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

KATHLEEN WRIGHT-GOTTSHALL et al. Plaintiffs, vs. THE STATE OF NEW JERSEY, GOVERNOR PHILIP MURPHY (IN HIS OFFICIAL CAPACITY), THE NEW JERSEY SUPREME COURT, CHIEF JUSTICE STUART RABNER (IN HIS OFFICIAL CAPACITY), and THE NEW JERSEY OFFICE OF LEGISLATIVE SERVICES Defendants.	IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CIVIL ACTION Docket No. 3:21-cv-18954-PGS-DEA

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Law Offices of Dana Wefer, LLC
Dana Wefer, Esq.
PO Box 374
290 Hackensack St.
Wood-Ridge, NJ 07075
973-610-0491
Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES & RULES OF COURT

PRELIMINARY STATEMENT

The Defendants in this case are all three branches of New Jersey government ("the Government") and the men who head the executive and judicial branches who were personally responsible for enacting the challenged medical test mandates: Governor Philip Murphy, Chief Justice Stuart Rabner, and Judge Glenn Grant ("the individual Defendants"). In August 2021, all three branches enacted unprecedented medical testing regimes for targeted government workers ("the Medical Test Mandates" or "the Mandates"). The Medical Test Mandates from each branch are broadly the same; they each required targeted government workers to undergo government-mandated medical testing a minimum of every seven days as a condition of continued employment. Under each of the Mandates, the individual Defendants retained for themselves the sole power to decide when, if ever, the Workers could resume normal life without being forced to undergo medical testing every seven days.

The Government does not dispute that each separate medical test constitutes two separate searches and seizures under the Fourth Amendment; the first search is the removal of the person's bodily fluids and the second in the analysis of the fluids. Thus, there is no dispute that Plaintiffs like probation officer Roseanne Hazlett, who was subject to the judiciary medical test mandate,

underwent more than 100 government imposed searches and seizures from August 2021 through August 2022.

The Government cannot dispute the searches and seizures, so it instead argues that these searches and seizures were reasonable because there was an emergency. The argument that the Fourth Amendment did not apply to these workers because the individual Defendants determined that emergency conditions existed should give the judiciary pause.

> History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, *Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), and the Red scare and McCarthy-era internal subversion cases, *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); *Dennis v. United States,* 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951), are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."

Skinner v. Ry. Lab. Executives' Ass'n, 489 U.S. 602, 635 (1989) (Justice MARSHALL, with whom Justice BRENNAN joins, dissenting). The Government points to the danger of covid and its desire to protect public health, but as wise Justices have noted:

> [W]hile unfettered government power to protect the public good may prevent fatalities, sickness, and great public loss, it is a hallmark of our constitutional republic that "constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries...[This] reflects our shared belief that even

> beneficent governmental power—whether exercised to save money, save lives, or make the trains run on time—must always yield to "a resolute loyalty to constitutional safeguards. *Almeida-Sanchez v. United States,* 413 U.S. 266, 273, 93 S.Ct. 2535, 2539-2540, 37 L.Ed.2d 596 (1973).

Skinner v. Ry. Lab. Executives' Ass'n, 489 U.S. 602 at 649-50 (J. Marshall, dissenting).

The Constitution is not suspended in an emergency and no matter how good the Government's intentions, it cannot violate the Constitutional rights of its citizens. Here, the Constitution was violated in a number of ways.

The unilateral imposition of a vast medical testing regime on government-targeted workers is without any precedent or legal support. The right to be free from government-mandated medical testing every seven days is *clearly* established by the Fourth Amendment and it fits no judicially decreed exception. The Constitution is clear.

The brazenness of these constitutional violations is amplified by the fact that the "emergency" under which the individual Defendants unilaterally decided to suspend the Constitution as to these targeted workers was either pretextual or irrational. The evidence for this bountiful. For example, nearly all of the Plaintiff Workers worked through Fall and Winter of 2020 when medical tests were available, but none was required to test. Curiously, the "emergency" that created the purported "need" for the Government to subject these Workers to mandatory medical

testing did not occur until after a so-called vaccine ("the covid shots") became available.

There is no historical or legal precedent that allows the government to force healthy people to submit to a minimum of 52 medical tests a year as a condition of their employment. The facts surrounding these oppressive testing mandates are without parallel or support in history or precedential case law. These mandates were *per se* unreasonable as a matter of law. They were also objectively unreasonable as a matter of fact in the following ways: they were unreasonable in 1) frequency of testing, 2) physical invasiveness, 3) the degradation involved in treating workers as though they are presumptively diseased, 4) intruding into personal and family time, 5) failing to safeguard the Workers' privacy, 6) the fact that the only way the mandates could end was at the discretion of the individual Defendants, and 7) the fact that none of the mandates were actually tied to any metrics of disease, such as community spread. Moreover, the forced testing continued well after it became clear that the shots did not prevent infection or transmission. Indeed, on January 19, 2022 Governor Murphy himself acknowledged this in promulgating a different Executive Order, Executive Order 283, which mandated healthcare workers to take a booster as a condition of employment. As factual support for *that* order, Governor Murphy stated: "evidence suggests people who have received a primary series of a COVID-19 vaccine but have not yet

received the recommended booster shot are more likely to become infected with this variant than prior variants and to be able to spread the virus to others."[1] Despite the fact that it became common knowledge through the winter of 2020-2021 that the vaccinated and unvaccinated categories into which the New Jersey government divided its workers was meaningless with regard to stemming the spread of covid, none of these Defendants took steps to tailor the policies to the new conditions by, for example, requiring vaccinated workers to test, requiring unboosted workers to test, or lifting the testing mandate on unvaccinated workers.

The Medical Test Mandates were a brazen violation of the Workers' constitutional rights and the Workers were injured by the Government's power being wielded against them in this manner.

The individual Defendants, some of the most powerful people in New Jersey government, claim that they could not have known they were not allowed to force workers to undergo unwanted and unnecessary medical tests every seven days because there is no precedent saying they could not do that. Therefore, they claim, they cannot be held responsible for violating the Workers' constitutional rights. But as these Defendants all ought to know, since they each swore oaths to uphold the Constitution, the right

[1] Executive Order 283 at pg. 3, available at https://nj.gov/infobank/eo/056murphy/pdf/EO-283.pdf.

of Americans to be free from unreasonable searches and seizures is guaranteed by the Constitution.

