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

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

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Oral Argument Requested.

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PRELIMINARY STATEMENT

Plaintiffs are teachers, school nurses, judiciary staff and state employees who are forced by their government employers to undergo unwanted medical testing on a weekly basis to prove they are not infected with covid-19. The coerced medical testing is an unconstitutional search and seizure under the 4th Amendment to the United States Constitution and also violates Plaintiffs' liberty and privacy rights protected by the 14th Amendment. The coerced medical testing policies cannot be sustained under strict scrutiny or rational basis analysis. They must be enjoined immediately to prevent further violations of Plaintiffs' constitutional rights.

There is no historical or legal precedent that allows the government to force healthy people to submit to a minimum of 52 medical tests a year as a condition of their employment.

The medical testing is an unreasonable search and seizure prohibited by the Fourth Amendment. It is unreasonable because the tests are physically invasive, emotionally taxing, and they intrude on Plaintiffs' personal and family time. Frequent, and sometimes public, medical testing is humiliating and degrading. Forced weekly medical testing treats Plaintiffs with a presumption that they are diseased as they are unable to work unless they prove their health every week, which is an insult to their human dignity. The reason they are forced to undergo weekly medical testing is

because they have declined to take a pharmaceutical that was supposed to prevent infection and transmission of covid-19, but which the entire world now knows is ineffective at doing so. This is all unreasonable

The testing regime also invades Plaintiffs' right to privacy and liberty to make their own health decisions. The facts on which the government premised the mandate are now known to be demonstrably wrong or outdated. The order is not tied to any covid-19 metrics, such as the level of community spread. No matter how low community transmission becomes, a person may never stop testing until the government says so or they take the pharmaceutical that does not work to prevent infection or transmission

The mandates must be enjoined.

STATEMENT OF FACTS

A. Executive Order 253

Executive Order 253 ("EO 253") requires teachers, school nurses, and state workers to either prove that they have taken two doses of the Pfizer or Moderna Pharmaceutical or one dose of the Janssen Pharmaceutical (collectively "the Pharmaceuticals") 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. 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[1] to a minimum of weekly or twice weekly testing on an ongoing basis *until fully vaccinated*") (emphasis added).

The EO states that the Pharmaceuticals/medical testing ultimatum is to "help prevent outbreaks and reduce transmission to children, including those who are not yet eligible for vaccination" and cites as a premise that "the CDC has emphasized that COVID-19 vaccines are effective, in that they can prevent individuals from getting and spreading the virus." Dkt. 1-1 at pg. 4. The EO does not provide any objective metrics or criteria that determine whether and when the medical testing regime may end. The EO requires Plaintiffs' employers to "have a policy for tracking test results from testing required by this Order" and they "must report results to local public health departments" as well as the state of New Jersey. *Id.* at 7.

B. The Judiciary Mandate

The New Jersey Judiciary requires judiciary employees who have not taken the Pharmaceuticals to submit to weekly medical tests to prove that they are not infected with covid. Dkt. 1-2 at pg. 2. Employees who have not taken the Pharmaceuticals must submit to weekly medical tests performed by "an approved testing facility"

[1] The Executive Order uses the word "submit" repeatedly, which cements the demeaning nature of the medical testing mandates. The American Heritage Dictionary defines submit as "To yield or surrender (oneself) to the will or authority of another."

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 submitted 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 Medical Test 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 Medical Test Mandate are required to schedule and pay for their own medical tests. 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 Medical Test Mandate is tied not to covid metrics, but to "vaccination." Employees who are not "fully vaccinated" must comply with the coerced medical tests "unless and until they are fully vaccinated", regardless of the level of community transmission.

C. Plaintiffs

Plaintiffs represent employees from every branch of New Jersey government who have chosen not to take the Pharmaceuticals

and are therefore subject to the coerced medical testing to keep their jobs and livelihood.

LEGAL ARGUMENT

Legal Standard

A temporary injunction should be granted if (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest. *Maldonado v. Houstoun*, 157 F.3d 179, 184 (3d Cir. 1998). Plaintiffs fulfill each element.

