

No. 21-1795

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

MATTHEW JOHNSON, *et al.*,

Plaintiffs-Appellants,

v.

GOVERNOR OF NEW JERSEY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
District of New Jersey; No. 1:20-cv-6750

**APPELLEES' MOTION TO DISMISS THE APPEAL
AS MOOT AND FOR STAY OF BRIEFING SCHEDULE**

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INTRODUCTION

In this appeal, a group of landlords are challenging a temporary New Jersey order empowering residential tenants to credit their security deposits toward their rent during the ongoing public health emergency. The basic problem for Appellants is that, long before the merits briefing will conclude, Executive Order 128 will expire on July 4, 2021, and Appellants' single request for prospective relief against ongoing enforcement of that emergency order will be moot.

There can be no question that the case will be moot. On June 4, 2021, New Jersey enacted A5820 to terminate the vast majority of the Governor's COVID-19 related orders—including Executive Order 128—effective July 4, 2021. Because Executive Order 128 is the only order being challenged, and Appellants are seeking only prospective forms of relief, there is no relief left that this Court could order. And no exception to mootness rules applies. The “voluntary cessation” and “capable of repetition, yet evading review” exceptions both require a “reasonable likelihood” that the State will reinstate this order, but the on-the-ground conditions have changed considerably in New Jersey since issuance of Executive Order 128 in April 2020. Appellants can offer nothing more than speculation that this will occur.

Consistent with the limits on judicial authority under Article III, this Court should grant this motion to dismiss. And given the strength of this motion, Appellees

request a stay of the merits briefing schedule until 30 days after the instant motion is decided, as a decision could obviate the need for any merits briefing.

STATEMENT OF FACTS AND OF THE CASE

Appellants challenge the validity of Governor Murphy’s Executive Order 128, which temporarily allows New Jersey residential tenants to use their security deposit to pay rent. *See* Dist. Ct. Dkt. (“Dkt.”) 15; N.J. Exec. Order No. 128 (Apr. 24, 2021) (“EO 128”). EO 128 was designed to mitigate the economic impact on tenants of the COVID-19 pandemic, and to reduce the risk of a wave of evictions for non-payment of rent when the health crisis ends. EO 128 at 2-3. The change was temporary—it was set to expire 60 days following the end of the State’s officially-designated Public Health Emergency (“PHE”). *Id.* And it was modest: EO 128 stressed that all tenants would remain liable for all outstanding rent and any property damage, and if a tenant renews her lease she must replenish the security deposit in full. *Id.*

Appellants filed this action on June 2, 2020, seeking declaratory relief and an injunction to prevent the continued enforcement of EO 128. Dkt. 1. Appellants’ Amended Complaint alleged that the enforcement of EO 128 violated their rights under the Contracts Clause, as well as under the Due Process, Equal Protection, and Privilege & Immunities Clauses. Dkt. 15. Appellants also included certain state law

claims, which they later voluntarily dismissed. Dkt. 39.¹ On September 30, 2020, the State filed a motion to dismiss the Amended Complaint. Dkt. 26.

On March 22, 2021, the District of New Jersey rejected Appellants' claims for failure to state a claim and dismissed the Amended Complaint in its entirety. Dkt. 46. Appellants filed a notice of appeal on April 21, 2021, Dkt. 48, and their opening brief is due June 16, 2021. Pursuant to an order of this Court, Appellees' opposition is due 30 days after service of Appellants' brief (on July 16, 2021), and Appellants' reply brief is due 21 days after that, meaning that appellate briefing will not conclude until August 6, 2021. This Court thus cannot entertain Appellants' challenge to the ongoing enforcement of EO 128 until after that date.

By that time, there will be no ongoing enforcement of EO 128. On June 3, 2021, the New Jersey Legislature passed A5820, which terminated the vast majority of the Governor's emergency orders—specifically including EO 128—effective July 4, 2021. *See* Appendix. A5820 reserves to the Governor certain enumerated powers related to management of the ongoing public health crisis, none of which apply to EO 128. The Governor signed A5820 into law on June 4, 2021, and simultaneously issued Executive Order 244 formally terminating the previously designated PHE. *See* Appendix. As a result, EO 128 expires on July 4, 2021.

¹ On December 15, 2020, Appellants refiled their state claims in a separate action in the New Jersey Superior Court. The Appellate Division heard oral argument in that matter on June 1, 2021, and the appeal is pending.

