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APPENDIX A

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT.

ALICIA LOWE; JENNIFER BARBALIAS; GARTH BERENYI; DEBRA CHALMERS; NICOLE GIROUX; ADAM JONES; NATALIE SALAVARRIA,

Plaintiffs, Appellants,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine; JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services; NANCY BEARDSLEY* in her official capacity as Acting Director of the Maine Center for Disease Control and Prevention; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE LLC; MAINEGENERAL HEALTH; NORTHERN LIGHT EASTERN MAINE MEDICAL CENTER,

Defendants, Appellees,

MTM ACQUISITION, INC., d/b/a Portland Press Herald/Maine Sunday Telegram, Kennebec Journal, and Morning Sentinel; SJ ACQUISITION, Inc., d/b/a Sun Journal,

Intervenors.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Nancy Beardsley has been substituted for Nirav D. Shah as defendant-appellee.

No. 22-1710

May 25, 2023

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Jon D. Levy, U.S. District Judge]

Before

Montecalvo, Selya, and Lynch
Circuit Judges

Mathew D. Staver, with whom Horatio G. Mihet, Roger K. Gannam, Daniel J. Schmid, and Liberty Counsel were on brief, for appellants.

Kimberly L. Patwardhan, Assistant Attorney General, with whom Aaron M. Frey, Attorney General, and Thomas A. Knowlton, Deputy Attorney General, Chief, Litigation Division, were on brief, for appellees Janet T. Mills, Jeanne M. Lambrew, and Nancy Beardsley.

James R. Erwin, Katharine I. Rand, Katherine L. Porter, and Pierce Atwood LLP on brief for appellees MaineHealth, Genesis HealthCare of Maine, LLC, Genesis HealthCare LLC, and MaineGeneral Health.

Ryan P. Dumais and Eaton Peabody on brief for appellee Northern Light Eastern Maine Medical Center.

LYNCH, Circuit Judge. Since 2021, Maine has required certain healthcare facilities to ensure that their non-remote workers are vaccinated against COVID-19. See 10-144-264 Me. Code R. § 2(A)(7); see also Me. Rev. Stat. Ann. tit. 22, § 802. We refer to this requirement as the "Mandate." The Mandate permits workers to seek exemptions for medical reasons, but not for religious ones. See Me. Rev. Stat. Ann. tit. 22, § 802(4-B); 10-144-264 Me. Code R. § 3. Facilities that do not comply with the Mandate are subject to penalties, including fines and license suspension. See Me. Rev. Stat. Ann. tit. 22, § 804; 10-144-264 Me. Code R. § 7(G).

The plaintiffs in this case are seven Maine healthcare workers who allege that their sincerely held religious beliefs prevent them from receiving any of the available COVID-19 vaccines. After Maine introduced the Mandate, the plaintiffs requested that their employers -- healthcare providers Genesis HealthCare of Maine, LLC; Genesis HealthCare LLC; MaineGeneral Health; MaineHealth; and Northern Light Eastern Maine Medical Center (collectively, the "Providers") -- exempt them from the vaccination requirement based on these religious beliefs. The Providers denied the requests, explaining that religious exemptions were not available under state law. The plaintiffs' employment was later terminated after they refused to accept COVID-19 vaccination.

The plaintiffs filed this suit against three Maine government officials in their official capacities (we refer to them collectively as the "State") and the Providers. The claims against the State assert, among

other things, that the Mandate, by allowing medical but not religious exemptions, violates the Free Exercise and Equal Protection Clauses of the U.S. Constitution. Against the Providers, the plaintiffs brought, inter alia, claims under Title VII of the Civil Rights Act of 1964, contending that the Providers' refusal to accommodate the plaintiffs' religious beliefs by exempting them from the vaccination requirement amounted to unlawful employment discrimination on the basis of religion. The district court dismissed the complaint. See Lowe v. Mills, No. 21-cv-00242, 2022 WL 3542187, at *1 (D. Me. Aug. 18, 2022).

We agree with the district court that the complaint's factual allegations establish that violating the Mandate in order to provide the plaintiffs' requested accommodation would have caused undue hardship for the Providers, and so affirm the dismissal of the Title VII claims.[1] But we conclude that the plaintiffs' complaint states claims for relief under the Free Exercise and Equal Protection Clauses, as it is plausible, based on the plaintiffs' allegations and in the absence of further factual development, that the Mandate treats comparable secular and religious activity dissimilarly without adequate justification. We affirm in part and reverse in part.

I.

A.

Maine law has required that certain licensed healthcare facilities ensure that their employees are

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[1] We also affirm the dismissal of several other claims that the plaintiffs do not discuss on appeal.

vaccinated against various diseases since 1989.[2] See 1989. [2] Me. Laws ch. 487, § 11 (mandating that employers require proof of either immunization against or serologic immunity to measles and rubella). Since 2001, the Maine Department of Health and Human Services (the "Department") has had regulatory authority to designate by rule diseases against which healthcare employers must require proof of immunization. See 2001 Me. Laws ch. 185, § 2. Prior to the COVID-19 pandemic, the Department required vaccination for measles, mumps, rubella, chickenpox, hepatitis B, and influenza. 10-144-264 Me. Code R. §§ 1(F), 2(A) (2021) (amended Aug. 2021). The plaintiffs do not challenge the requirement of vaccination against these diseases.

Until 2019, state law allowed exemptions from healthcare-worker vaccination requirements for most diseases under three circumstances: when an employee submitted (1) "a physician's written statement that immunization against one or more diseases may be medically inadvisable," or a written statement that vaccination was contrary to a "sincere [(2)] religious or [(3)] philosophical belief."[3] Me. Rev.

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[2] Current law specifies that the vaccination requirements apply to "licensed nursing facilit[ies], residential care facilit[ies], intermediate care facilit[ies] for persons with intellectual disabilities, multi-level health care facilit[ies], hospital[s,] [and] home health agenc[ies]." Me. Rev. Stat. Ann.vtit. 22, § 802(4-A)(A); accord 10-144-264 Me. Code R. § 1(E).

[3] Maine law also allowed -- and still allows – an exemption for an individual who "declines [a] hepatitis B vaccine, as provided for by the relevant [federal] law." Me. Rev. Stat. Ann. tit. 22, § 802(4-B)(C). No party argues that this exemption is relevant to this case, so we do not discuss it further.

Stat. Ann. tit. 22, § 802(4-B)(A)-(B) (2019) (amended 2019). In 2019, Maine's legislature modified these exemptions. See 2019 Me. Laws ch. 154, §§ 8-9. First, it amended the medical exemption to apply where the employee "provides a written statement from a licensed physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable." Id. § 8. The change took effect September 1, 2021. Id. § 12. Second, the legislature eliminated the religious and philosophical exemptions, with the change taking effect April 19, 2020. See id. § 9. These modifications were the subject of a statewide veto referendum in March 2020; over 72% of voters voted to retain the changes.[4] In April 2021, the Department amended its healthcare-worker vaccination rules, which had previously listed the available exemptions, to cross-reference the exemptions allowed by statute. See 10-144-264 Me. Code R. § 3 (2021) (as amended Apr. 2021; amended Nov. 2021).

In June 2021, the legislature amended the statute governing enforcement of the healthcare-worker vaccination requirements to augment the potential penalties for violations. See 2021 Me. Laws ch. 349, §§ 8-9 (codified at Me. Rev. Stat. Ann. tit. 22, § 804(2)-(3)). The amended statute provides:

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[4] See Tabulations for Elections Held in 2020, Dep't of the Sec'y of State, https://www.maine.gov/sos/cec/elec/results/results20.html (last visited May 24, 2023).

> Any person who neglects, violates or refuses to obey the [vaccination] rules or who willfully obstructs or hinders the execution of the rules may be ordered by the [D]epartment ... to cease and desist. ... In the case of any person who refuses to obey a cease and desist order issued to enforce the [vaccination] rules ..., the [D]epartment may impose a fine, which may not be less than $250 or greater than $1,000 for each violation. Each day that the violation remains uncorrected may be counted as a separate offense. ...
>
> A licensing agency under the [D]epartment may immediately suspend a license ... for a violation under this section.

Me. Rev. Stat. Ann. tit. 22, § 804(2)-(3).

In August 2021, the Department conducted an emergency rulemaking that added COVID-19 to the list of diseases against which non-remote healthcare workers at licensed facilities, including the Providers, must be vaccinated. See 10-144-264 Me. Code R. §§ 1(F)(7), 2(A)(7) (2021) (as amended Aug. 2021; amended Nov. 2021). The Department made this change permanent in November 2021.[5] See id. (as

[5] The permanent rule differs in some respects from the emergency rule; for instance, it does not cover dental or

amended Nov. 2021). The Mandate is the product of this rule and the related state statutes.

B.

Because this appeal follows a dismissal for failure to state a claim, we draw the facts from the plaintiffs' complaint. See, e.g., Douglas v. Hirshon, 63 F.4th 49, 52 (1st Cir. 2023).

The plaintiffs in this case are seven individuals formerly employed by the Providers in positions covered by the Mandate.[6] The plaintiffs allege that they object to receiving any of the available COVID-19 vaccines on religious grounds "because of the connection between the ... vaccines and the cell lines of aborted fetuses ... in the vaccines' origination, production, development, testing, or other inputs," which conflicts with the plaintiffs' belief "that all life is sacred, from the moment of conception to natural death, and that abortion is a grave sin against God and the murder of an innocent life."

Each plaintiff requested a religious "exemption and accommodation" from his or her employer excusing him or her from vaccination. The plaintiffs "offered, and [were] ready, willing, and able to comply

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emergency medical services providers, which the emergency rule had reached. Compare 10-144-264 Me. Code R. § 1, with id. (2021) (as amended Aug. 2021; amended Nov. 2021). No party argues that these differences are relevant to this appeal.

[6] Three of the plaintiffs formerly worked for Northern Light Eastern Maine Medical Center, two worked for Genesis HealthCare, and one worked for each of MaineGeneral Health and MaineHealth.

with ... [other] health and safety requirements to facilitate their religious exemption," such as by "wear[ing] facial coverings, submit[ting] to reasonable testing and reporting requirements, [and] monitor[ing] symptoms."

The Providers denied each request, explaining in their responses that the Mandate did not permit religious exemptions. After the plaintiffs refused to accept vaccination, they were terminated from their employment.

C.

The original complaint in this action was filed on August 25, 2021, in the U.S. District Court for the District of Maine against Governor Janet Mills, Department Commissioner Jeanne Lambrew, and then-Maine Center for Disease Control and Prevention ("Maine CDC") Director Nirav Shah[7] (the officials we refer to collectively as the "State") and the Providers.[8] The complaint, filed using pseudonyms for the plaintiffs, listed as plaintiffs six "Jane Does" and three "John Does" who allegedly worked in healthcare settings and objected to the Mandate on

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[7] Shah left office while this appeal was pending; Nancy Beardsley has been substituted as a defendant-appellee. See Fed. R. App. P. 43(c)(2).

[8] The complaint originally named as a defendant the Northern Light Health Foundation. Northern Light Eastern Maine Medical Center was substituted as a defendant in January 2022, prior to the filing of the operative amended complaint.

religious grounds.[9] Seven of the plaintiffs alleged that they were employees or former employees of the Providers, one alleged that he was an employer who objected to requiring his employees to comply with the Mandate, and one alleged that she was employed by this employer plaintiff.

The complaint included five counts. Against the State, it challenged the Mandate under the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. Against the Providers, it raised Title VII claims for failure to accommodate the plaintiffs' religious beliefs. And it alleged that all defendants had violated the Supremacy Clause by purportedly claiming that the Mandate superseded Title VII's requirements, and had conspired to violate the plaintiffs' civil rights in violation of 42 U.S.C. § 1985. The plaintiffs sought declaratory and injunctive relief, as well as damages.

The same day the complaint was filed, the plaintiffs moved for a temporary restraining order and preliminary injunction barring the State from enforcing the Mandate against the employer plaintiff and requiring the Providers to grant the employee plaintiffs religious exemptions from COVID-19 vaccination. The district court denied the motion. See Does 1-6 v. Mills, 566 F. Supp. 3d 34, 39 (D. Me. 2021). This court affirmed, concluding that the plaintiffs had not shown a likelihood of success on the merits, that

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[9] The complaint also listed as plaintiffs two thousand "Jack Does" and "Joan Does" who allegedly had "been told not to" seek religious exemptions from the Mandate or had sought such exemptions and been denied them.

they would likely suffer irreparable harm absent preliminary relief, or that the balance of the equities or the public interest favored an injunction.[10] See Does 1-6 v. Mills, 16 F.4th 20, 29-37 (1st Cir. 2021), cert. denied sub nom. Does 1-3 v. Mills, —— U.S. ——–, 142 S. Ct. 1112, 212 L.Ed.2d 9 (2022). The Supreme Court denied the plaintiffs' application for injunctive relief, see Does 1-3 v. Mills, —— U.S. ——, 142 S. Ct. 17, 17, 211 L.Ed.2d 243 (2021) (mem.), and their petition for certiorari, see Does 1-3, 142 S. Ct. at 1112.

After remand to the district court, two Maine newspapers intervened in the case to challenge the plaintiffs' use of pseudonyms. The district court granted the newspapers' motion to unseal the plaintiffs' identities and ordered the plaintiffs to file an amended complaint identifying themselves by name, see Does 1-6 v. Mills, No. 21-cv-00242, 2022 WL 1747848, at *7 (D. Me. May 31, 2022), and this court

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[10] This court's decision on the plaintiffs' preliminary injunction appeal does not control the outcome in this appeal because the different procedural postures implicate different burdens, standards of review, and factual records. That decision evaluated, based on evidence submitted by all parties, whether the district court had abused its discretion in denying the preliminary injunction motion, and whether the plaintiffs had met their burden of showing, among other things, both a likelihood of success on the merits and irreparable harm. See Does 1-6 v. Mills, 16 F.4th 20, 29-30 (1st Cir. 2021), cert. denied sub nom. Does 1-3 v. Mills, 142 S. Ct. 1112 (2022). In contrast, we review a dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo based on a record limited to the complaint's well-pleaded allegations, which need only make out plausible claims with all reasonable inferences drawn in the plaintiffs' favor. See, e.g., Frese v. Formella, 53 F.4th 1, 5-6 (1st Cir. 2022). The defendants properly do not contend that the result in Mills is binding in this appeal.

denied a stay of the order pending appeal, see Does 1-3 v. Mills, 39 F.4th 20, 22 (1st Cir. 2022). Following this court's decision, the plaintiffs voluntarily dismissed their appeal.

The plaintiffs filed the operative first amended complaint (the "complaint") in July 2022. This amended pleading removes some of the original plaintiffs (leaving only the seven plaintiffs who allege they were employed by the Providers), identifies the remaining plaintiffs by name, and updates some factual allegations to reflect developments since the original complaint's filing (such as the plaintiffs' termination from their employment with the Providers), but includes the same claims as the original complaint.

The defendants moved to dismiss. The State argued that some of the claims must be dismissed for lack of jurisdiction under Federal Rule of Civil Procedure ("Rule") 12(b)(1), asserting that the plaintiffs lack standing to sue Governor Mills, who does not play a role in enforcing the Mandate, and that the Eleventh Amendment bars the claims for money damages against the State. The State did not make similar jurisdictional arguments with respect to the non-damages claims for relief against the other Maine officials. The defendants also argued that the plaintiffs' allegations with respect to the other counts fail to state claims under Rule 12(b)(6). The plaintiffs opposed the motions, though they did not respond to the State's arguments limited to Rule 12(b)(1).

The district court granted the defendants' motions and dismissed the complaint. See Lowe, 2022 WL 3542187, at *1. It first dismissed the claims against Governor Mills and the damages claims against the State because the plaintiffs had failed to respond to the State's Rule 12(b)(1) arguments. See id. at *6. Turning to the Rule 12(b)(6) motions, the court concluded that the Mandate is a religiously neutral law of general applicability that is rationally related to Maine's legitimate public health interests, and so does not violate the Free Exercise or Equal Protection Clauses. See id. at *10-15. And it reasoned that the plaintiffs' factual allegations establish that the Providers could not have offered the plaintiffs their requested accommodation without violating state law and risking onerous penalties, creating an undue hardship that precludes liability under Title VII. See id. at *6-10. Finally, it concluded that the Supremacy Clause does not provide a distinct cause of action and that the complaint's allegations with respect to the conspiracy count were too vague and conclusory to support a plausible claim, and so dismissed the Supremacy Clause and conspiracy claims. See id. at *15.

This timely appeal followed.

II.

We review a district court's dismissal of a complaint under Rule 12(b)(6) de novo. E.g., Douglas, 63 F.4th at 54-55. To avoid dismissal, "[t]he complaint 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' " Id. at 55 (internal quotation marks omitted)

(quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). "We take the complaint's well-pleaded facts as true, and we draw all reasonable inferences in [the plaintiffs'] favor." Frese v. Formella, 53 F.4th 1, 5 (1st Cir. 2022) (quoting Barchock v. CVS Health Corp., 886 F.3d 43, 48 (1st Cir. 2018)). At this stage, we "ordinarily may only consider facts alleged in the complaint and exhibits attached thereto," Freeman v. Town of Hudson, 714 F.3d 29, 35 (1st Cir. 2013), although we may also consider materials "fairly incorporated" in the complaint or subject to judicial notice, Rodi v. S. New Eng. Sch. of L., 389 F.3d 5, 12 (1st Cir. 2004).

The plaintiffs' briefing on appeal does not address the dismissal of the claims against Governor Mills, the damages claims against the State, or the Supremacy Clause and § 1985 conspiracy claims. The plaintiffs have thus waived any arguments on those points, and we affirm those aspects of the district court's decision. See, e.g., Douglas, 63 F.4th at 54 n.6. That leaves the free exercise and equal protection claims against the State and the Title VII claims against the Providers at issue.

A.

1.

We begin with the free exercise claim. "The First Amendment's Free Exercise Clause, as incorporated against the states by the Fourteenth Amendment, protects religious liberty against government interference." Mills, 16 F.4th at 29. A key issue with respect to this claim is the appropriate standard of scrutiny. A law that incidentally burdens

religion is subject only to rational basis review if it is religiously neutral and generally applicable. E.g., id. A law that is not neutral or generally applicable is subject to strict scrutiny. E.g., id. A law is not generally applicable if it "treat[s] any comparable secular activity more favorably than religious exercise." Tandon v. Newsom, —— U.S. ——, 141 S. Ct. 1294, 1296, 209 L.Ed.2d 355 (2021) (per curiam); see also Fulton v. City of Philadelphia, —— U.S. —— , 141 S. Ct. 1868, 1877, 210 L.Ed.2d 137 (2021) ("A law ... lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."). Applying the Rule 12(b)(6) standard and drawing all reasonable inferences in the plaintiffs' favor, we conclude that it is plausible, in the absence of any factual development, that the Mandate falls in this category, based on the complaint's allegations that the Mandate allows some number of unvaccinated individuals to continue working in healthcare facilities based on medical exemptions while refusing to allow individuals to continue working while unvaccinated for religious reasons.

The Supreme Court has explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue," and that "[c]omparability is concerned with the risks various activities pose." Tandon, 141 S. Ct. at 1296; see also We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 285-88 (2d Cir. 2021) (conducting comparability analysis in context of New York vaccine mandate for healthcare workers).

Tandon, for example, held that a group of plaintiffs was likely to succeed in a free exercise challenge to a California law that, in response to the COVID-19 pandemic, sought to reduce the virus's spread by limiting religious gatherings in homes to no more than three households, but "permitt[ed] hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time." 141 S. Ct. at 1297; see id. at 1298 (Kagan, J., dissenting). The Court determined that these secular activities were comparable to the prohibited religious gatherings because the record did not show that they "pose[d] a lesser risk of transmission than [the plaintiffs'] proposed religious exercise at home." Id. at 1297 (majority opinion).

As its principal interest in permitting medical but not religious exemptions to the Mandate, the State cites a goal of "revers[ing] the trajectory of falling vaccination rates in order to prevent communicable, preventable diseases from spreading in ... healthcare facilities ... so that all persons medically unable to be vaccinated [can] be protected." The State also cites a more general interest in "protecting the lives and health of Maine people." (Quoting Lowe, 2022 WL 3542187, at *14.) Drawing all reasonable inferences in the plaintiffs' favor, it is plausible based on the plaintiffs' allegations that the medical exemption undermines these interests in a similar way to a hypothetical religious exemption. The availability of a medical exemption, like a religious exemption, could reduce vaccination rates among healthcare workers and increase the risk of

disease spread in healthcare facilities, compared to a counterfactual in which the Mandate contains no exceptions, all workers must be vaccinated, and neither religious objectors nor the medically ineligible can continue working in healthcare facilities. Cf. Tandon, 141 S. Ct. at 1297 (comparing risk of disease transmission).

The State argues that comparing the risks created by the two exemptions in this way is inappropriate because "Maine's asserted interest in providing only a medical exemption ... is not based on comparative assessments of risk," but instead on keeping vaccination rates high to protect Mainers, and especially Mainers medically unable to be vaccinated. But the State has not asserted an independent interest in maximizing vaccination rates apart from the public health benefits of doing so, and the Supreme Court has instructed us to assess comparability in the public health context based on "the risks various activities pose." Id. at 1296. The State's argument that it did not independently conduct this type of analysis is, if anything, a reason to be skeptical that dismissal is appropriate absent further factual development.

The State also references in passing an interest in "safeguarding Maine's healthcare capacity." (Quoting Lowe, 2022 WL 3542187, at *14.) While excusing some workers from vaccination for medical reasons may protect Maine's "healthcare capacity" by making more workers available, authorizing a religious exemption plausibly could have a similar effect. We thus cannot conclude, at least without more

facts, that this interest renders the two exemptions incomparable.

The State asserts that the medical exemption is "fundamentally different ... [from] a religious exemption because a medical exemption aligns with the State's interest in protecting public health and, more specifically, medically vulnerable individuals from illness and infectious diseases, while non-medical exemptions ... do not." (Quoting Lowe, 2022 WL 3542187, at *12.) But, drawing all reasonable inferences in the plaintiffs' favor, it is plausible that a version of the Mandate that did not include a medical exemption could do an even better job of serving the State's asserted public health goals, and that the inclusion of the medical exemption undermines the State's interests in the same way that a religious exemption would by introducing unvaccinated individuals into healthcare facilities.

Of course, it is entirely possible that additional facts might show that the two types of exemption are not comparable. For example (and not by way of limitation), it may be that medical exemptions are likely to be rarer, more time limited, or more geographically diffuse than religious exemptions, such that the two exemptions would not have comparable public health effects. Cf. We the Patriots, 17 F.4th at 286 (discussing evidence suggesting that medical and religious exemptions to a New York vaccine mandate were "not comparable in terms of the 'risk' that they pose[d]" (quoting Tandon, 141 S. Ct. at 1296)). We reject the plaintiffs' apparent view that the only relevant comparison is between the risks posed

by any one individual who is unvaccinated for religious reasons and one who is unvaccinated for medical reasons. Instead, we agree with the Second Circuit that Supreme Court precedent "suggests the appropriateness of considering aggregate data about transmission risks." Id. at 287; see id. at 286-87 ("We doubt that, as an epidemiological matter, the number of people seeking exemptions is somehow excluded from the factors that the State must take into account in assessing the relative risks to the health of healthcare workers and the efficacy of its vaccination strategy ...."). But, absent factual development, dismissal is unwarranted.

The State does advance a comparability argument based on facts outside the complaint that it argues we may nonetheless properly consider. The State cites a Federal Centers for Medicare and Medicaid Services ("CMS") interim final rule governing staff vaccination requirements in certain healthcare facilities, including hospitals and long-term care facilities, that receive Medicare and Medicaid funds, which the State represents "covers many of the same healthcare entities as Maine's [Mandate]." See Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021) (codified at 42 C.F.R. pts. 416, 418, 441, 460, 482-86, 491, 494). The State observes that CMS's explanation of the regulation states that the rule preempts state laws "providing for exemptions to the extent such law[s] provide[ ] broader grounds for exemptions than provided for by Federal law," id. at 61,613, and argues that the medical exemption permitted under the CMS

rule, which requires a worker seeking an exemption to provide signed documentation from a "licensed practitioner" that the worker has "recognized clinical contraindications to COVID-19 vaccines," e.g., id. at 61,619-20, is more restrictive than the medical exemption under Maine law, see Me. Rev. Stat. Ann. tit. 22, § 802(4-B)(A), such that, in practice, only the narrower medical exemption under the CMS rule will be available in at least some of the facilities covered by the Mandate.

The State then argues that this narrower CMS medical exemption would permit only a small number of healthcare workers to obtain medical exemptions from the Mandate. Citing a U.S. Centers for Disease Control and Prevention ("CDC") fact sheet, the State represents that "CDC[-]recognized contraindications to vaccination are limited to [(1)] known allergies [to vaccine components], [and (2)] severe allergic reactions (anaphylaxis) ... and [(3)] cardiac conditions (TTS) occurring after the administration of a prior dose of a COVID-19 vaccine." [11] Citing a CDC webpage, the State argues that at least two of these three contraindications are vanishingly rare -- with approximately five instances of anaphylaxis and four cases of TTS occurring per million vaccine doses administered -- such that "the approximately 11 or 12

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[11] The original source cited by the State appears no longer to be available online. For an archived version, see U.S. CDC, Summary Document for Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Authorized or Approved in the United States (Dec. 6, 2022), https://web.archive.org/web/20221221222603/https://www.cdc.gov/vaccines/covid19/downloads/summary-interim-clinical-considerations.pdf.

persons that would suffer an adverse reaction to a COVID-19 vaccination based on Maine's entire population (not just persons subject to the [Mandate]) is about the same [as the] number of [plaintiffs] in this appeal."[12] On that basis, the State argues that "[t]he risks between medical and religious exemptions are ... not comparable."