I.
PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS AND DENYING AN INJUNCTION WOULD RESULT IN IRREPARABLE HARM BECAUSE THE MEDICAL TEST MANDATES VIOLATE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The doctrine of unconstitutional conditions prohibits the government from conditioning a public benefit or privilege, including employment, on the surrender of a constitutional right. *Frost v. Railroad Commission of State of California,* 271 *U.S.* 583 (1926). The doctrine applies to government benefits like tax exemptions, unemployment benefits, welfare, and public employment. *Perry v. Sindermann*, 408 *U.S.* 593, 59 (1972) (internal citations omitted). The Medical Test Mandates violate the 4th and 14th Amendments to the United States Constitution and conditioning Plaintiffs' employment on surrendering those constitutional rights

violates the doctrine of unconstitutional conditions.

A. COERCED WEEKLY MEDICAL TESTING VIOLATES 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 indisputable 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, which the State of New Jersey conceded in its motion to dismiss. Dkt. 17 at pg. 19 (conceding that "[h]ere, Plaintiffs' Fourth Amendment right is implicated by the taking of nasal discharge or saliva for a COVID-19 test"). Consequently, the state must demonstrate a "special need" for the warrantless search and seizure. If there is no "special need," then it is unreasonable and unconstitutional.

1. The Government cannot show a special need

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 seizing and searching a person's bodily fluids based solely on their personal medical history, never mind doing so weekly and indefinitely. On the contrary, precedential case law concerning drug testing and medical testing demonstrates what a serious matter this is. The question of whether the government may compel a person to undergo medical testing without probable cause arises most frequently in the context of prisoners and suspected criminals. However, schools and state offices are not prisons and Plaintiffs are accused of no crime, so that case law is not applicable. Another context in which compelled medical testing has been upheld is the forced HIV testing of criminals convicted of sexual assaults that result in the exchange of bodily fluids. It is telling that even in this extreme circumstance, NJ's Supreme Court carefully analyzed and limited the application of this one-time medical testing. See State of *New Jersey in the Interest of J.G., N.S. and J.T.,* 151 *N.J.* 565, 581 (1997). The

seriousness with which even a single medical test of convicted rapists was treated by the New Jersey Supreme Court provides a sharp contrast to the unreasonable and blithe treatment of the workers here.

Holding that an individual's medical history constitutes a "special need" to subject that person to indefinite weekly medical tests would constitute a radical expansion of the special needs doctrine with no legal precedent to support such an expansion.

The mandates are contrary to the 4th Amendment and must be enjoined.

2. Other ways the Medical Test Mandates are unreasonable

The Medical Test Mandates are also unreasonable because they intrude on Plaintiffs' bodies, intrude on Plaintiffs' personal and family time, and emotionally and mentally harm the people forced to undergo medical tests. They are also unreasonable because they lack a rational basis on which to single these workers out for medical testing.

a. The frequency of required medical tests is unreasonable

The frequency of government-mandated medical tests is unprecedented and highly unreasonable. It has no parallel in any 4th Amendment case where testing of an individual's bodily fluids is at issue. Most 4th Amendment cases concern drug testing of employees in sensitive job positions, but the drug testing is

random and infrequent, nothing like the medical testing regimes imposed here. Some of the Plaintiffs in this case have undergone more than 50 government-mandated medical tests since the testing regimes were implemented less than a year ago. This is highly unreasonable and without precedent.

b. The Medical Test Mandates are unreasonable because forced medical testing is degrading and demeaning in theory and in practice