STATEMENT OF FACTS

A. Plaintiffs and the Mandates

Plaintiffs are teachers, school nurses, judiciary staff, and other government workers, most of who worked through the pandemic with no vaccine and no medical testing. *See* Hazlett Decl., Dtk. 1-19 at pg.108, ¶12. (worked through entire pandemic without any break and was never required to be tested until 18 months after covid started); Decl. of Keri Wilkes, Dkt. 1-29 at pg. 137, ¶6 (working in person since September 2020 and was not subjected to testing until October 2021); Decl. of Sandra Givas, Dkt. 1-15 at pg. 88,¶12 (worked in person all of 2020 and 2021 without testing until EO 253); Decl. of Kim Koppenaal, Dkt. 1-13 at pg.82, ¶5 (worked in person since Fall of 2020 without testing); Decl. of Jill Skinner, Dkt. 1-14 at pg. 85, ¶7 (working in person since April 2021); Decl. of Heather Hicks, Dkt. 1-31 at pg. 143, ¶5 (working in person from September 2020 without testing until EO 253); Decl. of Gina Zimecki, Dkt. 1-32 at pg. 147, ¶6 (worked in person since from October 2020 until EO 253 without being subjected to medical testing); Decl. of Deborah Aldiero, Dkt. 1-16 at pg. 90, ¶6 (worked full time in person since September 2020 until EO 253 without testing); Decl. of Jenell De Cotiis, Dkt. 1-23 at pg. 121, ¶6 (worked in person all of 2020 without medical testing);

Decl. of Jill Matthews, Dkt. 1-12 at pg.80, ¶6 (worked in person since October 2020 without medical testing); Decl. of Chrisha Kirk, Dkt. 1-27 at pg.131, ¶6 (worked in person since October 2020 without medical testing); Decl. of Jason Marasco, Dkt. 1-25 at pg. 126, ¶6 (school was back full time since September 2020); Decl. of David Tarabocchia, Dkt. 1-24 at pg.123, ¶5-6 (worked in person for the schools non-stop through the entire pandemic, including through the entire summer with no forced medical testing)

In early April 2021, the covid shots became available to everyone 16 and older.[2] Very public claims were made by very public officials about the so-called vaccine's efficacy at preventing infection and transmission, but it has always been a matter of public record that they were not authorized for prevention of infection or transmission of covid.[3]

---

[2] https://www.cnn.com/2021/03/30/health/states-covid-19-vaccine-eligibility-bn/index.html, Jacqueline Howard, CNN, All 50 states now have expanded or will expand Covid vaccine eligibility to everyone 16 and up (last accessed Nov. 28, 2022).

[3] Reuters Fact Check, *Fact Check-Preventing transmission never required for COVID vaccines' initial approval; Pfizer vax did reduce transmission of early variants*, (October 14, 2022) (stating "As clinical trial data on vaccine efficacy against the main endpoints – symptomatic and severe disease -- began to be released in November 2020… researchers and regulators made clear in public statements that the vaccines' effect on virus transmission remained unknown") available at https://www.reuters.com/article/factcheck-pfizer-vaccine-transmission-idUSL1N31F20E

The very same month, the covid shots were rolled out to the entire population over 16, the CDC was required to acknowledge that breakthrough infections were occurring.[4]

A few months later, On July 30, 2021, the CDC publically acknowledged that both vaccinated and unvaccinated carry "similarly high SARS-CoV-2 viral loads in vaccinated and unvaccinated people, which suggest[s] an increased risk of transmission."[5] As a consequence, the CDC stated that both vaccinated and unvaccinated should wear masks.

Less than a week after the CDC had acknowledged that anyone can become infected with and transmit covid, regardless of vaccination status, Chief Justice Rabner and Judge Glenn Grant announced that judiciary workers who had taken the covid shots could continue working without any new conditions on their employment, but that workers who had chosen not to take the covid shots would have to start undergoing weekly medical tests to prove they are not infected with covid. On August 23, 2021 Governor Murphy announced

---

[4] Apoorva Mandavilli, New York Times, *Can Vaccinated People Spread the Virus? We Don't Know, Scientists Say*, April 1, 2021 (quoting CDC spokesperson as saying "[i]t's possible that some people who are fully vaccinated could get Covid-19. The evidence isn't clear whether they can spread the virus to others. We are continuing to evaluate the evidence") available at https://www.nytimes.com/2021/04/01/health/coronavirus-vaccine-walensky.html

[5] Statement from CDC Director Rochelle P. Walensky, MD, MPH on Today's MMWR, July 30, 2021 available at https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html (last accessed November 28, 2022).

through executive order 253 ("EO 253") that he would do the same thing to all school workers (janitors, teachers, nurses, principals, bus drivers) and state government workers who had chosen not to take the shots. Underlying both Mandates was an assumption that those who had not taken the shots were a sudden danger to their co-workers, even though they had done nothing different.

Through November/December 2021 it became even more clear that vaccinated people were just as susceptible to covid as unvaccinated people. By January 10, 2022, even the CDC had acknowledged that the covid shots "can't" prevent transmission.[6] In February 2022, Governor Murphy promulgated Executive Order 283, which required certain workers to take a booster shot because "people who have received a primary series of a COVID-19 vaccine but have not yet received the recommended booster shot are more likely to become infected with this variant than prior variants and to be able to spread the virus to others."[7]

---

[6] Erik Sykes, CDC Director: *Covid vaccines can't prevent transmission anymore*, (January 10, 2022) available at https://www.msn.com/en-us/health/medical/cdc-director-covid-vaccines-cant-prevent-transmission-anymore/ar-AASDndg (quoting CDC director as saying ""Our vaccines are working exceptionally well … but what they can't do anymore is prevent transmission")

[7] Executive Order 283 at pg. 3, available at https://nj.gov/infobank/eo/056murphy/pdf/EO-283.pdf.

Through all this time, despite the obvious failure of the shots to prevent infection or transmission, the Workers were required to undergo medical testing every seven days subject to the sole discretion of the individual Defendants. On August 5, 2022, the Plaintiffs moved for injunctive relief. On August 15, 2022, Governor Murphy issued Executive Order 302 rescinding the executive branch Medical Test Mandate. On August 16, the Court ordered the state to file its opposition to Plaintiffs' motion on or before 8/23/22. DKT. 22. On August 18, 2022, the State wrote to Judge Castner to inform her that Governor Murphy had rescinded his mandate and asking the judge to allow the state to file its opposition by September 6th instead of August 23rd. Plaintiffs objected because the Test Mandates were still in effect as to judiciary and legislative workers. DKT 23. The state wrote a second letter to Judge Castner on August 18th again requesting an adjournment to September and stating that the judiciary and legislative branches would be "reviewing their own policies" over the next few weeks. DKT 24. On August 26th, the State wrote to Judge Castner informing her that the judiciary and OLS testing had been ended. DKT 25. On August 29th, Plaintiffs' counsel withdraw the motion for a temporary restraining order as moot. DKT 29.

B. The Details of the Mandates

Three medical testing mandates are challenged in this case, one from each branch of the New Jersey Government. The executive branch

and judiciary mandates were promulgated by individual policy makers at the top of that branch of government: Government Murphy in the case of Executive Order 253 and Chief Justice Rabner and Judge Glenn Grant in the case of the judiciary mandate. It is not clear who is responsible for the OLS mandate.