Comparisons of this sort may well be relevant to the comparability inquiry. See We the Patriots, 17 F.4th at 286. But these limited data are insufficient to resolve the comparability inquiry at the motion-to-dismiss stage -- even assuming we may properly consider them. Cf. Freeman, 714 F.3d at 35-37 (discussing limits on consideration of materials outside complaint in evaluating motion to dismiss). Even accepting, for the sake of argument, the State's premise that the narrower medical exemption under the CMS rule is relevant to the comparability analysis in this case, its interpretation of the CMS rule and the CDC's clinical recommendations, and its calculations about the prevalence of anaphylaxis and TTS, there are several significant gaps in the State's argument. First, the State does not explain how many facilities and workers covered by the Mandate actually fall within the CMS rule's coverage, simply stating that "many" do.[13] Second, it does not address how many

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[12] For the State's source, see Selected Adverse Events Reported After COVID-19 Vaccination, U.S. CDC (Mar. 7, 2023), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html.

[13] The plaintiffs' counsel stated at oral argument that the plaintiffs in this case worked at facilities covered by the CMS rule. But the State has not developed any argument that we should look only at facilities covered both by the CMS rule and

individuals might qualify for medical exemptions under the CMS rule based on known allergies to COVID-19 vaccines; it instead discusses the prevalence of only two of the three contraindications it describes. Third, the State's argument does not show how many individuals would likely seek religious exemptions from the Mandate, were they available, instead assuming that the number would be significantly greater than the number of plaintiffs in this case. Given those gaps, and the requirement at this stage to draw all reasonable inferences in the plaintiffs' favor, it remains plausible that the Mandate's medical exemption creates comparable risks to those that would be created by a religious exemption, warranting strict scrutiny.[14]

Because it is plausible, based on the complaint and without the benefit of factual development, that the Mandate is subject to strict scrutiny, dismissal would be appropriate only if the materials we may consider on a motion to dismiss establish that the Mandate survives that standard of review even when applying the Rule 12(b)(6) plausibility standard. Cf. Zenon v. Guzman, 924 F.3d 611, 616 (1st Cir. 2019)

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the Mandate for purposes of assessing the Mandate's constitutionality. We express no view on the merits of such an argument, were the State to advance it, but, absent such an argument, we decline to so constrain the inquiry.

[14] Our conclusion that it is plausible that the Mandate is subject to strict scrutiny on this basis makes it unnecessary at this stage to address the other arguments for strict scrutiny advanced by the plaintiffs, such as the assertion that the Mandate is not generally applicable because it creates "a mechanism for individualized exemptions." Fulton, 141 S. Ct. at 1877 (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

(discussing circumstances in which affirmative defense, for which defendant bears burden of proof, may be adjudicated on motion to dismiss). Strict scrutiny requires the State to show that the Mandate is narrowly tailored to advance a compelling government interest. See, e.g., Fulton, 141 S. Ct. at 1881. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." Id.

The State does briefly contend that the Mandate survives strict scrutiny, but its argument does not justify dismissal on the pleadings. It argues that a statement issued by the Maine CDC in November 2021, when the agency made the regulation requiring COVID-19 vaccination for healthcare workers permanent, establishes that the Mandate is the least restrictive means to achieve the State's public health goals. The statement discusses the agency's reasoning concerning why alternative measures, such as mandatory masking, were insufficient to prevent the spread of COVID-19. But the cited discussion is insufficient, standing alone, to satisfy the State's burden under strict scrutiny. For example, it does not address the likely effects of including a religious exemption in the Mandate or give reasons why doing so would prevent the state from achieving its public health goals.[15] Cf. id. at 1881-82 (holding that a government defendant had

[15] A portion of the agency's statement not cited by the State does reference the possibility of religious exemptions to the Mandate, but only in observing that the state legislature had eliminated the option for such exemptions by statute in 2019. It does not independently analyze the likely effects of such exemptions.

not shown that a religious exemption to a challenged policy would undermine the interests the policy aimed to advance so as to satisfy strict scrutiny). As a result, even assuming we may properly consider the statement at the motion-to-dismiss stage, cf. Freeman, 714 F.3d at 35-37, it does not establish that the Mandate satisfies strict scrutiny and, thus, that dismissal is appropriate.

We emphasize the narrowness of our holding. We do not determine what standard of scrutiny should ultimately apply to the free exercise claim. Nor do we decide whether the Mandate survives the applicable level of scrutiny. Those questions are not before us. We hold only that, applying the plausibility standard applicable to Rule 12(b)(6) motions and drawing all reasonable inferences from the complaint's factual allegations in the plaintiffs' favor, the complaint states a claim under the Free Exercise Clause.

2.

We next consider the plaintiffs' equal protection claim, which alleges that the Mandate burdens their free exercise rights and discriminates on the basis of religion. The district court reasoned that, because it had concluded that the free exercise claim warranted only rational basis review, an equal protection claim resting on the assertion that the Mandate burdens the plaintiffs' free exercise rights must also receive rational basis review. Lowe, 2022 WL 3542187, at *14-15 (citing Wirzburger v. Galvin, 412 F.3d 271, 282-83 (1st Cir. 2005)). The court determined that the Mandate survives rational basis

review under the Equal Protection Clause for the same reasons as in the free exercise context. See id. at *15. On appeal, the State endorses this reasoning. It does not develop any argument that, if we reverse the dismissal of the free exercise claim, we can nonetheless affirm the dismissal of the equal protection claim. As a result, because we reverse the dismissal of the free exercise claim, we also reverse the dismissal of the equal protection claim.

B.

We turn to the plaintiffs' Title VII claims against their former employers, the Providers. As relevant here, Title VII declares it an "unlawful employment practice for an employer ... to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e-2(a). The statute defines "religion" to "include[ ] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." Id. § 2000e(j).

This court "appl[ies] a two-part framework in analyzing religious discrimination claims under Title VII." Sánchez-Rodríguez v. AT & T Mobility P.R., Inc., 673 F.3d 1, 12 (1st Cir. 2012). "First, [a] plaintiff must make [her] prima facie case that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment

action." Id. (quoting Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 133 (1st Cir. 2004)). "[T]he burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship." Cloutier, 390 F.3d at 133. The Providers do not dispute that the plaintiffs have adequately alleged a prima facie case sufficient to survive a Rule 12(b)(6) motion, and do not claim that they offered any reasonable accommodation of the plaintiffs' religious practices. As to the Providers, this appeal thus turns on their undue hardship defense.

Although undue hardship is an affirmative defense, see id., dismissal on a Rule 12(b)(6) motion is nonetheless appropriate if "the facts establishing the defense [are] clear on the face of the plaintiff[s'] pleadings" and "there is 'no doubt' that the plaintiff[s'] claim[s] [are] barred," Zenon, 924 F.3d at 616 (first alteration in original) (internal quotation marks omitted) (first quoting Santana-Castro v. Toledo-Dávila, 579 F.3d 109, 114 (1st Cir. 2009); and then quoting Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001)). The complaint and the plaintiffs' briefing make clear that the plaintiffs would accept only one accommodation: a religious exemption allowing them to continue in their roles without receiving a vaccine while observing other precautions, such as masking and testing.[16] We thus

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[16] In their reply brief, the plaintiffs attempt to draw a distinction between their requested exemption from the Mandate and what they separately describe as their proposed accommodation of continuing in their previous roles while

need only determine whether that accommodation would have constituted an undue hardship.[17] See Cloutier, 390 F.3d at 134-35. We agree with the district court that it would, and reject the plaintiffs' arguments to the contrary.

1.

Maine law makes clear that, by providing the plaintiffs their requested accommodation as described in the complaint, the Providers would have risked onerous penalties, including license suspension. The Mandate requires the Providers to "require for all employees who do not exclusively work remotely [and who are not medically exempted] a [c]ertificate of [i]mmunization ... against ... COVID-19." 10-144-264 Me. Code R. § 2(A); see Me. Rev. Stat. Ann. tit. 22, § 802(4-B) (allowing medical exemptions); 10-144-264 Me. Code R. § 3 (permitting medical exemptions by cross-referencing section 802). Granting the plaintiffs their requested religious exemption would thus have

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complying with safeguards such as masking and testing. Because this issue was not raised in their opening brief, we deem it waived. See, e.g., FinSight I LP v. Seaver, 50 F.4th 226, 235 (1st Cir. 2022).

[17] At points in their briefing, the plaintiffs take issue with the alleged failure by the Providers to "provide at least a process for seeking an accommodation." As this court has explained in the context of the Americans with Disabilities Act, "liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts." Trahan v. Wayfair Me., LLC, 957 F.3d 54, 67 (1st Cir. 2020); see also Mills, 16 F.4th at 36 (applying this reasoning to Title VII claim). Nothing in the complaint suggests -- and the plaintiffs do not argue -- that such a resolution was possible here.

placed the Providers in violation of the Mandate. The penalties for such a violation are burdensome. By statute, the Department's licensing authorities "may immediately suspend a [healthcare facility's] license ... for a violation [of the Mandate]," and regulators may also impose substantial fines. Me. Rev. Stat. Ann. tit. 22, § 804(3); see id. § 804(2) (authorizing the Department to issue cease-and-desist orders to violators, with noncompliance punishable by fines of up to $1,000 per violation per day).

The complaint itself acknowledges the threat to the Providers' licenses. Quoting a press release from the Governor's office announcing the Mandate, it states: "[T]he [healthcare] organizations to which th[e] [Mandate] applies must ensure that each employee is vaccinated, with this requirement being enforced as a condition of the facilities' licensure."[18] The complaint then declares (in bolded text): "**Thus, the Governor has threatened to revoke the licenses of all health care employers who fail to mandate that all employees receive the COVID-19 vaccine.**" The only reasonable inference from this allegation and from the relevant Maine law, both of which we may properly consider in reviewing the dismissal of the Title VII claims, see Eves v. LePage, 927 F.3d 575, 578 n.2 (1st Cir. 2019) (en banc), is that granting the requested accommodation would have

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[18] See Press Release, Janet T. Mills, Governor, State of Maine, Mills Administration Requires Health Care Workers to Be Fully Vaccinated Against COVID-19 by October 1 (Aug. 12, 2021), https://www.maine.gov/governor/mills/news/mills-administrationrequires-health-care-workers-be-fullyvaccinated-against-covid-19-october.

exposed the Providers to a substantial risk of license suspension, as well as monetary penalties.

The plaintiffs' counsel essentially agreed with this conclusion at oral argument. Counsel observed that the State had "made clear that ... exemptions could be granted only for medical reasons," that granting the plaintiffs' desired accommodation would require violating the Mandate, and that "noncompliant employers would face fines and loss of licensure." He reiterated:

> Maine ... [went] to the extreme to say [that] no one can grant a religious exemption, and that if an employer grants a religious-based exemption, they could lose their license and they will be fined. That is an extraordinary step by the State of Maine against its employers .... It puts the employers to a great extent in this damned-if-you-do, damned-if-you-don't ... situation.

And he acknowledged that "obviously, [the plaintiffs'] real interest is with the State."

The risk of license suspension for violating the Mandate would have constituted an "undue hardship on the conduct of the [Providers'] business" under any plausible interpretation of that phrase. 42 U.S.C. § 2000e(j). Title VII does not define "undue hardship," see id. § 2000e, but current law holds that "[a]n accommodation constitutes an 'undue hardship' if it would impose more than a de minimis cost on the

employer," Cloutier, 390 F.3d at 134 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)). Cloutier, for example, held that it would have caused undue hardship to require a retailer to permit a cashier to wear facial piercings while working "because [doing so] would adversely affect the employer's public image," as the retailer "ha[d] made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aim[ed] to cultivate," and "[s]uch a business determination [was] within [the retailer's] discretion." Id. at 136; see id. at 135-36. The hardship in this case is far more significant: rather than having some intangible effect on the Providers' public images that could -- in their own discretionary judgment -- eventually harm their revenues, license suspension would concretely disrupt the Providers' "conduct of [their] business." 42 U.S.C. § 2000e(j).

We are aware that the Supreme Court has heard argument in a case in which the petitioner asks it to reconsider the more-than-de-minimis-cost interpretation of "undue hardship," see Groff v. DeJoy, No. 22-174 (U.S. argued Apr. 18, 2023), but our holding is not dependent on that formulation of the legal standard. Rather, we hold that the plaintiffs' requested accommodation would have constituted an undue hardship under any plausible interpretation of the statutory text. For example, the Americans with Disabilities Act ("ADA") also includes an "undue hardship" defense: the Act forbids "discriminat[ion] [in employment] against a qualified individual on the basis of disability," 42 U.S.C § 12112(a), including by

"not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ... unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business," id. § 12112(b)(5)(A). The statute defines "undue hardship" to "mean[ ] an action requiring significant difficulty or expense, when considered in light of [a statutorily defined list of] factors." Id. § 12111(10)(A); see also Small v. Memphis Light, Gas & Water, 952 F.3d 821, 826-27 (6th Cir. 2020) (Thapar, J., concurring) (arguing for an interpretation of "undue hardship" under Title VII that requires "significant costs on the [employer]"); Brief for Petitioner at 17-28, Groff, No. 22-174 (U.S. Feb. 21, 2023) (similar). The risk of license suspension facing the Providers would readily meet this standard, too; indeed, it is difficult to imagine a penalty that would cause a healthcare provider more significant difficulty "[i]n the conduct of [its] business," 42 U.S.C. § 2000e(j), than license suspension. Cf. EEOC v. Amego, Inc., 110 F.3d 135, 148 & n.15 (1st Cir. 1997) (concluding that accommodation would have constituted undue hardship under ADA where it would have required nonprofit to hire additional staff it could not realistically afford).

Other circuits' caselaw addressing the interaction between Title VII's undue hardship defense and state law supports our conclusion. For example, the Third Circuit, in United States v. Board of Education, 911 F.2d 882 (3d Cir. 1990), concluded that an accommodation would have constituted an

undue hardship for an employer school board where it would have required the board's administrators to violate a state criminal statute, thereby "expos[ing] [the] administrators to a substantial risk of criminal prosecution, fines, and expulsion from the profession."[19] Id. at 891; see id. at 890-91. While violating the Mandate would not carry a risk of criminal charges, it would create a substantial risk of enforcement, fines, and license suspension. Indeed, the threat to the Providers' business is, if anything, more direct in this case than in Board of Education, where the court discussed a risk of charges against the defendant's employees, see id. at 891; here, the objects of enforcement actions would be the Providers themselves, see Me. Rev. Stat. Ann. tit. 22, § 804(2)-(3).

The Ninth Circuit has similarly held that accommodations that would force private employers to "risk liability for violating" state law constitute undue hardships under Title VII.[20] Bhatia v. Chevron

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[19] The Third Circuit declined to "address the situation in which . . . the chances of enforcement are negligible and accommodation involves no realistic hardship," or "the situation in which the defendant is a government entity with the authority . . . to control whether or not enforcement actions will be brought." 911 F.2d at 891. No such situation obtains here: as discussed above, neither state law nor the complaint provide any reason to doubt that enforcement was likely.

[20] The Ninth Circuit recently declined to extend this rule to a state agency acting as an employer, reasoning that the agency was "part of the very state government that [was] responsible for creating and enforcing" the state law at issue, such that there was a lesser likelihood that the state law would be enforced against the agency and a risk that states could pass laws designed to excuse their agencies from compliance with

U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984); see also Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830 (9th Cir. 1999) ("[C]ourts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law."); Tagore v. United States, 735 F.3d 324, 329-30 (5th Cir. 2013) (citing Sutton with approval in a case involving a proposed accommodation that would require an employer to violate federal law).

Several circuits have also held that accommodations that would require employers to violate other federal laws are not required by Title VII -- sometimes on the theory that such a violation precludes the plaintiff from making out a prima facie case, and sometimes on the theory that such an accommodation would constitute an undue hardship. See Truskey v. Vilsack, No. 21-5821, 2022 WL 3572980, at *3 (6th Cir. Aug. 19, 2022) (unpublished decision) (collecting cases from Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits).

We need not and do not decide whether every accommodation that would require an employer to violate state or federal law would necessarily constitute an undue hardship under Title VII. But these out-of-circuit decisions confirm that potential penalties for violating other laws can render a proposed accommodation an undue hardship. And, for

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Title VII. Bolden-Hardge v. Off. of the Cal. State Controller, 63 F.4th 1215, 1225 (9th Cir. 2023); see id. at 1225-27. The Providers are private employers, so this reasoning does not apply here.

the reasons described above, we hold that this case falls in that category.

2.

The plaintiffs' counterarguments fail. Importantly, they do not develop any meaningful argument that the risk of license suspension in this case is insufficiently burdensome as to have constituted an undue hardship for the Providers. Indeed, as discussed above, the plaintiffs' counsel at oral argument acknowledged the difficulty faced by the Providers, characterizing it as a "damned-if-you-do, damned-if-you-don't ... situation." The plaintiffs instead argue that factual issues make dismissal under Rule 12(b)(6) inappropriate and that Title VII preempts the Mandate and requires the Providers to grant the requested accommodation. We find these contentions unpersuasive.

The plaintiffs assert generally that whether their requested accommodation would constitute an undue hardship "is a question of fact not suitable for determination on a motion to dismiss." As discussed above, however, we conclude that the complaint's allegations and the relevant Maine law permit no reasonable inference but that granting the plaintiffs their requested accommodation would have exposed the Providers to a substantial risk of license suspension and other penalties, creating an undue hardship. See Zenon, 924 F.3d at 616 (discussing adjudication of affirmative defenses at Rule 12(b)(6) stage); see also Iqbal, 556 U.S. at 678, 129 S.Ct. 1937 (describing Rule 12(b)(6) plausibility standard).

The plaintiffs offer two more specific purported factual issues that, they argue, preclude dismissal, but these arguments fare no better. First, they contend that they "plead[ed] and offered available alternatives to compulsory vaccination," such as masking and testing. This argument misunderstands the undue hardship that the Providers cite, which is not the safety risk from allowing the plaintiffs to work while unvaccinated, but instead the penalties that the Providers would have faced for violating the Mandate. Those penalties would have applied -- and constituted an undue hardship -- regardless of the factual merits of the plaintiffs' view that their proposed alternatives would be adequate in terms of safety.

Second, the plaintiffs argue in their briefing, based on a Department guidance document, that their requested accommodation would not actually have violated the Mandate. The guidance document at issue states that the Mandate "does not prohibit employers from providing accommodations for employees' sincerely held religious beliefs, observances, or practices that may otherwise be required by Title VII," but that "implementation, if such accommodations are provided by a [healthcare employer], must comply with the [Mandate]."[21] The plaintiffs assert that the first piece of quoted language shows that the Providers could lawfully have granted their requested accommodation. But this reading ignores the second piece of quoted language; read as

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[21] Health Care Worker Vaccination FAQs, State of Me. COVID-19 Response (Nov. 10, 2021), https://www.maine.gov/covid19/vaccines/public-faq/health-care-worker-vaccination.

a whole, the guidance document makes plain that employers could provide religious accommodations other than exemptions (for instance, by authorizing remote work, which would place the worker outside the Mandate's scope) but could not offer religious exemptions to workers covered by the Mandate (since doing so would not comply with the Mandate). The plaintiffs have never alleged or argued that they would have accepted any accommodations that would have placed them outside the Mandate's scope. And certainly the Providers could not have confidently relied on the guidance document to conclude that offering religious exemptions would not expose them to penalties for violating the Mandate, such as would render the plaintiffs' requested accommodation not an undue hardship. Indeed, the plaintiffs' counsel appeared to retreat from this argument at oral argument, recognizing that "the Maine CDC made clear that ... exemptions could be granted only for medical reasons," and that "if [the Providers] ... even consider [religious exemptions], then they're violating the ... Mandate." The guidance document does not save the Title VII claim.

In their final counterargument, the plaintiffs assert that Title VII preempts the Mandate, such that the Providers were required to offer the requested accommodation notwithstanding state law. The Supreme Court has explained that Title VII preempts state laws "only if they actually conflict with federal law." Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987); see id. at 281-83, 107 S.Ct. 683 (discussing "[t]he narrow scope of pre-emption available under [Title VII]"). The

plaintiffs' argument fails because there is no "actual[ ] conflict" in this case. As relevant here, Title VII could preempt the Mandate only if it required the Providers to grant the plaintiffs' requested accommodation. But granting that accommodation would have exposed the Providers to penalties for violating the Mandate, and thus constituted an undue hardship not required by Title VII.

This conclusion follows from Title VII's text and structure, which make clear that the undue hardship analysis precedes any conclusion about preemption of state law. The undue hardship defense is built into the statutory definition of "religion," see 42 U.S.C. § 2000e(j), such that an employment action cannot constitute discrimination on the basis of religion, and an employer cannot be liable under Title VII for religious discrimination, if the undue hardship defense applies, see, e.g., Bd. of Educ., 911 F.2d at 886. In other words, while the plaintiffs' counsel at oral argument stated that the need to comply with the Mandate, on the one hand, and with Title VII, on the other, placed the Providers in a "damned-if-you-do, damned-if-you-don't ... situation," the undue hardship defense clearly applies on the pleadings. Because the requested accommodation would have imposed undue hardship, Title VII does not require it.

The plaintiffs rely on 42 U.S.C. § 2000e-7, which provides:

> Nothing in [Title VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or

> punishment provided by any present or future law of any State ..., other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII].

They argue that this provision exempts the Providers from liability for violating the Mandate, which, they assert, purports to require the Providers to violate Title VII by denying them their preferred accommodation.

The plaintiffs' position takes an extremely broad view of Title VII's requirements for employers. Cf. We the Patriots, 17 F.4th at 291-92 (explaining that "Title VII does not require covered entities to provide [whatever] accommodation ... [p]laintiffs prefer"). But we need not address the merits of this interpretation because, in any event, the Providers do not have enforcement authority with respect to the Mandate, and they have no power to determine for the State that the Mandate is invalid under Title VII. Violating the Mandate would thus have exposed them to a risk of immediate license suspension -- an undue hardship that Title VII did not require them to suffer.[22]

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[22] The plaintiffs have never argued that there were any steps the Providers could or should have taken to test the Mandate's legal validity under Title VII or to determine whether granting the plaintiffs their requested accommodation would result in enforcement actions by the State, short of defying the Mandate and risking penalties. We thus need not decide whether taking such steps would have constituted an undue hardship. Cf., e.g., Seaworth v. Pearson, 203 F.3d 1056, 1057 (8th Cir.

The applicability of the undue hardship defense distinguishes this case from those the plaintiffs cite applying § 2000e-7 in the context of alleged racial discrimination -- where Title VII offers no undue hardship defense. See, e.g., Guardians Ass'n of the N.Y.C. Police Dep't, Inc. v. Civ. Serv. Comm'n, 630 F.2d 79, 104-05 (2d Cir. 1980) (explaining that an employer could not justify an employment policy with a "disparate racial impact" based on the "requirements of state law"). The plaintiffs cite no case holding that Title VII preempted a state law in analogous circumstances involving religion, and, as discussed above, multiple circuits have held that potential penalties under state law can establish an undue hardship defense. See Bd. of Educ., 911 F.2d at 890-91; Bhatia, 734 F.2d at 1384.

We conclude that the Title VII claims were properly dismissed.

III.

For the foregoing reasons, we affirm the dismissal of the plaintiffs' claims under the Supremacy Clause, § 1985, and Title VII. We also affirm the dismissal of the plaintiffs' claims against Governor Mills and their damages claims against the State. We reverse the dismissal of the remaining

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2000) (holding that it would have been an undue hardship to require an employer to seek a waiver from an IRS requirement that employers provide their employees' Social Security numbers to the agency).

claims, and remand for proceedings consistent with this opinion. All parties shall bear their own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT.

ALICIA LOWE; JENNIFER BARBALIAS; GARTH BERENYI; DEBRA CHALMERS; NICOLE GIROUX; ADAM JONES; NATALIE SALAVARRIA,

Plaintiffs, Appellants,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine; JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services; NANCY BEARDSLEY in her official capacity as Acting Director of the Maine Center for Disease Control and Prevention; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE LLC; MAINEGENERAL HEALTH; NORTHERN LIGHT EASTERN MAINE MEDICAL CENTER,

Defendants, Appellees,

MTM ACQUISITION, INC., d/b/a Portland Press Herald/Maine Sunday Telegram, Kennebec Journal, and Morning Sentinel; SJ ACQUISITION, Inc., d/b/a Sun Journal,

Intervenors.

JUDGMENT

Entered: May 25, 2023

This cause came on to be heard on appeal from the United States District Court for the District of Maine and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's dismissal of the plaintiffs' claims is affirmed in part and reversed in part, and the matter is remanded to the district court for further proceedings consistent with the opinion issue this day. All parties shall bear their own costs.

By the Court:
Maria R. Hamilton, Clerk

cc: Hon. Jon David Levy, Christa Berry, Clerk, United States District Court for the District of Maine, Mathew D. Staver, Stephen C. Whiting, Horatio Gabriel Mihet, Roger K. Gannam, Daniel Joseph Schmid, Thomas A. Knowlton, Kimberly Leehaug Patwardhan, James R. Erwin, Katharine Ives Rand, Katherine Lee Porter, Ryan P. Dumais, Sigmund D. Schutz, KatieLynn B. Townsend

APPENDIX C

United States District Court, D. Maine.

Alicia LOWE, et al., Plaintiffs,
v.
Janet T. MILLS, in her official capacity as Governor of the State of Maine, et al., Defendants.

1:21-cv-00242-JDL
|
Signed August 18, 2022

Attorneys and Law Firms

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Kimberly L. Patwardhan, Thomas A. Knowlton, Office of the Attorney General Six State House Station, Augusta, ME, Valerie A. Wright, Littler Mendelson, Portland, ME, for Defendants Janet T. Mills, Jeanne M. Lambrew, Dr. Nirav D. Shah.

Katharine I. Rand, James R. Erwin, Pierce Atwood LLP, Portland, ME, for Defendants MaineHealth, Genesis Healthcare of Maine LLC, Genesis Healthcare LLC, MaineGeneral Health.

Katherine Lee Porter, Eaton Peabody, Portland, ME, Ryan P. Dumais, Eaton Peabody, Brunswick, ME, for Defendant Northern Light Eastern Maine Medical Center.

