UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2230

KATIE SCZESNY, JAIME RUMFIELD, DEBRA HAGEN, and MARIETTE VITTI,
Plaintiff-Appellants,

v.

PHILIP MURPHY and STATE OF NEW JERSEY,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY, CIVIL ACTION NO. 3:22-cv-02314

BRIEF OF APPELLEES PHILIP MURPHY AND STATE OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

To ensure the health and safety of New Jersey residents during the COVID-19 pandemic, Executive Order 283 ("EO 283") required certain covered health care settings to maintain policies ensuring that employees are up to date on their COVID-19 vaccinations. That order, and two subsequent updates to that order, were issued based on the Centers for Disease Control's ("CDC") findings that vaccines protect against contracting and transmitting the virus and protect against serious illness—at a time when public health action was necessary in the face of new variants that were threatening the health of individuals and the overall health care system.

Appellants—nurses working in New Jersey who already received the COVID-19 vaccine—ask this Court to issue a preliminary injunction against these eminently reasonable policies. Although they claim that EO283's requiring that they stay "up-to-date" on the COVID-19 vaccine boosters violates their constitutional due process and equal protection rights, federal courts across the Nation have repeatedly rejected such claims. As these courts have held, vaccination requirements—especially those for healthcare workers—are an appropriate employment requirement that does not burden any fundamental right or target a suspect class. And these requirements are tailored to addressing the State's interest in mitigating the impact of COVID-19 by protecting the health of its most vulnerable citizens, promoting a safe environment

for its health care workforce, and ensuring the safe and effective operation of health care services—legitimate interests that EO 283 rationally advances.

Not only are Appellants unlikely to succeed on the merits of their challenge, but they have failed to demonstrate that the equities favor a preliminary injunction either. The requirements under EO 283 do not pose an actual threat of irreparable harm to Appellants—a fact that is well underscored by their own extensive delay in seeking relief. And enjoining EO 283 would threaten harm to the State's interests and to the public. The district court appropriately denied Appellants' application for preliminary injunctive relief, and this Court should affirm.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343, and this Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to review the denial of preliminary injunctive relief.

COUNTERSTATEMENT OF ISSUES ON APPEAL

Whether the district court abused its discretion in declining to enjoin Executive Order 283 on a preliminary basis.

COUNTERSTATEMENT OF RELATED CASES

This case has not previously been before this Court. Appellees are not aware of any related pending cases.

COUNTERSTATEMENT OF THE CASE

On March 9, 2020, in response to the emergence of COVID-19, New Jersey Governor Phillip D. Murphy declared a public health emergency, pursuant to the Emergency Health Powers Act, N.J. Stat. Ann. §§ 26:13-1 to -31, and a state of emergency, pursuant to the Disaster Control Act, N.J. Stat. Ann. App. §§ A:9-30 to -63. Ja269. The Governor subsequently adopted a series of executive orders to limit the spread of COVID-19 in New Jersey. *See* Ja277.

As the pandemic progressed, an important new tool became available to limit the spread of COVID-19: multiple COVID-19 vaccines. Although precise statistics have changed at various points during the pandemic, COVID-19 vaccines contribute to reductions in contraction and transmissibility of COVID-19, and are particularly important in preventing severe illness, hospitalizations, and death from this virus. *See* Ja294-321. And these vaccines proved especially important last winter—a time when the Omicron variant was rapidly spreading through the State, a variant that spread significantly more easily than the previous COVID-19 variants. *See* Ja291-312. Further, available evidence during the spread of the Omicron variant—and recommendations by public health professionals—showed that receiving the primary series of a COVID-19 vaccine might not be enough. Instead, the CDC reported that vaccinated people who receive a COVID-19 booster were likely to have

a stronger protection against contracting and transmitting COVID-19, and more protection against serious illness, including hospitalizations and death. Ja47.

Those interests are magnified when it comes to health care workers. After all, "the CDC has repeatedly emphasized the importance of heightened mitigation protocols in certain congregate and health care settings because of the significant risk of spread and vulnerability of the populations served." Ja49. And "requiring workers in those congregate and health care settings to be up to date with their COVID-19 vaccinations can help prevent outbreaks and reduce transmission to vulnerable individuals who may be at a higher risk of severe disease." *Id.* Indeed, the Federal Government likewise acted to reduce the spread of COVID-19 in health care settings by imposing a vaccine mandate on health care workers.[1]

On January 19, 2022, Governor Murphy signed EO 283. Ja44-46. Given the efficacy of COVID-19 vaccines and boosters at preventing severe illness, and the particular need to advance those interests in health care settings, the Order required

