

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

<p>KATHLEEN WRIGHT-GOTTSHALL et al.</p> <p>Plaintiffs,</p> <p>vs.</p> <p>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</p> <p>Defendants.</p>	<p>IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY</p> <p>CIVIL ACTION</p> <p>Motion Return Date: March 7, 2022</p> <p>Brief due: February 22, 2022</p>
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BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Oral Argument Requested.

Law Offices of Dana Wefer, LLC
Dana Wefer, Esq.
375 Sylvan Avenue, Suite 32
Englewood Cliffs, NJ 07632
973-610-0491
Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

There is absolutely no historical or legal precedent to force government employees to submit to a regime of medical testing like the ones created by the state government, the judiciary, and the office of legislative services. Coerced medical testing flies in the face of the individual rights to privacy and liberty that are enshrined in the 4th and 14th Amendments to our Constitution and deeply rooted in our nation's history and tradition.

The medical testing an unreasonable search and seizure under the Fourth Amendment. They invade Plaintiffs' right to privacy and liberty to make their own health decisions and decline medical procedures. They fail strict scrutiny under the Fourteenth Amendment and they are also irrational. The tests are physically invasive and mentally taxing. The mandates intrude on people's personal and family time. They invade Plaintiffs' privacy. The medical testing mandates are also irrational. They do not account for people who have gained immunity by recovering from infection and ignore the fact that people who are "vaccinated" can also contract and spread Covid. The mandates are demonstrably unnecessary because Plaintiffs who are now being forced to submit to coerced medical testing have worked through the pandemic without a vaccine and without medical testing. Frequent, and sometimes public, medical testing is humiliating. These mandates treat

Plaintiffs with a presumption that they are diseased and they are unable to work unless they prove their health every week.

STATEMENT OF FACTS

A. Executive Order 253

On August 23, 2021 Governor Murphy signed Executive Order 253 ("EO 253"), which requires all "covered workers" to either prove that they have taken two doses of the Pfizer or Moderna Covid-19 mRNA injections or one dose of the Janssen Covid-19 DNA injection (collectively "the Covid-19 injections") or else submit to a "minimum" of "once or twice weekly" medical testing to prove they are not infected with Covid. Dkt. 1-1 at pg. 5-7. "Covered workers" is defined as "all full and part time employees, substitute teachers, contractors, providers, and any other person whose requires them to make regular visit to the covered settings, including volunteers." *Id.* at pg. 7. "Covered settings" is defined as "[a]ll public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools." *Id.* at pg. 5. EO 253 is clear that the once or twice weekly testing is a floor, not a ceiling: "a covered setting may also maintain a policy that requires more frequent testing of covered workers." *Id.* at 8. The title of the EO states that it includes state workers, as did press releases New Jersey issued announcing the Mandate, but the language of the actual EO *does not include state workers.*

The medical testing requirement is indefinite in duration and is tied to "vaccination" status, not any covid metric. *Id.* at pg. 5. (covered workers must "submit to a minimum of weekly or twice weekly testing on an ongoing basis *until fully vaccinated*") (emphasis added). EO 253 further requires covered settings to maintain a policy for tracking the medical test results and reporting those test results to the local public health department, regardless of whether the results are positive or negative. *Id.* at 7.

Every government entity in New Jersey is compelled to enforce the order. Criminal prosecution and penalties are authorized against any government entity or person that takes any action in conflict with the order. *Id.* at pg. 9. The Order is to remain in effect until revoked by the Governor. *Id.*

The EO states that the Covid-19 injections/medical testing ultimatum is necessary to prevent transmission of covid and that preventing transmission is critical to keeping schools open for in person instruction. The EO ignores that many schools were open for in person instruction through the December 2020/January 2021 peak of the pandemic without any vaccination or testing. The EO does not provide any objective metrics or criteria that determine whether and when a school must be closed and does not contain any objective metrics or criteria by which the medical testing regime may end.

B. The Judiciary Mandate

On August 6, 2021 the New Jersey Judiciary announced, through a broadcast message, that all state court judges and staff are required to provide proof that they have taken the Covid-19 injections or else submit to medical testing every week to prove that they are not infected with Covid. Dkt. 1-2 at pg. 2.

