IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-2230

KATIE SCZESNY, MARIETTE VITTI, DEBRA HAGEN, AND JAIME RUMFIELD,

Plaintiffs-Appellants

v.

GOVERNOR PHILIP MURPHY,
Defendant-Appellee,

On appeal from the United States District Court of New Jersey's denial of a temporary restraining order pursuant to *Fed. R. Civ. P.* 65

APPELLANTS' REPLY BRIEF IN SUPPORT OF REVERSE AND REMAND FOR ENTRY OF A PRELIMINARY INJUNCTION

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ARGUMENT

I. THE NUMBER OF "BOOSTERS" REQUIRED

The State's current position is that "a worker is considered up to date once with a primary series and first booster dose." DKT 33:12. The state represents that Governor Murphy's definition of "up to date" is in accord with the CDC definition, but it is not because the CDC has changed the definition of "up to date" two times since this litigation was instituted in April of this year. The state wrongfully represents that the CDC defines "up to date" as having received a primary series and one booster when eligible." DKT 33:13 (citing JA 294). However, the Court may take judicial notice that the government website defining "up to date" has changed twice since the inception of litigation. At the time Appellants filed their opening brief, the CDC defined "up to date" as "all doses in the primary series and all boosters recommended for you, when eligible."[1] Between Appellants' opening brief and the date of this reply, the CDC changed the definition again and it now states that a person is "up to date" "immediately after [they] have received the most recent booster recommended for [them]."[2] Between Governor Murphy and the CDC, there

[1] An archive of the site on June 6, 2022 is available here: https://web.archive.org/web/20220606090707/https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html

[2] An archive of the site on November 28, 2022 is available here: https://web.archive.org/web/20221128072942/https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html

are now five different definitions of "up to date," plus its predecessor "fully vaccinated." This may be a comical display of government capriciousness were it not for the fact that Governor Murphy relies on this apparently flexible term to rationalize forcing pharmaceuticals on unwilling Nurses.

The Court may also take judicial notice of the fact that since Governor Murphy issued EO 283, the CDC has recommended that everyone eligible take a newly formulated "bivalent vaccine," that underwent *no* human clinical trials before being rolled out to the public.[3] This booster is not required under Governor Murphy's second definition of "up to date" (up-to-date after first booster dose), but it would be required under his first definition of "up to date" (up-to-date if primary series "and any booster doses for which they are eligible as recommended by the CDC"). JA 67; JA 52. If EO 283 is constitutional, then the question of whether hospital workers will have to take this new "vaccine" rests entirely in Governor Murphy's discretion. He can create a sixth definition of "up to date" by issuing a new executive order at any time. Or he can stay his hand. According to him, the decision is his, not the Nurses, because there is "no right to refuse a vaccine."

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[3] Jonathan Wolfe, New York Times Newsletter, *Virus Briefing*, August 31, 2022 (available at https://www.nytimes.com/2022/08/31/briefing/updated-boosters-omicron.html?searchResultPosition=3 (stating that "we are relying on trials in mice" because "[t]he virus is evolving too fast for scientists to do human trials because by the time they get results, we could have a new variant").

II. THE STATE INSISTS THAT THE NURSES HAVE NO RIGHT TO REFUSE A VACCINE, BUT REFUSE TO DEFINE "VACCINE"

The State asserts that "the right to refuse medical treatment does not include the right to refuse vaccination." However, the state refuses to define the term "vaccine." If "vaccines" alone stand outside the rule that people have a fundamental right to refuse unwanted medical treatment, it is *vital* to be able to identify what constitutes a "vaccine." How can the state say that it has the authority to coerce people to take vaccines without defining what a vaccine is? How can the state assert that the people have no right to refuse a "vaccine" without defining what a "vaccine" is? Without a definition, the term is capricious.

Despite its refusal or inability to define the word "vaccine," the state argues that *Jacobson* applies to the Mandated Pharmaceuticals because the purpose of the smallpox vaccine was to prevent smallpox and a purpose of the Mandated Pharmaceuticals is to prevent covid. However, the government presents no data concerning booster efficacy at actually preventing infection or spread. The studies the state relied on for this point in the District Court (JA 299-312 and JA 313-321) actually undermine the government's position.

The state submitted a publication from the New England Journal of Medicine titled "*Protection against SARS-CoV-2 after Covid-19 Vaccination and Previous Infection*. JA 299. However, the study only looked at efficacy against infection for two doses, not the booster. *Id.* The second study, titled "*Waning 2-Dose and 3-Dose*

Effectiveness of mRNA Vaccines Against COVID-19-Associated Emergency Department and Urgent Care Encounters and Hospitalizations Among Adults During Periods of Delta and Omicron Variant Predominance," only evaluates efficacy at preventing severe outcomes, not reducing infection or transmission. In fact, the paper states quite clearly on the first page that "little is known about durability of protection after 3 doses during periods of Delta or…Omicron" and that "variations in waning of [protecting against severe disease] by age group, immunocompromised status, other indicators of underlying health status, or vaccine product have not yet been examined." JA 313. Ultimately, the state presents *no* evidence at all concerning whether a single booster dose prevents infection (and thereby transmission) instead relying on hopeful assertions by the CDC that Governor Murphy included in EO 283 *See* JA 47 ("the CDC has reported that vaccinated people who receive a COVID-19 booster are likely to have stronger protection against contracting and transmission COVID-19").

Without any actual support for the claim that the booster prevents infection and transmission, the state's argument that the Mandated Pharmaceuticals are analogous to the smallpox vaccine at issue in *Jacobson* completely falls apart. In addition, *Jacobson* is distinguishable, and inapplicable, for all the reasons set forth in the Nurses' opening brief pages 14-27.

III. THE NURSES' CLAIMS ARE REDRESSABLE BY ENJOINING EO 283

All the evidence on the record shows that the Nurses were terminated due to EO 283. Plaintiff Katie Sczesny was *told* she was being terminated due to EO 283 and all the Nurses were terminated on the deadline set forth in EO 283. JA 80. There is no evidence that the Nurses are subject to any other "booster" mandate besides Governor Murphy's.

Governor Murphy argues that the Nurses' claims are not redressable because "CMS [Center for Medicare Service] *could* still independently impose those same requirements" and HMC [the hospital] *could* impose the same requirements. Appellant's Brief at pg. 11, 27. What other entities can and cannot do, and what litigation they may find themselves embroiled in if they do, is irrelevant to this matter. The Nurses were terminated due to EO 283 and if EO 283 is suspended, then the barrier on their employment would be lifted. For these reasons and the reasons set forth in Appellants' opening brief, EO 283 should be enjoined.

Respectfully submitted,

Law Offices of Dana Wefer, LLC
Attorney for the Workers

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: November 29, 2022

COMBINED CERTIFICATIONS

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

1) I am a member of the Bar of the Third Circuit Court of Appeals;
2) The brief complies with the word county and typeface requirements set forth in Federal Rule of Appellate Procedure 27. The brief is under 15 pages and is typed in Times New Roman font, 14-point type.
3) The brief and attached cases will be served on the government contemporaneously by filing with ECF;
4) The electronic brief and paper copies of the briefs are identical;
5) This brief and all associated documents were run through Windows Security Virus & Threat detection software on November 29, 2022 before uploading. No threats were found.

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: November 29, 2022