[1] On November 5, 2021, the federal Centers for Medicare & Medicaid Services (CMS) issued the Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (CMS-3415-IFC) (CMS Rule), which requires most Medicare and Medicaid-certified entities to ensure that staff be vaccinated against COVID-19 as a condition of participation in the Medicare and Medicaid programs. On January 13, 2022, the Supreme Court upheld the CMS Rule. *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022). The Court held that CMS acted within its statutory authority when it "concluded that a vaccine mandate is 'necessary to promote and protect patient health and safety" in the face of the ongoing pandemic. *Id.* at 652 (quoting 86 Fed. Reg. 61613).

health care settings to maintain a policy requiring covered workers to provide proof of their COVID-19 vaccination. Ja44-54. Covered health care settings must require both a primary series and booster doses for which a covered worker is eligible. *See id*. Policies adopted pursuant to EO 283 "must provide appropriate accommodations, to the extent required by federal and/or state law, for employees who request and receive an exemption from vaccination because of a disability, medical condition, or sincerely held religious belief, practice, or observance." *Id*. The policies required by EO 283 may, but are not required to, include the termination of employment as part of the disciplinary process for noncompliance. *Id*.

On March 2, 2022, EO 290 modified the timeframes set forth in EO 283 based on updated CDC guidance. Ja55. It set the booster dose deadline to April 11, 2022 for health care settings subject to the CMS Rule and May 11, 2022 for health care settings not subject to the CMS Rule, or within 3 weeks of becoming eligible for a booster dose, whichever was later. *Id.* On April 13, 2022, Governor Murphy signed EO 294, which clarified that the policies required by EO 283 and EO 290 require just one booster dose. Ja63. As clarified, a covered worker is considered "up to date" with vaccinations if they have received both a primary series and the first booster dose for which they are eligible as recommended by the CDC. *Id.*

On March 4, 2022, based on the progress made by the State and the decrease in the total number of hospitalized patients, the number of positive COVID-19 cases,

and rate of transmission, Governor Murphy terminated the public health emergency. *Id.* But part of the explanation for why the emergency could come to an end turned on vaccines and boosters—which remained critical to New Jersey's health policy, in particular in health care settings. *See id.* Indeed, the CDC likewise explains that the need to stay "up to date" with the COVID-19 vaccines—which the CDC defines as having received a primary series and one booster when eligible, Ja294—is important for addressing any additional variants of COVID-19 that can be expected to occur. *See* Ja291-321. After all, a booster dose still significantly increases the effectiveness of COVID-19 vaccination and reduces likelihood of hospitalization with COVID-19. Ja299. And even after prior COVID-19 infection, studies show that vaccination with a booster extends immunity. Ja299-312.

On April 21, 2022, nearly three months after EO 283 first required health care professionals to become up to date with their vaccinations and boosters, Appellants filed a complaint against the State and Governor Philip Murphy. Ja71. Appellants are all Registered Nurses who, at the time of the complaint, were either current or former employees of Hunterdon Medical Center (HMC).[2] *Id.* Appellants have all received the primary series of COVID vaccination. *See* Ja99 at ¶19; Ja105 at ¶5; Ja109 at ¶7; Ja113 at ¶5. They allege that they have either sought and were denied

[2] Upon information and belief, HMC is a CMS-covered entity. *See* Ja334. Although Appellants purportedly seek relief against HMC as well, they failed to name HMC as a party. Ja35; Ja72-73.

an exemption from the booster dose by HMC or did not wish to receive more vaccinations. Ja94 at ¶¶21, 23-25; Ja105 at ¶10; Ja109 at ¶¶15-16; Ja113 at ¶10.

As they have all received primary doses of a COVID-19 vaccine, Appellants challenge only the booster dose requirement under EO 283 (as clarified by EOs 290 and 294). Their claims are premised on the view that the Order is unconstitutional. Ja85-91. As relevant to this appeal, Appellants' Complaint alleges that EO 283 (1) violates their Fourteenth Amendment rights to liberty and privacy; (2) subjects them to disparate treatment in violation of equal protection; and (3) violates 42 U.S.C. § 1983.[3] Ja71 at ¶¶68-97. Appellants sought a declaration that Executive Orders 283, 290, and 294 are unconstitutional, facially and as applied to each Appellant. Ja71 at ¶¶98-99. The same day they filed their Complaint, Appellants moved for a temporary restraining order and/or preliminary injunctive relief enjoining HMC and the State from enforcing the Executive Orders. Ja71 at ¶100.

On June 7, 2022, the district court denied preliminary injunctive relief, Ja2, concluding that Appellants had "failed to show that they were likely to succeed on the merits." Ja37. With respect to substantive due process, the court concluded that the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905),

[3] The Complaint also alleges that EO 283 (4) effects an unconstitutional taking of Appellants' licenses and (5) violates their rights to be free from unreasonable search and seizure. However, Appellants did not rely on those theories in their motion for preliminary injunctive relief or on appeal.

was controlling, and the district court rejected Appellants' efforts to distinguish that case. And consistent with both *Jacobson* and myriad rulings throughout the country that faced analogous constitutional challenges during the COVID-19 pandemic to vaccine requirements, the district court held that there is no fundamental right to refuse vaccination. Ja14-19. As a result, the court applied rational basis review and found the challenged Executive Orders were rationally related to the State's asserted interests in the health and safety of the public, the safety of its health care workforce, and the continued operation of essential health care services. Ja30.