The judiciary medical testing mandate went into effect in August 2021 and applied to all judicial branch employees who had not taken the emergency covid shots. Executive Order 253 was announced on August 23, 2021 and required all school and state workers who chose not to get the emergency covid shots to begin testing two months later, on October 18, 2021.

The Mandates share many important features in common. They are all indefinite in nature. None of the Medical Test Mandates had any covid-related metrics by which testing could end or lessen. Testing was required no matter how low the community levels of covid. All the Medical Test Mandates could be ended only by judicial decree or by rescission by the individual Defendants. Under all the Medical Test Mandates, the only way for Workers to end the medical testing was to take the covid shots that evidently did not prevent infection or to leave their jobs.

In addition to mandating testing, EO 253 also required that all results of the Workers' coerced medical tests be tracked by their local government-employer as well as the local health Board and the State of New Jersey. Eo 253 at pg. 7. The Workers' personal

medical information was shared with these three government entities as well as a number of private entities, including the testing companies (about which Plaintiffs know very little) and laboratories selected by the State. *All* of the Workers' test results were to be reported to these entities, regardless of whether they were negative or positive. In addition, the Workers were required to sign waivers with the private companies, which means their personal medical information may have been shared with other unknown parties as well. EO 253 left the actual mechanism of testing up to the local government employer.

The Judiciary Medical Test Mandate required medical testing by "an approved testing facility" between Saturday morning and Wednesday night of each week. Workers were required to submit the medical tests to Human Resources by 11am Friday morning. If a worker's test results were delayed, the Worker was prohibited from working the next scheduled workday and up to 24 hours *after* they have submitted the negative test. The Judiciary provided 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.* Thus, if a Worker took a test on Wednesday, but results did not come by Friday, the worker would be excluded from work all of Monday even if the test was negative. A Worker excluded from work because of a delayed result from their medical test was forced to take administrative, sick, or vacation

time. If the Worker had no more administrative, sick, or vacation time, "the absence will be considered unauthorized and unpaid." *Id.*

LEGAL ARGUMENT

Legal Standard

In deciding a motion to dismiss under Rule 12(b)(6), a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008) (internal citations omitted).

Here, the Government seeks to have the Workers' Amended Complaint dismissed on three grounds: qualified immunity as to the individual defendants, sovereign immunity as to the government Defendants, and mootness.

When evaluating Defendants' affirmative defense of qualified immunity and the issue of whether a Complaint should be dismissed on those grounds, the Court must accept Plaintiffs' allegations as true and draw all inferences in Plaintiffs' favor. *George v. Rehiel*, 738 F.3d 562 at n4. (3d Cir. 2013). If there are disputed issues of material fact concerning the affirmative defense of qualified immunity, then a summary judgment standard applies and Third Circuit precedent establishes that such facts must go to a

jury. *Curley v. Klem*, 298 *F.3d* 271, 278 (3d Cir. 2002) (noting "the reality that factual disputes often need to be resolved before determining whether the defendant's conduct violated a clearly established constitutional right"); *Daventport v. Borough of Homestead*, 870 4.3d 273, 278 (3d Cir. 2017) (noting that when "qualified immunity depends on disputed issues of fact, those issues must be determined by a jury").

The question of sovereign immunity and mootness are questions of law for the Court to decide.

I.

QUALIFIED IMMUNITY DOES NOT APPLY TO THE INDIVIDAL DEFENDANTS WITH REGARD TO PLAINTIFFS' SECTION 1983 CLAIM

Section 1983 of the civil rights act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

Section 1983 was enacted by Congress to hold accountable state and local officials that improperly wield government power to violate the constitutional rights of others. Qualified immunity is an affirmative defense that protects local and state officials who are operating in good faith in a gray area of law. If the official knew or should have known that what he was doing violated the

constitution, the defense is not applicable. *Harlow v. Fitzgerald*, 457 *U.S.* 800, 819 (1982) (explaining that "if the official pleading the defense [of qualified immunity] claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained"); *see also id.* at 820-21 (agreeing with the substantive standard of "knew or should have known")(J. Brennan, concurring and joined by J. Marshall, and J. Blackmun).

Since *Harlow*, the Supreme Court has been clear that the "knew or should have known" standard does not require that the "very action in question has been held unlawful," just that "in light of pre-existing law the unlawfulness must be apparent. *Anderson v. Creighton*, 483 *U.S.* 635, 640 (1987) (internal citations omitted). The Third Circuit has explicitly recognized this as well. In *Gruenke v. Seip*, the Third Circuit held that the District Court "misapplied the qualified immunity framework to [plaintiff's] claim when it failed to heed *Anderson*'s caveat that the specific official conduct need not have been previously deemed unlawful" and stating that "[m]erely because the Supreme Court has not yet ruled" on [a specific issue] "does not mean that the right is not clearly established." *Gruenke*, 225 F.3d 290, 300 (3d Cir. 2000) (ultimately holding that a school official who required a female student to take a pregnancy test violated her clearly established

constitutional rights, that his conduct "was objectively unreasonable," and he could not use defense of qualified immunity).

Here, qualified immunity does not apply to any of the individual Defendants because the Defendants brazenly violated the Workers' clearly established constitutional rights, as discussed in Parts II and III. Moreover, it is notable that the Defendants here are sophisticated jurists and the highest policy makers in the New Jersey Government, all sworn to uphold the Constitution. They knew or should have known that they were violating the Workers' clearly established constitutional rights and liberties.

To have Plaintiffs' motion dismissed at this stage, the individual Defendants would have to show that the Medical Test Mandates were reasonable for the entire time they were in place. If at some point they became unreasonable due to changing circumstances, then a jury must decide at what point they became unreasonable and the Defendants knew or should have known they were violating the Workers' Constitutional rights. For that reason alone, dismissal based on the affirmative defense of qualified immunity is not appropriate at this time.

II.
THE FOURTH AMENDMENT

A. THE LAW IS CLEARLY ESTABLISHED

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The "basic rule of Fourth Amendment jurisprudence" is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Horton v. California*, 496 *U.S.* 128, 133 at n4. (1990). This is also true under the New Jersey Constitution. *New Jersey Transit PBA Local 304 v. New Jersey Transit Corp.*, 151 *N.J.* 531, 544 (1997) (stating that "[g]enerally, under the Fourth Amendment and under Article I, Paragraph 7 [of the New Jersey Constitution], searches or seizures conducted without a warrant based on probable cause are considered *per se* unreasonable"). To survive constitutional challenge, warrantless searches must fall under one of the established exceptions to the Fourth Amendment's requirement for probable cause. The Medical Test Mandates challenged here do not fall within any exception. Defendants' brief is notably bereft of any precedential case law.[8] In fact, Defendants do not cite a single

[8] All of the state's cited precedent concerning systemic medical testing is non-precedential and from within the last year, which, far from bolstering the state's position, highlights the lack of historical and legal precedent.

precedential case that allows anything like the medical testing regime the Government imposed on these Workers. There is none.