ORDER ON MOTIONS TO DISMISS

JON D. LEVY, CHIEF UNITED STATES DISTRICT JUDGE

The Plaintiffs are seven Maine healthcare workers who challenge the lawfulness of the Maine administrative rule that requires employees of designated Maine healthcare facilities to be vaccinated against the SARS-CoV-2 coronavirus—the cause of COVID-19 infections. *See* Immunization Requirements for Healthcare Workers, 10-144-264 Me. Code R. §§ 1-7 (amended Nov. 10, 2021) (LexisNexis 2022) (the "Rule"). [1] The Plaintiffs contend that the Rule's COVID-19 vaccine mandate violates their First Amendment right to the free exercise of religion and other federal constitutional and statutory rights because it does not exempt individuals whose sincerely held religious beliefs cause them to object to being vaccinated against COVID-19. The Plaintiffs also contend that their employers violated federal employment law by refusing to grant them a religious exemption from the vaccination requirement.

The Plaintiffs' amended complaint (ECF No. 152) names as defendants, in their official capacities, Governor Janet T. Mills; Dr. Nirav D. Shah, the

[1] The Rule can also be found at https://perma.cc/6D8Y-XCLP.

Director of Maine Center for Disease Control & Prevention ("Maine CDC"); and Jeanne M. Lambrew, the Commissioner of the Maine Department of Health and Human Services ("DHHS") (collectively, the "State Defendants"). The amended complaint also names as defendants five incorporated entities that operate healthcare facilities in Maine: Genesis Healthcare of Maine, LLC; Genesis Healthcare, LLC; Northern Light Eastern Maine Medical Center; [2] MaineHealth; and MaineGeneral Health (collectively, the "Hospital Defendants"). The Plaintiffs' amended complaint presents five claims arising under: Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to e-17 (West 2022); the Free Exercise Clause of the First Amendment; the Equal Protection Clause of the Fourteenth Amendment; the Supremacy Clause; and 42 U.S.C.A. § 1985 (West 2022) (Conspiracy to Interfere with Civil Rights).

The State and Hospital Defendants move to dismiss (ECF Nos. 107, 108, 109) each of the preceding claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The State Defendants also move, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss all claims against Governor Mills for lack of jurisdiction, and all monetary damages claims against the State Defendants on the basis of sovereign immunity.

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[2] The complaint originally named Northern Light Health Foundation as a defendant; Northern Light Eastern Maine Medical Center was substituted as a party for Northern Light Health Foundation (ECF No. 101) on January 20, 2022

A hearing on the Motions to Dismiss was held on June 24, 2022.[3] After careful consideration and for the reasons that follow, I grant the Defendants' motions.

I. BACKGROUND

The factual background is drawn from the Plaintiffs' amended complaint, documents incorporated by reference, and from official public records that are subject to judicial notice under Federal Rule of Evidence 201, including the Rule challenged by the Plaintiffs and the related statute and its legislative history. *See Newton Covenant Church v. Great Am. Ins.*, 956 F.3d 32, 35 (1st Cir. 2020); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). A court has discretion "to[ ] take judicial notice of the legislative history of federal and state law and of municipal ordinances." *Mitchell v. United States*, No. 1:15-cr-00040, No. 1:19-cv-00184, 2020 WL 5942316, at *7 (D. Me. Oct. 7, 2020) (quoting 1 Jack B. Weinstein, et al., *Weinstein's Federal Evidence* § 201.52[3][a] (2d ed. 2020)). I also take judicial notice of information from the official U.S. Centers for Disease Control and Prevention ("CDC") and the Maine CDC government websites "that is 'not subject to reasonable dispute.' " *Fortuna v. Town of Winslow*, No. 1:21-cv-00248, 2022 WL 2117717, at * 3 (D. Me. June 13, 2022) (quoting *Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79, 85 n.5 (1st Cir. 2010)).

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[3] On October 13, 2021, I denied the Plaintiffs' motion for preliminary injunction. *Does 1-6 v. Mills*, 566 F. Supp. 3d 34 (D. Me. Oct. 13, 2021), *aff'd*, 16 F.4th 20 (1st Cir. 2021), *cert. denied sub nom*., *Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022).

A. COVID-19

COVID-19 is a contagious respiratory illness that spreads between people who are in close contact with one another, through respiratory droplets or small particles. As of mid-August 2022, there have been 201,840 confirmed cases of COVID-19 in Maine, along with 78,091 probable cases, 5,469 hospitalizations, and 2,497 deaths. Maine CDC, *COVID-19: Maine Data*, https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/data.shtml (last visited August 18, 2022). In 2021, COVID-19 was the third-leading cause of death in the state. Maine CDC, et al. (July 12, 2022), *State of Maine: Maine Shared Community Health Needs Assessment Report* 2, https://www.maine.gov/dhhs/mecdc/phdata/MaineCHNA/documents/State% 20Report% 207.12.2022revision.pdf.

Effective August 12, 2021, DHHS and the Maine CDC adopted on an emergency basis the requirement that all employees of designated Maine healthcare facilities be fully vaccinated against COVID-19. *See* 10-144-264 Me. Code R. § 5(A)(7) (amended Aug. 12, 2021). On November 10, 2021, the Rule was amended on a non-emergency basis to permanently adopt the COVID-19 vaccination requirement.[4] *See* 10-144-264 Me. Code R. §§ 1(F)(7),

[4] Under the Rule, "designated healthcare facility" "means a licensed nursing facility, residential care facility, Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), multi-level healthcare facility, hospital, or home health agency subject to licensure by the State of Maine, Department of Health and Human Services Division of Licensing and Certification." 10-144-264 Me. Code R. § 1(E)

(2)(A)(7) (amended Nov. 10, 2021). Under the Rule, an employee may not be permitted by an employer to attend work at a designated healthcare facility if he or she does not comply with the vaccine requirement, unless the employee is exempt in accordance with the requirements of 22 M.R.S.A. § 802(4-B) (West 2022), which permits medical, but not religious or philosophical, exemptions from required vaccinations. 10-144-264 Me. Code R. § 3. A designated healthcare facility that violates the Rule is subject to sanctions, including the imposition of fines and license suspension. 10-144-264 Me. Code R. § 7(G) (amended Nov. 10, 2021) ("If a Designated Healthcare Facility fails ... to comply with the requirements of this rule, the Department may take enforcement action pursuant to 22 MRS § 804 [providing for the imposition of a fine and/or license suspension as a sanction for any person who violates a DHHS rule] or as otherwise provided by law."); 22 M.R.S.A. § 804 (West 2022).

(amended Nov. 10, 2021). Although the emergency rule also applied to dental health practices and emergency medical services organizations, 10-144-264 Me. Code R. § 2(B) (amended Aug. 12, 2021), these practices are not included in the current version of the Rule, 10-144-264 Me. Code R. §§ 1(E), 2(A) (amended Nov. 10, 2021). All references to "designated healthcare facilities" in this Order include all entities subject to the Rule's requirements

B. The Plaintiffs' Objection to the COVID-19 Vaccines

The Plaintiffs are seven individuals who were formerly employed by the Hospital Defendants.[5]

Plaintiff Alicia Lowe was formerly employed by Defendant MaineHealth at one of its healthcare facilities in Maine. She submitted a written request for a religious exemption from the vaccine, which was denied. Because of her refusal to obtain a COVID-19 vaccination, Lowe was terminated from her employment. She subsequently sought and obtained a Notice of Right to Sue from the Equal Employment Opportunity Commission ("EEOC").

Plaintiffs Debra Chalmers and Garth Berenyi were formerly employed by healthcare facilities operated by Defendant Genesis Healthcare in Maine. Both submitted written requests for religious exemptions from the vaccine mandate, and Genesis Healthcare denied the requests. Chalmers and Berenyi were terminated from their employment following their refusals to obtain COVID-19

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[5] The Plaintiffs were originally granted leave to proceed pseudonymously in this litigation. *Does 1-6 v. Mills*, No. 1:21-cv-00242, 2021 WL 4005985, at *2-3 (D. Me. Sept. 2, 2021). Following a Motion to Unseal Plaintiffs' Identities (ECF No. 105) filed by intervening media companies, the Plaintiffs were ordered to file an amended complaint identifying themselves by name. *Does 1-6 v. Mills*, 1:21-cv-00242, 2022 WL 1747848, at * 7 (D. Me. May 31, 2022). The Plaintiffs sought a stay of this order from the U.S. Court of Appeals for the First Circuit, which was denied on July 7, 2022. *Does 1-3 v. Mills*, No. 22-1435, 2022 WL 2526989, at * 5 (1st Cir. July 7, 2022). The Plaintiffs' amended complaint, identifying the seven remaining plaintiffs by name, was filed on July 11, 2022.

vaccinations. Both subsequently sought and obtained Notices of Right to Sue from the EEOC.

Plaintiffs Jennifer Barbalias, Natalie Salavarria, and Adam Jones were formerly employed by healthcare facilities operated by Defendant Northern Light Eastern Maine Medical Center in Maine. Each submitted written requests for religious exemptions from the vaccine mandate, and each request was denied. Barbalias, Salavarria, and Jones were terminated from their employment following their refusals to obtain COVID-19 vaccinations. Each subsequently sought and obtained Notices of Right to Sue from the EEOC.

Plaintiff Nicole Giroux was formerly employed by a healthcare facility operated by Defendant MaineGeneral Health in Maine. She submitted a written request for a religious exemption from the vaccine mandate, which was denied. Because of her refusal to obtain a COVID-19 vaccination, Giroux was terminated from her employment. She subsequently sought and obtained a Notice of Right to Sue from the EEOC.

As more fully explained in their amended complaint, the Plaintiffs object to receiving the COVID-19 vaccines based on their religious belief that "life is sacred from the moment of conception," ECF No. 152 at ¶ 46, and their assertion that the development of the three COVID-19 vaccines employed or benefitted from the cell lines of aborted fetuses. Specifically, the Plaintiffs object to the Moderna and Pfizer vaccines because both are mRNA

vaccines, which, the amended complaint claims, "have their origins in research on aborted fetal cells lines." ECF No. 152 at ¶ 55. The Plaintiffs also object to the Johnson & Johnson vaccine, asserting that aborted fetal cell lines were used in both its development and production. The amended complaint states that the use of fetal cell lines to develop the vaccines runs counter to the Plaintiffs' sincerely held religious beliefs that cause them to oppose abortion.

C. The COVID-19 Vaccine Mandate

Mandatory vaccination requirements for healthcare workers in Maine were established long before the emergence of COVID-19 in late 2019. Maine has required by statute, 22 M.R.S.A. § 802 (1989), that hospitals and other healthcare facilities ensure that their employees are vaccinated against certain communicable diseases since 1989. 1989 Me. Legis. Serv. 641 (West). When the governing statute, 22 M.R.S.A. § 802 (1989), was first enacted, it mandated vaccinations for measles and rubella. Its stated purpose was to report, prevent, and control infectious diseases that pose a potential public health threat to the people of Maine. *Id.* § 802(1)(D) (1989).

The statute was amended in 2001 to grant rulemaking authority to DHHS to specify mandatory vaccines for school children as well as for healthcare workers at designated healthcare facilities. *See* 2001 Me. Legis. Serv. 147 (West). Accordingly, in 2002, DHHS promulgated and first adopted "Immunization Requirements for Healthcare Workers," which is the original version of the Rule at issue here. 10-144-264 Me. Code R. §§ 1-7 (Apr. 16, 2002). As then adopted,

the Rule required vaccinations for measles, rubella, hepatitis B, mumps, and chickenpox. *Id.* § 5(A).

From 2001 until 2019, the statute recognized three exemptions from the vaccination requirements for both healthcare workers and school children: A "medical exemption," available for those who provided "a physician's written statement that immunization against one or more diseases may be medically inadvisable"; and both "religious [and] philosophical exemption[s]" for those "who state[d] in writing a sincere religious or philosophical belief that is contrary to the immunization requirement." 22 M.R.S.A. § 802(4-B)(A), (B) (2019). In 2019, the statute was revised to eliminate the exemptions for religious and philosophical beliefs, 2019 Me. Legis. Serv. 386 (West), thus leaving the medical exemption as the sole exemption permitted under law. In response to this legislative change, a statewide veto referendum regarding the new law eliminating the religious and philosophical exemptions was held in March 2020 pursuant to the People's Veto provision of the Maine Constitution, Me. Const. art. IV, pt. III, § 17. The vote resulted in the law being upheld, with over 72% of those casting ballots voting in favor of retaining the medical exemption as the sole exemption.[6] In April 2021, DHHS amended the Rule

[6] Full results are available on the Maine Secretary of State website. Dep't of Sec'y of State, State of Maine, Tabulations for Elections Held in 2020, https://www.maine.gov/sos/cec/elec/results/results20.html#ref20 (last visited August 18, 2022) (to calculate the percentage, select "March 3, 2020 Special Referendum Election" to access the spreadsheet of results. Then divide the number of "no" votes (281,750) by the total number of votes cast (388,393)).

to conform it to the statute by removing the listed exemptions from the Rule and having the Rule refer to the statute as governing the authorized exemption. *See* 10-144-264 Me. Code R. § 3 (effective Apr. 14, 2021); 22 M.R.S.A. § 802(4-B)(B) (West 2022).[7] In August 2021, DHHS again amended the Rule by adding the COVID-19 vaccination to the list of required vaccinations. 10-144-264 Me. Code R. § 1(F)(7) (amended Aug. 12, 2021). The current version of the Rule, promulgated in November 2021, continues to mandate COVID-19 vaccinations for healthcare workers. 10-144-264 Me. Code R. § 1(F)(7) (amended Nov. 10, 2021). The Plaintiffs do not challenge the lawfulness of the rulemaking process by which the current version of the Rule was adopted.

The preceding history demonstrates that although the Plaintiffs' legal challenge is aimed at the August 2021 amendment of the Rule resulting in all healthcare workers in Maine being required to be fully vaccinated against COVID-19 by October 1, 2021, it was the Legislature's 2019 revision of the statute, 22 M.R.S.A. § 802(4-B), that eliminated the religious exemption from all mandatory vaccines. Thus, DHHS' removal of the religious and philosophical exemptions in April 2021 served to conform the Rule to the requirements of the statute. References in this Order to the COVID-19 vaccine mandate refer to both the current version of the Rule

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[7] There is an additional exemption provided specifically for the Hepatis B vaccine, as mandated under federal law, 22 M.R.S.A. § 802(4-B)(C) (West 2022), which is unique and not relevant to the inquiry at hand

and the statute, 22 M.R.S.A. § 802(4-B), which operate in tandem.

Having provided the necessary background, I turn to the arguments set out in the Defendants' motions to dismiss.

II. DISCUSSION

A. Legal Standard

"The proper vehicle for challenging a court's subject-matter jurisdiction is Federal Rule of Civil Procedure 12(b)(1)." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362 (1st Cir. 2001). The plaintiff carries the burden of demonstrating the existence of subject-matter jurisdiction. *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996). Nonetheless, "[i]n ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." *Id.* at 1209-10.

In reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must "accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences therefrom in the pleader's favor." *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 52-53 (1st Cir. 2013) (quoting *Santiago v. Puerto Rico*, 655 F.3d 61, 72 (1st Cir. 2011)). Additionally, a court may consider information "gleaned from documents incorporated by reference into the complaint, matters of public record,

and facts susceptible to judicial notice." *Id.* at 53 (quoting *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011)). Although conclusory legal statements "can provide the framework of a complaint, they must be supported by factual allegations." [8] *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To survive a motion to dismiss for failure to state a claim, the complaint "must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Rodríguez-Reyes*, 711 F.3d at 53 (quoting *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012)).

The court is not "required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

B. Legal Analysis

As noted at the outset, the Plaintiffs' amended complaint presents five claims arising under: Title VII, 42 U.S.C.A. § 2000e to e-17; the Free Exercise Clause of the First Amendment; the Equal Protection Clause of the Fourteenth Amendment; the Supremacy Clause; and 42 U.S.C.A. § 1985 (West 2022) (Conspiracy to Interfere with Civil Rights).

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[8] The first six pages of the amended complaint set forth several legal and policy arguments in support of the Plaintiffs' position that are not in keeping with Rule 8(a)(2) of the Federal Rules of Civil Procedure's requirement that a pleading seeking relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

"When faced with motions to dismiss under both 12(b)(1) and 12(b)(6), a district court, absent good reason to do otherwise, should ordinarily decide the 12(b)(1) motion first." *Ne. Erectors Ass'n of BTEA v. Sec'y of Lab., Occupational Safety & Health Admin.*, 62 F.3d 37, 39 (1st Cir. 1995). Thus, I begin my analysis with a discussion of the State Defendants' motion, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss all claims against Governor Mills for lack of jurisdiction, and all monetary damages claims against the State Defendants on the basis of sovereign immunity.

1. Claims Against Governor Mills and Damages Claims Against All State Defendants

The State Defendants move to dismiss all the Plaintiffs' claims against Governor Mills under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction, asserting standing arguments. The State Defendants also contend that the Eleventh Amendment bars the Plaintiffs from pursuing official-capacity damages claims against any of the State Defendants. The Plaintiffs failed to oppose the State Defendants' Rule 12(b)(1) motion to dismiss. "It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Collins v. Marina-Martinez*, 894 F.2d 474, 481 n.9 (1st Cir. 1990). *See also Putney, Inc. v. Pfizer, Inc.*, No. 07-108-P-H, 2007 WL 3047159, at *8 (D. Me. Oct. 17, 2007) (explaining that, because the non-moving party failed to respond to arguments raised in the motion to dismiss, "the motion to dismiss

may be granted for that reason alone"); *see also Doe v. Bredesen*, 507 F.3d 998, 1007 (6th Cir. 2007) ("The district court correctly noted [that the plaintiff] abandoned [multiple] claims by failing to raise them in his brief opposing the government's motion to dismiss the complaint."). Because the Plaintiffs failed to oppose the Rule 12(b)(1) motion to dismiss, I treat the affected claims as abandoned. Thus, the claims against Governor Mills and damages claims against all State Defendants are properly dismissed.

2. Title VII

The Hospital Defendants move to dismiss the Title VII claims asserted against them in the amended complaint. I address their arguments by considering (a) the legal framework associated with those claims in this case, and (b) the parties' arguments.

a. Legal Framework

Title VII prohibits employers from "discriminat[ing] against[ ] any individual because of his ... religion." 42 U.S.C.A. § 2000e-2(c)(1) (West 2022). Discrimination is effectuated through an adverse employment action, which is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). "The First Circuit applies a two-part framework to religious discrimination claims under Title VII. First, the plaintiff must make her *prima facie* case that a bona fide religious practice conflicts with an

employment requirement and was the reason for the adverse employment action." *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004). "In order to establish a prima facie case of religious discrimination based on a failure to accommodate, the plaintiff must show that '(1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the [employer's] attention, and (3) the religious practice was the basis for the adverse employment decision.' " *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 55 (1st Cir. 2002) (quoting *EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996)).

Second, "if the plaintiff establishes her *prima facie* case, the burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship." *Cloutier*, 390 F.3d at 133. Title VII establishes that employers must accommodate "all aspects of [their employees'] religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C.A. § 2000e(j) (West 2022). "[A]n employer need not give an employee her preferred accommodation" to comply with Title VII. *Oquendo v. Costco Wholesale Corp.*, 857 Fed App'x 9, 11 (1st Cir. Apr. 29, 2021) (unpublished). Under Title VII, an accommodation is an undue hardship "if it would impose more than a *de minimis* cost on the

employer." *Cloutier*, 390 F.3d at 134. The undue hardship "calculus applies both to economic costs, such as lost business or having to hire additional employees to accommodate a Sabbath observer, and to non-economic costs, such as compromising the integrity of a seniority system." *Id.*

The amended complaint asserts that the Plaintiffs hold sincerely held religious beliefs against receiving COVID-19 vaccinations and that the Hospital Defendants refused to consider or grant religious accommodations by failing to grant a religious exemption from the vaccine mandate, in violation of Title VII. The amended complaint declares at the outset, in bold letters: "**All Plaintiffs seek in this lawsuit is to be able to continue to provide the healthcare they have provided to patients for their entire careers, and to do so under the same protective measures that have sufficed for them to be considered superheroes for over two years**." ECF No. 152 ¶ 8. This declaration is in keeping with the various allegations in the amended complaint indicating that a religious exemption from the vaccine mandate was the exclusive accommodation the seven Plaintiffs sought from their respective employers. Throughout the amended complaint and memoranda of law, the Plaintiffs employ the terms "religious accommodation" and "religious exemption" interchangeably, but, as I will discuss, although a "religious exemption" is a type of "religious accommodation," it is by no means the only type.

The focus of the Hospital Defendants' motions to dismiss is the undue hardship affirmative defense afforded to the Hospital Defendants by Title VII. The Hospital Defendants do not challenge the Plaintiffs' ability to make out a prima facie claim. Specifically, the Hospital Defendants do not challenge the sincerity of the Plaintiffs' asserted religious beliefs or that those beliefs are the reason for the Plaintiffs' refusal to be vaccinated. Nor do they challenge the Plaintiffs' contentions that their employment was terminated because they refused to receive COVID-19 vaccinations in keeping with Plaintiffs' religious objections to the vaccine. Thus, for purposes of the motions to dismiss, the Plaintiffs have set forth a prima facie case of religious discrimination in violation of Title VII, and the motions turn on the undue hardship affirmative defense.

b. Legal Analysis of the Title VII Claims

The Hospital Defendants contend that the Plaintiffs' Title VII claim must be dismissed because, based on the allegations of the amended complaint, the sole accommodation sought by the Plaintiffs—a religious exemption from the vaccine requirement—would necessarily, as a matter of law, impose an undue hardship on them as employers and therefore the accommodation is not required by Title VII. Undue hardship is an affirmative defense for purposes of Title VII that must be pled and proven by the employer. *See Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) ("The statutory definition of "religion" in Title VII ... [includes] an explicit affirmative defense for failure-to-

accommodate claims if the accommodation would impose an undue hardship on the employer."); *Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d at 55 (explaining that the employer bears the burden to show that any accommodation would result in undue hardship).

In its decision affirming my order denying the Plaintiffs' Motion for a Preliminary Injunction, the First Circuit determined that the "hospitals need not provide the exemption the appellants request because doing so would cause them to suffer undue hardship." *Does 1-6 v. Mills*, 16 F.4th at 36. Although informative, this determination is not conclusive at this stage because it was preliminary, having been voiced in connection with appellate review of the denial of the Plaintiffs' motion for a preliminary injunction.

The Hospital Defendants contend that the amended complaint, which asserts that "the Governor has threatened to revoke the licenses of all health care employers who fail to mandate that all employees receive the COVID-19 vaccine," ECF No. 152 ¶ 34, demonstrates on its face that the threat of sanctions for violating the mandate is real and is more than a de minimis hardship for purposes of Title VII. In addition, the Hospital Defendants note that the Plaintiffs do not allege that they sought or are entitled to any other reasonable accommodation.

"Affirmative defenses may be raised in a motion to dismiss, provided that the facts establishing the defense [are] clear 'on the face of the plaintiff's

pleadings.' " *Zenon v. Guzman*, 924 F.3d 611, 616 (1st Cir. 2019) (alterations omitted) (quoting *Santana-Castro v. Toledo-Davila*, 579 F.3d 109, 113-14 (1st Cir. 2009)). "[W]hen the facts establishing the defense appear within the four corners of the complaint, and upon review there is 'no doubt' that the plaintiff's claim is barred by the raised defense, dismissal is appropriate." *Id.* at 616. Thus, my analysis must address whether the facts establishing the affirmative defense are clear on the face of the pleadings, and then whether there is any room to doubt that the Plaintiffs' action is barred by the affirmative defense of undue hardship as asserted by the Hospital Defendants.

As a threshold matter, and before addressing the Plaintiffs' arguments in response to the motion, the record reflects that there is no dispute between the parties as to what Maine's vaccine mandate requires of designated healthcare facilities and the consequences for such employers, including the Hospital Defendants, if they were to choose to violate it. The Rule provides: "If a Designated Healthcare Facility fails ... to comply with the requirements of this rule, the Department may take enforcement action pursuant to 22 MRS § 804 or as otherwise provided by law." 10-144-264 Me. Code R. § 7(G) (amended Nov. 10, 2021). The statute, 22 M.R.S.A. § 804, provides:

> Any person who neglects, violates or refuses to obey the rules ... may be ordered by the department, in writing, to cease and desist.... In the case of any person who refuses to obey a cease and

> desist order ... the department may impose a fine, which may not be less than $250 or greater than $1,000 for each violation. Each day that the violation remains uncorrected may be counted as a separate offense....
>
> A licensing agency under the department may immediately suspend a license pursuant ... for a violation under this section.

Further, the amended complaint itself acknowledges in paragraphs 33 and 34 that the vaccine mandate required the Hospital Defendants not to employ healthcare workers who were unvaccinated against COVID-19 as of October 1, 2021:

> The Governor's COVID-19 Vaccine Mandate also says that "[t]he organizations to which this requirement applies must ensure that each employee is vaccinated, with this requirement being enforced as a condition of the facilities' licensure."
>
> **Thus, the Governor has threatened to revoke the licenses of all health care employers who fail to mandate that all employees receive the COVID-19 vaccine**.

ECF No. 152 ¶¶ 33-34 (emphasis in original). Thus, among other penalties, the Hospital Defendants would risk the immediate suspension of their state-

issued licenses if they were to violate the vaccine mandate.

The Plaintiffs make several arguments in response to the Hospital Defendants' position that it is clear from the face of the amended complaint that the Plaintiffs' Title VII claims are barred by the undue hardship defense.

First, the Plaintiffs contend in a conclusory fashion that "[c]ompliance with Title VII is not and cannot be an undue hardship." ECF No. 117 at 25. They offer no support, however, for the proposition underlying this argument—that employers' Title VII obligations excuse them from having to comply with a state statute and rule which mandate various vaccinations for healthcare workers—other than to argue that under the Supremacy Clause of the Constitution, "the federal law takes precedence and the state law is preempted," ECF No. 117 at 26 (emphasis omitted) (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018)).