Government-mandated weekly medical tests treats these workers as though they are presumptively diseased. Plaintiffs are not permitted to work unless they prove their health each week. This is inherently demeaning and degrading. In addition, the actual process of testing is an intrusion on their bodies and also humiliating. The nasal swab must be inserted into Plaintiffs' nose, and several Plaintiffs have experienced negative physical effects from this. *See* Decl. of Patricia Kissam, Dkt. 1-20 at ¶8 (severe headache that lasts long beyond test); Decl. of Jill Matthews, Dkt. 1-12 at ¶¶12-13 (headaches and nosebleeds after medical tests); Decl. of Alyson Stout, Dkt. 1-17 at ¶22 (irritated sinuses requiring saline rinses); Decl. Roseanne Hazlett, Dkt. 1-19 at ¶12 (nasal burning and runny nose); Decl. of Jason Marasco, Dkt. 1-25 at ¶13 (nose bleeds, discomfort, pain from government-mandated medical tests). The insertion of a swab into the nasal cavity to extract bodily fluids is a greater physical intrusion than urinalysis associated with drug testing.

The saliva tests, which are not an option for many Plaintiffs because their employer offers only nasal swabs, are also an intrusion on Plaintiffs' bodies and humiliating. Plaintiffs subject to saliva testing must refrain from eating or drinking 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. *See* Second Declaration of Donna Antoniello, Dkt. 13-1 at ¶11. The saliva test involves a humiliating and degrading process of drooling into a tube in front of other people. *See* Decl. of Jill Skinner, Dkt. 1-14 at ¶12; Second Declaration of Kim Koppenaal, Dkt. 13-1 at ¶8 ("The saliva test is degrading. I was embarrassed having to spit into a tube in front of others and I felt violated by the loss of my privacy and bodily autonomy"); Second Declaration of Vincenia Annuzzi, Dkt. 13-1 at ¶21 ("It is demeaning and demoralizing to have to spit saliva into a tube while someone observes me"); Declaration of Michele Pelliccio, Dkt. 13-1 at ¶9 ("The test I was given by the state required me to get on a zoom call with a stranger and spit into the tube in front of them. It was demeaning, degrading, and disgusting").

The physically intrusive nature of the nasal swab test and demeaning nature of the saliva test is unreasonable, especially in light of the fact that Plaintiffs are only singled out for such treatment because they did not take a pharmaceutical that does not

prevent infection and transmission anyway.

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

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

Plaintiff Roseanne Hazlett had her vacation significantly disrupted by the Judiciary Testing Mandate. To comply with the testing mandate, Ms. Hazlett was required to submit to medical testing in the middle of her vacation so she could return to work the following Monday. However, despite testing on a Wednesday, the results did not come by the 11am Friday deadline or that weekend. Ms. Hazlett was prohibited from returning to work because her

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

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

Id. at ¶10.

Other Plaintiffs also spend significant time finding testing sites, scheduling their tests, and following up with the testing companies to get their results on time so they are not forced to take personal days. *See e.g.,* Decl. of Alyson Stout, Dkt. 1-17 at pg. 95, ¶14 ("Weekly medical testing has disrupted peaceful and private times of my life. Finding the time and location to get tested has proven to be quite challenging"); Second Declaration of Jennifer Dougherty, Dkt. 13-1 at pg.44, ¶6 ("Weekly medical testing has been detrimental to my life and well-being. I have to schedule my tests thirteen days in advance and be on top of the schedule to

make sure that I have test results on time to prove my health"); Second Declaration of Jill Matthews, Dkt. 13-1 at pg.88, ¶12 (government-mandated medical tests take an hour out of her personal time each week); Decl. of Jason Marasco Dkt. 1-25 at pg. 127, ¶11 (must leave his house 20 minutes earlier on days he must submit to government-mandated medical tests).

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

d. 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 is taking a serious mental and emotional toll on Plaintiffs. *See e.g.,* Decl. of Keri Wilkes, Dkt. 1-29 at pg.138, ¶12. ("I am so stressed about the 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, Dkt. 1-15, pg.88 at ¶11 ("The weekly medical testing has intensified and worsened my anxiety disorder, putting excessive mental and physical strain on me"); Decl. of Alyson Stout, Dkt. 1-17 at pg. 95, ¶14 ("I hate the testing. It intrudes on my body, my mind, my privacy, and my family time").