On August 11, 2021 Defendant Glenn A. Grant, the administrator of the courts, issued a memo to "All State Court Judges and Judiciary Staff" that set forth the procedures the Judiciary uses to track employee submission to the injection or testing ultimatum. Dkt. 1-8. Employees who have not proved to the judiciary that they have taken the injections must submit to weekly medical tests performed by "an approved testing facility" between Saturday morning and Wednesday night of each week and submit their medical test results to Human Resources no later than Friday morning at 11am. If a person's test results are not uploaded to the app by 11am Friday morning, they are excluded from the work location on the next scheduled workday and may be excluded for up to 24 hours *after* they have submitted the negative test. The Judiciary Testing Mandate provides an example: "if the employee submits negative test results on Monday morning, they may not be permitted to return to the work location until Tuesday morning." *Id.*

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

Mandate states that its "preference is for testing to be conducted outside of working hours." Under an updated policy, employees may undergo the coerced medical testing during work hours, but they must specifically request time for "covid testing" from their supervisor, thereby being compelled to disclose their medical status and testing to their supervisor.

If an employee does not submit medical test results on time, they must take administrative, sick, or vacation time. *Id.* If the person has no more administrative, sick, and vacation time, "the absence will be considered unauthorized and unpaid." *Id.*

Like EO 253, the Judiciary Testing Mandate is tied not to Covid metrics, but to "vaccination." Employees who are not "fully vaccinated" must comply with the coerced testing "unless and until they are fully vaccinated."

C. Plaintiffs

Plaintiffs represent employees from every branch of government who have chosen not to take the Covid-19 injections and are therefore subject to the coerced medical testing to keep their jobs and livelihood.

LEGAL ARGUMENT

I.

THE MANDATES VIOLATE THE 4TH AMENDMENT PROHIBITION ON UNREASONABLE SEARCH AND SEIZURE

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.

It is unquestionable that the testing of an individual's bodily products involves at least two searches and seizures, the first relating to the taking of the body product and the second concerning its analysis. *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). Thus the 4th Amendment applies. As the state notes in its moving papers, it must show a "special need" for the coerced medical testing. If there is no "special need," then it is unreasonable.

The special need doctrine has been strictly limited by the Supreme Court and there is no precedential case law that even suggests the government possesses the power to coerce free individuals to submit to ongoing and routine medical testing. On the contrary, precedential case law shows that coerced testing through the taking and analysis of bodily fluids is a serious matter that requires serious consideration. The fact that there is no legal or historical precedent demonstrates that the right to be

free from such testing is deeply embedded in our nation's history and tradition.

Here, the government cannot show a special need and the facts show that the coerced medical testing regime is unreasonable. The special needs doctrine applies to jobs in "highly regulated industries," such as government employees who carry guns, are involved in train accidents or safety violations, and are responsible for seizing drugs. These *job duties* have been held to create a "special need" for the government. In every instance, the "special need" is tied to characteristics of the job, not characteristics of the person doing the job. There is *no* precedent at all for ongoing surveillance through medical testing. All of the state's cited precedent concerning medical testing is from non-precedential law and from within the last year, which highlights the lack of historical and legal precedent. Moreover, the state's assertion that "*Jacobson* [v. Massachusetts, 197 U.S. 1 (1905)] applies to constitutional claims raised against all manner of government action taken in the context of the public health emergency" is directly contradicted by Justice Gorsuch's warning that "*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." Roman Cath. Diocese of

Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (J. Gorsuch, concurring).

The government's purported special need is unavailing because it does not and could not work in theory and does not and could not work in reality.

The medical testing mandates are unreasonable because they intrude on the Plaintiffs' bodies, intrude on Plaintiffs' personal and family time, physically hurt people who must undergo the testing, and emotionally and mentally harm the people forced to undergo testing.

The Mandates are unreasonable infringements on Plaintiffs' privacy without a warrant, without particularized suspicion, and not falling within any exception to the warrant and particularized suspicion requirements. The Mandates are unreasonable because they intrude on Plaintiffs' body, mind, personal time, and liberty to make decisions concerning their own health.

A. The Mandates do not serve the government's purported special need because the Mandates cannot and do not work in theory

It is a matter of common sense that a medical test for Covid only reveals if the person had Covid *at the time they tested*. In every case, Plaintiffs are required to test and do not receive the results for days. In the meantime, they are working and if they were infected, making them test will not reveal this until after they have worked for at least two days, sometimes longer. In

addition, a person could pick up the virus between testing times and spread it the entire period until they next test. In every single case, workers who actually were infected with the virus would not know until days after their test.

Under the judiciary policy, a worker submits a test they took two days before to attend work three days later. A total of 6 days passes from the time the test is taken on Wednesday to when the person goes to work on Monday. Adding to the absurdity, the judiciary reserves the right to make the person same home an additional day for unknown reasons, making it a full week of the person working since they took the medical test.