The court rejected Appellants' other constitutional claims as well. In assessing Appellants' equal protection claim, the district court concluded that no suspect class or fundamental right was involved, and applied "the same rational basis standard of review" that applied for the substantive due process claim. Ja32. As with substantive due process, the district court found a rational relationship exists, and thus concluded that Appellants are not likely to succeed on their equal protection claim. *Id.* Further, construing Appellants' application as also asserting a procedural due process claim, the district court found that it failed for two independent reasons: Appellants offered no support for their assertion that their nursing licenses constitute protected property interests, and regardless, Appellants failed to demonstrate that they were entitled to any additional process before this rule of general applicability issued. Ja30-31. And finally, because Appellants' had failed to demonstrate a likelihood of success on any

of the constitutional claims, it followed that Appellants could not prevail in arguing that the EOs imposed unconstitutional conditions. Ja33.

The district court identified a second, independently sufficient reason to deny preliminary relief: the equities. Most importantly, Appellants had failed to make a clear showing of any immediate irreparable injury worked by the EOs. *See* Ja33-35. For one, Appellants' own delay of several months in bringing their claims weighed against the immediacy of their claimed harm. Ja33. For another, to the extent that Appellants argue preliminary relief was necessary to avert loss of their jobs, the EOs did not require termination, but rather required only that covered entities implement "disciplinary process[es]" that "may include" termination. Ja34 (quoting EO 283 at ¶4). And loss of employment provides no cognizable irreparable harm regardless. *See* Ja31. Moreover, on the record before the Court, Appellants failed to demonstrate that they would not still be subject to vaccination requirements by HMC. *See* Ja34-35. And on the other side of the ledger, the district court identified significant harms to the public and the State from an injunction. *See* Ja36-37.

SUMMARY OF ARGUMENT

The district court rightly held that Appellants are not entitled to a preliminary injunction because they have failed to demonstrate any of the requisite factors.

First, Appellants have not met their burden of showing a likelihood of success on the merits of their claims. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d

Cir. 2017). On appeal, Appellants focus almost entirely on a substantive due process claim. But that claim falters right out of the gate for one straightforward reason: there is no fundamental right to refuse vaccination. As the Supreme Court held over 100 years ago, and as courts across the Nation have consistently held throughout the past two years, the Constitution does not forbid a State from requiring vaccines, which are reserved for and concerned with protecting the public health by mitigating the spread of contagious, communicable diseases in the community. *See, e.g.*, *Jacobson*, 197 U.S. at 26; *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 594 (7th Cir. 2021). The alleged right to refuse vaccination therefore stands in sharp contrast to any decisions to refuse unwanted medical treatments or procedures that affect only the individual, and that do not bear on communicable diseases. And because there is no fundamental right involved, there only needs to be a rational basis for the State's approach. The challenged EOs unquestionably bear a rational relationship to legitimate government interests of protecting public health and the State's healthcare system.

Nor do any of Appellants' other claims—which they mention only in passing on appeal, and have largely waived these arguments in this forum—have any merit. Appellants' equal protection claim fails for the reasons laid out above: the challenged EOs do not affect a fundamental right or suspect class, and they advance legitimate public health aims. The procedural process claim fares no better because these EOs do not implicate any protected property right, and because they are

statewide rules of general application that do not require individual notice. And because Appellants failed to establish any merit to their constitutional claims, they cannot establish any violation under the doctrine of unconstitutional conditions.

Second, the remaining factors for granting a preliminary injunction likewise necessitate denial. Appellants' long delay in bringing suit and seeking preliminary relief from the EOs strongly undercuts their claim that they are suffering irreparable harm. *See Pharmacia Corp. v. Alcon Labs.*, 201 F. Supp. 2d 335, 382 (D.N.J. 2002). And Appellants failed to provide evidence that these EOs harm them, because HMC or the CMS could still independently impose those same requirements. In contrast to the lack of irreparable harm, the State has a compelling interest in both enforcing its laws and achieving the EO's goal of protecting its healthcare system—a goal that the Supreme Court recognized in upholding the CMS Rule. *See Biden v. Missouri*, 142 S. Ct. at 652-55. Similarly, enjoining the EOs would harm the public interest—as the benefits of COVID-19 vaccination are at their peak in the health care setting, where the risk of spread to vulnerable individuals is especially high.

STANDARD OF REVIEW

This Court employs a tripartite standard of review for preliminary injunctions. *K.A. v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002)). This Court reviews "the District Court's findings of fact for clear error, its legal conclusions de

novo, and its decision to grant [or deny] injunctive relief for abuse." *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 320 (3d Cir. 2020).