Plaintiff Alyson Stout states:

> The weekly testing is taking a huge emotional toll on my mental and emotional well-being. Rather than being able to use my non-working

> time to relax and enjoy family time, I find myself becoming anxious about getting an appointment for testing, going for the testing appointment, and then stressing every day waiting for my results to come in *via* email, not because I am worried I have Covid, but because I am worried the results will not come back on time for me to work.
>
> The idea that I may have to go undergo this testing indefinitely is gut wrenching and intrusive on every level. To think that I may not be able to go out of town for a week, or even a weekend, for fear of missing testing and not being able to work, or to have to worry about finding a place for testing while away, is distressing.

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

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 pg.112, ¶9; *see also* Decl. of Natalie Gricko, Dkt. 1-21 at pg. 115, ¶8 ("I am very anxious and stressed over the forced medical testing. I have been unable to focus, eat or sleep due to this testing mandate); Decl. of Chrisha Kirk, Dkt. 1-27 at pg.132 ¶13,17 ("I abhor undergoing this forced medical surveillance. I feel like I am a leper. I'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 pg.124, ¶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 pg. 129, ¶15 ("I'm so sad that I'm presumed sick until proven otherwise. I feel like I'm being persecuted for wanting to make my own medical decisions").

The government-mandated medical testing is unreasonable because it singles these workers out with a presumption that they are diseased and requires them to prove their health as a condition to working. It is a serious and unprecedented emotional and mental assault on workers to treat them in this way.

B. THE MANDATES VIOLATE PLAINTIFFS' SUBSTANTIVE DUE PROCESS RIGHTS OF LIBERTY AND PRIVACY UNDER BOTH STRICT SCRUTINY AND RATIONAL BASIS ANALYSIS

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. On the contrary, 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. People have the right to decline even lifesaving medical procedures. This applies to taking things out of a person's body against their will. *In re A.C.*, 573 A.2d 1235 (D.C. Court of

Appeals 1990) (c-section cannot be performed without consent, even to save life of baby); *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. Ct. 1978) (patient cannot be forced to undergo amputation even if they will likely die without it). It applies to putting things into a person's body against their will. *Zant v. Prevatte*, 286 S.E.2d 715 (Ga. 1982) (prisoner right to refuse food), *Erickson v. Dilgard*, 252 N.Y.S. 2d 705 (Special term 1962) (competent adult has liberty to refuse blood transfusion even if it may cause their death). It applies no matter how unreasonable or illogical the refusal. It applies even if children will be left without a parent. *In re Osborne*, 294 A.2d 372 (D.C. Court of Appeals 1972). Medical testing is a medical procedure that involves extracting and analyzing the products of a person's body and is therefore subject to strict scrutiny.

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"); *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).

In addition to the coerced medical testing being an intrusion on Plaintiffs' liberty and privacy rights, 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.

Because the Mandates intrude on fundamental rights, they should be analyzed with 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").

The Medical Test Mandates are unconstitutional regardless of the level of analysis that is applied, so they must be enjoined.

1. The proper level of analysis is strict scrutiny and the mandates fail under strict scrutiny because Plaintiffs' liberty and privacy interests outweigh the government's asserted interest

Strict scrutiny analysis applies to state action affecting fundamental rights. The government's asserted interests must be balanced and weighed against the seriousness of the intrusion 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)).

Here, Plaintiffs' privacy is violated as a matter of policy and in practice. Plaintiffs' medical test results, regardless of whether they are positive or negative are required to be shared with a minimum of three government entities: 1) their employer, 2)