It is indisputable that the testing of an individual's bodily products involves at least two searches and seizures, the first is the seizure of a person's bodily product and the second is the analysis of the person's bodily product. *Skinner v. Ry. Lab. Executives' Ass'n,* 489 *U.S.* 602, 616-17 (1989) (holding that both the taking of a person's blood and breath and the subsequent analysis are seizures under the Fourth Amendment). The state does not contest this. The state has the burden of showing that the massive and unprecedented medical testing regime falls within an "established and well-delineated" exception to the Fourth Amendment's warrant requirement. The state tries to argue that the medical testing regime falls within the "special needs" doctrine, but notably does not a cite a single precedential case in support of this argument. That is because any precedential case law the Government could cite actually cuts against its argument.

The Supreme Court has repeatedly emphasized that exceptions to the Fourth Amendment under the special needs doctrine are "limited" and "closely guarded." *See Skinner v. Ry. Lab. Executives' Ass'n, 489 U.S. 602, 624 (1989) (*upholding a "special need" for drug tests "[i]n limited circumstances, where the privacy interests implicated by the search are minimal"); *Chandler v. Miller*, 520 *U.S.* 305, 305, 314 (1997) (holding that statute

requiring "candidates for state office [to] pass a drug test does not fit within the *closely guarded* category of constitutionally permissible suspicionless searches"); *Veronia Sch. Dist. 47J v. Acton*, 515 *U.S.* 646, 665 (1995) (stating "[w]e caution against the assumption that suspicionless drug testing will easily pass constitutional muster in other contexts").

Here, the Government asks this court to take this "very limited" and "closely guarded" exception to the Fourth Amendment and expand it wildly. The Government asks this Court to expand the doctrine from random and infrequent *drug testing* of some public employees *based on the safety-sensitive job* they hold and expand it to allow *medical testing* of all public employees based on their personal healthcare decisions.

Neither the Supreme Court, nor Third Circuit have ever held that medical testing of public employees is an exception to the Fourth Amendment. The closest analogy the state could draw would be government-imposed medical testing of prisoners or accused criminals, but the Government notably leaves those cases out of its briefing because they support the Workers' position, not the Government's. In *State of New Jersey in the Interest of J.G., N.S. and J.T.*, 151 *N.J.* 565 (1997), the New Jersey Supreme Court held that a state statute requiring HIV testing of accused sexual assailants was constitutional under the special needs doctrine, "only" upon "a showing that there has been a possible transfer of

bodily fluids from the accused or convicted offender to the victim, and thus a demonstration of a risk that the AIDS virus may have been transmitted from the offender to the victim." *Id.* at 590. The Court held that "[o]nly if such a showing is made will the interests of the state in enacting the testing statutes outweigh the privacy interests of the offender." *Id.* The Court carefully analyzed the privacy interests of the accused sexual assailants in refusing to undergo a single unwanted medical test and disclosure of that medical test's results to the state and victim. The Court's careful application of the Fourth Amendment to the accused criminals forced to undergo a single medical test stands in stark contrast to the policies here that required innocent teachers, school nurses, and state auditors to undergo unwanted medical tests every seven days, not because they are accused of committing a crime, but because of their personal healthcare decision.

The special needs doctrine has been applied to some government workers, but only with regard to *drug* tests, not medical, and it has only been applied based on the characteristics of the *job*. It has never been applied to public workers based on the characteristics of the *worker*. *See e.g., New Jersey Transit PBA Local 304 v. New Jersey Transit Corp.*, 151 *N.J.* 531, 537 (1997) (stating that the regulations at issue applied to "employees who perform safety-sensitive functions including, among other things, carrying a firearm for security purposes"); *Stanziale v. County of*

Monmouth, 884 F. Supp. 140, 147 (1995) (granting summary judgment to plaintiff on the issue of liability because his Fourth Amendment rights were violated when he was required to take a drug test because his "position, as Sanitary Inspector, does not rise to the level of 'safety-sensitive' under the relevant case law"); *Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998)(stating that "we have never held that regulation alone is the sole factor that determines the scope of an employee's expectation of privacy...It is also the safety concerns associated with *particular type of employment*").

The limited instances in which the Supreme Court and Third Circuit have upheld drug testing of public employees show that even infrequent drug tests to determine if a public worker is illegally taking drugs must be sharply circumscribed to not violate the Fourth Amendment. *See Chandler v. Miller*, 520 U.S. 305, 318 (1997) (stating that Supreme Court "precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion"). In *Chandler,* the Court struck down a Georgia statute that tried to impose drug tests on candidates for state office. Justice Ginsberg, writing for the majority, warned that the Supreme Court's prior case of *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) is not "a

decision opening broad vistas for suspicionless searches" and must "be read in its unique context," which was that some Customs Service employees could be subject to periodic drug testing based on the fact that their *jobs* exposed them to organized crime, illegal drugs, access to valuable contraband, and being historically targeted for bribery.

Here, the Fourth Amendment clearly establishes the Workers' rights to be free from *any* unwanted, government-mandated medical tests. The precedential case law surrounding the "special needs" doctrine show that the doctrine is strictly circumscribed, has never been applied to allow medical testing of public employees at all, never mind every seven days, and has only ever been applied to jobs that are safety-sensitive, not the workers' personal healthcare choices. Moreover, the facts show that the coerced medical testing regime is objectively unreasonable.

B. The Medical Test Mandates are objectively unreasonable and, therefore, unconstitutional

The Medical Test Mandates were objectively unreasonable from the outset because of the frequency of required tests, the intrusion on the Workers' persona lives, and the fact that the Mandates were indefinite in duration and hinged on the discretion of single government actors. The Mandates were also unreasonable from the outset because they all depended on the assumption that

the covid shots prevented infection and transmission. However, it was clear at the time that the mandates were enacted that they could not do so reliably; indeed the head of the CDC had already said so. As time went on, it became more and more clear that there was no nexus between the purported aims of the mandate and the mandated testing policy.

1. The frequency of required medical tests is unreasonable

The frequency of the government-mandated medical tests under these mandates is unprecedented and highly unreasonable. It has no parallel in any 4th Amendment case where testing of an individual's bodily fluids is at issue. The closet parallel, the occasionally permitted drug testing of employees in sensitive job positions, has allowed only random and infrequent testing, nothing like the medical testing regimes imposed here. Some of the Plaintiffs in this case underwent more than 50 government-mandated medical tests while the medical test mandates were in effect. This is highly unreasonable and without precedent.