ARGUMENT

I. This Appeal Is Moot Because The Termination Of EO 128 Obviated Any Occasion For Meaningful Relief.

The enactment of legislation terminating EO 128 moots this appeal. A case becomes moot, and deprives this Court of jurisdiction, “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *see also Jersey Cent. Power & Light Co. v. N.J.*, 772 F.2d 35, 39 (3d Cir. 1985) (the central question in a mootness analysis “is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief”). That analysis is straightforward here: Appellants seek only declaratory and injunctive relief against an executive order that will no longer be in effect by the time merits briefing is scheduled to be completed.² Thus, “[t]he *raison d’être* for the injunction no longer exists” and the case is moot. *Black United Fund of N.J., Inc. v. Kean*, 763 F.2d 156, 160 (3d Cir. 1985) (grant of injunction enjoining state statute mooted by its repeal and enactment of new law); *see also N.Y. State Rifle & Pistol Ass’n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (holding that claims for declaratory and injunctive relief were mooted by amendment of challenged statute).

² Indeed, that is the only relief Appellants can seek, as any claim for damages relating to the prior issuance and enforcement of EO 128 would be barred by fundamental principles of state sovereign immunity.

Indeed, courts have repeatedly dismissed as moot challenges to COVID-19 related orders that were repealed or replaced. *See, e.g., Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (deeming moot a challenge to stay-at-home order that had expired, explaining “a case challenging a statute, executive order, or local ordinance usually becomes moot if the challenged law has expired or been repealed”); *Pleasant View Baptist Church v. Beshear*, 838 F. App’x 936, 938 (6th Cir. 2020) (same); *S. Wind Women’s Ctr. v. Stitt*, 823 F. App’x 677, 679 (10th Cir. 2020) (same); *see also Danville Christian Acad. v. Beshear*, 141 S. Ct. 527 (2020) (per curiam) (denying application to vacate stay of injunction of school-closings order based in part on order’s “impending expiration”). *Behar v. Murphy*, No. 20-5206, 2020 WL 6375707 (D.N.J. Oct. 30, 2020), is especially on point. *Behar* dismissed as moot a challenge to Governor Murphy’s Executive Order 107 after that Order was rescinded. As Chief Judge Wolfson put it, although the plaintiffs still sought injunctive relief, because the order had been rescinded, “the *raison d’etre* for the injunction no longer exists” and “no meaningful relief may be provided by the Court.” *Id.* at *3 (citation omitted). The same analysis applies here.

II. No Exception To Mootness Applies.

This appeal does not fall within the narrow exceptions to the mootness doctrine for “voluntary cessation” or for actions “capable of repetition, yet evading review.” As to voluntary cessation, this exception cannot apply where there is “no

reasonable likelihood that the alleged wrong will recur.” *Thompson v. U.S. Dep’t of Labor*, 813 F.2d 48, 51 (3d Cir. 1987). A “reasonable likelihood,” in turn, must be based on “more than speculation that a challenged activity will be resumed.” *Id.* As this Court has explained, “statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.” *Khodara Env’tl., Inc. ex rel. Eagle Env’tl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001). After all, were it otherwise, no statutory amendment could ever moot a case—because the State could theoretically always reenact a prior policy. *See id.* (citing *Nat’l Black Police Ass’n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997)); *see also Marcavage v. Nat’l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (courts presume a change in government policy was made “in good faith” and was not litigation posturing).

Here, the termination of EO 128 was motivated by the success of the State’s vaccination program and sustained decreases in COVID-19 cases, not by Appellants’ challenges to the Order. EO 128 was designed to protect tenants from the economic fallout of COVID-19 and to reduce a wave of evictions that might exacerbate the spread of the virus. *See* EO 128 at 2-3. But the circumstances that warranted this order have changed drastically. As the Governor reported on the same day he signed legislation terminating EO 128, nearly 70% of eligible New Jersey residents had already been at least partially vaccinated, with “over 4.9 million New

Jerseyans having received at least one dose of a vaccine and over 4.2 million having been fully vaccinated.” N.J. Exec. Order No. 244 (June 4, 2021). Vaccination has led to sustained drops in “the number of hospitalized patients in the State, the number of daily positive COVID-19 cases, spot positivity, and the rate of transmission.” *Id.* That the Legislature terminated EO 128, along with *all but thirteen* of the Governor’s COVID-19 related orders, confirms that the Legislature’s decision was motivated by this remarkably improved public health outlook. Under these circumstances, any suggestion that the State might one day reenact this policy amounts to no more than “speculation that a challenged activity will be resumed,” which does not present the live dispute necessary for the appeal to proceed. *Thompson*, 813 F.3d at 51.

