IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 23-1990

KATHLEEN WRIGHT-GOTTSHALL et al.

Plaintiffs-Appellants

v.

STATE OF NEW JERSEY et al.
Defendants-Appellees,

On appeal from the United States District Court of New Jersey dismissing the Verified Amended Complaint

APPELLANT'S BRIEF IN SUPPORT OF REVERSAL AND REINSTATEMENT

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SUBJECT MATTER & JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 because the claims arise under federal law and the Constitution. The Court of Appeals has jurisdiction under 28 U.S.C. §1291 because this is an appeal from a May 1, 2023 final order dismissing the Amended Verified Complaint. JA2. The Notice of Appeal was filed on May 30, 2023. JA 1.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that the Workers' right to be free from unreasonable search and seizure is not clearly established?
2. Whether the District Court erred in dismissing the Workers' 14th Amendment substantive due process and equal protection claims?
3. Whether the District Court erred in dismissing the claims against the government defendants as moot?

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

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

STATEMENT OF THE CASE

Plaintiffs are teachers, school nurses, judiciary staff, and other government workers, who worked through most of the pandemic with no vaccine and no medical testing. In early April 2021, the emergency covid vaccines became available to

everyone 16 and older.[1] Claims were made by public officials about the vaccine's efficacy at preventing infection and transmission, but it has always been a matter of public record that the vaccines were not authorized for prevention of infection or transmission of covid.[2] In addition, the very same month, the covid shots were rolled out to everyone over 16, the CDC was required to acknowledge that breakthrough infections were occurring.[3] 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

[1] 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).

[2] 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

[3] 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

suggest[s] an increased risk of transmission."[4] As a consequence, the CDC stated that both vaccinated and unvaccinated should wear masks.

Less than a week after the CDC had stated 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 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. A month later, the HR director of the Office of Legislative Services announced the same for legislative branch employees.

By January 10, 2022 the CDC acknowledged that the covid shots "can't" prevent transmission.[5] Nevertheless, the mandates stayed in effect another seven months

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[4] 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).

[5] 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")

with the Workers being required to undergo medical testing every seven day in order to continue working. The mandates were not lifted until after Plaintiffs filed a motion for a preliminary injunction in August 2022.

A. 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. The Office of Legislative Services mandate appears to have been announced by the OLS HR Director Christin Knox. JA66.

The judiciary medical testing mandate was announced and went into effect on August 6, 2021 and applied to all judicial branch employees who had not taken the emergency covid shots. JA57 (Broadcast message announcing judiciary mandate). 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. JA48 *(*Executive Order 253)

The Mandates shared many important features in common. They were 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 rescission by the individuals who put them in place. Under all the Medical Test Mandates, the only way for Workers to end the medical testing was to take the covid shots that were not authorized to 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. JA54. 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. JA63. 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." JA64. 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.*

STANDARD OF REVIEW

The standard of review on a motion to dismiss is plenary. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009).

SUMMARY OF THE ARGUMENT

By September 2020 NJ schools were mostly open again after covid-driven shutdowns that past spring. School nurses and teachers, like many of the Workers in this case, were back in schools with students wearing masks and socially distancing to stem the spread of covid. Every Worker in this case was working in person by September 2020. Many never stopped working even during the height of covid. The

Workers worked without a vaccine because no vaccine was available. Testing was available, but they were not required to test.

After more than a year of working in pandemic conditions with no vaccine and no testing, Chief Justice Rabner announced that all judiciary employees who had chosen not to take the emergency covid shots would henceforth be treated as presumptively diseased and excluded from work unless they proved they were not infected with covid every 7 days. The medical testing was to go on indefinitely in his sole discretion. Shortly thereafter, Governor Murphy announced a similar mandate for all state workers, state contractors, and everyone who worked in any school public or private. Office of Legislative Service HR director Christin Knox announced the same mandate in the legislative branch of government a few weeks later. JA57 (judiciary announcement), JA48 (EO 253), JA66 (OLS email).