Preemption occurs when "Congress enacts a law that imposes restrictions or confers rights on private actors [and] a state law confers rights or imposes restrictions that conflict with the federal law." *Murphy*, 138 S. Ct. at 1480. Title VII's provisions do not authorize or permit employers, however, to exempt their employees from federal and state laws with impunity. The statute expressly provides that its provisions should not be construed "to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present

or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C.A. § 2000e-7 (West 2022). "[A]n employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999) (affirming dismissal of the plaintiff's complaint because the requested accommodation would require the employer to violate federal law, which was an undue hardship as a matter of law). Similarly, "[e]very circuit to consider the issue has ... h[e]ld that Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a federal statute." *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir. 2015); *see also Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) ("Requiring defendants to violate the Internal Revenue Code and subject themselves to potential penalties by not providing Seaworth's SSN on information returns results in undue hardship."). Thus, the Plaintiffs' suggestion that the Hospital Defendants' obligation to comply with Title VII necessarily excuses them from having to comply with the vaccine mandate is unavailing because the consequences that the Hospital Defendants would face for their noncompliance are more than de minimis. *See Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 67 (1986) (noting that an accommodation causes an undue hardship whenever it results in a more-than-de minimis cost to the employer).

Second, the Plaintiffs contend that the question of whether the Hospital Defendants' refusal to accommodate the Plaintiffs' religious objections constitutes an undue hardship is a question of fact that cannot properly be decided on a motion to dismiss. The Plaintiffs cite to numerous decisions indicating that whether an otherwise reasonable accommodation sought by an employee would present an undue hardship for the employer is generally a question of fact and not for decision at the motion-to-dismiss stage. *See, e.g.*, *McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992) ("As for the balance between 'reasonable accommodation' and 'undue hardship,' these matters are questions of fact and thus generally inappropriate for resolution on the pleadings."); *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 877 (9th Cir. 1989) ("[W]e note that whether a particular accommodation would have imposed an undue hardship on the employer is a question of fact."); *Doe 1 v. NorthShore Univ. HealthSystem*, No. 21-cv-05683, 2021 WL 5578790, at *4 (N.D. Ill. Nov. 30, 2021) ("Assessing the undue-hardship question on the merits typically requires factual development, because whether an employer can 'reasonably accommodate a person's religious beliefs without undue hardship "is basically a question of fact." ' " (quoting *Minkus v. Metro. Sanitary Dist. of Greater Chi.*, 600 F.2d 80, 81 (7th Cir. 1979))). Here, however, and as explained previously, the facts establishing the requirements of the vaccine mandate and the consequences for employers who fail to abide by it are not in dispute. The Plaintiffs have not pointed to any disputed fact in relation to the requirements of the

vaccine mandate that requires further development beyond the motion to dismiss stage.

Finally, the Plaintiffs contend that the State Defendants and the Hospital Defendants have adopted inconsistent positions on whether any religious accommodation is available under the vaccine mandate. The Plaintiffs argue that the "Defendants cannot have their cake and eat it too, relying on the Vaccine Mandate to say it would be an undue hardship to violate state law while at the same time espousing that the Vaccine Mandate does not prohibit employers from providing an accommodation under Title VII." ECF No. 117 at 28. The Plaintiffs then assert that "[i]f State Defendants do not prohibit such an accommodation under Title VII, then [Hospital] Defendants cannot claim an undue hardship for violating a state law that does not prohibit providing Plaintiffs with accommodations." ECF No. 117 at 29.[9]

The stated positions of the State and Hospital Defendants are not, however, inconsistent. The amended complaint does not allege that any of the Defendants have asserted that all religious accommodations, apart from the exemption the

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[9] The Plaintiffs quote from written DHHS guidance that explains that, although the Rule does not prohibit employers from providing reasonable accommodations under Title VII, "if such accommodations are provided by a [designated healthcare facility, those accommodations] must comply with the [R]ule." ECF No. 117 at 28 (quoting State of Me., *Health Care Workers Vaccination FAQs*, (Nov. 10, 2021), https://www.maine.gov/covid19/vaccines/public-faq/health-care-worker-vaccination).

Plaintiffs desire, are unavailable. As the Plaintiffs acknowledge in paragraph 90 of their amended complaint, when MaineHealth denied Plaintiff Lowe's request for a religious exemption, it also informed her: "If you seek an accommodation other than a religious exemption from the state mandated vaccine, please let us know." ECF No. 152 ¶ 90. Contrary to the Plaintiffs' argument, the State and Hospital Defendants' positions–that a religious exemption from the vaccine mandate is not available but that other religious accommodations consistent with both Title VII and Maine's COVID-19 vaccine mandate may be available–are consistent.

c. Conclusion

To reprise, the facts establishing the affirmative defense of undue hardship are clear from the face of the Plaintiffs' pleadings, and there is no doubt that the affirmative defense bars the Plaintiffs' Title VII claim. The Plaintiffs sought one specific religious accommodation to the COVID-19 vaccine mandate—an exemption—that, if granted, would place the Hospital Defendants in violation of state law. Title VII does not mandate that employers provide the specific accommodation requested by an employee, nor does it require employers to provide accommodations that would require the employer to violate state law. Accepting the properly pled facts set forth in the amended complaint as true, if the Hospital Defendants had granted the sole accommodation sought by the Plaintiffs, it would result in an undue hardship by subjecting the Hospital Defendants to the imposition of a fine and

the "immediat[e] suspension of a license." 22 M.R.S.A. § 804(2), (3).

The amended complaint and the other information that may be considered under Fed. R. Civ. P. 12(b)(6) leaves no doubt that the Plaintiffs' Title VII claims are barred by the affirmative defense of undue hardship. *See Zenon*, 924 F.3d at 616. Accordingly, the amended complaint fails to state plausible claims for relief under Title VII and the claims are properly dismissed.

3. Free Exercise Clause of the First Amendment

The Plaintiffs assert that the appropriate standard of constitutional review for their claim under the Free Exercise Clause of the First Amendment is strict scrutiny, which, they contend, is a standard that the COVID-19 mandate cannot survive. The State Defendants contend that the less-demanding rational basis standard of constitutional review applies, and that the COVID-19 vaccine mandate satisfies this standard and thus does not violate the Free Exercise Clause. The question of which standard of constitutional review applies in this case turns on whether the COVID-19 vaccine mandate is neutral and generally applicable, as explained further below.

The Free Exercise Clause, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law prohibiting the free exercise" of religion. U.S. Const. amend. I, *see Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)

(incorporating the Free Exercise Clause of the First Amendment against the states). The Clause "embraces two concepts[:] freedom to believe and freedom to act." *Cantwell*, 310 U.S. at 303. Although the freedom to believe is absolute, the freedom to act on one's religious beliefs "remains subject to regulation for the protection of society." *Id.* at 304.

The Free Exercise Clause does not prevent states from enacting a "neutral, generally applicable regulatory law," even when that law infringes on religious practices. *See Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879-882 (1990). Laws that are deemed both neutral and generally applicable are traditionally subject to rational basis review. Thus, in *Smith*, the U.S. Supreme Court explained: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Id.* at 878-79. Further, "if prohibiting the exercise of religion ... is not the object of the [state action] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

However, if a law burdens a religious practice and does not satisfy the requirements of neutrality and general applicability, the law is invalid under the Free Exercise Clause unless it survives strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Under this

heightened standard of review, a law will be deemed invalid under the Free Exercise Clause unless it is "justified by a compelling governmental interest and ... narrowly tailored to advance that interest." *Id.* at 531-32.

To determine whether rational basis or strict scrutiny review applies, I turn to consider whether the COVID-19 vaccine mandate is both (1) neutral and (2) generally applicable.

a. Neutrality

Neutrality examines whether the State's object, or purpose, was to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. A law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation." *Id.* The first step in determining the object of a law is to examine whether it is facially neutral. *Id.* ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

By this standard, the COVID-19 vaccine mandate challenged here is facially neutral. Neither the statute nor the Rule mention religion, even by implication. Operating in tandem, they require that all healthcare workers employed at designated healthcare facilities receive the COVID-19 vaccination. They do not treat the COVID-19 vaccine differently than any other vaccines mandated under Maine law.

The vaccine mandate's facial neutrality is not dispositive, though, because a "[g]overnment [also] fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Thus, even a facially neutral law may not be neutral for Free Exercise purposes if its object is to discriminate against religious beliefs, practices, or motivations. *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt."). To discern whether the object of a law is discriminatory, courts look to "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision[-]making body." *Id.* at 540.

The amended complaint asserts that the COVID-19 vaccine mandate is not neutral because the removal of the religious exemption from the Rule in 2021 "specifically target[ed] Plaintiffs' religious beliefs for disparate and discriminatory treatment." ECF No. 152 ¶ 119. The amended complaint asserts that "[b]y removing statutorily required religious accommodations from consideration in Maine, the Governor has created and singled out for disparate treatment a specific class of healthcare employees (*i.e.*, religious objectors to COVID-19 vaccinations) as compared to other similarly situated healthcare workers (*i.e.*, those with medical exemption requests)." ECF No. 152 ¶ 147. The Plaintiffs

characterize this removal as a "religious gerrymander." ECF No. 152 ¶ 121.

The Plaintiffs' "religious gerrymander" argument fails to account for the fact that it was the Maine Legislature, and not the Governor, that removed religious and philosophical exemptions from mandated vaccines, and that the removal occurred with the 2019 amendment of the statute, two years prior to the enactment of the Rule challenged by Plaintiffs. Following the unsuccessful People's Veto held in 2020 that challenged the 2019 statutory change, DHHS removed the religious exemption from the Rule in April 2021 to conform the Rule to the change. These revisions pre-dated the adoption of the COVID-19 vaccine requirement.

The 2019 revision of 22 M.R.S.A. § 802(4-B) is therefore distinguishable from the history of the revision of the regulation challenged in *New Hope Family Services v. Poole*, 966 F.3d 145 (2d. Cir. 2020), which Plaintiffs heavily rely upon. In *New Hope Family Services*, a Christian adoption agency brought a Free Exercise challenge against a facially neutral regulation that prohibited adoption agencies from discriminating on the basis of sexual orientation and marital status. *Id.* at 148-49. The regulation at issue was revised to include this non-discrimination provision in 2013, and for five years following that change the agency continued its practice of referring unmarried or same-sex couples seeking to adopt to other agencies because of the agency's religious belief against recommending or placing children with unmarried or same-sex couples. *Id.* at 157-58. In

2018, though, the state notified the agency that it would need to change its policy to comply with the regulation, or it would be required to close. *Id.* at 158-59. The district court granted the state's motion to dismiss the agency's complaint, determining that the regulation was facially neutral and that there was no evidence that the aim of the regulation was to restrict or infringe upon religious practices. The Second Circuit reversed, *id.* at 160, determining that the complaint raised a plausible suspicion of hostility to religious beliefs despite the regulation's facial neutrality for multiple reasons. *Id.* at 165-70. These included the apparent inconsistencies between the regulation at issue and the statute it implemented, the abrupt and unexplained change in the way the Plaintiff's practices were treated, and public statements made by agency personnel that arguably demonstrated hostility to religious beliefs. *Id.*

Here, unlike in *New Hope Family Services*, the amended complaint does not allege facts that raise a plausible suspicion that hostility to religious beliefs motivated Maine's removal of non-medical exemptions to mandatory vaccinations. Accepting all well-pleaded facts in the amended complaint as true and drawing all reasonable inferences in favor of the Plaintiffs, the amended complaint does not allege facts suggesting that religious animosity inspired the statutory removal of the religious exemption to mandatory vaccinations in 2019 or the corresponding revision made to the Rule in April 2021. Nor does the amended complaint allege any public comments or other facts associated with the adoption of the COVID-19 vaccine mandate in August 2021 that

would, if proven, establish that the same arose from a hostility to religious beliefs.

For the foregoing reasons, the COVID-19 vaccine mandate is neutral.

b. General Applicability

General applicability addresses whether the State has selectively "impos[ed] burdens only on conduct motivated by religious belief." *Lukumi*, 508 at 543. The State Defendants contend that the COVID-19 vaccine mandate is generally applicable and does not target religious beliefs because the distinction between permitted medical exemptions and prohibited non-medical exemptions is based on an employee's medical condition, not the employee's beliefs. The Plaintiffs argue that "the Vaccine Mandate treats religious exemptions less favorably than *some* nonreligious exemptions. That is enough to remove the law from [the] neutrality and general applicability requirement of the First Amendment." ECF No. 117 at 6.

The Plaintiffs' approach to the question of general applicability bypasses a necessary analytical step. Courts must first determine whether the religious and secular interests at issue are comparable and then, if they are, examine, whether the less favorable treatment of religious interests results from a constitutionally impermissible value judgment. As the Supreme Court recently explained, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever

they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

The Plaintiffs contend that the secular activity at issue in this case that is comparable to the religious exemption the Plaintiffs seek is the COVID-19 vaccine mandate's medical exemption from all mandatory vaccines. The Plaintiffs assert that because individuals who are medically exempt from receiving the COVID-19 vaccine pose the same risk to the larger population as those who would be religiously exempt, the COVID-19 vaccine mandate is not generally applicable.

The Supreme Court has explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation." *Id.* The COVID-19 vaccine mandate's purpose is threefold: (1) "to protect the health and lives of Maine people," (2) to "safeguard Maine's health care capacity," and (3) to "limit the spread of the [COVID-19] virus." ECF No. 1-1 at 1 (Press Release from Governor Mills's office announcing the Rule). A medical exemption to state-mandated vaccines is fundamentally different and, therefore, not comparable to a religious exemption because a medical exemption aligns with the State's interest in protecting public health and, more specifically, medically vulnerable individuals from illness and infectious diseases, while non-medical exemptions, including religious exemptions, do not. This fundamental difference was recognized in the First

Circuit's earlier decision in this case: "[E]xempting from vaccination only those whose health would be endangered by vaccination does not undermine Maine's asserted interests here: (1) ensuring that healthcare workers remain healthy and able to provide the needed care to an overburdened healthcare system; (2) protecting the health of the those in the state most vulnerable to the virus—including those who are vulnerable to it because they cannot be vaccinated for medical reasons; and (3) protecting the health and safety of all Mainers, patients and healthcare workers alike." *Does 1-6 v. Mills*, 16 F.4th at 30-31.

Thus, exempting healthcare workers whose own health would be endangered if forced to receive a vaccine is in harmony with the purpose of the vaccine requirement itself—to protect public health. Additionally, the COVID-19 vaccine mandate at issue here provides a single objective exemption—a medical exemption—and as the First Circuit observed, "[n]o case in this circuit and no case of the Supreme Court holds that a single objective exemption renders a rule not generally applicable." *Does 1-6 v. Mills*, 16 F.4th at 30.

Individualized exemptions may, however, undermine a regulation's general applicability if they display an unconstitutional value judgment that gives preference to secular concerns over religious concerns. In *Fulton*, the Supreme Court explained that "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for

individualized exemptions." *Fulton*, 141 S. Ct. at 1877; *see also Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't. of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) ("A law is ... not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it."). The Plaintiffs also contend that the medical exemption at issue here should be treated as an individualized exception that is "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." ECF No. 117 at 11 (quoting and relying on *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999)). In *Fraternal Order of Police*, the Third Circuit applied strict scrutiny to invalidate a regulation that prohibited beards for male police officers that was adopted for the stated purpose of promoting uniformity of the officers' appearance, and that granted a medical exemption from the requirement while not exempting officers who maintained beards as a matter of religious faith. 170 F.3d at 365-67.

In this case, the amended complaint and the properly considered documents, information, and facts before me show that the purpose of requiring COVID-19 vaccinations for healthcare workers is solely to protect public health. Exempting individuals whose health will be threatened if they receive a COVID-19 vaccine is an essential, constituent part of a reasoned public health response to the COVID-19 pandemic. It does not express or suggest a discriminatory bias against religion. *See W.D. v.*

Rockland County, 521 F. Supp. 3d 358, 403 (S.D.N.Y. 2021) (concluding that New York's emergency declaration mandating vaccinations against measles, which provided a medical exemption but not a religious exemption, met the requirement of general applicability by "encouraging vaccination of all those for whom it was medically possible, while protecting those who could not be inoculated for medical reasons"). In the context of the COVID-19 vaccine mandate, the medical exemption is rightly viewed as an essential facet of the vaccine's core purpose of protecting the health of patients and healthcare workers, including those who, for bona fide medical reasons, cannot be safely vaccinated. In addition, the vaccine mandate places an equal burden on all secular beliefs unrelated to protecting public health—for example, philosophical or politically-based objections to state-mandated vaccination requirements—to the same extent that it burdens religious beliefs.

Thus, the medical exemption available as to all mandatory vaccines required by Maine law does not reflect a value judgment unfairly favoring secular interests over religious interests. As an integral part of the vaccine requirement itself, the medical exemption for healthcare workers does not undermine the vaccine mandate's general applicability. The amended complaint does not plead any facts that plausibly support the conclusion that the COVID-19 vaccine mandate is not generally applicable. Because the COVID-19 vaccine mandate is both neutral and generally applicable, rational basis review applies.

c. Rational Basis Review

"A law survives rational basis review so long as the law is rationally related to a legitimate governmental interest." *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008). Thus, the Plaintiffs must plead facts to plausibly support a claim that "the governmental infringement is not rationally related to a legitimate government purpose." *Mulero-Carrillo v. Román-Hernández*, 790 F.3d 99, 107 (1st Cir. 2015). For the following reasons, I conclude that the Plaintiffs have not pled facts that plausibly support their claim that the COVID-19 vaccine mandate is not rationally related to a legitimate government interest.

As described previously, the COVID-19 vaccine mandate's purpose is threefold: (1) "to protect the health and lives of Maine people," (2) to "safeguard Maine's health care capacity," and (3) to "limit the spread of the [COVID-19] virus." ECF No. 1-1 at 1 (Press Release from Governor Mills's office announcing the Rule). As the Supreme Court has observed, curbing the spread of COVID-19 is "unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 62, 67 (2020) (per curiam). An unquestionably compelling interest is inherently legitimate. Safeguarding Maine's healthcare delivery capacity and protecting the health and lives of Maine people are also legitimate government interests.

The Plaintiffs make a single, unsupported assertion in the amended complaint challenging the government's interest: "There is no legitimate, rational, or compelling interest in the Governor's

COVID-19 Vaccine Mandate's exclusion of exemptions and accommodations for sincerely held religious beliefs." ECF No. 152 ¶ 124. The Plaintiffs do not elaborate on this argument in their memorandum. This conclusory statement does not present any facts which cast doubt on the legitimacy of the Government's asserted interests in the COVID-19 vaccine mandate.

Reducing the number of unvaccinated healthcare workers at designated healthcare facilities in Maine is rationally related to the Government's interests in limiting the spread of COVID-19, safeguarding Maine's healthcare capacity, and protecting the lives and health of Maine people. Thus, the COVID-19 vaccine mandate is rationally related to the asserted legitimate governmental interests. For this reason, the Free Exercise claim is properly dismissed.

4. Equal Protection Clause

The amended complaint asserts that the COVID-19 vaccine mandate impermissibly creates a class of religious objectors and then subjects them to disparate treatment, in violation of the Equal Protection Clause. "[W]here a law subject to an equal protection challenge 'does not violate [a plaintiff's] right of free exercise of religion,' courts do not 'apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.' " *W.D.*, 521 F. Supp. 3d at 410 (second alteration in original) (quoting *A.M. ex rel. Messineo v. French*, 431 F. Supp. 3d 432, 446 (D. Vt. 2019)); *accord Wirzburger v. Galvin*, 412 F.3d 271, 282-83 (1st Cir. 2005)

("Because we [hold] that the [challenged law] does not violate the Free Exercise Clause, we apply rational basis scrutiny to the fundamental rights based claim that [the law] violates equal protection.").

Because I have determined that the vaccine mandate is rationally based, no further analysis is required, and the amended complaint's Equal Protection claim is appropriately dismissed.

5. Supremacy Clause

The amended complaint also asserts that the COVID-19 vaccine mandate violates the Supremacy Clause of the U.S. Constitution, U.S. Const. Art. VI, cl. 2, because the mandate purportedly violates the anti-discrimination provisions of Title VII.

The Supremacy Clause "is not the 'source of any federal rights,' and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989)). Rather, the Supremacy Clause "creates a rule of decision" that "instructs courts what to do when state and federal law clash." *Id.* As explained in the analysis of the Plaintiffs' Title VII claim, state and federal law do not clash here, and the mandate does not violate Title VII.

Accordingly, the amended complaint's claim under the Supremacy Clause that the Defendants "attempt[ed] to make Maine law supersede federal law," ECF No. 152 at 32, is appropriately dismissed as to all Defendants.

6. Unlawful Conspiracy to Violate Plaintiffs' Civil Rights in Violation of 42 U.S.C.A. § 1985

"A civil rights conspiracy as commonly defined is 'a combination of two or more persons acting in concert to commit an unlawful act ... the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another.' " *Parker v. Landry*, 935 F.3d 9, 17 (1st Cir. 2019) (quoting *Est. of Bennett v. Wainwright*, 548 F.3d 155, 178 (1st Cir. 2008)). To plead a civil rights conspiracy in violation of 42 U.S.C.A. § 1985, a Plaintiff must "allege that the purpose of the conspiracy is 'to deprive the plaintiff of the equal protection of the laws,' describe at least one overt act in furtherance of the conspiracy, and 'show either injury to person or property, or a deprivation of a constitutionally protected right.' " *Alston v. Spiegel*, 988 F.3d 564, 577 (1st Cir. 2021) (quoting *Pérez-Sánchez v. Pub. Bldg. Auth.,* 531 F.3d 104, 107 (1st Cir. 2008)).

The amended complaint asserts that the State and Hospital Defendants conspired to violate the Plaintiffs' civil rights in violation of 42 U.S.C.A. § 1985, but provides only conclusory, nonfactual allegations in support. The primary assertion made in support of the conspiracy claim is that the Hospital Defendants made public statements that were supportive of the COVID-19 vaccine mandate after it was announced, and that the Hospital Defendants subsequently refused to grant religious exemptions from the COVID-19 vaccination requirement. The amended complaint postulates that this public demonstration of support following the

announcement of the Rule shows that the State and Hospital Defendants had agreed to deprive the Plaintiffs of their constitutionally protected rights to free exercise of religion and to equal protection of the laws.

The Plaintiffs' contention that the Hospital Defendants' expression of support for the Rule following its adoption constitutes evidence of a civil conspiracy is implausible. "Vague and conclusory allegations about persons working together, with scant specifics as to the nature of their joint effort or the formation of their agreement, will not suffice to defeat a motion to dismiss" regarding a claimed civil rights conspiracy. *Alston*, 988 F.3d at 578. As the First Circuit observed in its review of my earlier denial of the Plaintiffs' motion for preliminary injunction, the Plaintiffs here "do not allege that the hospitals had any role in the amendment of the statute or issuance of the regulation, only that they supported the regulation after the fact." *Does 1-6 v. Mills*, 16 F.4th at 37. Because the Plaintiffs have failed to plead facts that, if proven, could demonstrate the existence of a conspiracy, the § 1985 claim is dismissed.

III. CONCLUSION

For the reasons stated above, the State and Hospital Defendants' Motions to Dismiss (ECF Nos. 107, 108, 109) are **GRANTED**.

SO ORDERED.

APPENDIX D

142 S. Ct. 1112

Supreme Court of the United States.

John DOES 1–3, et al., Petitioners,
v.
Janet T. MILLS, Governor of Maine, et al.

No. 21-717.
|
February 22, 2022

Case below, 16 F.4th 20.

Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

APPENDIX E

142 S. Ct. 17

Supreme Court of the United States.

John DOES 1–3, et al.
v.
Janet T. MILLS, Governor of Maine, et al.

No. 21A90
|
October 29, 2021

ON APPLICATION FOR INJUNCTIVE RELIEF

The application for injunctive relief presented to Justice BREYER and by him referred to the Court is denied.

Justice BARRETT, with whom Justice KAVANAUGH joins, concurring in the denial of application for injunctive relief.

When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant " 'is likely to succeed on the merits.' " *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. See, *e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (*per curiam*); cf. Supreme Court Rule 10. Were the

standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, dissenting from the denial of application for injunctive relief.

Maine has adopted a new regulation requiring certain healthcare workers to receive COVID–19 vaccines if they wish to keep their jobs. Unlike comparable rules in most other States, Maine's rule contains no exemption for those whose sincerely held religious beliefs preclude them from accepting the vaccination. The applicants before us are a physician who operates a medical practice and eight other healthcare workers. No one questions that these individuals have served patients on the front line of the COVID–19 pandemic with bravery and grace for 18 months now. App. to Application for Injunctive Relief, Exh. 6, ¶8 (Complaint). Yet, with Maine's new rule coming into effect, one of the applicants has already lost her job for refusing to betray her faith; another risks the imminent loss of his medical practice. The applicants ask us to enjoin further enforcement of Maine's new rule as to them, at least until we can decide whether to accept their petition for certiorari. I would grant that relief.

Start with the first question confronting any injunction or stay request—whether the applicants are likely to succeed on the merits. The First Amendment protects the exercise of sincerely held religious beliefs. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U.S. ——, —— – ——, 138 S.Ct. 1719, 1728-1730, 201 L.Ed.2d 35 (2018). Laws that single out sincerely held religious beliefs or conduct based on them for sanction are "doubtless ... unconstitutional." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). But what about other laws? Under this Court's current jurisprudence, a law may survive First Amendment scrutiny if it is generally applicable and neutral toward religion. If the law fails either of those tests, it may yet survive but the State must satisfy strict scrutiny. To do that, the State must prove its law serves a compelling interest and employs the least restrictive means available for doing so. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Smith*, 494 U.S., at 879, 110 S.Ct. 1595.

Maine does not dispute that its rule burdens the exercise of sincerely held religious beliefs. The applicants explain that receiving the COVID–19 vaccines violates their faith because of what they view as an impermissible connection between the vaccines and the cell lines of aborted fetuses. More specifically, they allege that the Johnson & Johnson vaccine required the use of abortion-related materials in its production, and that Moderna and Pfizer relied on aborted fetal cell lines to develop their vaccines.

Complaint ¶¶61–68. This much, the applicants say, violates foundational principles of their religious faith. For purposes of these proceedings, Maine has contested none of this.