Nor is the instant order “capable of repetition, yet evading review.” To meet this exception to mootness, Appellants “must establish that (1) the challenged action was in its duration too short to be fully litigated to its cessation or expiration and (2) there is a reasonable likelihood that [they will] be subjected to the same action again.” *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 (3d Cir. 2003). The repetition prong requires a “reasonable expectation” or “demonstrated probability” that the same conduct will recur, as distinct from a “mere physical or theoretical possibility.” *N.J. Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 33 (3d Cir. 1985); *see also United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int’l Union AFL-CIO-CLC v. Gov’t of the Virgin Islands*, 842 F.3d 201, 209 (3d Cir.

2016) (noting “the mere power to reenact a challenged law is not enough. Rather, there must be evidence indicating that the challenged law likely will be reenacted.”). For the same reasons set forth above—namely, EO 128 was terminated in response to dramatic changes in public health data, and it is pure speculation to suggest the Order will be reinstated—Appellants cannot make this showing.

While it is unnecessary to address this separate consideration, EO 128 was also not so short in duration as to evade review. *See Seneca Res. Corp. v. Twp. of Highland, Pa.*, 863 F.3d 245, 255 (3d Cir. 2017) (case evades review if “the issue cannot be resolved in time to fully contest the challenged action”). The 14-month duration of EO 128 clearly *was* long enough for the district court to fully adjudicate the merits—with several months to spare. Appellants simply declined to seek any temporary and preliminary relief, and thus the Order is expiring before the termination of the case. *See Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co.*, 610 F.2d 1141, 1146 (3d Cir. 1979) (noting that failure to seek preliminary injunctive relief in the district court or expedited review of appeal undermines any claim that the order was in place too briefly to permit resolution). Further, in the unlikely event that the State ever reenacts this policy, there are ample procedural avenues for the district court to hear the matter on an expedited schedule and to enter an initial order while there is still a live controversy. *See Cnty. of Morris*

v. Nationalist Movement, 273 F.3d 527, 534 (3d Cir. 2001). In no respect is that too short a timeframe for ample litigation.

CONCLUSION

The appeal should be dismissed as moot. In addition, in order to conserve the resources of both this Court and the parties, Appellees request that this Court stay merits briefing in this appeal until 30 days after this motion is decided.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,098 words.
2. This document 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 this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point regular font.

Dated: June 16, 2021

/s/ Stuart M. Feinblatt

Stuart M. Feinblatt

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2021, I filed the foregoing Motion to Dismiss the Appeal as Moot and for Stay of Briefing Schedule with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Stuart M. Feinblatt

Stuart M. Feinblatt

Appendix

ASSEMBLY, No. 5820

STATE OF NEW JERSEY 219th LEGISLATURE

INTRODUCED JUNE 1, 2021

Sponsored by:

Assemblyman CRAIG J. COUGHLIN

District 19 (Middlesex)

Assemblyman NICHOLAS CHIARAVALLOTI

District 31 (Hudson)

Senator STEPHEN M. SWEENEY

District 3 (Cumberland, Gloucester and Salem)

SYNOPSIS

Provides for termination of public health emergency declared by Governor to address COVID-19 pandemic, except certain executive orders, directives, and powers will remain in effect temporarily.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 6/3/2021)

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1 **AN ACT** concerning emergency health powers and supplementing
2 Title 26 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. All executive orders issued by the Governor prior to the
8 effective date of this act, P.L. , c. (C.) (pending before the
9 Legislature at this bill), that relied on the existence of the public
10 health emergency declared by the Governor in Executive Order No.
11 103 of 2020, as extended, shall expire 30 days following the
12 effective date of this act, with the exception of the executive orders
13 listed in this section that shall remain in effect until January 1,
14 2022. The Governor shall have the ability to revoke or modify the
15 executive orders listed in this section prior to January 1, 2022.