The government-mandated medical testing regimes were a clear violation of the Fourth Amendment, which provides that the people shall be free from unreasonable searches and seizures. It is undisputed that every medical test the Workers were forced to undergo to continue working constituted two separate searches and seizures, one in the taking of the sample and the second in the analysis of the sample. Moreover, the Workers have come forth with many facts demonstrating the unreasonableness of the searches including: 1) unreasonableness in the 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.

The medical test mandates also infringed upon the Workers' rights to privacy and bodily integrity under the substantive due process clause of the Fourteenth Amendment. These rights are well and clearly established under existing case law and precedent.

The District Court dismissed the Complaint because it said it was moot as to the government defendants and that the individual defendants are immune from suit under the doctrine of qualified immunity. This was error. Specifically, the District Court framed the right at issue incorrectly when analyzing the individual Defendants' claim of qualified immunity. Instead of analyzing the Workers' asserted right to be free from unreasonable search and seizure, as provided for in the plain text of the Fourth Amendment, the District Court framed the right as "the right to be free from government-mandated workplace testing of an infectious disease." JA25-26. However, that is not the right asserted by the Workers. The right asserted by the

workers is the right to be free from unreasonable search and seizure under the Fourth Amendment.

Under the Fourteenth Amendment, the Workers assert that their rights to bodily integrity, privacy, and equal protection are also clearly established and were violated by the medical test mandates. The District Court dismissed these claims without discussion.

It was also error to dismiss the claims against the state as moot because "[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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). That is especially true in a case like this one where the Defendant has made a specific effort to avoid review by trying to delay a Plaintiff's motion for a temporary restraining order and then ceased the challenged practice just before its opposition was due.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THE INDIVIDUAL DEFENDANTS HAVE QUALIFIED IMMUNITY

Standard of Review

The standard of review is plenary when reviewing a motion to dismiss. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009).

Argument

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 and violate the constitutional rights of the people. 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 available to that defendant. *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 that 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 A and B. 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.

A. THE FOURTH AMENDMENT

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").

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). 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 and the District Court did not say otherwise.

The Medical Test Mandates were objectively unreasonable from the outset because of the frequency of required tests, the intrusion on the Workers' personaL 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.

1. The frequency of required medical tests was unreasonable

The frequency of the government-mandated medical tests under these mandates was 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 based on the characteristics of the *job*, not the Worker. Some of the Plaintiffs in this case were subject to more than 100 government-mandated searches and seizures 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 was an intrusion on the Workers' bodies that

caused physical effects in many of them. *See* Decl. of Patricia Kissam, JA154-55 at ¶8 (severe headache that lasts long beyond test); Decl. of Jill Matthews, JA123 at ¶¶12-13 (headaches and nosebleeds after medical tests); Decl. of Alyson Stout, JA139 ¶22 (irritated sinuses requiring saline rinses); Decl. Roseanne Hazlett, JA151 ¶12 (nasal burning and runny nose); Decl. of Jason Marasco, JA170 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, were 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, JA248 ¶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, JA128 at ¶12; Second Declaration of Kim Koppenaal, JA214 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, JA223 at ¶21 ("It is demeaning and demoralizing to have to spit saliva into a tube while someone

observes me"); Declaration of Michele Pelliccio, Dkt. JA161 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 went missing was significant. Several Workers had their vacations or days off disrupted by the government-mandated medical tests and several were required 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, JA217, ¶9 (forced to take a personal day when test results were delayed); Declaration of Roseanne Hazlett, JA149 at ¶9 (had to take a personal day due to late test results from lab); Declaration of Jason Marasco, JA169 at ¶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, JA149 at ¶9. Plaintiff Hazlett's personal life was been significantly 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 spent significant time finding testing sites, scheduling tests, and following up with the testing companies to get their results on time so they were not forced to take personal days. *See e.g.,* Decl. of Alyson Stout, JA136 at ¶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, JA258 at ¶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, JA208 at ¶12 (government-mandated medical tests take an hour out of her personal time each

week); Decl. of Jason Marasco JA169 at ¶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 was 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.