That takes us to the question whether Maine's rule qualifies as neutral and generally applicable. Under this Court's precedents, a law fails to qualify as generally applicable, and thus triggers strict scrutiny, if it creates a mechanism for "individualized exemptions." *Lukumi*, 508 U.S., at 537, 113 S.Ct. 2217; see also *Fulton* v. *Philadelphia*, 593 U.S. ——, —— – ——, 141 S.Ct. 1868, 1876-1877, 210 L.Ed.2d 137 (2021).

That description applies to Maine's regulation. The State's vaccine mandate is not absolute; individualized exemptions are available, but only if they invoke certain preferred (nonreligious) justifications. Under Maine law, employees can avoid the vaccine mandate if they produce a "written statement" from a doctor or other care provider indicating that immunization "may be" medically inadvisable. Me. Rev. Stat. Ann., Tit. 22, § 802(4–B) (2021). Nothing in Maine's law requires this note to contain an explanation why vaccination may be medically inadvisable, nor does the law limit what may qualify as a valid "medical" reason to avoid inoculation. So while COVID–19 vaccines have Food and Drug Administration labels describing certain contraindications for their use, individuals in Maine may refuse a vaccine for other reasons too. From all this, it seems Maine will respect even mere *trepidation* over vaccination as sufficient, but only so

long as it is phrased in medical and not religious terms. That kind of double standard is enough to trigger at least a more searching (strict scrutiny) review.

Strict scrutiny applies to Maine's vaccine mandate for another related reason. This Court has explained that a law is not neutral and generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U.S. ——, ——, 141 S.Ct. 1294, 1296, 209 L.Ed.2d 355 (2021) (*per curiam*); see also *Fulton*, 593 U.S., at ——, 141 S.Ct., at 1877; *Lukumi*, 508 U.S., at 542–546, 113 S.Ct. 2217. And again, this description applies to Maine's rule. The State allows those invoking medical reasons to avoid the vaccine mandate on the apparent premise that these individuals can take alternative measures (such as the use of protective gear and regular testing) to safeguard their patients and co-workers. But the State refuses to allow those invoking religious reasons to do the very same thing.

Unpack this point further. Maine has offered four justifications for its vaccination mandate:

> (1) Protecting individual patients from contracting COVID–19;
>
> (2) Protecting individual healthcare workers from contracting COVID–19;
>
> (3) Protecting the State's healthcare infrastructure, including the work force, by preventing COVID–caused

> absences that could cripple a facility's ability to provide care; and
>
> (4) Reducing the likelihood of outbreaks within healthcare facilities caused by an infected healthcare worker bringing the virus to work. App. to Brief for Respondents, Decl. of Nirav Shah, p. 43, ¶56 (Shah Decl.).

Now consider the first, second, and fourth of these. No one questions that protecting patients and healthcare workers from contracting COVID–19 is a laudable objective. But Maine does not suggest a worker who is unvaccinated for medical reasons is less likely to spread or contract the virus than someone who is unvaccinated for religious reasons. Nor may any government blithely assume those claiming a medical exemption will be more willing to wear protective gear, submit to testing, or take other precautions than someone seeking a religious exemption. A State may not assume "the best" of individuals engaged in their secular lives while assuming "the worst" about the habits of religious persons. *Roberts v. Neace*, 958 F.3d 409, 414 (C.A.6 2020). In fact, the applicants before us have already demonstrated a serious commitment to public health during this pandemic and expressly stated that they, no less than those seeking a medical exemption, will abide by rules concerning protective gear, testing, or the like. Complaint ¶76.

That leaves Maine's third asserted interest: protecting the State's healthcare infrastructure. According to Maine, "[a]n outbreak among healthcare

workers requiring them to quarantine, or to be absent ... as a result of illness caused by COVID–19, could cripple the facility's ability to provide care." Shah Decl. 44, ¶56. But as we have already seen, Maine does not dispute that unvaccinated religious objectors and unvaccinated medical objectors are equally at risk for contracting COVID–19 or spreading it to their colleagues. Nor is it any answer to say that, if the State required vaccination for medical objectors, they might suffer side effects resulting in fewer medical staff available to treat patients. If the State refuses religious exemptions, religious workers will be fired for refusing to violate their faith, which will *also* mean fewer healthcare workers available to care for patients. Slice it how you will, medical exemptions and religious exemptions are on comparable footing when it comes to the State's asserted interests.

The Court of Appeals found Maine's rule neutral and generally applicable due to an error this Court has long warned against—restating the State's interests on its behalf, and doing so at an artificially high level of generality. According to the court below, Maine's regulation sought to "protec[t] the health and safety of all Mainers, patients, and healthcare workers alike." *Does 1–6* v. *Mills*, 16 F. 4th 20, 30–32 (C.A.1, Oct. 19, 2021). But when judging whether a law treats a religious exercise the same as comparable secular activity, this Court has made plain that only the government's *actually asserted* interests as applied to the parties before it count—not *post-hoc* reimaginings of those interests expanded to some society-wide level of generality. *Fulton*, 593 U.S., at ——, 141 S.Ct., at 1877; *Tandon*, 593 U.S., at ——,

141 S.Ct., at 1296-1297; *Lukumi*, 508 U.S., at 544–545, 113 S.Ct. 2217. "At some great height, after all, almost any state action might be said to touch on '... public health and safety' ... and measuring a highly particularized and individual interest" in the exercise of a civil right " 'directly against ... these rarified values inevitably makes the individual interest appear the less significant.' " *Yellowbear v. Lampert*, 741 F.3d 48, 57 (C.A.10 2014) (quoting J. Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 330–331 (1969)). This Court's precedents "do not support such a lopsided inquiry." 741 F.3d at 57.

That takes us to the application of strict scrutiny. Strict scrutiny requires the State to show that its challenged law serves a compelling interest and represents the least restrictive means for doing so. *Lukumi*, 508 U.S., at 546, 113 S.Ct. 2217. For purposes of resolving this application, I accept that what we said 11 months ago remains true today—that "[s]temming the spread of COVID–19" qualifies as "a compelling interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. ——, ——, 141 S.Ct. 63, 68-69, 208 L.Ed.2d 206 (2020) (*per curiam*). At the same time, I would acknowledge that this interest cannot qualify as such forever. Back when we decided *Roman Catholic Diocese*, there were no widely

distributed vaccines.[1] Today there are three.[2] At that time, the country had comparably few treatments for those suffering with the disease. Today we have additional treatments and more appear near.[3] If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.

Assuming for present purposes that its interest is a compelling one, Maine has not shown that its rule

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[1] Our opinion in *Roman Catholic Diocese* was published on November 25, 2020. COVID–19 vaccines outside of clinical trials weren't available to the public until the following month. See P. Loftus & M. West, First Covid-19 Vaccine Given to U. S. Public, Wall Street J., Dec. 14, 2020, https://www.wsj.com/articles/covid-19-vaccinations-in-the-u-s-slated-to-begin-monday-11607941806.

[2] Over 200 million Americans, nearly seven in ten, have received at least one dose of these vaccines. Nearly six in ten Americans have been fully vaccinated, including about 85% of those older than 65. See CDC, COVID–19 Vaccinations in the United States, COVID Data Tracker (Oct. 28, 2021), http://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total. Among States, Maine has particularly high vaccination rates: About 70% of its population has been fully vaccinated, good for fourth-best in the Nation. See Maine Coronavirus Vaccination Progress, USA Facts (Oct. 26, 2021), https://usafacts.org/visualizations/covid-vaccine-tracker-states/state/maine.

[3] C. Johnson, Merck's Experimental Pill To Treat COVID–19 Cuts Risk of Hospitalization and Death in Half, the Pharmaceutical Company Reports, Washington Post, Oct. 1, 2021, https://www.washingtonpost.com/health/2021/10/01/pill-to-treat-covid/ (noting that as of October 1, 2021, "[t]he United States moved a major step closer ... to having an easy-to-take pill to treat covid-19 available in the nation's medicine cabinet").

represents the least restrictive means available to achieve it. The State says that, to meet its four stated goals above, 90% of employees at covered health facilities must be vaccinated. Shah Decl. 43, ¶54; State Respondents' Brief in Opposition 9. The State doesn't offer evidence explaining the selection of its 90% figure. But even taking it as given, Maine does not explain how denying exemptions to religious objectors is essential to its achieving that threshold statewide, let alone in the applicants' actual workplaces. Had the State consulted its own website recently, it would have discovered that, as of last month, hospitals were already reporting a vaccination rate of more than 91%, ambulatory surgical centers 92%, and all other entities roughly 85% or greater.[4] Current numbers may be even higher. What's more, healthcare providers that employ four of the nine applicants in this case already told the media more than a week ago that they have reached 95% and 94% vaccination rates among their employees.[5] Many other States have made do with a religious exemption in comparable vaccine mandates. See Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 13 (observing that the overwhelming majority of States

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[4] Maine Center for Disease Control and Prevention, Maine Health Care Worker COVID–19 Vaccination Dashboard (Oct. 27, 2021), https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/publications/health-care-worker-covid-vaccination-rates.shtml.

[5] J. Lawlor, Maine Sees Jump in Vaccinations Among Health Care Workers as Deadline Nears, Lewiston Sun J., Oct. 14, 2021, https://www.sunjournal.com/2021/10/13/maine-reports-893-cases-of-covid-19-over-a-4-day-period (Northern Light Health reporting 95.5% vaccination rate, MaineHealth reporting a 94% rate).

with similar mandates provide a religious exemption). Maine's decision to deny a religious exemption in these circumstances doesn't just fail the least restrictive means test, it borders on the irrational.

Looking to the other traditional factors also suggests relief is warranted. Before granting a stay or injunctive relief, we ask not only whether a litigant is likely to prevail on the merits but also whether denying relief would lead to irreparable injury and whether granting relief would harm the public interest. *Roman Catholic Diocese*, 592 U.S., at ——— – ———, 141 S.Ct., at 69-71; see also 28 U. S. C. § 1651(a). The answer to both questions is clear. This Court has long held that " [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. " *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion). And as we have seen, Maine has so far failed to present any evidence that granting religious exemptions to the applicants would threaten its stated public health interests any more than its medical exemption already does.

This case presents an important constitutional question, a serious error, and an irreparable injury. Where many other States have adopted religious exemptions, Maine has charted a different course. There, healthcare workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious

beliefs. Their plight is worthy of our attention. I would grant relief.

APPENDIX F

16 F.4th 20

United States Court of Appeals, First Circuit.

Jane DOES 1-6; John Does 1-3; Jack Does 1-1000; Joan Does 1-1000, Plaintiffs, Appellants,
v.
Janet T. MILLS, in her official capacity as Governor of the State of Maine; Jeanne M. Lambrew, in her official capacity as Commissioner of the Maine Department of Health and Human Services; Nirav D. Shah, in his official capacity as Director of the Maine Center for Disease Control and Prevention; MaineHealth; Genesis Healthcare of Maine, LLC; Genesis Healthcare, LLC; Northern Light Health Foundation; MaineGeneral Health, Defendants, Appellees.

No. 21-1826
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October 19, 2021

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Jon D. Levy, U.S. District Judge]

Before

Howard, Chief Judge, Lynch and Barron, Circuit Judges.

Mathew D. Staver, Horatio G. Mihet, Roger K. Gannam, Daniel J. Schmid, and Liberty Counsel on brief for appellants.

Kimberly L. Patwardahan, Assistant Attorney General, Valerie A. Wright, Assistant Attorney General, Thomas A. Knowlton, Deputy Attorney General, Aaron M. Frey, Attorney General, on brief for appellees Janet T. Mills, Jeanne M. Lambrew, and Nirav D. Shah.

James R. Erwin, Katherine I. Rand, and Pierce Atwood LLP on brief for appellees MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare, LLC, and MaineGeneral Health.

Ryan P. Dumais, Katherine L. Porter, and Eaton Peabody on brief for appellee Northern Light Health Foundation.

LYNCH, Circuit Judge.

Faced with COVID-19's virulent delta variant and vaccination rates among healthcare workers too low to prevent community transmission, Maine's Center for Disease Control ("Maine CDC") promulgated a regulation effective August 12, 2021, requiring all workers in licensed healthcare facilities to be vaccinated against the virus. Under state law, a healthcare worker may claim an exemption from the requirement only if a medical practitioner certifies that vaccination "may be medically inadvisable." Me. Rev. Stat. tit. 22, § 802(4-B) (West 2021). Maine has mandated that its healthcare workers be vaccinated against certain contagious diseases since 1989. It has not allowed religious or philosophical exemptions to

any of its vaccination requirements since an amendment to state law in May 2019 (which took effect in April 2020), and the COVID-19 mandate complies with that state law.

Several Maine healthcare workers (and a healthcare provider who runs his own practice) sued, arguing that the vaccination requirement violates their rights including those under the Free Exercise Clause of the U.S. Constitution. They sued the Governor, the commissioner of the Maine Department of Health and Human Services ("Maine HHS"), and the director of Maine CDC alleging violations of the Free Exercise Clause, Supremacy Clause, Equal Protection Clause, and 42 U.S.C. § 1985. They also sued several Maine hospitals, which employ seven of the nine appellants, alleging violations of the Supremacy Clause, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1985.

The appellants sought a preliminary injunction to prevent enforcement of the regulation against them. The district court denied their motion. Does 1-6 v. Mills, No. 1:21-cv-242-JDL, —— F.Supp.3d ——, 2021 WL 4783626 (D. Me. Oct. 13, 2021).

We affirm.

I.

Maine has long required that healthcare workers be vaccinated against infectious diseases. See 1989 Me. Laws ch. 487, § 11. Prior to 2019, state law exempted workers from vaccination in three circumstances: when vaccination was medically inadvisable, contrary to a sincere religious belief, or

contrary to a sincere philosophical belief. Id. In 2019, the state responded to declining vaccination rates by amending its law to allow for only the medical exemption.[1] 2019 Me. Laws ch. 154, § 9 (codified at Me. Rev. Stat. Ann. tit. 22, § 802 (2021)); see Hearing on LD 798, An Act to Protect Maine Children and Students from Preventable Diseases by Repealing Certain Exemptions from the Laws Governing Immunization Requirements Before the J. Standing Comm. on Educ. & Cultural Affs., 129th Legis., 1st Reg. Sess. (Me. 2019) (statements of Rep. Tipping, Rep. McDonald, and Maine CDC Acting Dir. Beardsley); House Rec. H-392, 393-94 (Me. Apr. 23, 2019) (statement of Rep. Tipping). The bill's sponsor explained that one key rationale for the change was to protect the immunocompromised "who will never achieve the immunities needed to protect them and [who] rely on their neighbors' vaccinations." Hearing on LD 798, supra (statement of Rep. Tipping). The law went into effect in 2020, after nearly three-quarters of voters rejected a referendum seeking to veto the law. In April 2021, Maine CDC updated its mandatory vaccination regulations to reflect the statutory changes. 364 Me. Gov't Reg. 26 (LexisNexis May 2021); Code Me. R. tit. 10-144, ch. 264, § 3 (West 2021). In adopting that new rule, Maine explained that it was acting to reduce the "risk for exposure to, and possible transmission of, vaccine-preventable diseases resulting from contact with patients, or infectious material from patients." At the time, the rule required vaccination (without religious or

[1] It made the same change to the laws requiring public-school students and nursery-school employees to be vaccinated. See 2019 Me. Laws ch. 154, §§ 3-4, 6, 10.

philosophical exemption) against measles, mumps, rubella, chickenpox, hepatitis B, and influenza. Code Me. R. tit. 10-144, ch. 264, § 2. Contrary to the appellants' claims, Maine changed its vaccination laws to eliminate the religious and philosophical exemptions well before the COVID-19 pandemic was rampant.

Maine has articulated a strong interest in protecting the health of its population and has taken numerous steps, both before and after the development of the COVID-19 vaccines, to do so.[2] Maine's population is particularly vulnerable to COVID-19 because it has the largest share of residents aged 65 and older in the country. U.S. Census Bureau, 65 and Older Population Grows Rapidly as Baby Boomers Age, Release No. CB20-99 (June 25, 2020), https://www.census.gov/newsroom/press-releases/2020/65-older-population-grows.html. After COVID-19 vaccines became available, Maine encouraged all its residents to be vaccinated and took particular steps along those lines addressed to health care workers. Maine took the following steps:

- Starting in December 2020, Maine HHS and Maine CDC held regular information sessions with clinicians to educate them about the vaccines

[2] Before vaccines became available, state officials had taken many steps to curb the spread of COVID-19. See Calvary Chapel of Bangor v. Mills, No. 1:20-CV-156-NT, —— F.Supp.3d ——— – – ——, 2021 WL 2292795, at *1-7 (D. Me. June 4, 2021) (describing efforts), appeal filed, No. 21-1453 (1st Cir. docketed June 14, 2021).

including plans for vaccine distribution and methods for addressing vaccine hesitancy.

- Starting that same month, Maine HHS and Maine CDC convened a working group to study the most effective ways of educating clinicians on the vaccines.

- Given the limited vaccine availability in December 2020 and January 2021, Maine gave priority to frontline healthcare workers over other groups in the population during the first stage of vaccine distribution. Hospitals ***26** offered on-site vaccination to their staff and other eligible recipients.

- Because COVID-19 poses greater risks of infection and death to older people, Maine CDC prioritized older residents as well. It started with residents older than seventy and then expanded first to residents older than sixty and then to residents older than fifty.

- In partnership with Maine HHS and Maine CDC, hospitals provided several large public vaccination sites across the state. Maine HHS and Maine CDC helped staff the sites with public health, healthcare, and emergency-response volunteers.

- Maine CDC also distributed vaccines to healthcare facilities, EMS

organizations, and pharmacies across the state.

- From March 2021, Maine HHS provided free transportation to vaccination sites to residents who could not get to the sites.

- From April to June, Maine HHS and Maine CDC offered a mobile vaccination unit in rural and underserved areas of the state.

- For twenty days in May, Maine HHS offered incentives to any Mainer who got his or her first dose of a COVID-19 vaccine. Those eligible could choose between a complimentary fishing license, a complimentary hunting license, a Maine Wildlife Park Pass, a $20 L.L. Bean gift card, a ticket to a Portland Sea Dogs game, or an Oxford Plains Speedway Pass.

- In June, Governor Mills announced a prize sweepstakes, allowing all vaccinated residents to enter and tying the prize to the number of residents vaccinated by Independence Day weekend. On July 4, a dialysis dietitian from Winslow won nearly $900,000. Press Release, Office of Gov. Mills, Governor Mills Announces Winner of Don't Miss Your Shot: Vaccinationland Sweepstakes (July 4, 2021), https://www.maine.gov/governor/mills/

news/governor-mills-announces-winner-dont-miss-your-shot-vaccinationland-sweepstakes-2021-07-04.[3]

By the end of July 2021, 65.0% of Maine residents had received at least one dose of a COVID-19 vaccine. However, the geographic distribution of vaccination was, and remains, uneven throughout the state. See Maine CDC, COVID-19 Vaccination Dashboard: COVID Vaccination by County Listing, (last visited Oct. 15, 2021) https://www.maine.gov/covid19/vaccines/dashboard; see also Pietrangelo, 15 F.4th at 106 n.1 ("The accuracy of state and federal vaccine distribution data cannot be reasonably questioned ...."). Many counties report much lower vaccination rates. Maine CDC, COVID-19 Vaccination Dashboard, supra. Efforts to reach the elderly population have also shown geographic differences. See id.

Despite these measures, Maine faced a severe crisis in its healthcare facilities when the delta variant hit the state.[4] According to Maine CDC, the

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[3] "While our review is generally limited to the record below, see Fed. R. App. P. 10, we may take judicial notice of facts which are 'capable of being determined by an assuredly accurate source.' " Pietrangelo v. Sununu, No. 21-1366, 15 F.4th 103, 106 n.1 (1st Cir. Oct. 1, 2021) (citations omitted) (quoting United States v. Hoyts Cinemas Corp., 380 F.3d 558, 570 (1st Cir. 2004)).

[4] The emergency rule defines a healthcare facility as "a licensed nursing facility, residential care facility, Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), multi-level healthcare facility, hospital, or home health agency subject to licensure by [Maine HHS]."

delta variant is more than twice as contagious as previous variants and may cause more severe illness than previous variants. An individual infected with the delta variant may transmit it to others within twenty-four to thirty-six hours of exposure. Those conditions threaten the entire population of the state. But health care facilities are uniquely susceptible to outbreaks of infectious diseases like COVID-19 because medical diagnosis and treatment often require close contact between providers and patients (who often are medically vulnerable). And outbreaks at healthcare facilities hamper the state's ability to care for its residents suffering both from COVID-19 and from other conditions. That problem is particularly acute in Maine because, as Maine CDC's director stated, "the size of Maine's healthcare workforce is limited, such that the impact of any outbreaks among personnel is far greater than it would be in a state with more extensive healthcare delivery systems." Maine CDC determined that at least 90% of a population must be vaccinated to prevent community transmission of the delta variant. No county in Maine, including those that have the highest vaccination rates, has achieved the 90% level. Maine CDC, COVID-19 Vaccination Dashboard, supra. Many counties are at much lower levels. Id. And while community has a broader meaning than workers at a particular healthcare facility, even at those facilities the 90% figure has not been reached. At the end of the last monthly reporting period before Maine CDC adopted the emergency rule, ambulatory surgical centers achieved 85.9% of workers vaccinated; hospitals hit only 80.3%, nursing homes reached 73.0%, and intermediate care facilities for

individuals with intellectual disabilities only 68.2%. On August 11, four of fourteen known COVID-19 outbreaks in Maine were occurring at health care facilities with "strong infection control programs."[5] Those outbreaks were mostly caused by healthcare workers bringing COVID-19 into the facilities.

In adopting its emergency rule, Maine CDC considered the adequacy of other measures to arrest the crisis in its healthcare facilities and to protect both its healthcare infrastructure and its residents. Maine CDC considered the following alternatives to mandatory vaccination:

- **Weekly or twice weekly testing.** Maine CDC found that individuals infected with the delta variant can transmit the virus within twenty-four to thirty-six hours of exposure. It thus concluded that periodic testing would be ineffective.

- **Daily testing.** Maine CDC found that accurate polymerase chain reaction tests take twenty-four to seventy-two hours to provide results and that rapid antigen tests are too inaccurate and too hard to reliably secure. It thus concluded that daily testing would be ineffective.

- **Vaccination exemptions for individuals previously infected**

[5] By September 3, that number would jump to nineteen out of thirty-three outbreaks.

with COVID-19. Maine CDC found that the scientific evidence was uncertain as to whether a previously infected individual would develop sufficient immunity to prevent transmission. It thus concluded that it could not justify such an exemption.

- **Continued reliance on personal protective equipment.** Maine CDC found that the use of personal protective equipment reduced but did not eliminate the possibility of spreading COVID-19 in healthcare facilities. It thus ***28** concluded that mandating personal protective equipment alone would be ineffective.

See Does, —— F.Supp.3d at ——, 2021 WL 4783626, at *3. For these stated reasons, Maine CDC concluded that none of its available alternatives to mandatory vaccination would allow it to protect its healthcare infrastructure and its residents.

On August 12, Maine HHS and Maine CDC issued an emergency rule adding COVID-19 to the list of diseases against which healthcare workers must be vaccinated.[6] Pointing to a 300% increase in COVID-

[6] Maine agencies may adopt temporary rules on an emergency basis without going through regular notice and comment procedures "to avoid an immediate threat to public health, safety or general welfare." Me. Rev. Stat. Ann. tit. 5, § 8054; see Ms. S. v. Reg'l Sch. Unit 72, 829 F.3d 95, 105–06 (1st Cir. 2016) (describing Maine rulemaking procedures). Along with adopting the emergency rule, Maine CDC has proposed a

19 cases between June 19 and July 23 and the danger of the delta variant, the agencies said the rule was necessary because "[t]he presence of the highly contagious [d]elta variant in Maine constitutes an imminent threat to public health, safety, and welfare." In announcing the rule, Governor Mills explained that "[healthcare] workers perform a critical role in protecting the health of Maine people, and it is imperative that they take every precaution against this dangerous virus, especially given the threat of the highly transmissible [d]elta variant." The rule requires healthcare facilities to "exclude[ ] from the worksite" for the rest of the public health emergency employees who have not been vaccinated. In interpretive guidance, Maine CDC clarified that the mandate does not extend to those healthcare workers who do not work on-site at a designated facility, for example those who work remotely. Thus, employers may accommodate some workers' requests for religious exemptions provided that the accommodations do not allow unvaccinated workers to enter healthcare facilities. Maine HHS and Maine CDC later announced that they would not begin enforcing the rule until October 29.

Seeking to enjoin the emergency rule, the appellants filed suit in the District of Maine. The appellants are unvaccinated Maine healthcare workers (and a healthcare provider) who object to vaccination with any of the three available COVID-19 vaccines. They claim that their religious beliefs prohibit them from using any product "connected in

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permanent rule, which is going through a notice and comment period.

any way with abortion." The appellants allege that Johnson & Johnson/Janssen used cells ultimately derived from an aborted fetus to produce its vaccine and that Moderna and Pfizer/BioNTech used the same type of cells in researching their vaccines. So, the appellants say, their religion prohibits them from being vaccinated. At least one appellant has lost her job with appellee Genesis Healthcare because she refused to get vaccinated. All the appellants allege causes of action under the Free Exercise Clause, the Equal Protection Clause, the Supremacy Clause, Title VII, and 42 U.S.C. § 1985.

The appellants sought an ex parte temporary restraining order and a preliminary injunction. The district court denied the motion for a temporary restraining order, concluding that the appellants failed to satisfy the requirements of Federal Rule of Civil Procedure 65(b)(1). It then received briefing and heard argument on the motion for a preliminary injunction. Following the hearing, the district court denied the motion in a forty-one-page decision. Does, —— F.Supp.3d at ——, 2021 WL 4783626, at *2.

The appellants sought and we denied an injunction pending appeal. We expedited proceedings and now resolve the appellants' appeal of the district court's order denying a preliminary injunction.

II.