2. The Medical Test Mandates are unreasonable because forced medical testing is physically intrusive and degrading

The actual process of testing is an intrusion on the Workers' bodies that caused physical effects in many of them. *See* Decl. of Patricia Kissam, Dkt. 1-20 at ¶8 (severe headache that lasts long beyond test); Decl. of Jill Matthews, Dkt. 1-12 at ¶¶12-13

(headaches and nosebleeds after medical tests); Decl. of Alyson Stout, Dkt. 1-17 at ¶22 (irritated sinuses requiring saline rinses); Decl. Roseanne Hazlett, Dkt. 1-19 at ¶12 (nasal burning and runny nose); Decl. of Jason Marasco, Dkt. 1-25 at ¶13 (nose bleeds, discomfort, pain from government-mandated medical tests). The insertion of a swab into the nasal cavity to extract bodily fluids is a greater physical intrusion than urinalysis associated with drug testing.

The saliva tests, which were not an option for many Plaintiffs because their employer offered only nasal swabs, are also an intrusion on Plaintiffs' bodies and humiliating. Plaintiffs subjected to saliva testing were required to refrain from eating or drinking for a half hour before testing, and some Plaintiffs reported physical effects such as dry mouth and jaw pain from having to produce a sufficient amount of saliva. *See* Second Declaration of Donna Antoniello, Dkt. 13-1 at ¶11. The saliva test involves a humiliating and degrading process of drooling into a tube in front of other people. *See* Decl. of Jill Skinner, Dkt. 1-14 at ¶12; Second Declaration of Kim Koppenaal, Dkt. 13-1 at ¶8 ("The saliva test is degrading. I was embarrassed having to spit into a tube in front of others and I felt violated by the loss of my privacy and bodily autonomy"); Second Declaration of Vincenia Annuzzi, Dkt. 13-1 at ¶21 ("It is demeaning and demoralizing to have to spit saliva into a tube while someone observes me");

Declaration of Michele Pelliccio, Dkt. 13-1 at ¶9 ("The test I was given by the state required me to get on a zoom call with a stranger and spit into the tube in front of them. It was demeaning, degrading, and disgusting").

3. The Medical Test Mandates are unreasonable because they intrude on personal and family time

The time required to find testing places, travel to take the tests, undergo the medical tests, upload and report the test results, and track down test results if they are missing is significant. Several Workers have had their vacations or days off disrupted by the government-mandated medical tests and several have been forced to use personal days when their (ultimately negative) medical test results did not come back on time. *See e.g.*, Second Declaration of Jill Skinner, Dkt. at pg. 49, ¶9 (forced to take a personal day when test results were delayed); Declaration of Roseanne Hazlett, Dkt. 1-19 at pg. 107, ¶9 (had to take a personal day due to late test results from lab); Declaration of Jason Marasco, Dkt. 1-25 at pg. 127, ¶12 (had to leave his family to undergo government-mandated medical testing on a holiday he had taken off to spend with his sons).

Plaintiff Roseanne Hazlett had her vacation significantly disrupted by the Judiciary Testing Mandate. To comply with the testing mandate, Ms. Hazlett was required to submit to medical testing in the middle of her vacation so she could return to work

the following Monday. However, despite testing on a Wednesday, the results did not come by the 11am Friday deadline or that weekend. Ms. Hazlett was prohibited from returning to work because her medical test results had not come back in time. She was required to take a personal day. Because she did not know when the results would come, she drove 80 miles to get a rapid test so she could return to work on Tuesday and not have to use anymore of her personal time. The test showed what she already knew; she was not sick. Decl. of Roseanne Hazlett, Dkt. 1-19 at pg.107, ¶9. Plaintiff Hazlett's personal life has been greatly affected by the Judiciary's Testing Mandate. She states:

> I am so stressed all the time now because I know I have to have these results back. I have to plan my whole week around this. Two times CVS cancelled my test at the last moment due to "staff shortage" and an "unforeseen event." They never have openings day of or the next day. Then I have to scramble to find a rapid test.

Id. at ¶10.

Other Plaintiffs also spend significant time finding testing sites, scheduling their tests, and following up with the testing companies to get their results on time so they are not forced to take personal days. *See e.g.,* Decl. of Alyson Stout, Dkt. 1-17 at pg. 95, ¶14 ("Weekly medical testing has disrupted peaceful and private times of my life. Finding the time and location to get tested has proven to be quite challenging"); Second Declaration of

Jennifer Dougherty, Dkt. 13-1 at pg.44, ¶6 ("Weekly medical testing has been detrimental to my life and well-being. I have to schedule my tests thirteen days in advance and be on top of the schedule to make sure that I have test results on time to prove my health"); Second Declaration of Jill Matthews, Dkt. 13-1 at pg.88, ¶12 (government-mandated medical tests take an hour out of her personal time each week); Decl. of Jason Marasco Dkt. 1-25 at pg. 127, ¶11 (must leave his house 20 minutes earlier on days he must submit to government-mandated medical tests).

The government-mandated medical tests are unreasonable because they intrude on the workers' personal time and family life.

4. The Medical Test Mandates were unreasonable because they did not further their purported goals and went on long after it was clear that the covid shots do not prevent infection or transmission

The underlying assumption of all the Medical Test Mandates is that workers who chose not to take the covid shots were a unique threat to the public health. Curiously, they only became such a threat to public health after the covid shots became available.

It was clear at the time the Medical Test Mandates were implemented that both vaccinated and unvaccinated workers could become infected with and transmit covid, but the individual Defendants put the testing mandates in place anyway. By January 2022, the head of the CDC had openly acknowledged that the covid shots "can't" prevent infection and transmission, but the

individual Defendants kept the mandates in place. By February 2022, Governor Murphy had promulgated a "booster" mandate for healthcare workers on the premise that being "fully vaccinated" did not prevent infection or transmission. Yet the testing mandates stayed in place another six months, until Plaintiffs pressed for a judicial decree enjoining the mandates.

The Government relies heavily on the argument that it was following CDC guidance, but fails to explain why it ignored the CDC's acknowledgement in July 2021 that the covid shots did not promise to prevent infection or transmission or why the Mandates remained in place after January 10, 2022 when CDC Director Walensky openly admitted that the shots, in fact, "can't" prevent infection or transmission. Moreover, the Government says that it implemented this testing policy pursuant to CDC guidance, but has provided no CDC guidance that "unvaccinated" employees should be subjected to medical tests every seven days and disallowed to work until they prove their health. By all appearances, the Mandates were based on cherry-picked statistics and statements that aligned with the beliefs of the individual Defendants and not the reality that breakthrough infections began almost immediately after the shots were rolled out to the general public before failing completely to prevent infection and transmission by winter 2021/22.

Tellingly, after it was clear that the covid shots did not prevent infection or transmission, the Government did not expand

the testing to vaccinated workers or require a booster of vaccinated workers to avoid testing. This undermines the Government's purported purpose of stemming the spread of covid.