the local health department, and 3) the state of New Jersey. In addition, there has been minimal to no effort to respect Plaintiffs' privacy in practice. For example, some Plaintiffs know that their coworkers and supervisors are being told their private medical information. *See* Decl. of Natalie Gricko, Dkt. 1-21 at pg.116, ¶11 ("My medical information is being shared and discussed by my supervisors. My boss told me 'we know who's vaccinated and who's not'"); Second Declaration of Jill Skinner, Dkt. 13-1 at pg. 49, ¶7 ("a mass email [was] sent from human resources with the first and last names and emails of all staff in the district who have not taken the Covid-19 pharmaceuticals"); Declaration of Heather Hicks ("my profile [with the testing company] and the profile of many others were emailed to other staff, some of whom are not even testing"); Second Declaration of Chrisha Kirk, Dkt. 13-1 at pg. 18, ¶9 ("I have to drop off my saliva sample into a plastic bin on the main counter of the office at school. Everyone who is in there sees me drop it off and you can see the names of everyone else who placed a sample in there. My privacy is not protected"); Second Declaration of Kim Koppenaal, Dkt. 13-1 at pg. 62, ¶14 ("When I was alone with the technician taking the sample, the names of other individuals testing were within sight. There appeared to be minimal effort to maintain privacy") and ¶12 ("I have personal knowledge that my privacy and the privacy of others was violated. For example, on October 23, 2021, Med Life (the test

provider through the school) emailed me someone else's test results").

Plaintiffs are often required to undergo the medical testing in a public place. *See* Second Declaration of Jill Matthews, Dkt. 13-1 at pg. 88 ¶13 ("There is minimal privacy at the Praxis testing site. Technicians shout people's names back and forth. I have been asked multiple times if I am Jill or another woman with the same last name as me"); Decl. of Jason Marasco, Dkt. 1-25 at pg. 127, ¶10; Second Declaration of Heather Hicks, Dkt. 13-1 at ¶10; Second Declaration of Natalie Gricko, Dkt 13-1 at pg. 29, ¶15; Second Declaration of Donna Antoniello, Dkt. 13-1 at pg. 32 ¶6 ("There was no privacy whatsoever...you are in full sight of people there for testing, as well as others who work for the schools. The first time I tested on site, the superintendent, the high school nurse, and another administrator were all there observing");

Plaintiffs are required to upload their information to a panoply of third parties, about which Plaintiffs know almost nothing except that they are contracted with the state. *See e.g.*, Decl. of Chrisha Kirk, Dkt. 1-27 at pg.132, ¶10 (required to upload test results to "Frontline"); Decl. of David Tarabocchia, Dkt. 1-24 at pg. 124, ¶9 (required to upload his test results on a phone application that he will have to keep on his personal phone for this purpose and he is required to hand in a physical copy of his results to his supervisor); Second Declaration of Jill Matthews,

Dkt. 13-1 at pg. 89, ¶15 ("I was required to create a profile on Praxis HCS, Parkway Clinical (the lab Praxis uses) and Vault testing websites or download a special app concerning testing. Besides my employer, I have no idea who has access to my medical information via their website and/or app"); Second Declaration of Donna Antoniello, Dkt. 13-1 at pg. 33, ¶8 ("To use the onsite testing center from the school I am required to create a profile on the testing provider's website and waive my rights to privacy"); Second Declaration of Heather Hicks at ¶9 ("The testing company's waiver, which they initially required me to sign, stated that they could use my "leftover sample" for their "legitimate business purposes." I refused to sign this, and others did as well. They took that statement out of the paper waiver, but I do not know if their policy actually changed"); Second Declaration of Gina Zimecki, Dkt. 13-1 at pg. 36, ¶6 ("My school district is using Broad Institute for its testing regime. I had to register and make an account with the testing company in order to have them test me"); Second Declaration of Natalie Gricko, Dkt. 13-1 at pg.29, ¶16 ("I do not know what Mirimus is doing with my private information or how the school district is ensuring my medical privacy. There is nothing about it in their policy").

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.

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. Forced medical testing a minimum of every 7 days as a condition of employment is an unconstitutional condition that violates Plaintiffs' liberty and privacy rights to exercise control over their own medical and healthcare decisions without coercion by the state.

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'. Plaintiffs' right to privacy and autonomy over their own bodies to decide whether to undergo medical testing and how often outweighs the government's purported interest in stemming the spread of covid through forced medical testing of employees who decided not to take a pharmaceutical that does not prevent infection or transmission of covid.

2. The Mandates are not rationally related to the government's purported interest in stemming the spread of covid-19 because they cannot work in theory and do not work in practice

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 are presymptomatically infected with the virus would not know until days after their test. 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.[2] 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.