All of the Workers worked through Fall and Winter of 2020 when medical tests were available, but none was required to test. Many worked through the entire pandemic, even early spring 2020 when things were scary and uncertain. Curiously, the "emergency" that created the purported "need" for the Government to subject these Workers to mandatory medical testing did not occur until after the emergency covid shots became available and recommended by the CDC.

At the time the Medical Test Mandates were implemented, the CDC had already said 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 public officials here claim that they were following CDC guidance, but do not cite any guidance saying that Workers like the teachers, school nurses, and probation officers should be screened weekly for covid. There never was any such guidance. That was never a CDC recommendation. Moreover, the public officials fail to explain why they 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. 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.

Even if the shots *had* worked, the Mandates made little sense. Workers did not receive the results of their tests until 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.[6] 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. JA230 at ¶¶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 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.

[6] 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 was.

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, JA180 at ¶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, JA131 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, JA136 at ¶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.

Id. at ¶¶18,29.

Workers subject to the oppressive medical testing mandates report significant anxiety and anguish. *See* Decl. of Patricia Kissam, JA154 at ¶9 (chewing her nails and cuticles to pieces and losing sleep due to the anxiety); *see also* Decl. of Natalie Gricko, JA157 at ¶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, JA174 at ¶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, JA166 at ¶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, JA172 at ¶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").

Government-mandated systemic medical testing was unreasonable from its inception because it singled these workers out with a presumption that they were diseased because they made a different health decision for their bodies than a federal agency recommended. It is a serious and unprecedented emotional and mental assault on innocent Workers to treat them in this way. This is especially true when the leading public health officials that these Defendants claimed 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.

B. The Fourteenth Amendment law is clearly established

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.

1. 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.

2. 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 person's privacy in a manner that prevents the official from claiming qualified immunity. In *Gruenke v Sipp*, 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.

Some Plaintiffs know that their coworkers and supervisors were told their private medical information. *See* Decl. of Natalie Gricko, Dkt. JA157 at ¶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, JA217 at ¶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, JA250 at ¶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, JA213 at ¶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, JA208 at ¶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, JA169 at ¶10; Declaration of Heather Hicks, JA at ¶10; Second Declaration of Natalie Gricko, JA241 at ¶15; Second Declaration of Donna Antoniello, JA247 at ¶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, JA174 at ¶10 (required to upload test results to "Frontline"); Decl. of David Tarabocchia, JA166 at ¶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, JA2080 at ¶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, JA172 at ¶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, JA261 at ¶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, JA241 at ¶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.

3. The Right to Equal Protection under the Laws

The Workers were targeted for unequal treatment. The unequal treatment is that 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.

4. 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)).

The Government sets forth broad interests related to public health such as reducing the risk of serious illness, hospitalization, and deaths, safeguarding the public health by containing the spread of covid-19, and protecting public health. However, these are interests are not sufficiently narrow to be compelling. Moreover, the mandates were not necessary and were not narrowly tailored to achieve those interests.

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. *See* Hazlett Decl., JA151 at ¶11. (worked through entire pandemic without any break and was never required to be tested until 18 months after covid started); Decl. of Keri Wilkes, JA180 at ¶6 (worked in person since September 2020 and was not subjected to testing until October 2021); Decl. of Sandra Givas, JA131 at ¶12 (worked in person all of 2020 and 2021 without testing until EO 253); Decl. of Kim Koppenaal, JA125 at ¶5 (worked in person since Fall of 2020 without testing until October 2021); Decl. of Jill Skinner, JA128 at ¶7 (workied in person since April 2021); Decl. of Heather Hicks, JA186 at ¶5 (worked in person from September 2020 without testing until October 2021); Decl. of Gina Zimecki, JA190 at ¶6 (worked in person since from October 2020 until October