Even if the shots *had* worked, the Mandates made little sense. Workers did not receive the results of their tests for days after they tested (under the judiciary policy a minimum of five days passed between when the Worker took the test and when they reported to work based on that test being negative). A person could pick up the virus immediately after testing and be infected and spreading covid for an entire week before the next test would return positive. In fact, a perfect example arose during the course of litigation. On December 29, 2021 Plaintiff Vincenia Annuzzi felt unwell. Despite feeling unwell, she made a 24 mile round trip drive to take a Covid test so she would be in compliance with the mandate.[9] She continued to feel unwell, so on January 4th, she went to her doctor and received a positive covid test. That very same day, she received a *negative* result from her government mandated test taken on December 29, 2021. Second Declaration of Vincenia Annuzzi, Dkt. 13-1 at pg. 81,¶5-6. Under the Medical Test Mandate, Ms. Anuzzi would have been permitted to work from December 29th through January 6th despite being sick with covid because her

[9] Ms. Anuzzi was on her winter break at the time, but was forced to leave her house on her vacation, while feeling unwell, to comply with the testing mandate, demonstrating how unreasonable the medical testing regime is.

December 29th test came back negative and she was not required to test again until January 5th and would not have received the results until at least January 6th. Thankfully, she did not rely on the government medical testing regime to know if she was sick; she exercised common sense.

5. Coerced submission to a regime of government mandated medical testing has a severe emotional and mental impact on the workers

Being coerced into frequent, invasive, government-mandated medical testing in order to keep their jobs inflicted a serious mental and emotional toll on Plaintiffs. *See e.g.,* Decl. of Keri Wilkes, Dkt. 1-29 at pg.138, ¶12. ("I am so stressed about the...weekly medical testing. My hair is falling out. I cannot sleep. My skin is breaking out in a rash"); Decl. of Sandra Givas, Dkt. 1-15, pg.88 at ¶11 ("The weekly medical testing has intensified and worsened my anxiety disorder, putting excessive mental and physical strain on me"); Decl. of Alyson Stout, Dkt. 1-17 at pg. 95, ¶14 ("I hate the testing. It intrudes on my body, my mind, my privacy, and my family time").

Plaintiff Alyson Stout states:

> The weekly testing is taking a huge emotional 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 in *via* email, not because I am worried I have Covid, but

> because I am worried the results will not come back on time for me to work.
>
> The idea that I may have to go undergo this testing indefinitely is gut wrenching and intrusive on every level. To think that I may not be able to go out of town for a week, or even a weekend, for fear of missing testing and not being able to work, or to have to worry about finding a place for testing while away, is distressing.

Decl. of Alyson Stout, Dkt. 1-17 at pg. 95, ¶18,29.

Workers subject to the oppressive medical testing mandates report significant anxiety and anguish. *See* Decl. of Patricia Kissam, Dkt. 1-20 at pg.112, ¶9 (chewing her nails and cuticles to pieces and losing sleep due to the anxiety); *see also* Decl. of Natalie Gricko, Dkt. 1-21 at pg. 115, ¶8 ("I am very anxious and stressed over the forced medical testing. I have been unable to focus, eat or sleep due to this testing mandate); Decl. of Chrisha Kirk, Dkt. 1-27 at pg.132 ¶13,17 ("I abhor undergoing this forced medical surveillance. I feel like I am a leper...I am healthy, but I am being treated by the government and my employer like I am diseased"); Decl. of David Tarabocchia, Dkt. 1-24 at pg.124, ¶11 ("Emotionally this issue has put me and my family through really tough times as of late. I cannot sleep at night"); Decl. of Donna Antoniello, Dkt. 1-26 at pg. 129, ¶15 ("I'm so sad that I'm presumed sick until proven otherwise. I feel like I'm being persecuted for wanting to make my own medical decisions").

The government-mandated systemic medical testing was unreasonable from its inception because it singled these workers out with a presumption that they are diseased because they made a different health decision for their bodies than the CDC recommended. It is a serious and unprecedented emotional and mental assault on Workers to treat them in this way. This is especially true when the leading public health officials that these Defendants claim to be following had acknowledged for months that the pharmaceuticals "can't" prevent infection and transmission.

The Testing Mandates at issue here are extremely intrusive. There is no case law or precedent that even suggests the government may force people to submit to a regime of frequent medical testing that intrudes on people's bodies, psyches, privacy, and personal time the way these Mandates intruded on Plaintiffs'. The Mandates were objectively unreasonable and violated the Workers' clearly established constitutional rights.

IV. THE FOURTEENTH AMENDMENT VIOLATIONS

The Medical Test Mandates violate three separate rights protected under the Fourteenth Amendment: the right to bodily integrity, the right to privacy, and the right to equal protection under the law. As with the Fourth Amendment, the testing mandates at issue here violate well-established rights and Defendants fails to cite any precedential cases to support their position that they not have known that targeting workers to indefinitely undergo

medical testing every seven days violated their constitutionally protected liberty and privacy rights.

A. The right to bodily integrity includes the right to refuse unwanted medical tests

The right to bodily integrity is an established fundamental right under the Fourteenth Amendment, discussed at length in *Washington v. Glucksberg*. To describe it, Justice Souter quoted another jurist:

> This liberty interest in bodily integrity was phrased in a general way by then-Judge Cardozo when he said, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" in relation to his medical needs.

Glucksberg, 521 U.S. 702, 777 (1997) (J. Souter, concurring). Justice Souter noted that this right includes the "right to be free from medical invasions into the body." *Id.*

The right to be free from unwanted medical testing is encompassed within the right to bodily integrity. *See Skinner v. Ry. Lab. Executives' Ass'n,* 489 U.S. 602, 603 (1989) (stating that "subjecting a person to the breath test...must be deemed a search...and thereby implicates concerns about bodily integrity"); *Missouri v. McNeely*, 569 *U.S.* 141, 148 (2013). (blood test is "an invasion of bodily integrity"); *Vacco v. Quill*, 521 *U.S.* 793, 807 (1997) (referring to "well-established, traditional rights to bodily integrity and freedom from unwanted touching").

The medical tests constituted repeated unwanted touching and repeated unwanted medical interventions that violated the Workers' bodily integrity. Because the medical tests impinge on the fundamental right to bodily integrity, strict scrutiny applies.

B. The Right to Privacy

Privacy interests rooted in the Fourteenth Amendment, namely "the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions" are fundamental rights. *Doe by & through Doe v. Boyertown Area Sch. Dist.,* 897 F.3d 518, 527 (3d Cir. 2018)(citing Doe v. Luzerne County, 660 F.3d 169, 175 (3d Cir. 2011)); *see also P.F. v. Mendres*, 21 F. Supp. 2d 476, 482 (D.N.J. 1998) (stating that "[t]he Third Circuit has held that an individual has a constitutionally recognized right to privacy in medical records, records of prescription medication and other personal medical information"); *Doe v. SEPTA,* 72 F.3d 1133, 1145 (3d Cir.1995) (individual has right to privacy in prescription information); *FOP v. City of Philadelphia,* 812 F.2d 105, 112 (3d Cir.1987) (certain inquiries in questionnaire concerning the applicant's physical and mental condition implicated privacy interests protected by Constitution, as the information may contain intimate facts about one's body and state of health).