Predictably, the absurd situation has led to absurd results, as detailed in the next section.

B. The Mandates do not serve the government's purported special need because they cannot and do not work in reality

Some Plaintiffs in this suit have not complied with the testing mandates and therefore have no test results. 11 Plaintiffs have complied and have tested negative every single time they tested for a total of 201 negative tests. Second Declaration of Roseanne Hazlett at ¶5 (25 covid tests, all negative); Second Declaration of Jason Marasco at ¶5 (30 covid tests, all negative); Second Declaration of Chrisha Kirk at ¶5 (17 tests, all negative); Second Declaration of Sandra Givas at ¶6 (12 tests, all negative); Second Declaration of Donna Antonietello at ¶5 (8 covid tests, all

negative); Second Declaration of Kimberly Koppenaal at ¶20 (11 covid tests, all negative); Second Declaration of Melissa Farrell at ¶5 (15 tests, all negative); Second Declaration of Gina Zemecki at ¶5 (8 covid tests, all negative); Second Declaration of Heather Hicks at ¶6 (13 tests, all negative); Second Declaration of Melani Borodziuk at ¶5 (16 covid tests, all negative); Second Declaration of Jill Matthews at ¶10 (30 tests, all negative).

Eight Plaintiffs have received a positive test result, but in *every single case* where a person actually became sick, they realized they were sick before testing positive and had already called out of work. Plaintiff Alyson Stout felt unwell on January 8th and called in sick to work on January 9th. On January 9th, she went for her already-scheduled covid test. She remained home from work on the 10th and 11th because she suspected she had Covid. On the 11th, she received her positive result. Plaintiff Patricia Kissam received a positive result for a test she took when she already knew she was sick. Second Declaration of Patrica Kissam at ¶5. Plaintiff Jill Skinner received a positive test result for a test taken on a day when she had already called out of school. Second Declaration of Jill Skinner at ¶5. Plaintiff Jennifer Dougherty was already sick and not going to the office when she received her positive result. Second Declaration of Jennifer Dougherty at ¶5. Plaintiff Deborah Aldiero called out of work the morning of January 12th because her husband tested positive the

night before. Ms. Aldiero went for a test later that day, after calling out, and that came back positive. Second Declaration of Deborah Aldiero at ¶8. Her 22 other tests were negative. *Id.* Plaintiff Donna Antoniello called out of work because she felt ill. She tested after she had already called out of work and that test came back positive. Second Declaration of Donna Antoniello at ¶5.

One Plaintiff appears to have had a false positive test. Natalie Gricko tested on January 20, 2022 pursuant to the guidelines. She worked from January 20th through the 25th. On the 25th, she received a positive result and was required to “quarantine” on the 26th, because it was 5 days since her positive test. She never became sick. Declaration of Natalie Gricko at ¶9.

Another Plaintiff appears to have received a false negative, but fortunately knew that she felt unwell and called out of work anyway. Plaintiff Vincenia Annuzzi has taken 16 tests under the mandate, all of which were negative. On December 29, 2021 she felt unwell, but under the testing regime, she was required to test *even on her winter break*. She made a 24 mile round trip drive to take a Covid test so she would be in compliance with the mandate. On January 4th, she went to her doctor and received a positive covid test. The same day, she received a negative result from her December 29, 2021 test. Second Declaration of Vincenia Annuzzi at ¶¶5-6.

In no case did the medical testing regime catch a case of covid before the actual individual. In the case of Natalie Gricko, even if her test were not a false positive, the medical testing regime failed because she worked for four days *after* she took the test and before the positive result was received.

C. The Mandates are unreasonable because they intrude on workers' bodies, personal time, and mental and emotional well-being

The Mandates have worked a severe emotional toll on Plaintiffs. They are negatively effecting Plaintiffs physically, mentally, and emotionally.

1. Several Plaintiffs have left their jobs or been terminated from their jobs because the testing was such a massive intrusion on their privacy and well-being

Several Plaintiffs have left or lost their jobs over the testing mandate.

Plaintiff Kathleen Gottshall-Wright was forced into early retirement because she refused to test. After 37 years of joyful work as a kindergarten teacher, she was forced into early retirement because it violated her religious beliefs and expectation of privacy to be forced to participate in mandatory medical testing when she is not sick. Second Declaration of Kathleen-Gottshall Wright at ¶17 ("I am retiring early because I cannot work and my employer has indicated that they intend to bring tenure charges to remove me as a Kindergarten teacher. I am only retiring this year because of the testing mandate").