16 (1) Executive Order No. 106 (2020)

17 (2) Executive Order No. 111 (2020)

18 (3) Executive Order No. 112 (2020)

19 (4) Executive Order No. 123 (2020)

20 (5) Executive Order No. 127 (2020)

21 (6) Executive Order No. 150 (2020)

22 (7) Executive Order No. 159 (2020)

23 (8) Executive Order No. 170 (2020)

24 (9) Executive Order No. 178 (2020)

25 (10) Executive Order No. 207 (2020)

26 (11) Executive Order No. 229 (2021)

27 (12) Executive Order No. 233 (2021)

28 (13) Executive Order No. 237 (2021)

29 (14) The most recent executive order containing general
30 coronavirus disease 2019 (COVID-19) mitigation measures
31 regarding face coverings, social distancing, and gatherings prior to
32 the effective date of this act, and this executive order shall not be
33 more restrictive than the recommendations provided in the federal
34 Centers for Disease Control and Prevention guidelines on social
35 distancing and face coverings in response to the coronavirus disease
36 2019 (COVID-19) pandemic, unless a substantial increase in
37 hospitalizations, substantially increased spot positivity, or rate of
38 transmission above 1 necessitates a modification that would be
39 more restrictive.

40

41 2. Notwithstanding the provision of section 1 of this act,
42 P.L. , c. (C.) (pending before the Legislature at this bill),
43 allowing Executive Order No. 112 of 2020 to remain in place until
44 January 1, 2022, any civil or criminal immunity related to the
45 COVID-19 response bestowed by either Executive Order No. 112 of
46 2020, P.L.2020, c.18, or Department of Health Executive Directive
47 No. 20-006 (Revised) as issued December 16, 2020 upon health
48 care professionals, health care facilities, health care systems,

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1 modular field treatment facilities, and any other sites designated by
2 the Commissioner of the Department of Health for temporary use in
3 connection with the State's COVID-19 response, including hotels
4 and student dormitories, shall last until September 1, 2021, and then
5 expire on that date. Conduct occurring prior to September 1, 2021
6 by health care professionals, health care facilities, or health care
7 systems shall retain the civil or criminal immunity provided by
8 Executive Order No. 112 of 2020, P.L.2020, c.18, or Department of
9 Health Executive Directive No. 20-006 (Revised) as issued
10 December 16, 2020. The civil immunity bestowed upon health care
11 professionals in connection with the State's COVID-19 response by
12 P.L.2020, c.18 shall continue beyond September 1, 2021 only for
13 individuals specifically engaged in vaccinations or testing related to
14 COVID-19.

15

16 3. a. Following the termination of the public health emergency
17 declared by the Governor in Executive Order No. 103 of 2020, as
18 extended, the force and effect of any administrative order, directive,
19 or waiver issued by the head of a State agency that relied on the
20 existence of the public health emergency declared by the Governor
21 in Executive Order No. 103 of 2020, as extended, shall expire on
22 January 11, 2022. Such administrative order, directive, or waiver
23 may be continued and may be modified by the head of a State
24 agency, unless such administrative order, directive, or waiver is
25 explicitly revoked, until January 11, 2022.

26 b. Notwithstanding subsection a. of this section, the Governor
27 shall notify the Legislature by January 1, 2022 if the Governor
28 determines that it is necessary or appropriate to continue for an
29 additional 90 days beyond January 11, 2022 any administrative
30 order, directive, or waiver issued by the head of a State agency that
31 relied on the existence of the public health emergency declared by
32 the Governor in Executive Order No. 103 of 2020, as extended.
33 The administrative orders, directives, or waivers shall be extended
34 for an additional 90 days if each House of the Legislature passes a
35 concurrent resolution to continue any such administrative order,
36 directive, or waiver. Any administrative order, directive, or waiver
37 as to which the Governor does not provide notification to the
38 Legislature or as to which both Houses of the Legislature do not
39 pass a concurrent resolution to continue shall expire on January 11,
40 2022.

41 c. Notwithstanding subsection a. of this section, the provisions
42 of any administrative order, directive, or waiver issued by the
43 Department of Health that relied on the existence of the public
44 health emergency declared by the Governor in Executive Order No.
45 103 of 2020, as extended, governing staffing ratios, overtime, shifts,
46 and vacation time shall remain in force and effect until September
47 1, 2021, at which time all such provisions of administrative orders,
48 directives, and waivers governing staffing ratios, overtime, shifts,

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1 and vacation time shall be superceded by relevant provisions of
2 laws, regulations, or collective bargaining agreements in effect on
3 that date.

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5 4. The termination of the public health emergency declared by
6 the Governor in Executive Order No. 103 of 2020, as extended,
7 shall in no way diminish, limit, or impair the powers of the
8 Governor or the head of a State agency pursuant to the provisions of
9 the civilian defense and disaster control act P.L.1942, c.251
10 (C.App.A:9-33 et seq.). The state of emergency declared in
11 Executive Order No. 103 of 2020, as extended, pursuant to
12 P.L.1942, c.251 (C.App.A:9-33 et seq.) shall remain in effect until
13 terminated by the Governor.