ARGUMENT

The Court should affirm the denial of preliminary relief. To merit such relief, a movant must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm absent a preliminary injunction; (3) that the preliminary injunction will not result in greater harm to the non-movant; and (4) that the public interest favors the injunction. *Kos Pharms. Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). In particular, the movant has the burden of "meet[ing] the threshold for the first two 'most critical' factors"—the likelihood of success and the irreparable harm prongs. *Reilly*, 858 F.3d at 179. Even if the movant satisfies those requirements, the court must still "consider[] the remaining two factors"—the balance of the equities and public interest—"and determine[] in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Kos Pharms.,* 369 F.3d at 708. A party seeking emergency relief "that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." *Lane v. New Jersey*, 725 F. App'x 185, 187 (3d Cir. 2018) (citation omitted). Appellants cannot demonstrate that any of the traditional factors support their claim, let alone their totality.

I. APPELLANTS' CLAIMS WILL NOT SUCCEED ON THE MERITS.

The district court rightly held that Appellants' leadoff claim—brought under a substantive due process theory—lacks merit. And none of Appellants' remaining claims, which they mention only briefly or not at all on appeal, are any stronger.

A. Substantive Due Process

Appellants have failed to demonstrate a likelihood of success on their claim that the EOs violate their substantive due process right to liberty. As courts across the Nation have uniformly held when facing analogous constitutional challenges to COVID-19 vaccine policies, no fundamental right to refuse vaccination exists. That conclusion is compelled by the Supreme Court's century-old decision in *Jacobson*. And it would be correct as a matter of first principles even if *Jacobson* did not exist. Because the challenged EOs do not infringe on a fundamental right, they are subject to rational basis alone, which they survive easily.

Both precedent and first principles foreclose Appellants' claim that they have a fundamental substantive due process right to refuse the COVID-19 booster. As to the precedent, over a century ago the Supreme Court upheld a state statute—enacted during a smallpox epidemic—requiring all adults to be vaccinated against smallpox, without exception, on penalty of criminal conviction. *Jacobson*, 197 U.S. at 12. The Court rejected the argument that the law violated an "inherent right of every freeman to care for his own body and health in such way as to him seems best." *Id*. at 26. The

Court explained that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id.* Rather, "[t]here are manifold restraints to which every person is necessarily subject for the common good," including the community's "right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 26-27. In other words, no fundamental right was implicated, and a law "enacted to protect public health" was unconstitutional only if lacked any "real or substantial relation to" that interest. *Id*. at 31; *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (noting standard is "essentially . . . rational basis review"). The vaccine easily met that standard. *Jacobson*, 197 U.S. at 36.

Across the Nation and throughout the COVID-19 pandemic, the federal courts have followed *Jacobson* to uphold vaccination requirements. *Klaassen* is especially on point. Faced with a similar challenge to a COVID-19 vaccine policy, the Seventh Circuit reasoned that "[g]iven *Jacobson*, . . . there can't be a constitutional problem with vaccination against SARS-CoV-2." *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 594 (7th Cir. 2021). After all, the court reasoned, substantive due process "depends on the existence of a fundamental right ingrained in the American legal tradition," but *Jacobson* "shows that plaintiffs lack such a right. To the contrary, vaccination requirements, like other public-health measures, have been common in this nation."

Id. And although Appellants obviously dislike the standard announced by *Jacobson*, *Klaassen* had an answer to that argument too: "a court of appeals must apply the law established by the Supreme Court." *Id.*

Nor was *Klaassen* alone in both reading and applying *Jacobson* this way. *See, e.g.*, *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 290 (2d Cir. 2021); *Health Freedom Def. Fund v. Reilly*, No. 21-8688, 2022 WL 5442479, *5 (C.D. Cal. Sept. 2, 2022); *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1249-51 (D. Or. 2021); *Norris v. Stanley*, 567 F. Supp. 3d 818, 822 (W.D. Mich. 2021); *Messina v. Coll. of N.J.*, 566 F. Supp. 3d 236, 246-49 (D.N.J. 2021); *Valdez v. Grisham*, 559 F. Supp. 3d 1161, 1172-77 (D.N.M. 2021); *M. Rae, Inc. v. Wolf*, 509 F. Supp. 3d 235, 246 (M.D. Pa. 2020). In lockstep with these decisions, the district court was correct to rely on *Jacobson* in this case as well. As in *Jacobson*, Appellants do not have a liberty right at all costs. Their liberty is subject to reasonable policies aimed at the legitimate state interest in protecting the public health—a governmental interest that is of course particularly strong when it comes to health care settings. And such policies includes vaccine requirements.