Plaintiff Keri Wilkes has never tested because it is an invasion of her bodily autonomy and privacy. She has been on leave since October 2021. Second Declaration of Keri Wilkes at ¶5 (“I went on leave October 19, 2021 when the coerced medical testing began. I have been on leave since October 2021. I am not comfortable with the testing because it impinges on my privacy. I agreed to do saliva testing if it would not be sent away to a testing company, but this is apparently not possible”).

Plaintiff Kim Koppenaal worked as a teacher at Shephard Preparatory High School. She complied with the testing when it was once a week, but when the school raised it to two times a week, she could no longer cope with the physical, mental, and emotional stress from mandatory weekly medical testing and constant medical surveillance. She was fired from her job on January 5th for not testing. Second Declaration of Kimberly Koppenaal at ¶¶18-19.

Plaintiff Michele Pelliccio worked as a paralegal for the state. The regime of coerced medical testing and having to prove her health to work took a substantial mental and physical toll on her. She tendered her resignation in January after an 11 day suspension for failing to test. Second Decl. of Michele Pelliccio at ¶12.

The fact that multiple workers are leaving their jobs due to the testing mandate is evidence that the mandates are unreasonable.

2. The Testing Mandates are an unreasonable physical intrusion on Plaintiffs’ bodies and many Plaintiffs experience negative physical effects from the testing

Many Plaintiffs have experienced immediate, and sometimes lasting, physical ill effects from the nasal swab testing procedure. Decl. of Patricia Kissam, Dkt. 1-20 at ¶8. (felt like her brain had been “stabbed” and developed a severe headache that continued for a week); Decl. of Jason Marasco, Dkt. 1-25 at ¶13 (“I hate getting the nasal swab. It has made my nose bleed twice already. It’s intrusive. Sometimes it is shoved so far up my nose I have to pull away. It makes my eyes water.”); Second Declaration of Jill Matthews at ¶14 (The nasal swabs...gave me bad headaches, eye pressure, nose tingles, and nose bleeds” requiring over the counter medication); Second Declaration of Chrisha Kirk at ¶12 (nasal swab “irritated my sinuses causing me to sneeze and blow my nose for the next two hours. Since doing the nasal swab tests, I experience frequent bloody discharge from my nose, something I never experienced before testing”); Second Declaration of Gina Zimecki at ¶18 (“The medical testing causes stinging in my nose, watering eyes, and physical manifestations of stress”); Second Declaration of Roseanne Hazlett at ¶10 (“I have experienced nose bleeds, sneezing, coughing, inflammation in my sinus cavity due to the nasal swab testing. I have headaches and I am worried my eyesight is being affected”); Second Declaration of Kim Koppenaar at ¶7 (“The nasal swabs irritated my nose every time I tested. Sometimes I also developed a mild headache”); Declaration of Alyson

Stoute at ¶22 (rarely had allergy or sinus issues prior to weekly medical testing, but now her sinuses are “very irritated” on a regular basis and she must use sinus rinses and saline to ease her discomfort”).

Many Plaintiffs object to the intrusive nature of the nasal swabs and harbor concerns about their safety because the swabs are often sterilized with ethylene oxide, a known carcinogen. See Exhibit A to Wefer Cert. See e.g., Decl. of Keri Wilkes, Dkt. 1-29 at ¶11 (“I do not want to be subjected to the chemicals on the testing swabs”); Decl. of Kim Koppenaal, Dkt. 1-13 at ¶12 (concerned that weekly testing poses its own health risks); Decl. of Michele Pelliccio, Dkt. at ¶9 (does not want anything with chemicals on it going into her nasal cavities because she has a history of severe allergies).

The saliva tests, which are not an option for many Plaintiffs because their employer offers only nasal swabs, are also an intrusion on Plaintiffs’ bodies. The workers are not supposed to eat or drink for a half hour before testing, and some Plaintiffs report physical effects such as dry mouth and jaw pain from having to produce a sufficient amount of saliva. Second Declaration of Donna Antoniello at ¶11. More strikingly, the saliva test involves a humiliating and degrading process of drooling into a tube in front of other people. Decl. of Jill Skinner, Dkt. 1-14 at ¶12; Second Declaration of Kim Koppenaal 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 at ¶21 ("It is demeaning and demoralizing to have to spit saliva into a tube while someone observes me"); Second Declaration of Michele Pelliccio 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 demanding, degrading, and disgusting").