14 While the state of emergency declared in Executive Order No.
15 103 of 2020 shall remain in effect, the deadlines in paragraph (1) of
16 subsection i. of section 6 of P.L.2001, c.404 (C.47:1A-5) shall
17 apply to any request made under the open public records act after
18 the effective date of this act, with the exception of requests made
19 for records related to the COVID-19 response, which shall continue
20 to be governed by paragraph (2) of subsection i. of section 6 of
21 P.L.2001, c.404 (C.47:1A-5).

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23 5. Following the termination of the public health emergency
24 declared by the Governor in Executive Order No. 103 of 2020, as
25 extended, the Governor, Commissioner of Health, and the head of
26 any other State agency may issue orders, directives, and waivers
27 pursuant to P.L.2005, c.222 (C.26:13-1 et seq.) related to (1)
28 vaccination distribution, administration, and management, (2)
29 COVID-19 testing, (3) health resource and personnel allocation, (4)
30 data collection, retention, sharing, and access, (5) coordination of
31 local health departments, and (6) implementation of any applicable
32 recommendations of the Centers for Disease Control and Prevention
33 to prevent or limit the transmission of COVID-19, including in
34 specific settings.

35 The authority granted by this section shall last until January 11,
36 2022, unless the Governor notifies the Legislature by January 1,
37 2022 that the authority granted by this section is necessary to
38 combat the continuing threat posed by COVID-19 and should last
39 for another 90 days. In the event of such notification, the
40 Legislature shall have the authority to pass a concurrent resolution
41 to concur with the Governor's notice. If such a concurrent
42 resolution passes both Houses of the Legislature, then the authority
43 granted by this section shall continue for an additional 90 days. If
44 such a concurrent resolution does not pass both Houses of the
45 Legislature, then the authority granted by this section shall expire
46 on January 11, 2022.

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48 6. This act shall take effect immediately.

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STATEMENT

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Under this bill, all executive orders issued by the Governor prior to the effective date of this bill that relied on the existence of the public health emergency declared by the Governor in Executive Order No. 103 of 2020, as extended, will expire 30 days following the effective date of this bill, with the exception of the executive orders listed below that will remain in effect until January 1, 2022. The Governor will have the ability to revoke or modify the following executive orders prior to January 1, 2022.

- Executive Order No. 106 (2020)
- Executive Order No. 111 (2020)
- Executive Order No. 112 (2020)
- Executive Order No. 123 (2020)
- Executive Order No. 127 (2020)
- Executive Order No. 150 (2020)
- Executive Order No. 159 (2020)
- Executive Order No. 170 (2020)
- Executive Order No. 178 (2020)
- Executive Order No. 207 (2020)
- Executive Order No. 229 (2021)
- Executive Order No. 233 (2021)
- Executive Order No. 237 (2021)

The most recent executive order containing general COVID-19 mitigation measures regarding face coverings, social distancing, and gatherings prior to the effective date of this bill and the executive order cannot be more restrictive than the recommendations provided in the federal Centers for Disease Control and Prevention guidelines on social distancing and face coverings in response to the COVID-19 pandemic, unless a substantial increase in hospitalizations, substantially increased spot positivity, or rate of transmission above 1 necessitates a modification that would be more restrictive.

Notwithstanding the provision allowing Executive Order No. 112 of 2020 to remain in place until January 1, 2022, any civil or criminal immunity related to the COVID-19 response bestowed by either Executive Order No. 112 of 2020, P.L.2020, c.18, or Department of Health Executive Directive No. 20-006 of 2020 upon health care professionals, health care facilities, health care systems, modular field treatment facilities, and any other sites designated by the Commissioner of the Department of Health for temporary use in connection with the State's COVID-19 response, including hotels and student dormitories, will last until September 1, 2021, and then expire on that date. Conduct occurring prior to September 1, 2021 by health care professional, health care facilities, or health care systems will retain the civil or criminal immunity provided by Executive Order No. 112 of 2020, P.L.2020, c.18, or Department of Health Executive Directive No. 20-006 of 2020. Under the bill, the civil immunity bestowed upon health care professionals in

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1 connection with the State's COVID-19 response by P.L.2020, c.18
2 would continue beyond September 1, 2021 only for individuals
3 specifically engaged in vaccinations or testing related to COVID-
4 19.