Appellants seek to distinguish *Jacobson*, but they run into two problems: the case is indistinguishable from this one, and even were it otherwise, substantive due process still would not give them the right they seek. Appellants stridently argue the modern definition of "vaccine" differs from the definition used in *Jacobson*. Br. 14-

25. But the fact that decades of scientific advancement improved the technology available for immunization against illnesses to protect public health does not render *Jacobson* inapplicable. Nor do Appellants explain how such factual distinctions are relevant to the reasoning in *Jacobson—i.e.*, the right of the community to reduce the spread of a contagious disease. Advancement in technology hardly undermines that constitutionally-significant state interest. As the chorus of cases applying *Jacobson* to COVID-19 vaccination policies demonstrates, *see supra* at 15, these inapposite factual distinctions are not enough to set *Jacobson* aside.

In fact, to the extent there are any relevant distinctions between this case and *Jacobson*, they cut against Appellants. For one, New Jersey "does not require every adult member of the public to be vaccinated, as Massachusetts did in *Jacobson*." *Klaassen*, 7 F.4th at 593. Instead, the EOs only apply to covered healthcare settings where the State's public health interest is obviously heightened, and employees who do not wish to be vaccinated by the deadline were free to leave. For another, while the statute in *Jacobson* subjected violators to criminal prosecution, 197 U.S. at 13, the challenged EOs here only require healthcare settings to impose discipline process for noncompliance with the vaccination requirement, which *may* include termination of employment. Ja50. Still more, "*Jacobson* sustained a vaccination requirement that lacked exceptions for adults." *Klaassen*, 7 F.4th at 593. These EOs, by contrast, carefully require accommodations for covered healthcare workers who "request and

receive an exemption from vaccination because of a disability, medical condition, or sincerely held religious belief, practice, or observance." Ja53.

Moreover, even assuming that *Jacobson* can be distinguished, Appellants fail to establish that any fundamental rights are actually at issue. They do not point to a single decision holding that there is a fundamental right to refuse vaccination, the right at issue in this case, and the State is not aware of any. Appellants instead rely primarily on *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990), to argue that there is a fundamental right to refuse medical treatment and that the decision to refuse vaccination falls within that right. Br. 12. But *Cruzan* expressly approved of the Court's holding in *Jacobson* that "an individual's liberty interest in declining an unwanted smallpox vaccine" was outweighed by "the State's interest in preventing disease." *Cruzan*, 497 U.S. at 279. *Cruzan* thus could not have recognized a broad right applicable to all medical decisions. If anything, it recognized that the right to refuse medical treatment does not include the right to refuse vaccination.

Nor do any of the other cases Appellants cite establish a fundamental right to refuse vaccination. Appellants reach for cases holding that individuals cannot be forced to undergo certain medical procedures like a caesarian-section, amputation, or blood transfusion. And they cite to decisions mentioning a generic right to privacy and bodily integrity. Br. 12-13. But those cases involved individual decisions that had little ramification for the health of others. None of them implicated a decision

with such broad *public* health consequences as declining vaccination against a highly contagious disease while working in contact with vulnerable people at healthcare facilities. Courts have instead expressly refused to extend the right to refuse medical decisions to the decision to refuse vaccines. *See, e.g.*, *Lukaszczyk v. Cook Cty.*, 47 F.4th 587, 601-02 (7th Cir. 2022) (finding that challenges to COVID-19 vaccine requirements have been unable to "provide a textual or historical argument for their constitutional interpretation" and cannot "cite any controlling case law or other legal authority in support of their position, instead relying on decisions that are either factually distinguishable or that have been overruled"). The district court was thus correct to apply rational basis review.[4]

And the EOs easily survive rational basis review. Under that standard, state action need only be "rationally related to a legitimate government interest." *Sameric Corp. of Del., Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998).

[4] To the extent that Appellants' substantive due process claim relies upon putative property rights in their licenses, degrees, or employment, these claims are not viable. As this Court has held, the "right to 'engage in business'" is "not protected by substantive due process." *Wrench Transp. Sys. v. Bradley*, 340 F. App'x 812, 815 (3d. Cir. 2009); *Joey's Auto Repair & Body Shop v. Fayette Cty.*, 785 F. App'x 46, 50 (3d Cir. 2019) (same); *see also Hill v. Borough of Kutztown*, 455 F.3d 225, 234 n.12 (3d Cir. 2006) (noting that "public employment is not a fundamental right"). Thus, the asserted "right to practice in [one's] chosen profession . . . does not invoke heightened scrutiny." *Guttman v. Khalsa*, 669 F.3d 1101, 1118 (10th Cir. 2012). Following this rule, courts have consistently applied rational basis review to laws conditioning employment on vaccination. *See, e.g.*, *Lukaszczyk*, 47 F.4th at 602 (citing cases).