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

13-1 at pg. 81,¶5-6. Under the testing regime set forth under EO 253, 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.

Under the judiciary Medical Test Mandate, a worker submits a test they took between 2-6 days before to attend work 3-6 days later. A minimum of 6 days passes from the time the test is taken on a Wednesday to when the person goes to work the following Monday. By this time, a person who tested positive but had no symptoms would already be out of quarantine under CDC guidelines.[3] The testing thus accomplishes nothing. Adding to the absurdity, the judiciary reserves the right to make the person stay home an additional day for unknown reasons, making it a full week of the person working since they took the medical test.

The policies cannot achieve their purported purpose under their plain terms. For that reason, they cannot survive rational basis or strict scrutiny.

[3] Calculated using CDC quarantine calculator located at https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html#

3. The Mandates fail strict scrutiny analysis because they are not necessary or narrowly tailored and they fail strict scrutiny and rational basis analysis because there is no nexus between the testing and the government's proffered interest

The Testing Mandates are not narrowly tailored. They are not linked to immunity to covid, just vaccination status. They are not tied to any actual metrics of disease or community spread of the disease, just vaccination status. They are indefinite in time and thus not narrowly tailored. 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 government-mandated medical testing regime is not necessary or narrowly tailored

Many Plaintiffs worked through the pandemic in person and not one of them was subject to medical testing in that time, proving the Medical Test Mandates are not necessary. *See* Hazlett Decl., Dtk. 1-19 at pg.108, ¶12. (worked through entire pandemic without any break and was never required to be tested until 18 months after covid started); Decl. of Keri Wilkes, Dkt. 1-29 at pg. 137, ¶6 (working in person since September 2020 and was not subjected to testing until October 2021); Decl. of Sandra Givas, Dkt. 1-15 at pg. 88,¶12 (worked in person all of 2020 and 2021 without testing until EO 253); Decl. of Kim Koppenaal, Dkt. 1-13 at pg.82, ¶5 (worked in person since Fall of 2020 without testing); Decl. of

Jill Skinner, Dkt. 1-14 at pg. 85, ¶7 (working in person since April 2021); Decl. of Heather Hicks, Dkt. 1-31 at pg. 143, ¶5 (working in person from September 2020 without testing until EO 253); Decl. of Gina Zimecki, Dkt. 1-32 at pg. 147, ¶6 (worked in person since from October 2020 until EO 253 without being subjected to medical testing); Decl. of Deborah Aldiero, Dkt. 1-16 at pg. 90, ¶6 (worked full time in person since September 2020 until EO 253 without testing); Decl. of Roseanne Hazlett, Dkt. 1-19 at pg. 108, ¶11 (worked as a probation officer in the field non-stop through the entire pandemic and was never required to test until late 2021); Decl. of Jenell De Cotiis, Dkt. 1-23 at pg. 121, ¶6 (worked in person all of 2020 without medical testing); Decl. of Jill Matthews, Dkt. 1-12 at pg.80, ¶6 (worked in person since October 2020 without medical testing); Decl. of Chrisha Kirk, Dkt. 1-27 at pg.131, ¶6 (worked in person since October 2020 without medical testing); Decl. of Jason Marasco, Dkt. 1-25 at pg. 126, ¶6 (school was back full time since September 2020); Decl. of David Tarabocchia, Dkt. 1-24 at pg.123, ¶5-6 (worked in person for the schools non-stop through the entire pandemic, including through the entire summer with no forced medical testing).

b. The Medical Testing Mandates are not rationally related to the government's asserted interest

Rational basis analysis asks whether a government action is rationally related to a legitimate government purpose. *Schumacher*

v. Nix, 965 F.2d 1262, 1266 (3d Cir. 1992). A government action is not rationally related to its purported purpose if the facts upon which it is based are wrong. The Third Circuit has recognized that "under rational basis review, the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.* at 1271. Here, EO 283 is predicated on the fact that it was believed the shots would prevent infection and transmission, but that fact is now known to be incorrect. It is common knowledge, acknowledged by the head of the CDC and other leading health officials, that the Mandated Pharmaceuticals do not prevent infection and transmission of covid to any measurable or known degree. EO 283 and the Judicial Medical Test Mandate cannot pass rational basis analysis for this reason.