5 Following the termination of the public health emergency
6 declared by the Governor in Executive Order No. 103 of 2020, as
7 extended, the force and effect of any administrative order, directive,
8 or waiver issued by the head of a State agency that relied on the
9 existence of public health emergency declared by the Governor in
10 Executive Order No. 103 of 2020, as extended, would expire on
11 January 11, 2022. Under the bill, such administrative orders,
12 directive, or waiver may be continued and may be modified by the
13 head of a State agency, unless such administrative order, directive,
14 or waiver is explicitly revoked, until January 11, 2022.

15 The bill provides that the Governor must notify the Legislature
16 by January 1, 2022 if the Governor determines that it is necessary
17 or appropriate to continue for an additional 90 days beyond January
18 11, 2022 any administrative order, directive, or waiver issued by the
19 head of a State agency that relied on the existence of the public
20 health emergency declared by the Governor in Executive Order No.
21 103 of 2020, as extended. The administrative order, directive, or
22 waiver would be extended for an additional 90 days if each House
23 of the Legislature passes a concurrent resolution to continue any
24 such administrative orders, directives, or waivers. Any
25 administrative orders, directives, or waivers as to which the
26 Governor does not provide notification to the Legislature or as to
27 which both Houses of the Legislature do not pass a concurrent
28 resolution to continue would expire on January 11, 2022.

29 Under the bill, the provision of any administrative order,
30 directive, or waiver issued by the Department of Health that relied
31 on the existence of the public health emergency declared by the
32 Governor in Executive Order No. 103 of 2020, as extended,
33 governing staffing ratios, overtime, shifts, and vacation time shall
34 remain in force and effect until September 1, 2021, at which time
35 all such provisions of administrative orders, directives, and waivers
36 governing staffing ratios, overtime, shifts, and vacation time will be
37 superceded by relevant provisions of laws, regulations, or collective
38 bargaining agreements in effect on that date.

39 The bill specifies that the termination of the public health
40 emergency declared by the Governor in Executive Order No. 103 of
41 2020, as extended, will in no way diminish, limit, or impair the
42 powers of the Governor or the head of a State agency pursuant to
43 the provisions of the civilian defense and disaster control act
44 P.L.1942, c.251 (C.App.A:9-33 et seq.). The state of emergency
45 declared in Executive Order No. 103 of 2020 pursuant to that law
46 will remain in effect until terminated by the Governor.

47 However, while the state of emergency declared in Executive
48 Order No. 103 of 2020 remains in effect, the deadlines in paragraph

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1 (1) of subsection i. of section 6 of P.L.2001, c.404 (C.47:1A-5) will
2 apply to any requests made under the open public records act after
3 the effective date of this bill, with the exception of requests made
4 for records related to the COVID-19 response, which will still be
5 governed by paragraph (2) of subsection i. of section 6 of P.L.2001,
6 c.404 (C.47:1A-5).

7 Following the termination of the public health emergency
8 declared by the Governor in Executive Order No. 103 of 2020, as
9 extended, the Governor, Commissioner of Health, and the head of
10 any other State agency may issue orders, directives, and waivers
11 pursuant to the emergency health powers law, P.L.2005, c.222
12 (C.26:13-1 et seq.), related to (1) vaccination distribution,
13 administration, and management, (2) COVID-19 testing, (3) health
14 resource and personnel allocation, (4) data collection, retention,
15 sharing, and access, (5) coordination of local health departments,
16 and (6) implementation of any applicable recommendations of the
17 Centers for Disease Control and Prevention to prevent or limit the
18 transmission of COVID-19, including in specific settings. The
19 authority granted above will last until January 11, 2022, unless the
20 Governor notifies the Legislature by January 1, 2022 that the
21 authority granted is necessary to combat the continuing threat posed
22 by COVID-19 and should last for another 90 days. In the event of
23 such notification, the Legislature will have the authority to pass a
24 concurrent resolution to concur with the Governor. If such a
25 concurrent resolution passes both Houses of the Legislature, then
26 the authority granted will continue for an additional 90 days. If
27 such a concurrent resolution does not pass both Houses of the
28 Legislature, then the authority granted would expire on January 11,
29 2022.