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

The time required to find testing places, undergo the medical test, upload and report the test results, and track down test results if they are missing is significant. Several Plaintiffs have had their vacations or days off disrupted by mandatory testing. Other Plaintiffs must spend their personal time booking testing appointments, calling and emailing labs to track down test results, undergo medical testing on their personal time, and spend time driving to and from testing sites. Two Plaintiffs, Jason Marasco and Jill Matthews, have been dragged into litigation because of confusion between the insurance company and testing company. See Second Declaration of Jason Marasco at ¶7 and Second Declaration of Jill Matthews at ¶9.

Plaintiff Alyson Stout has been subjected to medical testing since September 2021. She reports: "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.” Decl. of Alyson Stout, Dkt. 1-17 at ¶14. Ms. Stout tried to fit the government mandated medical testing into her schedule in several different ways. First she tried evenings, but found that it was impossible to do in the evening because her evenings are devoted to making dinner for her family, walking her dogs, going to the gym, and just generally living her normal evening life. *Id.* at ¶16. The only time that really works for her is Sundays, after church. After undergoing the medical testing she goes straight home to book her appointment for the following week because her experience has been that the slots fill up quickly. *Id.* at ¶¶16-17. Ms. Stout had to leave a family birthday party early because she had a scheduled covid test and could not change the time because no other times were available. *Id.* at ¶19.

Plaintiff Roseanne Hazlett had her vacation significantly disrupted by the Judiciary Testing Mandate. Ms. Hazlett took vacation time from September 20, 2021 to September 24, 2021 to relax at home. However, to return to work the following Monday, she was required to submit to medical testing in the middle of her vacation, Wednesday September 22nd. The results did not come by 11am Friday September 24th. She anxiously waited all weekend long for the results to come in so she could upload them and return to work on Monday. However, the results still had not arrived by Monday morning. She was told that she could not return to work

because her medical test results had not come back in time. She was required to take "admin" time, which she usually reserves for days when it is snowing because it's difficult for her to drive in the snow. Because she did not know when the results would come, she drove 80 miles to get a rapid test in order to 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 ¶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.

Plaintiff Jill Matthews must find a place to test, schedule her tests, and travel to the testing site. The coerced medical testing takes an hour out of her personal time each week. Second Declaration of Jill Matthews at ¶12.

Plaintiff Jason Marasco also had to devote 40 minutes a week to the government mandated medical testing because he was required to undergo the tests twice a week. He had to leave his house 20 minutes earlier on those days. Decl. of Jason Marasco Dkt. 1-25 at

¶11. Mr. Marasco's family time has also been intruded upon by the Testing Mandate. His children's school was closed on Columbus Day, but his was not. Under his district's policy, he must undergo the government mandated medical testing on Monday mornings or face discipline. So on Columbus Day, which he took off, he had to take time away from his family to go submit to the government medical testing. *Id.* at ¶12.

Other Plaintiffs must surrender part of their lunch hour to testing, such as Donna Antonello. Second Declaration of Donna Antonello at 7. Before on-site testing was offered, earlier this year, she drove 213 miles to and from testing sites to comply with the mandate. *Id.* at 9. See also Decl. of Jill Skinner Dkt. 1-14 at ¶13.

Plaintiffs spent 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. Second Declaration of Jennifer Dougherty 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").

Plaintiff Donna Antonello is required to submit a negative test result every Monday morning and the medical test must have been conducted within the past 48 hours. Decl. of Donna Antonello,

Dkt. 1-26 at ¶9. This means that she must undergo medical testing on her weekend. If she is not able to submit a test result in time, then she must stay home and use her personal or sick days until she is able to present a test result. *Id.* at ¶9.

Several Plaintiffs have been forced to use sick or personal days when their (ultimately negative) test results did not arrive on time. See e.g., Second Declaration of Jill Skinner at 9 (forced to take a personal day when test results were delayed); Declaration of Roseanne Hazlett 1-19 at ¶9 (had to take a personal day due to late test results from lab).

4. Coerced submission to a regime of government mandated medical testing has a severe emotional and mental impact on Plaintiffs and is inherently degrading

Being coerced into frequent, invasive, government-mandated medical testing in order to keep their jobs is taking a serious mental and emotional toll on Plaintiffs. See Decl. of Wright-Goshall at ¶13 (stating that “[t]he requirement of this test has consumed me. I am mentally and emotional[ly] drained” and that her anxiety, for which she is treated, has been heightened by the Mandate); Decl. of Keri Wilkes at ¶12. (“I am so stressed about the state trying to force me to submit to weekly medical testing. My hair is falling out. I cannot sleep. My skin is breaking out in a rash”); Decl. of Sandra Givas at ¶11 (“The weekly medical testing has intensified and worsened my anxiety disorder, putting excessive mental and physical strain on me”); Decl. of Kim

Koppenaar at ¶14 (“The idea that I’m now going to be singled out, subjected to public testing without any medical privacy is upsetting”); Decl. of Alyson Stout at ¶14 (“I hate the testing. It intrudes on my body, my mind, my privacy, and my family time”).