"[T]hose attacking the rationality of the [state action] have the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 314 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 364 (1973)). And as every other federal court has concluded, Appellants cannot establish that vaccine policies lack a rational basis: the EOs further the State's interests in stemming the spread of COVID-19, protecting the health of its most vulnerable residents, maintaining a safe environment for its health care workforce, ensuring effective operation of essential health care services, and decreasing risk of hospitalization. *See* Ja20-22; Ja28.[5] The district court did not clearly err in reaching that conclusion, and Appellants did not remotely establish the extraordinary record that would be necessary to rebut it.

Appellants baldly assert that the EOs do not pass rational basis review because it is allegedly "common knowledge" that the available COVID-19 vaccines "do not prevent infection and transmission of covid to any measurable or known degree."[6]

[5] In their application for preliminary injunction, Appellants assumed that the State has a compelling interest. Ja21. Appellants have now changed course, arguing that the state interest in stopping the spread of COVID-19 is not compelling. Br. 29. In addition to being wrong, this argument should be rejected because it was not raised before the district court. *See Brenner v. Local 514, United Bhd. of Carpenters & Joiners*, 927 F.2d 1283 (3d Cir. 1991) ("It is well established that failure to raise an issue in the district court constitutes waiver of the argument.").

[6] Appellants repeatedly state that COVID-19 vaccinations do not prevent infection or transmission, yet fail to cite any support for this assertion; in so doing, they appear to rely heavily on facts outside the record. *See* Br. 29-30, 37, 47.

Br. 47. But that argument, made without support, is unavailing. In establishing the booster requirement, EO 283 cited numerous factors, including the effectiveness of primary series vaccines at preventing severe illness, hospitalization, and death, and evidence that the efficacy of primary series vaccination decreases over time. Ja44-49. Moreover, the EOs cite the CDC's findings that the COVID-19 booster prevents further spread and prevents severe impacts on the health of individuals and the health care system. Ja46-47. As the district court concluded, it is not the job of the Court to weigh the competing evidence and evaluate the efficacy or safety of the vaccine; its role is only to decide whether the State has asserted a rational basis for the EOs. Ja29; *see Lukaszczyk*, 47 F.4th at 603 (faulting plaintiffs for failing to supply enough "evidence—studies, expert reports, or otherwise" so as to "eliminate a 'conceivable basis' for the mandates under rational basis review," and emphasizing how high the legal bar would be). Here, there is clearly a "conceivable basis" for this government action, and that ends the inquiry on this substantive due process claim.

The district court correctly applied rational basis review and concluded that Appellants' substantive due process claims are not likely to succeed.

B. Appellants' Remaining Claims Have No Likelihood Of Success.

None of Appellants' other claims—procedural due process, equal protection, and unconstitutional conditions—support a preliminary injunction either.

The procedural due process argument has both been waived and lacks merit. As to the former, Appellants devoted just a single sentence to their procedural due process claim in the district court, Ja30, and on appeal, they abandon it altogether. Appellants have therefore waived their argument and the Court should not address it. *See New Jersey v. Merrill Lynch & Co*., 640 F.3d 545, 547 n.3 (3d Cir. 2011).

But even if the Court reaches the merits, the district court was plainly correct to hold that the EOs do not violate Appellants' procedural due process rights. The procedural due process claim is "subject to a 'two-stage' inquiry: (1) whether the plaintiff has a 'property interest protected by procedural due process,' and (2) 'what procedures constitute due process of law.'" *Schmidt v. Creedon*, 639 F.3d 587, 595 (3d Cir. 2011) (quoting *Gikas v. Wash. Sch. Dist.*, 328 F.3d 731, 737 (3d Cir. 2003)). At the first stage, as explained above, Appellants have not identified any recognized protected property interest: there is no property interest in working in a healthcare setting, let alone a property interest in working in a healthcare setting free from any vaccination requirements. *See supra* at 18 n.4. That disposes of this claim.

The second stage is fatal too. As the district court appropriately discerned, the EOs are rules of general applicability. *See* Ja31-32. As courts have held for over a century, such laws are not subject to the same due process dictates as individualized orders—which is why Congress, as well as state or local officials, can adopt general laws without granting every affected person a hearing before they do so. *See Rogin*

v. Bensalem Twp., 616 F.2d 680, 693 (3d Cir. 1980) (noting that rule calling on every person affected by a general law to receive "procedural due process[rights] including hearings, opportunity for confrontation and response, clear standards, an impartial arbiter, and possibly judicial review would be inconsistent with the structure of our system of government"); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule . . . ."). Because the challenged EOs are not targeted at individuals or at particular facilities, but instead regulate entire classes of employees in the State, the procedural due process claim fails.