We review the district court's factual findings for clear error, its legal conclusions de novo, and its ultimate decision to deny the preliminary injunction

for abuse of discretion.[7] Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 21 (1st Cir. 2020).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

A.

1.

Applying the standard of review set forth above, we begin our analysis with the appellants' free exercise claims.

The First Amendment's Free Exercise Clause, as incorporated against the states by the Fourteenth

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[7] The appellants claim that our review of the facts in First Amendment cases must be de novo. The free speech cases they cite for that proposition, however, describe the deference due to a jury's verdict and turn on mixed questions of fact and law. See Sindi v. El-Moslimany, 896 F.3d 1, 14 (1st Cir. 2018) (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 106 (1st Cir. 2000) (citing Bose). They do not stand for the proposition that our review of all factual findings is de novo. See Bose, 466 U.S. at 499-501, 104 S.Ct. 1949 (explaining that in defamation cases, courts must engage in independent review of mixed questions of fact and law but that Rule 52(a) still applies to findings of fact). Nor is the distinction material as the appellants largely do not contest the district court's factual findings.

Amendment, protects religious liberty against government interference. See Cantwell v. Connecticut, 310 U.S. 296, 303-04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). When a religiously neutral and generally applicable law incidentally burdens free exercise rights, we will sustain the law against constitutional challenge if it is rationally related to a legitimate governmental interest. See Fulton v. City of Philadelphia, —— U.S. ——, 141 S. Ct. 1868, 1876, 210 L.Ed.2d 137 (2021) (citing Emp. Div. v. Smith, 494 U.S. 872, 878-82, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). When a law is not neutral or generally applicable, however, we may sustain it only if it is narrowly tailored to achieve a compelling governmental interest. Id. at 1881 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)).

To be neutral, a law may not single out religion or religious practices. See Lukumi, 508 U.S. at 532-534, 113 S.Ct. 2217. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." Fulton, 141 S. Ct. at 1877 (citing Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, —— U.S. ——, 138 S. Ct. 1719, 1730–32, 201 L.Ed.2d 35 (2018), and Lukumi, 508 U.S. at 533, 113 S.Ct. 2217).

To be generally applicable, a law may not selectively burden religiously motivated conduct while exempting comparable secularly motivated conduct. See Lukumi, 508 U.S. at 543, 113 S.Ct. 2217.

"A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.' " Fulton, 141 S. Ct. at 1877 (quoting Smith, 494 U.S. at 884, 110 S.Ct. 1595) (alteration in original). Under that rule, if a state reserves the authority to "grant exemptions based on the circumstances underlying each application," it must provide a compelling reason to exclude "religious hardship" from its scheme. Id. (quoting Smith, 494 U.S. at 884, 110 S.Ct. 1595). Nor is a law generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Id. (citing Lukumi, 508 U.S. at 542-46, 113 S.Ct. 2217).

We see no error in the district court's conclusion that the appellants have not met their burden of showing a likelihood of success on any aspect of their free exercise claims.

The appellants argue that the emergency rule is not neutral and is not generally applicable. They have shown no probability of success on those issues.

To start with, the rule is facially neutral, see Trump v. Hawaii, —— U.S. ——, 138 S. Ct. 2392, 2418, 201 L.Ed.2d 775 (2018), and no argument has been developed to us that the state singled out religious objections to the vaccine "because of their religious nature." Fulton, 141 S. Ct. at 1877 (emphasis added). The state legislature removed both religious and philosophical exemptions from

mandatory vaccination requirements, and thus did not single out religion alone.

The rule is also generally applicable. It applies equally across the board. The emergency rule does not require the state government to exercise discretion in evaluating individual requests for exemptions. Unlike, for example, Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), in which the government had discretion to decide whether "good cause" existed to excuse the requirement of an unemployment benefits scheme, id. at 399-401, 406, 83 S.Ct. 1790, here there is no "mechanism for individualized exemptions" of the kind at issue in Fulton, 141 S. Ct. at 1877 (quotation marks and citation omitted). Instead, there is a generalized "medical exemption ... available to an employee who provides a written statement from a licensed physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable." Me. Rev. Stat. tit. 22, § 802(4-B). No case in this circuit and no case of the Supreme Court holds that a single objective exemption renders a rule not generally applicable. See Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam) ("As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.").

The rule is also generally applicable because it does not permit "secular conduct that undermines the government's asserted interests in a similar way."

Fulton, 141 S. Ct. at 1877; see Tandon v. Newsom, —– U.S. ——, 141 S. Ct. 1294, 1296, 209 L.Ed.2d 355 (2021) ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."). We conclude that exempting from vaccination only those whose health would be endangered by vaccination does not undermine Maine's asserted interests here: (1) ensuring that healthcare workers remain healthy and able to provide the needed care to an overburdened healthcare system; (2) protecting the health of the those in the state most vulnerable to the virus -- including those who are vulnerable to it because they cannot be vaccinated for medical reasons; and (3) protecting the health and safety of all Mainers, patients and healthcare workers alike. See Smith, 494 U.S. at 874, 890, 110 S.Ct. 1595 (upholding as constitutional a criminal prohibition on peyote ingestion that exempted those to whom "the substance has been prescribed by a medical practitioner" with no exemption for religious use). Maine's three interests are mutually reinforcing. It must keep its healthcare facilities staffed in order to treat patients, whether they suffer from COVID-19 or any other medical condition. To accomplish its three articulated goals, Maine has decided to require all healthcare workers who can be vaccinated safely to be vaccinated.

Providing a medical exemption does not undermine any of Maine's three goals, let alone in a manner similar to the way permitting an exemption for religious objectors would. Rather, providing

healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care. The medical exemption is meaningfully different from exemptions to other COVID-19-related restrictions that the Supreme Court has considered. In those cases, the Supreme Court addressed whether a state could prohibit religious gatherings while allowing secular activities involving everyday commerce and entertainment and it concluded that those activities posed a similar risk to physical health (by risking spread of the virus) as the prohibited religious activities. See, e.g., Tandon, 141 S. Ct. at 1297 (rejecting the California order that restricted worship but permitted larger groups to gather in "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants"); Roman Cath. Diocese of Brooklyn v. Cuomo, —— U.S. ——, 141 S. Ct. 63, 66–68, 208 L.Ed.2d 206 (2020) (per curiam) (rejecting the New York order that restricted worship but permitted larger groups to gather at "acupuncture facilities, camp grounds, garages, as well as many [businesses] whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities"); see also S. Bay United Pentecostal Church v. Newsom, —— U.S. ——, 141 S. Ct. 716, 717, 209 L.Ed.2d 22 (2021) (statement of Gorsuch, J., joined in part by four justices) (criticizing the California order that restricted worship but permitted larger groups to gather in "most retail" establishments and "other businesses"). In contrast to those cases, Maine CDC's

rule offers only one exemption, and that is because the rule itself poses a physical health risk to some who are subject to it.[8] Thus, carving out an exception for those people to whom that physical health risk applies furthers Maine's asserted interests in a way that carving out an exemption for religious objectors would not.

Unlike the medical exemption, a religious exemption would not advance the three interests Maine has articulated. In contrast to the restrictions at issue in Tandon, Roman Catholic Diocese, and South Bay United, Maine's rule does not rest on assumptions about the public health impacts of various secular or religious activities. Instead, it requires all healthcare workers to be vaccinated as long as the vaccination is not medically contraindicated -- that is as long as it furthers the state's health-based interests in requiring vaccination. Thus, the comparability concerns the Supreme Court flagged in the Tandon line of cases are not present here. See Tandon, 141 S. Ct. at 1296 ("Comparability [for free exercise purposes] is concerned with the risks various activities pose, not the reasons why people gather." (emphasis added)). By analogy, if Maine's emergency rule were an occupancy limit, it would apply to all indoor activities equally based on facility size, but it would exempt healthcare facilities. That analogous policy would serve the state's goal of protecting public health, while maximizing the number of residents able to

[8] Those risks can be serious and even life threatening. For example, the COVID-19 vaccines are contraindicated for those who have had allergic reactions to a component of the vaccines.

access healthcare and thus minimizing health risks. Such a rule would not fall afoul of the Supreme Court's decisions. See Tandon, 141 S. Ct. at 1296. The rule is generally applicable. And it easily satisfies rational basis review.

Strict scrutiny does not apply here. But even if it did, the plaintiffs still have no likelihood of success.

"Stemming the spread of COVID–19 is unquestionably a compelling interest ...." Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 67; see also Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348, 353 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."). Few interests are more compelling than protecting public health against a deadly virus. In promulgating the rule at issue here, Maine has acted in response to this virus to protect its healthcare system by meeting its three goals of preventing the overwhelming of its healthcare system, protecting those most vulnerable to the virus and to an overwhelmed healthcare system, and protecting the health of all Maine residents. In focusing the vaccination requirement on healthcare workers, Maine has taken steps to increase the likelihood of protecting the health of its population, particularly those who are most likely to suffer severe consequences if they contract COVID-19 or are denied other needed medical treatment by an overwhelmed healthcare system.

We begin by asking "not whether the [state] has a compelling interest in enforcing its [rule]

generally, but whether it has such an interest in denying an exception" to plaintiffs. Fulton, 141 S. Ct. at 1881. If any healthcare workers providing such services, including the plaintiffs, were exempted from the policy for non-health-related reasons, the most vulnerable Mainers would be threatened. Cf. id. at 1881-82.

Maine also reasonably used all the tools available to fight contagious diseases. Its rule, thus, does not fail narrow tailoring.[9] The available tools roughly fit into two categories. The first category involves pharmaceutical interventions. The second involves non-pharmaceutical interventions. Maine CDC and Maine HHS have considered their experience with both categories.

The first category itself contains two types of interventions. The COVID-19 vaccines protect against infection and lower the risk of adverse health consequences, including death, should a vaccinated person become infected. Vaccination also reduces a person's risk of transmitting COVID-19 to others.

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[9] The appellants claim they were forced to bear the burden of showing that the regulation failed strict scrutiny. The district court's decision belies that claim. See Does, —— F.Supp.3d at ——, 2021 WL 4783626, at *12 ("The government must also demonstrate that it 'seriously undertook to address the problem with less intrusive tools readily available to it' and 'that it considered different methods that other jurisdictions have found effective.' ") (quoting McCullen v. Coakley, 573 U.S. 464, 494, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014)). As we do here, the district court required Maine to show that its rule satisfied strict scrutiny. Maine met that burden by showing that it considered alternative means of achieving its goals and that those alternatives were inadequate.

There are also treatments that can be administered to infected patients once they have contracted the disease. Because those treatments do not prevent infections, Maine established in the record that reliance on such treatment options would not meet its goals.

The second category is one in which Maine actively engaged before the mandate and included measures like testing, masking, and social distancing. Those measures proved to be ineffective in meeting Maine's goals. As to testing, Maine CDC concluded that regular testing cannot prevent transmission given how quickly an infected person can transmit the delta variant and how long accurate testing takes. And Maine experienced multiple COVID-19 outbreaks in healthcare facilities adhering to mandatory masking and distancing rules. Thus, Maine has shown that non-pharmaceutical interventions are inadequate to meet its goals. See Does, —— F.Supp.3d at ——, —— – ——, 2021 WL 4783626, at *3, *12-14 (making factual findings about the inadequacy of non-pharmaceutical alternatives).

Maine has demonstrated that it has tried many alternatives to get its healthcare workers vaccinated short of a mandate. These include vaccine prioritization, worksite vaccine administration, and prizes for vaccination. But both its healthcare-worker-focused efforts and general incentives have failed to achieve the at least 90% vaccination rate required to halt community transmission of the delta variant. Maine has no alternative to meet its goal

other than mandating healthcare workers to be vaccinated. See id.

As part of our narrow tailoring analysis, we consider whether the rule is either under- or overinclusive. See Lukumi, 508 U.S. at 546, 113 S.Ct. 2217. The rule is not. The regulation applies to all healthcare workers for whom a vaccine is not medically contraindicated. Indeed, eliminating the only exemption would likely be unconstitutional itself. See Jacobson v. Massachusetts, 197 U.S. 11, 38–39, 25 S.Ct. 358, 49 L.Ed. 643 (1905). Nor is the regulation overinclusive. It does not extend beyond the narrow sphere of healthcare workers, limiting the universe of people covered to those who regularly enter healthcare facilities. The emergency rule is thus focused to achieve the state's goal of keeping its residents safe because it requires vaccination only of those most likely to come into regular contact with those for whom the consequences of contracting COVID-19 are likely to be most severe.

Out-of-circuit authorities to the contrary are distinguishable and not persuasive. The appellants stress Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (Alito, J.), in which the Third Circuit prohibited a police department from offering medical but not religious exemptions to its facial hair policy. It applied strict scrutiny to the policy after determining that the police department's disparate allowance of exemptions suggested a discriminatory intent. Id. at 365. But critically, the police department sought to justify its policy by pointing to its interest in a uniform

appearance among police officers. Id. at 366. Thus, the Third Circuit concluded, the medical exemptions undermined the police department's interests, which "indicate[d] that the [d]epartment has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." Id. But, in doing so, the court also distinguished the police department's exemption from the no-beard policy for undercover officers, explaining that the undercover officer exemption "does not undermine the [d]epartment's interest in uniformity because undercover officers obviously are not held out to the public as law enforcement." Id. (quotation omitted). The court further recognized that the very restriction on a controlled substance that the Supreme Court upheld in Smith contained an exemption permitting use of the substance for individuals to whom the substance "ha[d] been prescribed by a medical practitioner." Id. (quoting Smith, 494 U.S. at 874, 110 S.Ct. 1595). Neither this medical prescription exemption in Smith, the court explained, nor the exemption for undercover officers, "trigger heightened scrutiny because the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." Id. Here, in contrast, the medical exemptions support Maine's public health interests. Maine would hardly be protecting its residents if it required them to accept medically contraindicated treatments. Rather than undermine Maine's asserted governmental interest, the health exemption supports it. Therefore, Maine's providing

medical but not religious or philosophical exemptions does not suggest an improper motive.

Nor do the appellants find support in their citation of the Sixth Circuit's recent decision denying a stay pending appeal of a preliminary injunction in Dahl v. Board of Trustees of Western Michigan University, No. 21-2945, 15 F.4th 728 (6th Cir. Oct. 7, 2021) (per curiam). In Dahl, the District Court for the Western District of Michigan preliminarily enjoined a state university from requiring student-athletes to be vaccinated in order to participate in athletic activities. Id. at 730. The university's policy provided that "[m]edical or religious exemptions and accommodations will be considered on an individual basis." Id. at 733. The Sixth Circuit held that the policy provided a "mechanism for individualized exemptions," applied strict scrutiny, and held that the policy was not narrowly tailored to meet the university's goals. Id. at 733–35. The emergency rule here is materially different from the university's policy in Dahl. First, Maine's emergency rule does not allow any government official discretion to consider the merits of an individual's request for an exemption. Even so and even assuming that strict scrutiny applies, Maine has narrowly tailored its rule. That conclusion follows from the second key distinction between this case and Dahl: the vaccination requirement in Dahl required vaccination only of athletes, not of the thousands of other students with whom the athletes may live, study, eat, and socialize. See id. at 734–35. In contrast, the Maine rule covers everyone who works with the medically vulnerable population in healthcare facilities. Unlike the

university's athletes-only policy, Maine's emergency rule is not underinclusive even under Dahl because it encompasses every employee working in a setting posing a serious risk of COVID-19 exposure and transmission.

Finally, the appellants' reliance on recent decisions in New York does not advance their cause. See Dr. A. v. Hochul, No. 1:21-cv-1009, —— F.Supp.3d ——, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021) (granting preliminary injunction); see also We the Patriots USA, Inc. v. Hochul, No. 21-2179 (2d Cir. Sept. 30, 2021) (unpublished order) (granting in part injunction pending appeal). In Dr. A., a group of healthcare workers challenged under the Free Exercise Clause an emergency regulation issued by the New York State Public Health & Health Planning Council, which required most healthcare workers in that state to be vaccinated against COVID-19.[10] The Maine regulation here is distinguishable from the New York regulation at issue in Dr. A. Eight days after New York officials promulgated a version of the regulation containing a religious exemption, they amended the regulation to "eliminate the religious exemption." —— F.Supp.3d at ——, 2021 WL 4734404, at *8. In light of that change, Dr. A. found that state officials had singled out religious believers through a "religious gerrymander." Id. In contrast, Maine's legislature eliminated religious and philosophical exemptions to mandatory vaccination in May 2019 and Maine voters approved the law in

[10] The Dr. A plaintiffs also raised Title VII claims. We believe the Title VII analysis in Dr. A is erroneous for the same reasons the appellants' Title VII claims fail here. See infra Part II.A.2.

March 2020. That timeline does not support a claim of religious gerrymandering. Nor have the appellants developed a religious animus argument on appeal. Dr. A. is also inapplicable because it found that New York had failed to explain why the testing and masking alternatives offered to medically exempt healthcare workers were inadequate. —— F.Supp.3d at ——, 2021 WL 4734404, at *9-10. In contrast, Maine has explained, and the district court found, that testing and masking would not achieve Maine's vital goals to the extent that vaccination would. See Does, —— F.Supp.3d at ——, 2021 WL 4783626, at *14. Further, unlike in Dr. A., Maine has demonstrated that given the "limited" nature of its healthcare workforce and its significant elderly population -- the highest in the nation -- it has tried and failed to control "numerous COVID-19 outbreaks at health care facilities," even after multiple attempts to implement a variety of alternative measures. In confronting the various risks to its own population and its own healthcare delivery system, Maine's rule does not violate the Constitution. See S. Bay United Pentecostal Church v. Newsom, —— U.S. ——, 140 S. Ct. 1613, 1613-14, 207 L.Ed.2d 154 (2020) (Roberts, C.J., concurring).

2.

The appellants also assert claims against the state appellees under the Equal Protection Clause, against the hospitals under Title VII, and against all appellees under the Supremacy Clause and 42 U.S.C. § 1985. We find no error in the district court's conclusion that they are unlikely to succeed on any of

those claims. See Does, —— F.Supp.3d at ——, 2021 WL 4783626, at *15-16.

When a free exercise challenge fails, any equal protection claims brought on the same grounds are subject only to rational-basis review. Locke v. Davey, 540 U.S. 712, 720 n.3, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004); Wirzburger v. Galvin, 412 F.3d 271, 282 (1st Cir. 2005). As the appellants are unlikely to succeed on their free exercise claims, they are unlikely to succeed on their equal protection claims as well.

The appellants' Supremacy Clause argument rests on their assertion that the hospitals (in concert with the state appellees) have "claim[ed] that the protections of Title VII are inapplicable in the State of Maine." The record simply does not support that argument. The parties agree that Title VII is the supreme law of the land; the hospitals merely dispute that Title VII requires them to offer the appellants the religious exemptions they seek. See Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281-83, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987) (describing "narrow scope" of preemption under Title VII). The appellants have not shown their entitlement to an injunction under the Supremacy Clause.

Nor do the appellants fare better in their Title VII arguments for a preliminary injunction.[11] To

[11] Appellee Northern Light argues that the appellants waived their request for injunctive relief by not including it in their earlier request for an injunction pending appeal. We may properly consider that request in our review here of the district court's denial of preliminary injunctive relief against all parties,

obtain a preliminary injunction, the appellants must show that they have inadequate remedies at law. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1019, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). When litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy. To obtain an injunction, therefore, the appellants must show a "genuinely extraordinary situation." Sampson v. Murray, 415 U.S. 61, 92 n.68, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974); cf. Matrix Grp. Ltd. v. Rawlings Sporting Goods Co., 378 F.3d 29, 34 (1st Cir. 2004) (holding that an injunction is unavailable in ordinary breach of contract action). The district court determined that the appellants "have not shown that the injuries they have suffered or may suffer -- the loss of their employment and economic harm -- meet [that] high standard," noting that the appellants had not exhausted their administrative remedies. Does, ––– F.Supp.3d at ———, 2021 WL 4783626, at *16; see Fort Bend Cnty. v. Davis, ––– U.S. ———, 139 S. Ct. 1843, 1850-51, 204 L.Ed.2d 116 (2019) (describing exhaustion requirements).

We find no error in that conclusion. Indeed, our court has expressly declined to provide such preliminary relief, and has declined to "reach the question of what circumstances would justify a district court in granting preliminary relief in such cases," finding only that "[a]t a minimum, an aggrieved person seeking preliminary relief outside the statutory scheme for alleged Title VII violations would have to make a showing of irreparable injury

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as the appellants have preserved and developed their argument on appeal.

sufficient in kind and degree to justify the disruption of the prescribed administrative process." Bailey v. Delta Air Lines, Inc., 722 F.2d 942, 944 (1st Cir. 1983). The appellants have failed to demonstrate why they are entitled to pre-termination relief despite their failure to exhaust, given that the loss of employment "does not usually constitute irreparable injury" except in "the genuinely extraordinary situation" going beyond mere cases of "insufficiency of savings or difficulties in immediately obtaining other employment." Sampson, 415 U.S. at 90, 92 n.68, 94 S.Ct. 937. That is true regardless of whether the appellants have administratively exhausted their claims. The appellants' failure to exhaust does not put them in a better position to seek extraordinary relief. And even if the appellants were entitled to an injunction, they have not shown a likelihood of success on the ultimate merits questions. The hospitals need not provide the exemption the appellants request because doing so would cause them to suffer undue hardship. See Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 134 (1st Cir. 2004); see also Trahan v. Wayfair Maine, LLC, 957 F.3d 54, 67 (1st Cir. 2020) (holding that "liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts").

Finally, the appellants are unlikely to succeed on their § 1985 conspiracy claims. To properly plead a § 1985 conspiracy, the appellants "must allege the existence of a conspiracy, allege that the purpose of the conspiracy is 'to deprive the plaintiff of the equal

protection of the laws,' describe at least one overt act in furtherance of the conspiracy, and 'show either injury to person or property, or a deprivation of a constitutionally protected right.' " Alston v. Spiegel, 988 F.3d 564, 577 (1st Cir. 2021) (quoting Pérez-Sánchez v. Pub. Bldg. Auth., 531 F.3d 104, 107 (1st Cir. 2008)). To allege that a civil rights conspiracy exists, they "must plausibly allege facts indicating an agreement among the conspirators to deprive [them] of [their] civil rights." Id. at 577-78 (quoting Parker v. Landry, 935 F.3d 9, 18 (1st Cir. 2019)). Here the appellants do not allege that the hospitals had any role in the amendment of the statute or issuance of the regulation, only that they supported the regulation after the fact. Thus, their conspiracy claims are unlikely to succeed.

B.

Having found no error in the district court's conclusion that the appellants are unlikely to succeed on the merits of any of their claims, we turn to its handling of the other preliminary injunction factors.

Even if, arguendo, these claims presumptively cause irreparable harm, we think the state has overcome any such presumption. Further, because the appellants have not shown a constitutional or statutory violation, they have not shown that enforcement of the rule against them would cause them any legally cognizable harm.

Finally, we review the district court's balancing of the equities and analysis of the public interest

together, as they "merge when the [g]overnment is the opposing party." Nken v. Holder, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). Maine's interest in safeguarding its residents is paramount. While we do not diminish the appellants' liberty of conscience, we cannot find, absent any constitutional or statutory violation, any error in the district court's conclusion that the rule promotes strong public interests and that an injunction would not serve the public interest. See Does, —— F.Supp.3d at ——, 2021 WL 4783626, at *17.

III.

The district court's order denying a preliminary injunction is affirmed.

APPENDIX G

566 F.Supp.3d 34

United States District Court, D. Maine.

Jane DOES 1-6 et al., Plaintiffs,
v.
Janet T. MILLS, in Her Official Capacity as Governor of the State of Maine, et al., Defendants.

1:21-cv-00242-JDL
|
Signed 10/13/2021

Daniel J. Schmid, Pro Hac Vice, Horatio G. Mihet, Pro Hac Vice, Mathew D. Staver, Pro Hac Vice, Roger K. Gannam, Pro Hac Vice, Liberty Counsel, Orlando, FL, Stephen C. Whiting, The Whiting Law Firm, Portland, ME, for Plaintiffs.

Kimberly L. Patwardhan, Thomas A. Knowlton, Valerie A. Wright, Office of the Attorney General, Augusta, ME, for Defendants Janet T. Mills, Jeanne M. Lambrew, Dr. Nirav D. Shah.

Katharine I. Rand, James R. Erwin, Pierce Atwood LLP, Portland, ME, for Defendants Mainehealth, Genesis Healthcare of Maine LLC, Genesis Healthcare LLC, Mainegeneral Health.

Katherine Lee Porter, Eaton Peabody, Portland, ME, Ryan P. Dumais, Eaton Peabody, Brunswick, ME, for Defendant Northern Light Health Foundation.

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

JON D. LEVY, CHIEF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Plaintiffs, eight individual healthcare workers and one individual healthcare provider, seek a preliminary injunction (ECF No. 3) prohibiting Janet T. Mills, Maine's Governor, and other named defendants from requiring all employees of designated healthcare facilities to be vaccinated against the SARS-CoV-2 coronavirus—the cause of COVID-19 infections—through the enforcement of the rule, Immunization Requirements for Healthcare Workers, 10-144-264 Me. Code R. §§ 1-7 (2021)[1] (the "Rule"), as amended August 12, 2021. The Plaintiffs contend that the vaccination requirement violates their First Amendment and other federal constitutional and statutory rights because it does not exempt from its requirements individuals whose sincerely held religious beliefs cause them to object to being vaccinated against COVID-19. Seven of the nine plaintiffs also contend that their employers violated federal employment law by refusing to grant

[1] The Rule can be found at https://www.maine.gov/dhhs/mecdc/rules/maine-cdc-rules.shtml (perma.cc/R3UM-ZBN3) (navigate to the text of the Rule by selecting "Emergency," and then choosing "Emergency Rulemaking: 10-144 CMR Ch. 264 – Immunization Requirements for Healthcare Workers.").

them a religious exemption from the vaccination requirement.