A policy is also irrational if it classifies people differently to achieve a government interest, but the classification cannot advance the government interest. For example, in *Jimenez v. Weinberger*, 417 U.S. 628 (1975), the Supreme Court analyzed a social security regulation that barred illegitimate children of disabled parents from filing claims for their parent's social security. The proffered government interest for the regulation was to prevent spurious claims by children who were not qualified to receive their parents' social security because they were not dependent on the disabled parent. The Court

noted a disconnect between the government's classification of people and the government's interest because a child's ability to submit a spurious claim is independent of their status as legitimate or illegitimate. *Id.* at 637. The court noted that the policy was both "overinclusive in that it benefits some children who are legitimate...but who are not dependent on their disabled parent" and "underinclusive in that it conclusively excludes some illegitimates...who are, in fact, dependent upon their disabled parent". *Id.* The regulation was held to be unconstitutional under rational basis analysis.

The disconnect in *Jiminez* is analogous to the Medical Test Mandates at issue here because the state's interest in stemming the spread of covid is disconnected from a person's likelihood to become infected with and transmit covid to others. Just as in *Jiminez*, the policy is overinclusive because unvaccinated people are required to undergo weekly medical testing even though they are no more likely to become infected with covid than those who took the pharmaceuticals. It is also underinclusive because people who took the pharmaceuticals can also still spread covid, but are allowed to work without submitting to weekly medical tests.

The forced medical testing regime does not and cannot prevent the spread of covid-19 in theory or in practice. The entire premise of the Medical Test Mandates is that the vaccines confer immunity that will prevent infection and transmission; it is assumed as

part of the policy. At best, the pharmaceuticals provide *personal protection* against severe outcomes. It is now common knowledge that the Mandated Pharmaceuticals do not prevent people from becoming infected with covid or transmitting it to others. Even Governor Murphy was infected with covid after he took a third dose. This is now commonly known and the CDC Director has even stated with regard to the pharmaceuticals that while they may provide personal protection from severe illness "what they can't do anymore is prevent transmission." [4] Because the Medical Test Mandates are all premised on preventing infection and transmission and because the pharmaceuticals cannot prevent infection and transmission, there is no nexus between the asserted government interest and the policy. The mandates therefore cannot survive under rational basis analysis.

C. THE MANDATES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION BECAUSE THEY DISCRIMINATE AGAINST WORKERS ON THE BASIS OF THEIR HAVING EXERCISED A FUNDAMENTAL RIGHT TO DECLINE A MEDICAL PROCEDURE

The equal protection clause of the 14th Amendment prohibits discrimination on the basis of the whether a citizens has exercised a fundamental right. Here, Plaintiffs have exercised a fundamental right to decline a medical procedure (taking the pharmaceuticals).

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[4] 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

On the basis of that, they are subjected to ongoing weekly medical tests. The policy is thus subject to strict scrutiny analysis on that basis as well, and fails for the reasons outlined above.

II.

DEFENDANTS WILL NOT SUFFER IRREPARABLE HARM IF THE MEDICAL TEST MANDATES ARE ENJOINED AND IT IS IN THE PUBLIC INTEREST TO ENJOIN THEM

The Medical Test Mandates are unconstitutional for the reasons outlined herein. Government coercion that violates the Constitution is irreparable harm *per se* and the government has no interest in the enforcement of an unconstitutional action. There is no irreparable harm to Defendant in enjoining EO 283 because "the Government does not have an interest in the enforcement of an unconstitutional law." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Plaintiffs thus fulfill all four factors necessary for a preliminary injunction and/or temporary restraining order.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court enjoin enforcement of EO 253, the judiciary testing policy, and the testing of all state workers.

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Dated: August 5, 2022 BY: s/Dana Wefer

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