EXECUTIVE ORDER NO. 244

WHEREAS, on March 9, 2020, through Executive Order No. 103, the facts and circumstances of which are adopted by reference herein, I declared both a Public Health Emergency and a State of Emergency throughout the State due to the public health hazard created by Coronavirus disease 2019 ("COVID-19"); and

WHEREAS, Executive Order No. 103 (2020) described both the symptoms and dangers presented by COVID-19 and the likelihood of community spread across the State, and it recognized the need to use all available statewide authorities to prepare for and respond to COVID-19 cases in New Jersey, to implement appropriate measures to mitigate the spread of COVID-19, and to prepare in the event of an increasing number of individuals requiring medical care or hospitalization; and

WHEREAS, as COVID-19 continued to spread across New Jersey and an increasing number of individuals required medical care or hospitalization, I issued a series of Executive Orders pursuant to my authority under the New Jersey Civilian Defense and Disaster Control Act and the Emergency Health Powers Act ("EHPA"), to protect the public health, safety, and welfare against the emergency created by COVID-19, including Executive Order Nos. 104-133, Nos. 135-138, Nos. 140-166, Nos. 168-173, No. 175, Nos. 177-181, No. 183, Nos. 186-187, Nos. 189-198, No. 200, Nos. 203-204, No. 207, and Nos. 210-211 (2020) and Nos. 214-216, Nos. 219-220, Nos. 222-223, No. 225, Nos. 228-235, and Nos. 237-243 (2021), the facts and circumstances of which are all adopted by reference herein; and

WHEREAS, N.J.S.A. 26:13-3(b) establishes that a public health emergency declared by the Governor shall automatically terminate after 30 days, unless renewed for an additional 30 days through a declaration of the Governor; and

WHEREAS, on April 7, 2020, I issued Executive Order No. 119, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on May 6, 2020, I issued Executive Order No. 138, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on June 4, 2020, I issued Executive Order No. 151, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on July 2, 2020, I issued Executive Order No. 162, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on August 1, 2020, I issued Executive Order No. 171, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on August 27, 2020, I issued Executive Order No. 180, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on September 25, 2020, I issued Executive Order No. 186, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on October 24, 2020, I issued Executive Order No. 191, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on November 22, 2020, I issued Executive Order No. 200, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on December 21, 2020, I issued Executive Order No. 210, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on January 19, 2021, I issued Executive Order No. 215, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on February 17, 2021, I issued Executive Order No. 222, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on March 17, 2021, I issued Executive Order No. 231, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on April 15, 2021, I issued Executive Order No. 235, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, on May 14, 2021, I issued Executive Order No. 240, which declared that the Public Health Emergency declared in Executive Order No. 103 (2020) continues to exist; and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, and 210 (2020), and Nos. 215, 222, 231, 235, and 240 (2021), I declared that all Executive Orders and Administrative Orders adopted in whole or in part in response to the COVID-19 Public Health Emergency remained in full force and effect; and

WHEREAS, due to the significant emergency measures the State has taken in response to COVID-19, in the summer and fall of 2020 there was a decrease in the rate of reported new cases of COVID-19 in New Jersey, in the total number of individuals being admitted to hospitals for COVID-19, and in the rate of reproduction for COVID-19 infections in New Jersey; and

WHEREAS, given the progress the State had made based on these emergency measures and after consultation with officials from the Department of Health ("DOH"), I announced a multi-stage New Jersey's Road Back Plan ("Road Back Plan") for the methodical

and strategic reopening of businesses and activities based on scientific data and metrics concerning the level of disease transmission risk and essential classification; and

WHEREAS, in line with the Road Back Plan, the State had been able to relax a number of restrictions, each time tailored to the relative risk the activity presents, and additional restrictions on outdoor and indoor businesses were lifted over the past several months; and

WHEREAS, the fact that the spread of COVID-19 had been limited by the State's emergency measures did not previously suggest that the Public Health Emergency had dissipated, because absent certain mitigation measures, public health experts anticipated that the spread of COVID-19 would again significantly increase; and

WHEREAS, in the past year, we have gained critical knowledge regarding COVID-19, including a better understanding of the risks associated with certain activities, the activities that are most conducive to spread of the virus, and the safeguards that can be implemented to mitigate those risks; and

WHEREAS, this information, together with expanded access to testing, personal protective equipment, and other materials necessary to protect individuals from spread of the virus, as well as the ongoing COVID-19 Vaccination Plan ("Plan") discussed below, allowed the State to lift most restrictions, with exceptions for certain settings of higher concern; and

WHEREAS, over the last two months, the number of hospitalized patients has gone from over 2,300 to under 500, the number of patients in intensive care has gone from over 450 to under 100, and the number of ventilators in use has gone from over 230 to under 65; and

WHEREAS, over the two months, the number of individuals testing positive for COVID-19 has gone from approximately 3,500 per day to several hundred per day, and the weekday spot positivity of COVID-19 tests has gone from 7-8 percent to under 2 percent; and

