was not required to undergo medical testing in that period. Exhibit 32, Decl. of Gina Zimecki at ¶¶ 5-6.

133. Ms. Zimecki is very health conscious and careful about what substances she puts in her body. She is concerned about using swabs in her nose, and does not want to be exposed to possible carcinogens unnecessarily. She has not been told whether she will be required to test at work or on her own personal time, but either way she will suffer either a professional or personal imposition. She suffers mental stress due to the worry about when and how her testing will need to happen, and whether how she will pay for it. *Id.* at ¶¶ 7-9, 11.

134. Plaintiff Jennifer Mess has been the activity arts educator at a public middle school in Middletown,

NJ for 21 years. She has been working in person since September 2020, including through the pandemic peak of December 2020/January 2021. She was not subject to medical testing in that time. The covid-19 injections and the medical testing both violate her sincerely held religious beliefs. Exhibit 33, Decl. of Jennifer Mess at ¶¶ 5,6,11.

CONSTITUTIONAL CLAIMS

I.

The Testing Mandates Violates the Fourth Amendment Prohibition on Unreasonable Search and Seizure

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

136. The Testing Mandates are unreasonable.

137. The Mandates violate the Fourth Amendment prohibition on unreasonable search and seizure and the right for the people to be secure in their persons and property.

II.

The Testing Mandates Violate Plaintiffs' Fourteenth Amendment Right to Privacy

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

139. The Testing Mandates all involve extensive medical tracking and surveillance. Persons subject to the Mandates are subject to invasions of their privacy in multiple and layered ways:

a. They are required to undergo medical testing;

b. They are required to report their medical test results to the their employer;

c. Many are required to report their medical test results to multiple people at their place of employment;

d. Many are required to upload their medical test results to a third-party application;

e. Their medical test results are reported to local health authorities;

f. Their medical test results are reported to the state;

g. Their medical test results are put in a data-base by the state;

h. They are required to report their test results through various smartphone applications.

140. There are serious privacy issues with all of the policies, and little concern seems to be paid to the privacy of persons being subjected to the testing mandates.

141. There is no legal or historical precedent or support for the government to require public employees to submit to ongoing invasive medical testing and continually report their health status to a state entity.

142. The lack of precedent is *prima facie* evidence that the liberty to be free from invasive testing and medical surveillance by the state is fundamental and deeply rooted in the country's history and tradition.

143. The state's interest in stemming the spread of Covid-19 must be weighed against the individual right to privacy.

144. The individual's right to be free of medical surveillance and a systemic regime of medical testing by the government entity outweighs the state's interest.

145. The policies are not narrowly tailored to achieve the government's stated interests.

146. The Testing Mandates present Plaintiffs with an ultimatum to undergo either a medical procedure or ongoing and indefinite medical testing.

147. Plaintiffs' privacy rights permit them to decline both the medical procedures and the medical testing.

148. The Testing Mandates are unconstitutional under the 14th Amendment right to privacy.

III.

The Testing Mandates Violate Plaintiff's Fourteenth Amendment Liberty Rights

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

150. Plaintiffs have the fundamental liberty right to be free from the coerced medical testing required by The Testing Mandates.

151. The Testing Mandates present Plaintiffs with an ultimatum to undergo either a medical procedure or ongoing and indefinite medical testing.

152. Plaintiffs' liberty rights permit them to decline both the medical procedures and the medical testing.

IV.

The Testing Mandates Violate the Equal Protection Clause of the Fourteenth Amendment

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

154. Plaintiffs have the fundamental right to be free from the coerced medical testing required by The Testing Mandates.

155. Plaintiffs have the fundamental right to decline the Covid-19 injections.

156. Plaintiffs are being subjected to disparate and unequal treatment based on the exercise of their fundamental rights.

157. The Testing Mandates violate the equal protection clause of the Constitution.

V.

The Testing Mandates Violate Plaintiffs' Right to Free Exercise of Their Religion Under the First Amendment

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

159. Several Plaintiffs are unable to comply with The Testing Mandates because both the Covid-19 injections and the ongoing testing conflict with their sincerely held religious beliefs.

160. The Mandates present an undue burden on Plaintiffs' sincerely held religious beliefs and uncon-

stitutionally interfere with the free exercise of their religion.

161. The Testing Mandates violate the First Amendment of the Constitution.

VI.

Violation of 42 U.S.C. § 1983

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

163. Governor Philip Murphy, Chief Justice Stuart Rabner, and Glenn Grant have violated Plaintiffs' Constitutional rights while acting under the color of law.

164. As a result of Defendants' actions in violation of Plaintiffs' constitutional rights, Plaintiffs have been and continue to be damaged.

VII.

Violations of the NJ State Constitution Articles 4, 5 and 7

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

2. The Testing Mandates are an unreasonable search and seizure under Article 7 of the Constitution.

3. The Testing Mandates violate Articles 4 and 5 of the Constitution because they deprive certain Plaintiffs of their right to freely practice their religion as a condition of holding public employment.

PRAYER FOR RELIEF

Wherefore, Plaintiffs request the following relief:

4. Declare EO 253 unconstitutional on its face and as applied;

5. Declare The Judiciary Testing Mandate unconstitutional on its face and as applied to each Plaintiff;

6. Declare the OLS Testing Mandate unconstitutionally facially and as applied;

7. Enjoin The State of New Jersey from enforcing EO 253;

8. Enjoin Chief Justice Stuart Rabner and Glenn Grant from enforcing The Judiciary Testing Mandate;

9. Enjoin OLS from enforcing its Testing Mandate;

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

11. Grant Plaintiffs consequential, emotional, and punitive damages; and

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

Respectfully submitted,

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Attorney for Plaintiffs

Dated: August 25, 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.

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Dated: August 25, 2022