Appellants' equal protection argument fails too. This argument is just a single sentence long: an assertion that Appellants are "treated unfavorabl[y] based on the exercise of their fundamental right to reject unwanted medical procedures." Br. 10. But that claim is subject only to rational basis review and fails for the same reasons that the substantive due process argument did. *See Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter*, 526 U.S. 124, 127-28 (1999) (holding that if a classification involves no fundamental right and rests on no suspect classes, "it cannot run afoul of the Equal Protection Clause if there is a rational relationship

between disparity of treatment and legitimate governmental purpose"). As explained above, there is no fundamental right to refuse vaccination, *see supra* at 13-17, and unvaccinated persons have never been considered a suspect class. *See, e.g.*, *Bauer v. Summey*, 568 F. Supp. 3d 573, 596-97 (D.S.C. 2021); *see also Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen., Fl. Dep't of Health*, 50 F.4th 1126, 1148-50 (11th Cir. 2022) (identifying one's vaccination status as a "non-suspect class"). And again as explained above, on rational basis review, there is no doubt that a vaccine policy conceivably advances a legitimate interest. *See supra* at 18-20. The decision below thus reflects the correct legal principles, applies the correct analysis, and reaches the correct result.

Finally, the district court correctly held that the EOs do not violate the doctrine of unconstitutional conditions. Ja33. Appellants argue that the EOs impermissibly require Appellants, as a condition of their continued employment, to surrender their rights. Br. 13-14. Because Appellants have not demonstrated that any right has been violated, *see supra at* 13-18, their unconstitutional conditions claim necessarily fails. *See, e.g.*, *Petrella v. Brownback*, 787 F.3d 1242, 1265 (10th Cir. 2015) ("The [unconstitutional conditions] doctrine only applies if the government places a condition on the exercise of a constitutionally protected right.") (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013)); *Norris*, 567 F. Supp. 3d at 822 (rejecting unconstitutional conditions claim on the basis that the COVID-19

vaccination policy is not unconstitutional in the first place); *Andre-Rodney v. Hochul,* 569 F. Supp. 3d 128, 140 (N.D.N.Y. 2021); *Smith v. Biden*, No. 21-19457, 2021 WL 5195688, *8 (D.N.J. Nov. 8, 2021). There is no basis for this Court to reach a different conclusion.

II. THE OTHER PRELIMINARY INJUNCTION FACTORS LIKEWISE FORECLOSE GRANTING PRELIMINARY RELIEF.

Beyond their failure to demonstrate a likelihood of success on the merits—in this Circuit, a gateway factor to preliminary relief—Appellants fail to demonstrate the equities necessary for the extraordinary remedy of a preliminary injunction. The district court therefore did not abuse its discretion in finding that they failed to satisfy the predicates for granting preliminary relief.

Most importantly, Appellants fail to establish that enjoining enforcement of the EOs was necessary to avoid irreparable harm. As a threshold matter, the district court did not abuse its discretion in finding that Appellants' long and unexplained delay in pursuing their constitutional claims weighs heavily against the "immediacy" of a purported harm. Ja33-34 (citing *Smart Vent Prods. v. Crawl Space Door Sys*., No. 13-5691, 2016 WL 4408818 (D.N.J. Aug. 15, 2016)). Such delay can "knock[] the bottom out of any claim of immediate and irreparable harm" and is a "dispositive basis" for rejecting a preliminary injunction. *Pharmacia Corp. v. Alcon Labs.*, 201 F. Supp. 2d 335, 382 (D.N.J. 2002); *see Lanin v. Borough of Tenafly*, 515 Fed. App'x 114, 117 (3d Cir. 2013) ("[P]reliminary injunctions are generally granted under the

theory that there is an urgent need for speedy action to protect the plaintiffs' rights . . . [and] [d]elay[s] in seeking enforcement of those rights . . . tends to indicate at least a reduced need for such drastic, speedy action."); *Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson*, No. 19-8828, 2019 WL 1519026, *4 (D.N.J. Apr. 8, 2019) (agreeing "delay in filing" for relief "undermines" irreparable harm).

Indeed, while Appellants insist that preliminary injunctive relief is necessary to preserve the status quo, Br. 50, their delay in seeking emergent relief necessarily means that an injunction would *disrupt*—rather than preserve—the situation on the ground. *See Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994) (agreeing that delays increase the risk that preliminary relief would "fundamentally alter[] the status quo"). Indeed, EO 283 had been in effect for three months before Appellants even filed their lawsuit, let alone sought preliminary injunctive relief. Today, it has been in effect for nearly ten. Now more than before, any preliminary injunctive relief would fundamentally alter the status quo.[7]

Even beyond delay, Appellants fail to demonstrate that preliminary injunctive relief was necessary to avoid irreparable harm. For their harm, Appellants contend the rejection of the booster means they would "lose their jobs and become effectively unemployable in New Jersey in their field." Br. 50. But as a matter of law, loss of

[7] Although EO 290 and EO 294 were issued more recently, they only extended the deadlines for covered individuals to comply with EO 283's vaccine requirement—they did not subject Appellants to new or additional requirements.

employment alone is not irreparable injury. *See Morton v. Beyer*, 822 F.2d 364, 372 (3d Cir. 1987) (explaining "requisite irreparable harm is not established in employee discharge cases by financial distress or inability to find other employment," because "loss of income alone" does not "constitute[] irreparable harm"); *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974) (holding "an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury").