WHEREAS, the rate of transmission in the State has remained significantly below 1 for most of the last two months; and

WHEREAS, the COVID-19 Activity Level Report ("CALI Report") issued by the Communicable Disease Service in the New Jersey DOH calculates COVID-19 activity levels throughout the State using the case rate, percent of COVID-like illness, and percent positivity; and

WHEREAS, the CALI Report for the week ending May 29, 2021, presented an activity level of moderate throughout most of the State, with the southeast region showing low activity level, down from high as recently as mid-April; and

WHEREAS, as part of the State's response to COVID-19, DOH has created a comprehensive Plan to manage the receipt, administration, and tracking of the vaccines developed to inoculate the State's residents and workforce against COVID-19; and

WHEREAS, as part of that Plan, New Jersey set an initial goal of fully vaccinating 70 percent of the eligible adult population in New Jersey by June 30, equating to approximately 4.7 million individuals; and

WHEREAS, the State has thus far administered approximately 9 million doses of COVID-19 vaccines, with over 4.9 million New Jerseyans having received at least one dose of a vaccine and over 4.2 million having been fully vaccinated; and

WHEREAS, vaccine supply was previously constrained, but is now sufficient to permit every eligible individual within the State reasonable access; and

WHEREAS, the Centers for Disease Control and Prevention ("CDC") recently issued guidance regarding social distancing and masking measures that reflects the low probability that fully vaccinated individuals will transmit the virus and emphasizes the significant protection against severe illness that the vaccine provides individuals; and

WHEREAS, given the decisive decreases in key statistics, such as the number of hospitalized patients in the State, the number of daily positive COVID-19 cases, spot positivity, and the rate of transmission, and the continuation of the State's Plan, the State has now lifted the vast majority of restrictions that were designed to reduce transmission and spread of the virus; and

WHEREAS, despite the extensive progress made in combatting COVID-19, there remains an ongoing threat necessitating that certain actions taken pursuant to the powers granted under the EHPA, including vaccine management, administration and tracking, remain in place; and

WHEREAS, ongoing oversight of the State's vaccination program is particularly important as the rollout continues, as the State prepares for additional groups of New Jerseyans to become eligible for vaccination, and as the State prepares for the potential necessity of booster doses in the future; and

WHEREAS, the CDC continues to highlight certain settings, including schools and health care facilities, as places where mitigation protocols are necessary; and

WHEREAS, the CDC also continues to release updated recommendations regarding mitigation protocols that may require the State to modify current policies and protocols; and

WHEREAS, in light of that ongoing need, I have just signed Assembly Bill No. 5820, which ensures that essential authorities, including the power of State agencies to modify existing emergency Orders and issue new Orders for certain purposes, can continue after the termination of the Public Health Emergency declared in Executive Order No. 103 (2020) to avoid disruption in New Jersey's emergency response; and

WHEREAS, neither the legislation nor this Order diminish the existing authorities of State agencies, separate and apart from any emergency powers; and

WHEREAS, the legislation also extends the effective period for specified Executive Orders issued pursuant to Executive Order No. 103 (2020) authorities, including but not limited to Orders regarding statutory and regulatory deadline extensions that are critical to wind down in a measured and thoughtful manner; and

WHEREAS, in light of this legislation becoming law, the Public Health Emergency declared in Executive Order No. 103 (2020) can be safely and responsibly lifted; and

WHEREAS, while the State has effectively curtailed the immediate public health threat of the virus, the economic and social impacts of the virus will require ongoing management and oversight; and

WHEREAS, the State of Emergency declared in Executive Order No. 103 (2020) pursuant to N.J.S.A. App.A.:9-33 et seq. must remain in effect to allow for the continued management of New Jersey's recovery from and response to the COVID-19 pandemic;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby DECLARE and PROCLAIM:

1. The Public Health Emergency declared in Executive Order No. 103 (2020) pursuant to the EHPA, N.J.S.A. 26:13-1, et seq., is hereby terminated.

2. The State of Emergency declared in Executive Order No. 103 (2020) pursuant to N.J.S.A. App.A.:9-33 et seq. continues to exist in the State of New Jersey.

3. This Order shall take effect immediately.

GIVEN, under my hand and seal this
4th day of June,
Two Thousand and Twenty-one,
and of the Independence of
the United States, the Two
Hundred and Forty-Fifth.

[seal]

/s/ Philip D. Murphy

Governor

Attest:

/s/ Parimal Garg

Chief Counsel to the Governor