The Third Circuit has specifically recognized that government officials who impose unwanted and unreasonable medical tests on

those over whom the official holds power, violates that persons privacy in a manner that prevents the official from claiming qualified immunity. In *Gruenke*, the Third Circuit rejected a school official's claim of qualified immunity for requiring a female student to take a pregnancy test. The court held that the forced testing implicated her substantive due process rights of "to be free from the disclosure of personal matters" and "medical information, which we have previously held is entitled to this very protection." *Gruenke*, 225 F.3d at 302. The Court also stated that the "failure to take appropriate steps to keep that information confidential" was such an obvious violation of her constitutional rights that the official could not avail himself of the defense of qualified immunity.

Here, the Workers' privacy has been violated in several different ways including: 1) the test itself, 2) mandating disclosure of the Workers' medical information to no fewer than three government entities, 3) mandating disclosure of the Workers' medical information to a variety of third-parties, and 4) failing to safeguard the Workers' medical information from being disclosed to coworkers and others.

For example, some Plaintiffs know that their coworkers and supervisors were told their private medical information. *See* Decl. of Natalie Gricko, Dkt. 1-21 at pg.116, ¶11 ("My medical information is being shared and discussed by my supervisors. My

boss told me 'we know who's vaccinated and who's not'"); Second Declaration of Jill Skinner, Dkt. 13-1 at pg. 49, ¶7 ("a mass email [was] sent from human resources with the first and last names and emails of all staff in the district who have not taken the Covid-19 pharmaceuticals"); Declaration of Heather Hicks ("my profile [with the testing company] and the profile of many others were emailed to other staff, some of whom are not even testing"); Second Declaration of Chrisha Kirk, Dkt. 13-1 at pg. 18, ¶9 ("I have to drop off my saliva sample into a plastic bin on the main counter of the office at school. Everyone who is in there sees me drop it off and you can see the names of everyone else who placed a sample in there. My privacy is not protected"); Second Declaration of Kim Koppenaal, Dkt. 13-1 at pg. 62, ¶14 ("When I was alone with the technician taking the sample, the names of other individuals testing were within sight. There appeared to be minimal effort to maintain privacy") and ¶12 ("I have personal knowledge that my privacy and the privacy of others was violated. For example, on October 23, 2021, Med Life (the test provider through the school) emailed me someone else's test results").

Plaintiffs were often required to undergo the medical testing in a public place. *See* Second Declaration of Jill Matthews, Dkt. 13-1 at pg. 88 ¶13 ("There is minimal privacy at the Praxis testing site. Technicians shout people's names back and forth. I have been asked multiple times if I am Jill or another woman with the same

last name as me"); Decl. of Jason Marasco, Dkt. 1-25 at pg. 127, ¶10; Second Declaration of Heather Hicks, Dkt. 13-1 at ¶10; Second Declaration of Natalie Gricko, Dkt 13-1 at pg. 29, ¶15; Second Declaration of Donna Antoniello, Dkt. 13-1 at pg. 32 ¶6 ("There was no privacy whatsoever...you are in full sight of people there for testing, as well as others who work for the schools. The first time I tested on site, the superintendent, the high school nurse, and another administrator were all there observing").

Plaintiffs are required to upload their information to a panoply of third parties, about which Plaintiffs know almost nothing except that they are contracted with the state. *See e.g.*, Decl. of Chrisha Kirk, Dkt. 1-27 at pg.132, ¶10 (required to upload test results to "Frontline"); Decl. of David Tarabocchia, Dkt. 1-24 at pg. 124, ¶9 (required to upload his test results on a phone application that he will have to keep on his personal phone for this purpose); Second Declaration of Jill Matthews, Dkt. 13-1 at pg. 89, ¶15 ("I was required to create a profile on Praxis HCS, Parkway Clinical (the lab Praxis uses) and Vault testing websites or download a special app concerning testing. Besides my employer, I have no idea who has access to my medical information via their website and/or app"); Second Declaration of Donna Antoniello, Dkt. 13-1 at pg. 33, ¶8 ("To use the onsite testing center from the school I am required to create a profile on the testing provider's website and waive my rights to privacy"); Second Declaration of

Heather Hicks at ¶9 ("The testing company's waiver, which they initially required me to sign, stated that they could use my "leftover sample" for their "legitimate business purposes." I refused to sign this, and others did as well. They took that statement out of the paper waiver, but I do not know if their policy actually changed"); Second Declaration of Gina Zimecki, Dkt. 13-1 at pg. 36, ¶6 ("My school district is using Broad Institute for its testing regime. I had to register and make an account with the testing company in order to have them test me"); Second Declaration of Natalie Gricko, Dkt. 13-1 at pg.29, ¶16 ("I do not know what Mirimus is doing with my private information or how the school district is ensuring my medical privacy. There is nothing about it in their policy").

Personal health, medical treatment, medical diagnosis, and medical testing are deeply personal and private issues; this is reflected in Plaintiffs' sworn statements and existing precedential case law. These Mandates violated the Workers' clearly established privacy rights.

C. The Right to Equal Protection under the Laws

The Workers were targeted for unequal treatment because they were required to undergo medical testing every seven days as a condition to work while other workers were not. As outlined in Part II(A), the unequal treatment burdens the Workers' fundamental right to bodily integrity. Because the policy burdens a fundamental

right, it is subject to strict scrutiny under the equal protection clause as well.

D. The Mandates are unconstitutional under the 14th Amendment because they fail strict scrutiny

Because the Mandates intrude on the fundamental rights of bodily integrity and privacy, they are subject to strict scrutiny. *Harris v. McRae*, 448 U.S. 297, 312 (1980) (stating that "[i]t is well settled that...if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional"); see also, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978) (stating that "a government practice or statute which restricts 'fundamental rights'...is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available"); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating that "the Fourteenth Amendment 'forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)).

1. The Government's Interests

The Government sets forth very broad interests related to public health: 1) "reducing the risk of serious illness, hospitalization,

and deaths." (pg 20), 2) "preserving public health during pandemics" (pg. 20), 3) "safeguarding the public health by containing the spread of covid-19." (pg. 24), 5) "protecting public health" (pg. 24).

The purported interests are all extremely broad, which makes them less compelling and less likely to be narrowly tailored.

2. The Imposition on the Workers' liberty and privacy significantly outweighs the Government's asserted interests

For all the same reasons the Medical Test Mandates are unreasonable, Plaintiffs liberty and privacy rights concerning their bodies and medical information outweigh the government's very general interest in advancing public health, especially because the Government has not shown a nexus between the mandates and the interest in protecting public health.

3. The Mandates are not necessary or narrowly tailored

The Testing Mandates were not necessary. This is evident from the fact that most Plaintiffs worked full time in person through 2020 and most of 2021 without a vaccine or medical testing. Nor were the mandates narrowly tailored. On the contrary, they are exceedingly broad. The policies were enacted with no mechanism or metric for termination except at the discretion of the individual Defendants. The Mandates were in place no mater how low community transmission became and the Mandates stayed in place long after it was clear that anyone could become infected with and transmit

covid.