To date, every court to consider it has thus rejected the argument that potential loss of employment due to an employee's unwillingness to comply with a COVID-19 vaccine mandate constitutes an irreparable harm. *See, e.g.*, *Mass. Corr. Officers Fed. Union v. Baker*, 567 F. Supp. 3d 315, 327-28 (D. Mass. 2021); *Does 1-6 v. Mills*, 566 F. Supp. 3d 34, 57 (D. Me.), *aff'd*, 16 F.4th 20 (1st Cir. 2021) (denying injunction against State's rule requiring employees of covered health centers to be vaccinated against COVID-19*)*; *Smith*, 2021 WL 5195688, *8; *Harsman v. Cincinnati Children's Hosp. Med. Ctr.*, No. 21-597, 2021 WL 4504245, *4 (S.D. Ohio Sept. 30, 2021); *Norris*, 567 F. Supp. 3d at 823-24; *Williams v. Brown*, 567 F.

Supp. 3d 1213, 1228 (D. Or. 2021); *Andre-Rodney*, 569 F. Supp. 3d at 141. In light of this Court's established case law, it should not break from this consensus.[8]

Appellants also contend that the district court erred in holding that Appellants' claims were not redressable. They argue that because the federal CMS Rule does not require boosters, enjoining the EOs necessarily redresses their injuries. Br. 49. But the district court disagreed because, even without the EOs, Appellants might have been subject to vaccination requirements issued by HMC. Ja35. The court noted that it was in fact HMC, not the State, that reviewed and denied Appellants' exemption applications. Ja94 at ¶¶21, 23-25; Ja105 at ¶10; Ja109 at ¶¶15-16. Thus, even if the CMS Rule does not require boosters, Appellants have not shown that enjoining the enforcement of the EOs would prevent HMC from maintaining a similar policy on its own. Ja34. Appellants therefore did not demonstrate on this record that enjoining the EOs would resolve their alleged harm, irreparable or otherwise.

[8] Appellants' particular loss-of-employment theory of irreparable harm is especially weak. As the district court observed, the EOs do not require termination; rather, they require the covered health care settings to have "disciplinary process[es]" that "*may* include" termination. Ja34 (emphasis added) (citing EO 283 at ¶4). The same EOs also permit covered settings to impose "additional or stricter requirements." *Id.* at ¶9. Appellants did not assert specific facts demonstrating that HMC's disciplinary policies pursuant to the Orders necessitated their termination and/or suspension—despite its centrality to their theory of harm. To be sure, Appellants represent that they were "all terminated" from their employment at HMC, although these facts are not found in the record. Br. 4 n.3, 9. But the record lacks sufficient detail regarding the disciplinary process that ultimately led to that point.

On the other side of the ledger, the balance of equities and the public interest also support denial. Although Appellants claim that New Jersey has no "interest in the enforcement of an unconstitutional law," Br. 50, that of course simply assumes their own conclusion. And when one considers these EOs, the State's enforcement interest becomes quite clear. Of course, the State and its residents suffer irreparable harm anytime that the State is enjoined from enforcing its policies. *See Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). But this harm would be especially profound: vaccines have played a central role in enabling States like New Jersey to lift a wide range of other restrictions while protecting public health. *See, e.g.*, *Cty. of Butler v. Gov. of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021). Interfering with requirements that these nurses in health care settings be vaccinated and receive at least one booster dose would directly undermine that success. *See, e.g.*, *Biden v. Missouri*, 142 S. Ct. at 651 (emphasizing vaccination of health care workers against COVID-19 is "necessary for the health and safety of individuals to whom care and services are furnished" and avoiding worker absenteeism due to COVID-19-related exposures or illness that can create staffing shortages that disrupt patient access to recommended care); Ja36 (district court opinion making same points). Appellants have provided this Court no legal basis to take this disruptive step—particularly in the posture of a preliminary injunction application.

CONCLUSION

For these reasons, the district court's order denying Appellants' request for preliminary injunctive relief should be affirmed.

Respectfully submitted,

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Dated: November 7, 2022

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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Dated: November 7, 2022

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 7,125 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and thus does not exceed the 13,000-word limit.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in Times New Roman that is at least 14 points.

3. The text of this brief complies with L.A.R. 31.1(c) in that it is identical to the text of the paper copies.

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Dated: November 7, 2022

CERTIFICATION OF SERVICE

I hereby certify that on November 7, 2022, I caused the Brief for Appellees to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing. Counsel of record will receive service via the Court's electronic filing system.

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