2021without being subjected to medical testing); Decl. of Deborah Aldiero, JA133 at ¶6 (worked full time in person since September 2020 until October 2021without testing); Decl. of Jenell De Cotiis, JA164 at ¶6 (worked in person all of 2020 and 2021 without medical testing); Decl. of Jill Matthews, JA123 at ¶6 (worked in person from October 2020 until October 2021 without medical testing); Decl. of Chrisha Kirk, JA174 at ¶6 (worked in person from October 2020 until October 2021 without medical testing); Decl. of Jason Marasco, Dkt. JA169 at ¶6 (school was back full time since September 2020); Decl. of David Tarabocchia, JA166 at ¶¶5-6 (worked in person for the schools non-stop through the entire pandemic, including through the entire summer with no forced medical testing until October 2021.)

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.

Moreover, there is no nexus between the mandates and protecting public health. There is no evidence that the mandates did anything to advance public health.

Finally, for the all the same reasons the mandates were unreasonable under the Fourth Amendment, as set forth in Parts I(A) and I(B), the interests of the

Workers' in not being treated as though they are presumptively diseased and not being subjected to an oppressive medical testing regime outweighs the government's broad interest in protecting public health.

II. THE DISTRICT COURT ERRED IN HOLDING THE CASE AGAINST THE STATE ENTITIES IS MOOT

Despite filing the Complaint promptly on the day EO 253 went into effect, despite two motions to dismiss, and despite a motion for a temporary restraining order, no judge has ever reviewed whether these mandates were constitutional. If the motion for a preliminary injunction had been heard, then a judge would have ruled on it, but the government officials dropped the mandates shortly after the motion was filed. This case is not moot because the doctrine of voluntary cessation applies.

"Mootness" is an affirmative defense that must be proven by the party asserting it. 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).

The district court erred in dismissing the Worker's case against the government as moot because the voluntary cessation doctrine applies. On August 5, 2022, the Workers filed a motion for a temporary restraining order on the mandates in advance of the starting school year. DKT 19. On August 15, 2022, the state filed a letter asking for an extension on the return date of the motion, even though it was not a dispositive motion. DKT 20. That same day, the Workers' counsel filed a letter objecting to the request to extend the return date. DKT 21. On August 16, 2022,

Judge Castner ordered the Defendants to file their opposition to the Workers' request for a Temporary Restraining Order by August 23, 2022. DKT 22. On August 18, 2022, Defendants wrote to the court asking for a stay of the preliminary injunction deadlines. DKT 23. The Workers' objected. DKT 24. Multiple letters were exchanged on this point. Ultimately, Judge Castner gave the Defendants until September 6, 2022 to file their opposition to the Workers' request for a temporary restraining order. On August 26, 2022, Defendants wrote to the Court reporting that all the Mandates had been withdrawn and the Workers' withdrew the motion for a preliminary injunction as it had become moot. DKT 29. This case should not be dismissed as moot because the cessation of the behavior happened only after the Workers requested an injunction, the Defendants deliberately asked the judge to put off ruling on the Workers' motion, and then voluntarily ceased the conduct during that time. Moreover, the State of NJ "vigorously defends" the challenged mandates. Indeed, the government without any evidence says the success of this policy is one of the reasons it was able to lift it. 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.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court enter an order reversing the District Court's dismissal of the Verified Amended Complaint and remanding for further proceedings.

Respectfully submitted,

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BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: August 8, 2023

COMBINED CERTIFICATIONS

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

1) I am a member of the Bar of the Third Circuit Court of Appeals;
2) The brief complies with the word county and typeface requirements set forth in Federal Rule of Appellate Procedure 27. The word count of this electronic brief is 8,146 words exclusive of the Table of Authorities and Table of Contents and is typed in Times New Roman font, 14-point type.

3) The brief and joint appendix will be served on the government contemporaneously by filing with ECF;
4) The electronic brief and paper copies of the briefs are identical;
5) This brief and all associated documents were run through Windows Security Virus & Threat detection software on August 8, 2022 before uploading. No threats were found.

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: August 8, 2022