The Plaintiffs' five-count Complaint (ECF No. 1) names as defendants, in their official capacities, Governor Mills; Dr. Nirav D. Shah, the Director of Maine CDC; and Jeanne M. Lambrew, the Commissioner of the Maine Department of Health and Human Services ("DHHS") (the "State Defendants"). The Complaint also names five incorporated entities that operate healthcare facilities in Maine: Defendants Genesis Healthcare of Maine, LLC; Genesis Healthcare, LLC; Northern Light Health Foundation; MaineHealth; and MaineGeneral Health (the "Hospital Defendants").

The Rule requires all employees of designated healthcare facilities[2] to receive their final dose of the vaccination against the SARS-CoV-2 coronavirus by September 17, 2021. 10-144-264 Me. Code R. § 5(A)(7) (effective Aug. 12, 2021). On September 2, 2021, the DHHS and Maine CDC announced that they would not begin enforcing the Rule's provisions until

[2] Under the Rule, designated healthcare facility "means a licensed nursing facility, residential care facility, Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), multi-level healthcare facility, hospital, or home health agency subject to licensure by the State of Maine, Department of Health and Human Services Division of Licensing and Certification." The Rule also applies to dental health practices (where dentists and/or dental hygienists provide oral health care) and to Emergency Medical Services operations. 10-144-264 Me. Code R. § 1(D), (E), (H) (Aug. 12, 2021). All references to "designated healthcare facilities" in this Order include all of the entities subject to the Rule's requirements.

October 29, 2021, to allow additional time for employees of designated healthcare facilities to comply with the Rule by receiving their final vaccine dose by October 15. ECF No. 49-5 at ¶ 37. If granted, the preliminary injunction would prohibit the Defendants from enforcing the Rule or terminating the Plaintiffs' employment based on their refusal to be vaccinated against COVID-19.

A hearing on the Motion for Preliminary Injunction was held on September 20, 2021.[3] After careful consideration and for the reasons that follow, I deny the Plaintiffs' motion. (ECF No 3).

II. BACKGROUND

The parties have filed declarations and various exhibits in support of their positions. Except where otherwise noted, I have based my findings on these documents.[4] Additionally, I take judicial notice of

[3] The Plaintiffs' Motion also included a request for an ex parte temporary restraining order to the same effect. On August 26, 2021, after a conference with the Plaintiffs' counsel, I denied that portion of the Motion (ECF No. 11), concluding that the Plaintiffs had not satisfied the requirements of Federal Rule of Civil Procedure 65(b)(1) for a temporary restraining order without providing notice to the Defendants.

[4] The bulk of my findings regarding the COVID-19 pandemic and the State's response are derived from the Declaration of Dr. Nirav D. Shah, Director of Maine CDC, (ECF No. 49-4) and the Declaration of Sara Gagné-Holmes, Deputy Commissioner of the DHHS (ECF No. 49-5). The Plaintiffs have not submitted declarations that dispute the factual assertions made in the Shah and Gagné-Holmes declarations.

certain additional facts pertinent to the Motion. *See In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003) (noting that although a district court is generally limited to examining the record, it may also consider "the documents incorporated by reference in it, matters of public record, and other matters susceptible to judicial notice"); *see also Loucka v. Lincoln Nat'l Life Ins. Co.*, 334 F. Supp. 3d 1, 8-9 (D.D.C. 2018) ("[T]he CDC's Lyme-testing criteria and procedures are a matter of public record, and it cannot be reasonably questioned that the agency's website is an accurate source for those standards.").

To provide the necessary background, I begin by addressing: (A) COVID-19 and Maine's response; (B) the asserted religious beliefs that cause Plaintiffs to refuse to be vaccinated against COVID-19; and (C) the origin of the emergency rulemaking that required that healthcare workers be vaccinated against COVID-19.

A. The COVID-19 Global Pandemic

COVID-19 is a highly contagious disease that can cause serious illness and death. ECF No. 49-4 at ¶¶ 11, 13, 15. In March 2020, the World Health Organization declared COVID-19 to be a global pandemic. ECF No. 49-4 at ¶ 12. As of September 12, 2021, there were approximately 219 million cases of COVID-19 worldwide. ECF No. 49-4 at ¶ 13. Globally, over 4,550,000 people have died from COVID-19, including approximately 660,000 deaths in the United States. ECF No. 49-4 at ¶ 13. As of September

14, 2021, Maine had 81,177 total cases of COVID-19, with 969 deaths. ECF No. 49-4 at ¶ 14.

Variants of the virus have emerged over the course of the pandemic. ECF No. 49-4 at ¶ 20. The Delta variant, which is now the predominant variant of all COVID-19 cases in the United States, ECF No. 49-4 at ¶ 50, is more than twice as contagious as previous variants, ECF No. 49-4 at ¶ 22. As of August 27, 2021, the Delta variant accounted for 96.7% of all positive COVID-19 samples sequenced in Maine. ECF No. 49-4 at ¶ 50. A higher level of contagiousness necessitates a correspondingly higher vaccination rate among the public to achieve "herd immunity."[5] ECF No. 49-4 at ¶ 28. With the emergence of the Delta variant, epidemiological models have increased the projected vaccination rate needed to achieve herd immunity from 70% to 90%. ECF No. 49-4 at ¶ 29.

Three COVID-19 vaccines are generally available: Pfizer-BioNTech (the "Pfizer vaccine"), Moderna, and Janssen (the "J&J vaccine"). ECF No. 49-4 at ¶ 40. All three are effective against the Delta variant. ECF No. 49-4 at ¶ 43. Prior to their availability, the United States Centers for Disease Control and Prevention ("CDC") and Maine CDC recommended that people wear face coverings and practice physical distancing to limit the spread of the virus. ECF No. 49-5 at ¶ 5. Once the first vaccine

[5] Herd immunity refers to the population-level phenomenon whereby the community is sufficiently populated with vaccinated individuals that unvaccinated individuals can enjoy a substantially lessened risk of exposure and, therefore, of infection, as the vaccinated individuals block the virus from spreading from person to person. ECF No. 49-4 at ¶¶ 27-28.

doses became available in December 2020, Maine CDC prioritized the vaccination of frontline healthcare professionals and patient-facing staff through its eligibility guidelines. ECF No. 49-5 at ¶¶ 15-18. The vaccines are now widely available, and the State has worked in parallel with hospital systems to encourage and facilitate the widespread vaccination of Maine residents. ECF No. 49-5 at ¶¶ 19(f), 23-29.

The Rule was amended in August 2021 to add COVID-19 to the list of infectious diseases for which vaccinations are mandated for employees of designated healthcare facilities. It represented the latest in a series of measures employed by the State to combat the COVID-19 pandemic in healthcare settings. When formulating the amendment, Maine CDC reviewed and considered alternatives to mandating vaccinations, including the measures then being employed by Maine healthcare facilities, such as twice-weekly or daily testing, symptom monitoring, and the use of personal protective equipment ("PPE"). ECF No. 49-4 at ¶¶ 59-64. Maine CDC rejected twice-weekly testing as inadequate given the speed at which the Delta variant is transmitted—a person infected with the Delta variant can transmit the infection to others within just 24 to 36 hours of exposure. ECF No. 49-4 at ¶¶ 25, 61. Similarly, Maine CDC rejected daily antigen testing as insufficient because the most effective tests (polymerase-chain-reaction tests ("PCR")) require 24 to 72 hours to produce results and the faster rapid-antigen tests are too inaccurate and in short supply. ECF No. 49-4 at ¶ 62. Symptom monitoring as a standalone measure was rejected because the virus

can be transmitted by persons who are asymptomatic. ECF No. 49-4 at ¶ 60. Similarly, sole reliance on the use of PPE was rejected because, even if worn correctly, PPE will not stop the spread of COVID-19 in healthcare settings. ECF No. 49-4 at ¶ 64.

Healthcare facilities throughout Maine have used a combination of the preceding measures to control the COVID-19 virus since the beginning of the pandemic; nonetheless, they have been the sites of numerous outbreaks of the virus. ECF No. 49-4 at ¶ 65. The number of outbreaks at designated healthcare facilities rose substantially from early August to early September 2021, notwithstanding the fact that the hospitals where the outbreaks occurred had strong infection control programs in place. ECF No. 49-4 at ¶¶ 46-47. Most of the healthcare facility outbreaks resulted from infected healthcare workers bringing COVID-19 into the facility. ECF No. 49-4 at ¶ 48.

B. The Plaintiffs' Objection to the COVID-19 Vaccines

The Plaintiffs are nine individuals who are identified in the Complaint by pseudonyms. The Complaint alleges that Jane Does 1 through 5 and John Does 2 and 3 are healthcare workers employed by the Hospital Defendants. John Doe 1 is a licensed healthcare provider who operates his own practice.

Jane Doe 6 is a healthcare worker employed by John Doe 1.[6,7]

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[6] The Complaint alleges the following facts regarding the Plaintiffs:

Plaintiff Jane Doe 1 is a Maine resident and healthcare worker employed by a healthcare facility operated by Defendant MaineHealth in Maine. She submitted a written request for a religious exemption from the vaccine mandate to her employer, which was denied.

Plaintiff John Doe 1 is a licensed healthcare provider who operates a designated healthcare facility in Maine. The Complaint alleges that he and his employees have sincerely held religious objections to receiving the COVID-19 vaccine, and that he faces the closure of his practice and loss of his business license should he consider or grant religious exemptions to the vaccine mandate to his employees.

Plaintiff Jane Doe 6 is a healthcare worker employed by John Doe 1. The Complaint is unclear as to whether she has requested a religious exemption to the mandate from her employer, John Doe 1.

Plaintiffs Jane Doe 2 and John Doe 2 are both Maine residents and healthcare workers employed by healthcare facilities operated by Defendant Genesis Healthcare in Maine. Both submitted written requests for religious exemptions from the vaccine mandate, and Genesis Healthcare denied them. Jane Doe 2 was given until August 23, 2021 to receive the vaccination and alleges that she was terminated from her employment for failure to meet this deadline.

Plaintiffs Jane Does 3 and 4 and John Doe 3 are Maine residents and healthcare workers employed by healthcare facilities operated by Defendant Northern Light Health Foundation in Maine. Each submitted written requests for religious exemptions from the vaccine mandate, and each request was denied.

The Plaintiffs object to receiving the COVID-19 vaccines based on their stated belief that "life is sacred from the moment of conception[.]" ECF No. 1 at ¶ 54. They contend that the development of the three COVID-19 vaccines employed or benefitted from the cell lines of aborted fetuses. Specifically, the Plaintiffs object to the Moderna and Pfizer vaccines because both are mRNA vaccines which, the Plaintiffs claim, "have their origins in research on aborted fetal cells lines." ECF No. 1 at ¶ 65. Plaintiffs also object to the J&J vaccine, asserting that aborted fetal cell lines were used in both its development and production. They allege that the use of fetal cell lines to develop the vaccines runs counter to their sincerely held religious beliefs that cause them to oppose abortion.

In their responses to the Plaintiffs' motion seeking preliminary injunctive relief, the Defendants have not challenged the sincerity of the Plaintiffs' asserted religious beliefs or that those beliefs are the reason for the Plaintiffs' refusal to be vaccinated. I

Plaintiff Jane Doe 5 is a Maine resident and healthcare worker employed by a healthcare facility operated by Defendant MaineGeneral Health in Maine. She submitted a written request for a religious exemption from the vaccine mandate to her employer, which was denied.

[7] The Complaint also names Plaintiffs Jack Does 1 through 1000 and Joan Does 1 through 1000 as putative plaintiffs who have not yet been joined in the action.

therefore treat these facts as established for purposes of deciding the Preliminary Injunction Motion.[8]

C. The COVID-19 Vaccine Mandate

Mandatory vaccination requirements for healthcare workers in Maine were established long before the emergence of COVID-19 in late 2019. Since 1989, Maine has required by statute that hospitals and other healthcare facilities ensure that their employees are vaccinated against certain communicable diseases. 1989 Me. Legis. Serv. 641 (West). When the statute, 22 M.R.S.A. § 802 (1989), was first enacted, it required vaccinations for measles and rubella. Its stated purpose was to report, prevent, and control infectious diseases that pose a potential public health threat to the people of Maine. *Id.* § 802(1)(D) (1989).

The ensuing years witnessed the development of new vaccines and vaccine recommendations, resulting in frequent revisions to the statute. In response, the statute was again amended in 2001 to delegate to DHHS the authority, by rulemaking, to designate mandatory vaccines for healthcare workers at designated healthcare facilities and for school

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[8] Pursuant to the Court's scheduling order entered on September 2, 2021 (ECF No. 35), the deadline for the Defendants' answers to the Complaint will be set once the Court has entered an order on the Motion for Preliminary Injunction and the period for filing an interlocutory appeal of that order has expired or, if an interlocutory appeal is filed, the appeal has been finally determined. As a result, the Defendants have not yet filed answers to the Complaint.

children. 2001 Me. Legis. Serv. 147 (West). Accordingly, in 2002 DHHS promulgated and first adopted the rule entitled "Immunization Requirements for Healthcare Workers," which is the Rule at issue here. 10-144-264 Me. Code R. §§ 1-7 (Apr. 16, 2002). At its adoption, the Rule required vaccinations for measles, rubella, hepatitis B, mumps, and chickenpox. *Id.* at § 5(A).

From 2001 until 2019, the statute contained three exemptions from the vaccination requirements for both Maine healthcare workers and school children: a "medical exemption" for those who provided "a physician's written statement that immunization against one or more diseases may be medically inadvisable," and both "religious [and] philosophical exemption[s]" for those "who state[d] in writing a sincere religious or philosophical belief that is contrary to the immunization requirement." 22 M.R.S.A. § 802(4-B)(A), (B) (2019). In 2019, the Maine Legislature enacted legislation repealing the exemptions for religious and philosophical beliefs, 2019 Me. Legis. Serv. 386 (West), thus leaving the medical exemption as the sole exemption permitted under law. In response to this legislative change, a statewide veto referendum regarding the new law eliminating the religious and philosophical exemptions was held in March 2020 pursuant to the People's Veto provision of the Maine Constitution, Me. Const. art. IV, pt. III, § 17. The law was upheld, with over 72% of voters voting in favor of it.[9] In April

[9] Full results are available on the Maine Secretary of State website. Dep't of Sec'y of State, State of Maine, Tabulations for Elections Held in 2020,

2021, DHHS amended the Rule by, among other things, removing the provision describing the permissible exemptions and referring back to the statute which lists medical exemptions as the sole category of exemption. *See* 10-144-264 Me. Code R. § 3 (effective Apr. 14, 2021); 22 M.R.S.A. § 802(4-B)(B). [10] In August 2021, DHHS promulgated the current version of the Rule by adding the COVID-19 vaccination to the list of required vaccinations and also adding dental practices and emergency services organizations as enumerated designated healthcare facilities subject to the Rule's requirements. 10-144 C.M.R. Me. Code R. § 1 (effective Aug. 12, 2021). The Plaintiffs do not challenge the lawfulness of the rulemaking process by which the current version of the Rule was adopted.

The preceding history demonstrates that although Plaintiffs' arguments are directed at the amendment of the Rule in August 2021 and the Rule's failure to include a religious exemption from the COVID-19 vaccination requirement, it was the Legislature's revision of the statute in 2019 which eliminated the religious exemption for all mandatory

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https://www.maine.gov/sos/cec/elec/results/results20.html#ref20 (last visited Oct. 10, 2021) (to calculate the percentage, select "March 3, 2020 Special Referendum Election" to access the spreadsheet of results. Then divide the number of "no" votes (281,750) by the total number of votes cast (388,393).

[10] There is an additional exemption provided specifically for the Hepatis B vaccine, as mandated under Federal Law, 22 M.R.S.A. § 802(4-B)(C), which is distinct and not relevant to the inquiry at hand.

vaccines. Therefore, when I refer in this decision to the COVID-19 vaccine mandate, I am referring to the Rule as it operates in conjunction with the statute, 22 M.R.S.A. § 802(4-B), which authorizes it.

Having provided the necessary background, I turn to the legal standard which would govern the award of a preliminary injunction.

III. PRELIMINARY INJUNCTION LEGAL STANDARD

"A preliminary injunction is an 'extraordinary and drastic remedy ... that is never awarded as of right.' " *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011) (quoting *Munaf v. Geren*, 553 U.S. 674, 689-90, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008)).

A trial court must consider four factors when assessing a request for a preliminary injunction: (1) likelihood of success on the merits, (2) whether, absent preliminary relief, the plaintiff will suffer irreparable harm, (3) whether "the balance of equities tips in [the plaintiff's] favor," and (4) whether granting the injunction serves the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Of these factors, "[t]he movant's likelihood of success on the merits weighs most heavily in the preliminary injunction calculus." *Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 18 (1st Cir. 2020). This first factor is so consequential that "[i]f the moving party cannot demonstrate that he is likely to succeed in his quest,

the remaining factors become matters of idle curiosity." *Me. Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) (quoting *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)).

At this preliminary stage, the court "need not conclusively determine the merits of the movant's claim; it is enough for the court simply to evaluate the likelihood ... that the movant ultimately will prevail on the merits." *Ryan*, 974 F.3d at 18.

IV. LEGAL ANALYSIS

The Plaintiffs' Complaint presents five claims arising under: (A) the Free Exercise Clause of the First Amendment; (B) Title VII, 42 U.S.C.A. § 2000e to e-17 (West 2021); (C) the Equal Protection Clause of the Fourteenth Amendment; (D) a claim of Conspiracy in violation of 42 U.S.C.A. § 1985 (West 2021); and (E) the Supremacy Clause. As will become apparent, the likelihood of the Plaintiffs' success on their Free Exercise claim largely controls the outcome as to the remaining claims for purposes of determining the Plaintiffs' entitlement to preliminary injunctive relief.

A. The Free Exercise of Religion

The Free Exercise Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law prohibiting the free exercise" of religion. U.S. Const. amend. I, *see Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 84

L.Ed. 1213 (1940) (incorporating the Free Exercise Clause of the First Amendment against the states). The clause "embraces two concepts[:] freedom to believe and freedom to act." *Cantwell*, 310 U.S. at 303, 60 S.Ct. 900. Although the freedom to believe is absolute, the freedom to act on one's religious beliefs "remains subject to regulation for the protection of society." *Id.* at 304, 60 S.Ct. 900.

The Constitution's Free Exercise Clause does not prevent states from enacting a "neutral, generally applicable regulatory law," even when that law infringes on religious practices. *See Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879-882, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Laws that are deemed both neutral and generally applicable are traditionally subject to rational basis review. Thus, in *Smith*, the U.S. Supreme Court explained: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Id.* at 878-79, 110 S.Ct. 1595. Further, "if prohibiting the exercise of religion ... is not the object of the [state action] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[11] *Id.* at 878, 110 S.Ct. 1595. However, if a

[11] Writing for the Court's majority in *Smith*, Justice Scalia reasoned that the question of whether a religious exemption or accommodation should be adopted as part of a neutral, generally applicable regulatory law is not within the purview of the courts'

law burdens a religious practice and does not satisfy the requirements of neutrality and general applicability, the law is invalid under the Free Exercise Clause unless it survives strict scrutiny, meaning it is "justified by a compelling governmental interest and ... narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

The parties' dispute under the Free Exercise Clause centers on the standard of constitutional review that applies: rational basis review or strict scrutiny review. The Plaintiffs argue that the COVID-19 vaccine mandate's failure to provide a religious exemption means that the regulation is not neutral and generally applicable and, therefore, must be analyzed under the more demanding strict scrutiny standard. The Defendants disagree, contending that the mandate is neutral and generally applicable

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role in enforcing the Free Exercise Clause but is instead for the other branches of government to determine:

> But to say that a nondiscriminatory religious-practice exemption is permitted [by the Free Exercise Clause], or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

notwithstanding the lack of religious exemption, and that the more deferential rational basis standard of review applies.

Under rational basis review, "a neutral, generally applicable regulatory law that compel[s] activity forbidden by an individual's religion" withstands a Free Exercise challenge if there is a rational basis for the regulation. *Smith*, 494 U.S. at 880, 110 S.Ct. 1595. Applying rational basis review to the COVID-19 vaccine mandate at issue here would be in keeping with the Supreme Court's foundational decision in the area of mandatory vaccines—*Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905)—in which the Court upheld the constitutionality of a state mandated smallpox vaccine. In so doing, the Court applied a deferential standard of review and rejected a Fourteenth Amendment substantive due process challenge to the law, concluding that the mandatory vaccination law was constitutional because it had a "real [and] substantial relation to the protection of the public health and the public safety."[12] *Id.* at 31, 25 S.Ct. 358.

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[12] The Plaintiffs argue that because *Jacobson* pre-dates both the application of the Free Exercise Clause to the states and the Court's adoption of the tiers of scrutiny for constitutional questions, it is inapposite. The Defendants do not solely rest their argument on *Jacobson* but they do argue that it supports the more general proposition that a state may mandate vaccinations and need not include religious exemptions when doing so.

In the years since the Supreme Court recognized that the First Amendment's Free Exercise Clause applies to the states, *Jacobson* has been treated as informative authority both regarding the scope of government power to enact mandatory

vaccination requirements to protect public health and for the proposition that the Constitution does not require religious exemptions from state-mandated vaccinations. *See, e.g., Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194 (1922) (affirming that *Jacobson* "settled that it is within the police power of a state to provide for compulsory vaccination"); *Prince v. Massachusetts*, 321 U.S. 158, 166-67, 64 S.Ct. 438, 88 L.Ed. 645 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) ("[M]andatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"); *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) ("[Plaintiff] has not been denied any legal right on the basis of her religion. Constitutionally, [plaintiff] has no right to a [vaccine] exemption."); *Workman v. Mingo Cnty. Bd. of Educ.*, 419 Fed. App'x 348, 352-54 (4th Cir. 2011) (relying on the *Jacobson, Zucht*, and *Prince* line of cases to hold that a state mandatory vaccination law that allowed medical but not religious exemptions was constitutional); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1084, 1086 (S.D. Cal. 2016) ("[I]t is clear that the Constitution does not require the provision of a religious exemption to vaccination requirements" because, "[a]s stated in *Prince*, the right to free exercise does not outweigh the State's interest in public health and safety."); *Klaassen v. Trs. of Ind. Univ.*, No. 1:21-CV-238, 549 F.Supp.3d 836, 861–68, 890 (N.D. Ind. July 18, 2021) (providing a detailed analysis of *Jacobson's* continued viability and noting that "courts have consistently held that schools that provided a religious exemption from mandatory vaccination requirements did so *above and beyond* that mandated by the Constitution"), *aff'd*, 7 F.4th 592 (7th Cir. 2021) (relying on *Jacobson* to hold that "there can't be a constitutional problem with vaccination against SARS-CoV-2" because, although *Jacobson* has been criticized, "a court of appeals must apply the law established by the Supreme Court"); *Boone v. Boozman*, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002) ("The constitutionally-protected free exercise of religion does not excuse an individual from compulsory immunization; in this instance, the right to free exercise of religion ... [is] subordinated to society's interest in

However, *Jacobson* did not specifically address the scope of an individual's constitutional rights under the First Amendment's Free Exercise Clause in relation to mandatory vaccines, and that inquiry is the crux of the dispute here.

Under strict scrutiny review, a challenged government action may be upheld only if "it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1296-97, 209 L.Ed.2d 355 (2021) (per curiam). The government must also demonstrate that it "seriously undertook to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 573 U.S. 464, 494, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

To determine whether rational basis or strict scrutiny review applies, I turn to consider whether the COVID-19 vaccine mandate is both (1) neutral, and (2) generally applicable.

1. Neutrality

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protecting against the spread of disease."); *Harris v. Univ. of Mass., Lowell*, No. 21-cv-11244, 2021 WL 3848012, at *7 (D. Mass. Aug. 27, 2021) (following the *Jacobson* line to hold that "UMass is under no constitutional obligation to offer a religious exemption to its Vaccine Requirement.").

Neutrality examines whether the State's object, or purpose, was to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. A law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation." *Id.* The first step in determining the object of a law is to examine whether it is facially neutral. *Id.* ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

By this standard, the COVID-19 vaccine mandate challenged here is facially neutral. Neither the applicable statute nor the Rule mention religion, even by implication. Operating in tandem, they require that all healthcare workers employed at designated healthcare facilities receive the COVID-19 vaccination. They do not treat the COVID-19 vaccine differently than any other vaccinations mandated under Maine law.

The vaccine mandate's facial neutrality is not dispositive, though, because the "[g]overnment [also] fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, —— U.S. ——, 141 S. Ct. 1868, 1877, 210 L.Ed.2d 137 (2021). Thus, even a facially neutral law may not be neutral for Free Exercise purposes if its object is to discriminate against religious beliefs, practices, or motivations. *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217 ("The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt.").

The Plaintiffs contend that the COVID-19 vaccine mandate is not neutral because the removal of the religious exemption from the Rule "specifically target[ed] Plaintiffs' religious beliefs for disparate and discriminatory treatment." ECF No. 1 ¶ 131. They assert that "Maine has plainly singled out religious employees who decline vaccination for especially harsh treatment (i.e., depriving them from earning a living anywhere in the State), while favoring employees declining vaccination for secular, medical reasons." ECF No. 57 at 4. This argument mirrors claims made recently by healthcare providers challenging New York's COVID-19 vaccine mandate, which also did not provide for religious exemptions. *Dr. A. v. Hochul*, No. 1:21-cv-1009, 2021 WL 4734404, at **4-6 (N.D.N.Y. Oct. 12, 2021). However, the challenged New York regulation is distinguishable from Maine's COVID-19 vaccine mandate, because the New York regulation originally provided for a religious exemption which was then removed only a few days before the requirement became effective; additionally, New York provides religious exemptions to other mandated vaccinations for healthcare workers. *Id.* at *4, *5, *16 n.9. For these reasons, the court determined that the intentional, last-minute change to the language in the New York regulation was a "religious gerrymander" that required strict scrutiny. *Id.* at *19. In contrast, the Maine Legislature removed the religious exemption as to all mandated vaccines by amending 22 M.R.S.A. § 802(4-B) in 2019. Following the unsuccessful People's Veto held in 2020, DHHS removed the religious exemption from the Rule in April 2021 to conform the Rule to the

2019 statutory change. This revision pre-dated the COVID-19 vaccine requirement and served to ensure that the Rule was consistent with Maine law. The history associated with the revision of the Rule does not demonstrate animus toward religion.