Plaintiff Alyson Stout, who has now been subjected to the testing for a little over a month 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 ¶¶18,29.

Plaintiff Patricia Kissam reports that she worries about the coerced medical testing all the time, is chewing her nails and cuticles to pieces over her anxiety, and is losing sleep due to the anxiety the coercive testing mandate. Decl. of Patricia Kissam, Dkt. 1-20 at ¶9. See also Decl. of Natalie Gricko, Dkt. 1-21 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, Dkt. 1-27 at ¶¶13,17 (“I abhor undergoing this forced medical surveillance. I feel like I am a leper. I’m not sick! I don’t understand why I have to prove my health each week...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 ¶11 (“Emotionally this issue has put me and my family through really tough times as of late. I cannot sleep at night knowing that my job is forcing me to do something that religiously and physically I don’t feel safe doing.”); Decl. of Donna Antoniello, Dkt. 1-26 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”).

II.

THE MANDATES VIOLATE PLAINTIFFS’ SUBSTANTIVE DUE PROCESS RIGHTS OF LIBERTY AND PRIVACY BY FORCING THEM TO SUBMIT TO UNWANTED MEDICAL TESTING PROCEDURES AND DISCLOSE PRIVATE HEALTH INFORMATION TO A WIDE RANGE OF THIRD PARTIES

The right of a free and mentally competent person to decline unwanted medical procedures is well-established as essential to the ordered concept of liberty and the individual right to privacy. Medical testing is a procedure that involves extracting and analyzing the products of a person’s body. In addition, 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" and citing *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir.1980), *Doe v. SEPTA*, 72 F.3d 1133, 1145 (3d Cir.1995) (individual has right to privacy in prescription information), and *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)).

Strict scrutiny analysis applies to state action affecting fundamental rights. In addition to the coerced medical testing, the additional requirement that Plaintiffs submit to ongoing medical surveillance and the disclosure of personal medical information to multiple government entities, their employers, and vendors contracted by the state also implicates fundamental rights

because they fall within the zone of privacy protected by the 14th Amendment.

The government's asserted interests must be balanced and weighed against the seriousness of these intrusions on liberty and privacy. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (stating that the state's interest must be "of sufficient magnitude to override the interest claiming protection"). The policy also must be narrowly tailored to advance the state's asserted interests. *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)).

Health, medical treatment, medical diagnosis, and medical testing are deeply personal and private issues and this is reflected in Plaintiffs' sworn statements. Some have never been tested for covid and never would be but for the government forcing them to undergo the medical testing to order to keep their jobs. See Decl. of Melissa Farrell at ¶9; Decl. of Donna Antoniello at ¶¶ 11, 17 (stating that she has declined medical screenings recommended by her doctor because they involved a covid test and she "feel[s] very strongly about not getting a test. I do not want

to be subjected to medical procedures and testing that I do not need”).

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 and personal time the way these Mandates are imposing on Plaintiffs’.

Moreover, the Testing Mandates are not narrowly tailored. They do not account for the naturally immune, they are indefinite in time, they are not tied to any actual metrics of disease or community spread of the disease, they do not account for the fact that people who have taken the injections can still get and spread Covid, and the Mandates’ alleged necessity is completely undermined by the fact that many of the Plaintiffs worked full time in person last year without a vaccine or medical testing.

A. The Mandates force Plaintiffs to disclose their personal medical information to local government, state government, their employers, their supervisors, unknown people who have access to phone applications, vendors providing the testing services, and unknown third parties

There has been minimal to no effort to respect the constitutional right to privacy guaranteed by the Fourteenth Amendment. Some Plaintiffs know that their coworkers and supervisors are being told their private medical information. See Decl. of Natalie Gricko, Dkt. 1-21 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 Matthews 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"); Second Declaration of Jill Skinner 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"); Second Declaration of Donna Antoniello at ¶6 ("There was no privacy whatsoever. There were no privacy curtains and 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"); Second Declaration of Heather Hicks at ¶8 ("During initial setup, my profile and the profile of many others were emailed to other staff, some of whom are not even testing"); Second Declaration of Chrisha Kirk 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 Koppenaar 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").