E. Jacobson v. Massachusetts is irrelevant

The state is desperate to conflate the so-called vaccine with the medical testing, insisting that the state had the right to force Workers to take the covid shots, so it could also force Workers to test for covid. The Government ignores that the *testing* is itself an independent violation of the Workers' right to bodily integrity. Had Plaintiffs been fully vaccinated and subject to the same testing mandates, the arguments would be the same for the Fourth Amendment and substantive due process claims.[10] Whether the Workers have a right or not "to refuse vaccination" is irrelevant.

The state spends much of its brief trying to shoehorn the Medical Test Mandates facts into *Jacobson* because it is the only way the state can escape strict scrutiny. It is clear though, that *Jacobson* just does not apply.

The question before the *Jacobson* Court was straight forward: Did a statute authorizing a $5 fine for refusing smallpox vaccination violate Mr. Jacobson's liberty? The Court's holding was equally straight forward: "[W]e hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." Jacobson v. Massachusetts, 197 U.S. at, 25.

[10] The equal protection claim would not exist.

Jacobson has no obvious applicability to the Medical Test Mandates, so to make it fit, the Government is forced to rely on a "greater includes the lesser" fallacy. The Government cites no binding or historic precedent for its argument that because the state can (theoretically) force one intrusion upon a Workers' body, it can also force other different intrusions. That is not how constitutional rights work. *See Fed. Election Comm'n v. Wisconsin Right To Life, Inc.,* 551 U.S. 449, 477 (2007)(considering a "greater includes the lesser" argument in the context of the First Amendment and stating "[a]t the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy...This greater-includes-the-lesser approach is not how strict scrutiny works"); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511(1996) (holding that "the 'greater-includes-the-lesser' argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine").

Moreover, the idea that taking one or two shots is a "greater" intrusion than 50 unwanted medical tests is a matter of opinion and perspective. There may be Workers who got the shots to avoid testing.

The Supreme Court has been clear, especially in the last two years, that *Jacobson* "hardly supports cutting the Constitution loose during a pandemic." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (J. Gorsuch, concurring). *Jacobson* has no applicability to Plaintiffs' claims.

III. THE INDIVIDUAL DEFENDANTS CANNOT CLAIM SOVERIEGN IMMUNITY BECAUSE THEY ARE SUED IN THEIR INDIVIDUAL CAPACITY UNDER *EX PARTE YOUNG* AND THE STATE ENTITIES WAIVED IT IN THE DESIGN OF THE CONVENTION

The individual Defendants cannot claim sovereign immunity under *Ex Parte Young*. *Ex parte Young*, 209 U.S. 123, 143, 159-160 (1908) (explaining that when an official holding the power of government "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct").

Sovereign immunity also does not apply when the Plaintiff is seeking declaratory relief and the state has agreed to suit in the plan of the convention. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (explaining that "[t]he 'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding")..

IV. THE WORKERS' CLAIMS ARE NOT MOOT

Mootness is an affirmative defense that must be proven by the party asserting it. With regard to the individual Defendants, there

is clearly a live controversy. The Workers sustained damages. Because there is no basis to dismiss the claims against the individual Defendants under a theory of qualified immunity and because Plaintiffs' damages are directly traceable to the actions of the individual Defendants, the Plaintiffs have a live controversy.

With regard to the Government defendants, the Workers' claims are not moot because the government cannot meet its burden to show mootness under the voluntary cessation doctrine. When a Defendant accused of wrongdoing stops the alleged wrongdoing voluntarily it brings the case within the "voluntarily cessation doctrine," which means the case is *presumptively NOT moot* and "[t]he Government bears the burden to establish that a once-live case has become moot." *W. Virginia v. Env't Prot. Agency*, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2594 (2022). This is a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). It is an *especially* "heavy" burden in a case like this one where, "[t]he only conceivable basis for a finding of mootness in the case is [the Defendant's] voluntary conduct." *W. Virginia v. Env't Prot. Agency*, 213 L. Ed. 2d 896, 142 S. Ct. 2587, 2607 (2022)(cleaned up and internal citations omitted); *See also Friends of the Earth*, 528 U.S. at 189 (stating

that "[i]t is well settled that "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"). A Defendant can only establish mootness through voluntary cessation when it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). The Supreme Court has stated that when a Defendant has voluntary withdrawn a challenged policy that is the basis of litigation but continues to "vigorously defend" the legality of its action, the claim remains justiciable. *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288–289 (1982).

Here, the state "vigorously defends" the challenged policies. Indeed, it says the success of this policy is one of the reasons it was able to lift it. (DKT 36-1:19). Just as when it put the Mandate in place, the Government cites "key benchmark statistics" in its decision to lift the mandate. However, the details of these statistics were not shared in the implementation or lifting of the Mandates. Moreover, the voluntary cessation of the mandates appears to be temporally related to the Plaintiffs' request for judicial intervention.

Every case the Government cites to in its moving brief to argue this case is moot is distinguishable on the same material

fact: in each of those cases the mandate ended on its own terms. *Cnty. Of Butler v. Governor of Pennsylvania*, 8 F.4th 226, 230 (3d Cir. 2021), *cert. denied sub nom.*, *Butler Cnty., Pennsylvania v. Wolf*, 142 *S. Ct.* 7772 (2022) (stating that "the voluntary cessation doctrine does not apply here because the orders expired by their own terms and not as a response to the litigation"). In In *Cnty. of Butler*, not only did the Government's alleged wrongdoing expire by its own terms, the Governor was stripped of his power to unilaterally act in connection with the pandemic by both the legislature *and* a concurrent amendment to the Pennsylvania Constitution. *Id; see also Parker v. Governor of Pennsylvania*, No. 20-3518, 2021 WL 5492803, at *4 (3d Cir. Nov. 23, 2021) (stating that the "voluntary cessation exception does not apply because the mandate expired by its own terms and not as a response to litigation"); *Johnson v. Governor of New Jersey*, No. 21-1795, 2022 WL 767035, at *1 (3d Cir. Mar. 14, 2022) (EO at issue expired "by operation of law" while the appeal was pending).

Unlike the cases cited by the Government, this case falls within the voluntary cessation doctrine because the challenged mandates did not expire by their own terms. Indeed, they *could* not expire by their own terms. The only way the mandates could end was by judicial decree or rescission by the individual Defendants. Because they ended voluntarily only when Plaintiffs' were pressing

for a judicial decree, the voluntary cessation doctrine applies and the claims are not moot.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court deny Defendants' motion to dismiss.

Law Offices of Dana Wefer, LLC
Attorney for Plaintiffs

Dated: November 28, 2022

BY: s/Dana Wefer

DANA WEFER, ESQ.