Plaintiff Jill Skinner had her medical status announced and discussed at a work meeting with the principal of her school and other members of the Child Study Team. The principal pulled out a list of people who had not uploaded proof of vaccination and stated, in front of Ms. Skinner's colleagues, that she was the only person in the room who had not uploaded proof. The principal insinuated that Ms. Skinner did not care about her community and family because she has chosen not to take a Covid-19 injection. The principal then stated the process for getting tested and made Ms. Skinner repeat it back to her. The entire incident was humiliating and made Ms. Skinner feel as though she was being publically shamed. Decl. of Jill Skinner Dkt. 1-14 at ¶16.

Plaintiffs are often required to undergo the medical testing in a public place. See Decl. of Jason Marasco, Dkt. 1-25 at ¶10 ("There is no privacy at the testing site. All you have to do is look at all the people in line to see who's not vaccinated."); Second Declaration of Heather Hicks at ¶10 ("The initial testing site in my district was the high school auxiliary gymnasium. Students and parents who were involved in after school activities could easily see who is testing because of this location. After complaints from staff, the test location was moved to a cafeteria

that is utilized less after school. However it is still wide open to anyone who may be walking through or sitting at tables in the cafeteria for after school activities between 2-6pm on a Friday for sports, drama, or other clubs"); Second Declaration of Natalie Gricko at ¶15 ("I have been required to test in the elementary school gymnasium in front of other people twelve times and, as a result, my private medical information and status has been revealed to my coworkers and subordinates").

Plaintiffs' private medical and personal information is shared with various, sometimes unknown, people at their jobs. Decl. of Donna Antoniello at ¶14 ("I also feel violated because I am forced to share my private medical information with supervisors and anyone else who has access to this information"); Second Declaration of Kim Koppenaar at ¶15 ("My medical information and test results were shared with a number of school employees without my consent. The school nurse reported my medical information to the director, principal, and business manager").

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 ¶10 (required to upload test results to "Frontline"); Decl. of David Tarabocchia, Dkt. 1-24 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

and he is required to hand in a physical copy of his results to his supervisor); Second Declaration of Jill Matthews 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 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 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 Gricco 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”).

In addition, all Plaintiffs who are forced to submit to medical testing are required to sign waivers concerning their

personal information by the vendors contracted by the state. They do not know where their private medical information is going or how it may be used or even if their bodily fluid is destroyed or if the company keeps the sample for research.

B. The Mandates are not necessary or narrowly tailored and are, in fact, irrational, so they fail under both strict scrutiny and rational basis

Strict scrutiny applies to the mandates because they intrude on the fundamental rights of privacy and liberty. The state argues that *Jacobson v. Massachusetts* applies, but medical testing is not smallpox vaccination. The cases are not analogous and Supreme Court justices have already warned that *Jacobson* is not to be stretched to other contexts in the way the state urges this court to do. Regardless, the mandates fail strict scrutiny and rational basis scrutiny because they are not necessary or narrowly tailored. Even under a more deferential analysis, the mandates are irrational.

1. Many Plaintiffs worked through the peak of the pandemic in person without a vaccine, without medical testing, and without issue- proving the Mandates are not necessary

Many Plaintiffs worked through the pandemic in person and not one of them was subject to testing in that time. Hazlett Decl., Dtk. 1-19 at ¶ 12. (worked through entire pandemic without any break and was never required to be tested until September of this year); Decl. of Keri Wilkes, Dkt. 1-29 at ¶6 (working in person

since September 2020 and was not subjected to testing at that point or through the peak of the pandemic in December 2020/January 2021); Decl. of Sandra Givas, Dkt. 1-15 at ¶12 (worked in person all last year and was healthy the entire year); Decl. of Kim Koppenaar, Dkt. 1-13 at ¶5 (worked in person since Fall of 2020 with the exception of a few virtual weeks); Decl. of Jill Skinner, Dkt. 1-14 at ¶7 (working in person since April 2021); Decl. of Heather Hicks, Dkt. 1-31 at ¶5 ("I have been working in person for the schools since September 2020. I did summer school fully in person with no masks. I was never subjected to testing during the pandemic); Decl. of Gina Zimecki, Dkt. 1-32 at ¶6 (worked in person since October 2020 and through the Covid peak of December 2020/January 2021 without being subjected to medical testing); Decl. of Deborah Aldiero, Dkt. 1-16 at ¶6 (worked full time in person since September 2020 and through the summer without being forced to submit to medical testing); Decl. of Roseanne Hazlett, Dkt. 1-19 at ¶11 (worked as a probation officer in the field non-stop through the entire pandemic and was never required to test in that time); Decl. of Jenell De Cotiis, Dkt. 1-23 at ¶6 (worked in person all last year with disabled students who require very close physical contact for help with bathrooming and eating); Decl. of Jill Matthews, Dkt. 1-12 at ¶6 (worked in person since October 2020 and was never required to be tested before); Decl. of Chrisha Kirk, Dkt. 1-27 at ¶6 (worked in person since October 2020, through

peak of December 2020/January 2021); Decl. of Jason Marasco, Dkt. 1-25 at ¶6 (school was back full time since September 2020); Decl. of David Tarabocchia, Dkt. 1-24 at ¶¶5-6 (worked in person for the schools non-stop through the entire pandemic, including through the entire summer with no masks and no forced medical testing).

2. The mandates do not consider immunity at all, only "vaccination" status and the vaccines do not prevent infection or transmission

People who have taken the Covid-19 injections can still get and transmit Covid-19. This is well known and the CDC Director has even stated with regard to the injection that they prevent severe illness and death, "[b]ut what they can't do anymore is prevent transmission." Plaintiffs have seen this play out in real life in New Jersey. Plaintiff Deborah Aldiero is a school nurse and aware of every positive Covid case in the school. Of 13 cases in her school, only 1 was an unvaccinated person. Overall, a higher percentage of vaccinated people came down with Covid during the most recent surge than unvaccinated. Second Declaration of Deborah Aldiero at ¶9. The mandates are not only not narrowly tailored to stem the spread of Covid, they are not rational.

¹ <https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html>, *Fully Vaccinated People who get a Covid-19 breakthrough infection can transmit the virus, CDC chief says*, August 6, 2021

3. The mandates cannot and do not work

The mandates are irrational for many of the same reasons they are unreasonable, discussed in Parts Ia and Ib. Specifically, they cannot and do not work in theory or in practice.

IV.

THE MANDATES VIOLATE THE EQUAL PROTECTION CLAUSE

It is unconstitutional to treat classes of people differently based on the exercise of a fundamental right. It is a fundamental right to protect privacy of medical information and it is a fundamental right to decline medical procedures, such as the Covid-19 injections. Here, Plaintiffs are treated differently due to the exercise of their fundamental right to decline the injections.

Plaintiffs' school districts have formally adopted a policy that treats them unfairly if they are exposed to covid at work. Employees who take an injection and are exposed at work may continue teaching and are not excluded from school, however employees who have chosen not to must "quarantine" for 10 days and use their sick or personal days, even if they are healthy and have tested negative and even if they are already immune through recovery. See Decl. of Jenell De Cotiis, Dkt. 1-23 at ¶¶16-17; Decl. Jill Matthews Dkt. 1-12 at ¶19 (same policy); Decl. of Chrisha Kirk, Dkt. 1-27 at ¶¶14-16.

These policies violate the Equal Protection Clause of the Constitution because they intrude on the fundamental rights of

liberty and privacy concerning private medical decisions, specifically the decision not to take one of the pharmaceuticals. This triggers strict scrutiny. The discriminatory policies are not narrowly tailored because they do not account for people who are immune and allow people to work in the schools who have been exposed and can still become infected with and transmit covid according to the CDC:

Some fully vaccinated people will get sick, and some will even be hospitalized or die from COVID-19.

CDC is monitoring these cases among vaccinated persons and evaluating trends in order to better understand who is at risk for severe COVID-19 following vaccine breakthrough infection. Vaccinated people have also experienced asymptomatic infections.

CDC, COVID-19 Vaccine Breakthrough Case Investigation and Reporting, (Last updated October 15, 2021) available at <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html>.

V.

THE MANDATES VIOLATE THE FIRST AMENDMENT

Several Plaintiffs have a religious objection to the testing and to the Covid-19 injections. With regard to the testing, the New Jersey Department of Health recognizes that religious exemptions must be honored for tuberculosis tests. A NJDOH pamphlet concerning Tuberculosis Testing in New Jersey

Schools explicitly states:

Employees, student teachers, contractors or volunteers who have contact with students and claim religious exemption cannot be compelled to submit to tuberculosis testing.

Exhibit B to Wefer Cert. The same is true of Covid-19 testing.

V.

NONE OF THE DEFENDANTS CAN CLAIM SOVERIEGN IMMUNITY BECAUSE THEY HAVE WAIVED IT IN THE DESIGN OF THE CONVENTION

Sovereign immunity does not apply when 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”). When the states ratified the Constitution, they waived immunity as to suit concerning violation of the Constitution they ratified.

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: February 22, 2022

BY: s/Dana Wefer

DANA WEFER, ESQ.