In support of their argument, the Plaintiffs cite to a trio of recent per curiam or memorandum decisions issued by the U.S. Supreme Court: *Roman Catholic Diocese of Brooklyn v. Cuomo*, —— U.S. ——— , 141 S. Ct. 63, 208 L.Ed.2d 206 (2020) (per curiam); *South Bay Pentecostal Church v. Newsom*, —— U.S. – ——, 141 S. Ct. 716, 209 L.Ed.2d 22 (2021) (mem.); and *Tandon v. Newsom*, —— U.S. ———, 141 S. Ct. 1294, 209 L.Ed.2d 355 (2021) (per curiam). Each involved a challenge to a state law aimed at quelling the spread of COVID-19. Each was issued in response to a motion for emergency injunctive relief to preserve the status quo pending resolution of appellate review. Of the three, the Plaintiffs rest primarily on *Tandon v. Newsom*.

In *Tandon*, the Supreme Court granted injunctive relief against enforcement of a California regulation that prohibited indoor private gatherings of more than three households during the COVID-19 pandemic. 141 S. Ct. at 1297. The prohibition had the effect of restricting at-home religious gatherings while allowing groups of more than three households to gather in public settings, such as hair salons, retail stores, and restaurants. *Id.* In enjoining the regulation's enforcement, the Court explained that "government regulations are not neutral and generally applicable, and therefore trigger strict

scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* "Comparability is concerned with the risks various activities pose, not the reasons" motivating the activities. *Id.* The Court's majority concluded that private indoor gatherings of three or more households were comparable to groups of the same or a greater number of households in public businesses, which were not prohibited by the regulation, and granted an injunction against the policy's enforcement pending appellate review. *Id.* at 1297.

Citing *Tandon*, the Plaintiffs argue that the Free Exercise Clause prohibits the treatment of "**any** secular activity more favorably than religious activity." ECF No. 57 at 3 (emphasis in original). This misstates *Tandon*'s holding because it omits the crucial modifier—"comparable"—from the analysis of whether a secular activity has been treated more favorably than a religious activity.

In the unique context of a vaccine mandate intended to protect public health, there is a fundamental difference between a medical exemption—which is integral to achieving the public health aims of the mandate—and exemptions based on religious or philosophical objections—which are unrelated to the mandate's public health goals. The risks associated with the two are not comparable.

Reducing the risk of adverse medical consequences for a high-risk segment of the population is essential to achieving the public health objective of the vaccine mandate. A religious exemption would not address a risk associated with the vaccine mandate's central objectives. Under *Tandon*'s reasoning, rational basis review applies.

Tandon is distinguishable from this case in another respect. The vaccination requirement challenged here does not prevent the Plaintiffs from exercising their religious beliefs by refusing to receive the COVID-19 vaccination. In contrast, in *Tandon* interference with the free exercise of religion was direct because the statute prevented like-minded persons from gathering together to perform religious rituals. Here, the Rule does not compel the Plaintiffs to be vaccinated against their will, and the Plaintiffs have, in fact, freely exercised their religious beliefs by declining to be vaccinated. This is not to minimize the seriousness of the indirect consequences of the Plaintiffs' refusal to be vaccinated, as it affects their employment. Nonetheless, the Rule has not prevented the Plaintiffs from staying true to their professed religious beliefs.

The two remaining decisions in the trio relied upon by the Plaintiffs are also readily distinguished. In *South Bay United Pentecostal Church v. Newsom*[13]

[13] The California Order challenged in *South Bay* came before the Court twice on application for injunctive relief: in May 2020, the Court issued a memorandum opinion denying the application, –– U.S. ——, 140 S. Ct. 1613, 1613, 207 L.Ed.2d 154 (2020) (Mem.); in February 2021 the Court denied relief with respect to the percentage capacity limitations imposed on houses of

the Court partially granted an application for injunctive relief from California Governor Gavin Newsom's executive order limiting attendance at indoor religious gatherings to prevent further spread of COVID-19. 141 S. Ct. at 716, 718. Writing separately, Justice Gorsuch concluded that the restrictions on religious institutions imposed by California followed a pattern of that state "openly impos[ing] more stringent regulations on religious institutions than on many businesses" throughout the pandemic, and that this represented religious discrimination and required strict scrutiny. *Id.* at 717 (statement of Gorsuch, J.). The restrictions considered in *South Bay* are unlike the vaccine mandate at issue here. *Id.* In *South Bay*, California had explicitly imposed stricter attendance limits on in-person worship services, while not imposing similar limits in secular settings. There is no similar targeted imposition of restrictions on religious practices presented by the COVID-19 vaccine mandate.

Finally, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court granted injunctive relief from a State of New York order that imposed severe restrictions on religious gatherings in certain high-risk zones of New York City during the first wave of the Covid-19 pandemic. 141 S. Ct. at 66. Specifically, the order limited attendance at religious gatherings in "red" zones to no more than ten persons

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worship and limitations on singing and chanting during indoor services, and granted the injunction with respect to the other capacity limits, —— U.S. ——, 141 S. Ct. 716, 716, 209 L.Ed.2d 22 (2021) (Mem.).

and in "orange" zones to no more than 25 persons, while allowing myriad essential businesses in those same locations to admit an unlimited number of persons. *Id.* at 66-67. Invoking *Smith*, the Court determined that the challenged order was neither neutral nor generally applicable due to these categorizations. *Id.* at 67. Applying strict scrutiny, the Court held that although "[s]temming the spread of COVID-19 is unquestionably a compelling interest," the regulation was likely unconstitutional for lack of narrow tailoring. *Id.* There were multiple less restrictive rules that could have achieved the State's goal without burdening the exercise of religion so severely, such as tying the maximum attendance at a house of worship to the size of that facility. *Id.* The Court was not persuaded that the State demonstrated that houses of worship, which had "admirable safety records," "contributed to the spread of COVID-19" such that the targeted and restrictive prohibition could be constitutionally sound. *Id.* at 67-68.

Roman Catholic Diocese of Brooklyn is distinguishable from the COVID-19 vaccine mandate at issue here because the mandate does not impose restrictions on religious practices while allowing similar secular conduct to continue unfettered. Additionally, the vaccine mandate does not compel the Plaintiffs to be vaccinated for COVID-19 involuntarily and, therefore, the Plaintiffs have not been directly prevented from adhering to their religious beliefs as was the case in *Roman Catholic Diocese of Brooklyn*. Finally, as I will soon address, the State Defendants have demonstrated that other

less-restrictive measures would be insufficient alternatives to the vaccine mandate.

Therefore, the COVID-19 vaccine mandate is facially neutral, and the trio of recent Supreme Court per curiam and memorandum COVID-19 decisions does not dictate otherwise. Additionally, in probing for covert animus, what matters is the State's motive in removing the vaccine exceptions for religion and philosophy from the statute in 2019 because it was then—not in 2021 as Plaintiffs assert—that the change took effect. The Plaintiffs have not offered any reasoned explanation as to why Maine's COVID-19 vaccine mandate for healthcare workers should be viewed as targeting religious beliefs while vaccines for other communicable diseases that may have involved fetal cell lines in their development or production should not. The record establishes that the Maine Legislature's object in eliminating the religious and philosophical exemptions in 2019 was to further crucial public health goals, and nothing more.

Specifically, the Legislature considered data establishing that it was the religious and philosophical exemptions to mandatory vaccines that had prevented Maine from achieving herd immunity as to several infectious diseases, which is a prerequisite to eliminating those diseases.[14] Measles,

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[14] The statistics referenced in the legislative record, and cited here, pertain to vaccination rates for school children; however, they are relevant to the State's motivations for healthcare workers because the statute at issue removed religious and philosophical exemptions for both of these groups and there is no colorable argument (nor have the Plaintiffs advanced one) that

for example, requires a 95% population-level vaccination rate, ECF No. 49-4 ¶ 35, and this was undermined in the years prior to 2019 by the large percentage of unvaccinated persons resulting from the religious and philosophical exemptions, ECF No. 48-3 at 3-6. As Representative McDonald, cosponsor of the legislation, testified:

> Maine has the seventh-highest non-medical exemption rate in the nation.... The average philosophical and religious exemption rate for kindergarten-aged students in Hancock County, ME was 8.7 percent.... There are schools [in Hancock County] experiencing non-medical exemption rates as high as 33.3 percent.

ECF No. 48-3 at 1.

Then-Acting Director of Maine CDC, Nancy Beardsley, testified that "non-medical exemptions, which include religious and philosophical reasons, were reported at 5.0% for Maine, compared to the national rate of 2.0%." ECF No. 48-4 at 1. Medical exemptions, in contrast, accounted for 0.3% of the overall exemption rate. ECF No. 48-4 at 1. Beardsley also testified that the high exemption rates in Maine had caused pertussis outbreaks:

> Hancock and Waldo counties also represent two of the four counties with the highest

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the State had a different motivation for removing the exemptions for healthcare workers than for school children.

> reported rates of pertussis cases in 2018 .... Not only did high exemption rates likely contribute to high rates of pertussis disease in these two counties, but also in the entire State, as Maine reported the highest rate of pertussis disease in the country for 2018.

ECF No. 48-4 at 2.

The Plaintiffs have not specifically disputed that the reasons put forward by the State Defendants for the Legislature's removal of the religious and philosophical exemptions in 2019 were, in fact, the actual reasons. Accordingly, there is no factual support for the proposition that the August 2021 amendment of the Rule, adding the COVID-19 vaccine to the list of mandatory vaccinations for Maine's healthcare workers, "specifically target[ed] Plaintiffs' religious beliefs for disparate and discriminatory treatment," as the Plaintiffs argue. ECF No. 1 ¶ 131. Moreover, there is no basis to find that the August 2021 amendment of the Rule, including the removal of the religious and philosophical exemptions so that the Rule would conform to the 2019 amendment to the statute, was intended to discriminate against religious beliefs, practices, or motivations. *See Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217. For these reasons, the COVID-19 vaccine mandate is neutral because it is facially neutral and it was not intended to discriminate against individuals' religious beliefs, practices, or motivations.

2. General Applicability

General applicability addresses whether the State has selectively "impos[ed] burdens only on conduct motivated by religious belief." *Id.* at 543, 113 S.Ct. 2217. The Plaintiffs reason that the COVID-19 vaccine mandate is not generally applicable and that it must be subjected to strict scrutiny review because the mandate favors healthcare workers who refuse to be vaccinated for medical reasons over healthcare workers who refuse to be vaccinated for religious reasons. They contend that the State's adoption of medical exemptions as the sole type of exemption reflects a value judgment by the State, one which prioritizes secular interests over religious interests. Thus, they contend that the vaccine mandate fails the test of general applicability because it burdens religious beliefs while not similarly burdening secular interests.

Individualized exemptions undermine a regulation's general applicability if they display an unconstitutional value judgment that gives preference to secular concerns over religious concerns. In *Fulton*, the Supreme Court explained that "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877; *see also Cent. Rabbinical Cong. Of U.S. & Can. v. N.Y.C. Dep't. of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (citing *Lukumi*, 508 U.S. at 535-38, 113 S.Ct. 2217). ("A law is ... not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to

the legitimate government interests purportedly justifying it.)" "[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

The Plaintiffs contend that the medical exemption at issue here should be treated as an individualized exception which is "sufficiently suggestive of discriminatory intent so as to trigger heightened [strict] scrutiny." *Id.* They point to various judicial decisions applying strict scrutiny and invalidating regulations that permitted medical exemptions but not religious exemptions. However, the decisions cited by the Plaintiffs all relate to government regulations that were primarily intended to achieve governmental objectives other than protecting public health. Thus, in *Fraternal Order of Police, id.*, the court applied strict scrutiny and invalidated a regulation that prohibited beards for male police officers that was adopted for the stated purpose of promoting uniformity of the officers' appearance, and which granted a medical exemption from the requirement while not exempting officers who maintained beards as a matter of religious faith. The other decisions cited by the Plaintiffs addressed similar circumstances. *See Litzman v. New York City Police Department*, No. 12 Civ. 4681, 2013 WL 6049066, at *2-3 (S.D.N.Y. Nov. 15, 2013) (requiring religious exemptions to a policy mandating once-yearly facial shaving for male police officers to ensure compliance with respirator fit-testing requirements);

Singh v. McHugh, 185 F. Supp. 3d 201, 211-13 (D.D.C. 2016) (determining that religious accommodation was required under a policy that would not permit a Sikh student seeking to enroll in the Army's Reserve Officers' Training Corps program to wear a turban, unshorn hair, and beard due to a grooming policy to promote uniformity); and *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 599 (W.D. La. 2019) (determining a policy requiring beards for male officers "for officer safety reasons and to promote a uniform appearance of all officers" required religious accommodations).

Here, the purpose of requiring COVID-19 vaccinations for healthcare workers is to protect public health and not any other policy objective, such as promoting the uniformity of the appearance of police officers or firefighters. Exempting individuals whose health will be threatened if they receive a COVID-19 vaccine is an essential, constituent part of a reasoned public health response to the COVID-19 pandemic. It does not suggest a discriminatory bias against religion. *See W.D. v. Rockland County*, 521 F. Supp. 3d 358, 403 (S.D.N.Y. 2021) (concluding that New York's emergency declaration mandating vaccinations against measles, which provided a medical exemption but not a religious exemption, met the requirement of general applicability by "encouraging vaccination of all those for whom it was medically possible, while protecting those who could not be inoculated for medical reasons.").

The medical exemption at issue here was adopted to protect persons whose health may be

jeopardized by receiving a COVID-19 vaccination. The exemption is rightly viewed as an essential facet of the vaccine's core purpose of protecting the health of patients and healthcare workers, including those who, for bona fide medical reasons, cannot be safely vaccinated. Because the medical exemption serves the core purpose of the COVID-19 vaccine mandate, it does not reflect a value judgment prioritizing a purely secular interest—such as the uniformity of appearance of uniformed officers considered in *Fraternal Order of Police*—over religious interests. In addition, the vaccine mandate places an equal burden on all secular beliefs unrelated to protecting public health—for example, philosophical or politically-based objections to state-mandated vaccination requirements—to the same extent that it burdens religious beliefs.

The medical exemption applicable to the COVID-19 vaccine and the other vaccines required under Maine law does not reflect a value judgment unfairly favoring secular interests over religious interests. As an integral part of the vaccine requirement itself, the medical exemption for healthcare workers does not undermine the vaccine mandate's general applicability.

3. Conclusion Regarding the Standard of Constitutional Review

For the reasons I have explained, the COVID-19 vaccine mandate is both neutral and generally applicable; therefore, rational basis review applies. The trio of recent Supreme Court *per curiam* and memorandum decisions relied on by the Plaintiffs do

not suggest otherwise. I therefore turn to consider whether the mandate satisfies rational basis review.

4. Rational Basis Review

The Plaintiffs do not seriously question the existence of a rational basis for the adoption of the COVID-19 vaccine mandate. I address this question nonetheless because it is the key to deciding the requirement's constitutionality under the Free Exercise Clause. "A law survives rational basis review so long as the law is rationally related to a legitimate governmental interest." *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008).

Stopping the spread of COVID-19 in Maine, and specifically stemming outbreaks in designated healthcare facilities to protect patients and healthcare workers, is a legitimate government interest. For several reasons, the mandate is rationally related to this interest.

First, data collected by Maine CDC throughout the COVID-19 pandemic demonstrates that unvaccinated individuals are substantially more likely both to contract COVID-19 and to suffer serious medical consequences as a result. ECF No. 49-4 ¶¶ 16, 23, 52. Second, the percentage of COVID-19 outbreaks occurring in healthcare facilities is increasing rapidly and most of these outbreaks are caused by healthcare workers bringing the virus into the facilities. ECF No. 49-4 ¶¶ 46-48. Third, despite widespread availability of COVID-19 vaccinations, the rate of COVID-19 vaccinations for healthcare workers in designated healthcare facilities remains

below the 90% threshold needed to stem facility-based outbreaks. ECF No. 49-4 ¶¶ 53-54. Mandating COVID-19 vaccinations for healthcare workers at designated healthcare facilities will increase the vaccination rate for a critically important segment of Maine's workforce while lowering the risk of facility-based outbreaks.

The State defendants have provided ample support demonstrating a rational basis for their adoption of the COVID-19 vaccine mandate as a requirement that furthers the government's interest in protecting public health, healthcare workers, vulnerable patients, and Maine's healthcare system from the spread of COVID-19.

5. Strict Scrutiny Review

Although I conclude that rational basis, and not strict scrutiny, is the correct level of constitutional review, even if strict scrutiny were the required standard, the COVID-19 vaccine mandate for healthcare workers still withstands the Plaintiffs' Free Exercise challenge. As previously discussed, a challenged government action subject to strict scrutiny may be upheld only if "it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. The government must also demonstrate that it "seriously undertook to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 573 U.S. 464, 494, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

a. Compelling Interest

Curbing the spread of COVID-19 is "unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67. Plaintiffs here admit as much, conceding that "[t]o be sure, efforts to contain the spread of a deadly disease are 'compelling interests of the highest order.' " ECF No. 57 at 8 (quoting *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 910 (W.D. Ky. 2020)).

b. Narrow Tailoring

The record establishes that "[t]he gold standard to prevent and stop the spread of communicable diseases, including COVID-19, is vaccination." ECF No. 49-4 at ¶ 34. High vaccination rates minimize the number of unvaccinated individuals in group settings—such as healthcare environments—which ultimately facilitates population-level immunity and prevents outbreaks of these diseases both within these settings and in the general population. ECF No. 49-4 at ¶¶ 35-37. Achieving the high levels of vaccination needed to establish population-level immunity is crucial to protect the health of the most vulnerable individuals, including "individuals with weakened immune systems, infants too young to be vaccinated, and persons unable to be vaccinated." ECF No. 49-4 at ¶¶ 38-39. For "individuals undergoing treatment for serious diseases, and individuals who have a demonstrated allergy to one of the vaccine components," certain vaccinations are inadvisable for medical reasons. ECF No. 49-4 at ¶ 39. For these

people, receiving a particular vaccine could have adverse health consequences. ECF No. 49-4 at ¶ 39.

The Plaintiffs' sole challenge to the scientific rationale put forward by the State Defendants for the vaccine mandate is based on the Plaintiffs' citation to an article published in National Geographic Magazine that reports on a preliminary study that found that vaccinated persons with breakthrough COVID-19 infections can transmit the virus. This preliminary finding, however, does not address the broader question of whether COVID-19 vaccinations reduce the risk of people spreading the virus that causes COVID-19. According to the CDC, they do. CDC, *Key Things to Know About COVID-19 Vaccines*, (Oct. 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html ("COVID-19 vaccines can reduce the risk of people spreading the virus that causes COVID-19."). Nor does the National Geographic article address the related question of whether vaccinated persons become infected at a lesser rate than unvaccinated persons and whether vaccinations provide substantial protection against COVID-19 hospitalizations. On these points as well, the CDC indicates that they do. *Id.* ("People can sometimes get COVID-19 after being fully vaccinated. However, this only happens in a small proportion of people, even with the Delta variant. When these infections occur among vaccinated people, they tend to be mild."); *see also* Ashley Fowlkes et al., *Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance—Eight U.S. Locations, December*

2020–August 2021, CDC (Aug. 27, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7034e4.htm?s_cid=mm7034e4_w; Wesley H. Self, et al., *Comparative Effectiveness of Moderna, Pfizer-BioNTech, and Janssen (Johnson & Johnson) Vaccines in Preventing COVID-19 Hospitalizations Among Adults Without Immunocompromising Conditions—United States, March–August 2021*, CDC (Sept. 24, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7038e1.htm?s_cid=mm7038e1_w. The study cited by the Plaintiffs does not establish a lack of narrow tailoring for purposes of strict scrutiny analysis. If vaccinated individuals are less likely to become infected, they are less likely to transmit the disease. The preliminary study cited by the Plaintiffs does not call this crucial point into question.

Plaintiffs further contend that the COVID-19 vaccine mandate is not the least restrictive means of achieving the State's goal to protect public health and the healthcare system from communicable disease. They argue that there are alternatives to vaccination that would not restrict their religious beliefs, and that Maine has not demonstrated that these alternatives would not achieve the objectives of the Rule. Plaintiffs specifically point to the use of PPE and frequent testing as less restrictive tactics that Maine could employ.

The record demonstrates that PPE and regular testing are not sufficient to achieve Maine's compelling interest in stopping the spread of COVID-19. Regular testing, an alternative method proposed

by the Plaintiffs, was considered and ultimately rejected because "regular testing for the presence of the virus in employees is insufficient to protect against the Delta variant." ECF No. 49-4 at ¶ 61. The speed of the Delta variant's transmission outpaces test-result availability. ECF No. 49-4 at ¶¶ 61-62. With weekly or twice-weekly testing, "[a]n employee who tests negative on a Monday morning could be exposed that afternoon, and, within 36 hours, could be spreading the virus to others over the course of the several days until the next test." ECF No. 49-4 at ¶ 61. Further, "[b]ecause test results are not available for at least 24 hours, and sometimes up to 72 hours, daily PCR testing is insufficient for the same reasons." ECF No. 49-4 at ¶ 61. Daily testing, therefore, would require the use of rapid antigen tests, which are both less accurate and in short supply. ECF No. 49-4 at ¶ 62. Accordingly, regular testing is not an alternative measure that would effectively serve to stop the spread of COVID-19.

The use of PPE is also not an equivalent alternative measure. PPE is an important measure to prevent the spread of transmissible diseases, including COVID-19, but "it does not eliminate the possibility of spreading COVID-19, especially in healthcare settings." ECF No. 49-4 at ¶ 64. Maine healthcare facilities have utilized PPE and other practices, including regular testing and symptom monitoring, to reduce healthcare facility-based COVID-19 outbreaks. ECF No. 49-4 at ¶ 65. These measures have not been sufficient to prevent these outbreaks. In the face of the Delta variant and rising percentage of healthcare facility-based outbreaks,

they are not alternative equivalent measures that would achieve the compelling interest of curbing the spread of COVID-19.

Next, Plaintiffs argue that Maine currently stands alone in the nation by not providing religious exemptions to vaccine mandates for healthcare workers,[15] which necessarily demonstrates that less restrictive alternatives are available. The Plaintiffs reason that if every other state has been able to offer religious exemptions to COVID-19 mandates, Maine should as well. However, the Plaintiffs have not provided any scientific or expert evidence demonstrating the efficacy of the approaches adopted in other states. Maine may be one of the first states to conclude that it is wise to mandate vaccinations for certain healthcare workers, but it does not follow that other, less demanding approaches are equally effective or even appropriate given the circumstances presented in this state. The Government Defendants

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[15] At least two other states have adopted COVID-19 vaccine mandates which do not provide religious exemptions. In August 2021, the State of New York mandated COVID-19 vaccinations for healthcare workers in the state and did not include a religious exemption within the mandate. *Dr. A. v. Hochul*, No. 1:21-cv-1009, 2021 WL 4189533 (N.D.N.Y. Sept. 14, 2021). A preliminary injunction against the requirement was granted on October 12, 2021, *Dr. A. v. Hochul*, No. 1:21-cv-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021); as previously discussed, this case is distinguishable from Maine's vaccine mandate. Rhode Island has also mandated COVID-19 vaccinations for healthcare workers and did not provide for religious exemptions to that requirement; a temporary injunction was denied on September 30, 2021. *Dr. T v. McKee*, No. 1:21-cv-00387, 2021 WL 4476784 (D.R.I. Sept. 30, 2021).

assert that unlike many other states, "the size of Maine's healthcare workforce is limited, such that the impact of any outbreaks among personnel is far greater than it would be in a state with more extensive healthcare delivery systems." ECF No. 49-4 at ¶ 66. The Plaintiffs have not presented any expert witness declarations, science-based reports or data, or any other information to support their argument that there are equally effective, less restrictive alternatives to the vaccine mandate. Based on the record before me, there is no basis to conclude that, as the Plaintiffs' position suggests, what may be good enough for other states is necessarily equally good for the conditions presented in Maine.

Accordingly, I conclude that the COVID-19 vaccine mandate is narrowly tailored to serve the compelling interest of containing the spread of this serious communicable disease. Even if strict scrutiny were required, the Plaintiffs have not shown that they are likely to succeed on the merits of their Free Exercise claim against the Defendants.

B. Title VII

Seven plaintiffs assert that the Hospital Defendants refused to con[16]sider or grant religious accommodations by failing to grant exemptions from the vaccine mandate and that this refusal violates Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e to e-17 (West 2021).

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[16] Jane Does 1 through 5 and John Does 2 and 3.

Title VII forbids an employer "to discriminate against, any individual because of his ... religion." 42 U.S.C.A. § 2000e-2(c)(1). Discrimination is effected through an adverse employment action: "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Title VII requires that employers "offer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment, unless such an accommodation would create an undue hardship for the employer's business." *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004).

The Plaintiffs argue that the Hospital Defendants have unlawfully discriminated against them by refusing to grant exemptions to the COVID-19 vaccine mandate and terminating, or threatening to terminate, their employment for abiding by their sincerely held religious beliefs. At the time of filing, Plaintiffs had not exhausted the administrative remedies available to them for their claim of unlawful employment discrimination, such as pursuing a complaint with the Maine Human Rights Commission or Equal Employment Opportunity Commission.

The Supreme Court has "set a high standard for obtaining preliminary injunctions restraining termination of employment." *Bedrossian v. Nw. Mem'l Hosp.*, 409 F.3d 840, 845 (7th Cir. 2005) (citing

Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974)). The case must present a "genuinely extraordinary situation" to support granting an injunction, *Sampson*, 415 U.S. at 92 n.68, 94 S.Ct. 937; allegations of "humiliation, damage to reputation, and loss of income" are insufficient to meet that standard, *Bedrossian*, 409 F.3d at 845, as are "deterioration in skills" and "inability to find another job," *id.* at 846. Courts generally do not grant preliminary injunctions to prevent termination of employment, because "the termination ... of employment typically [is] not found to result in irreparable injury." 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2021). Injuries incurred in employment discrimination claims may be addressed through remedies at law, such as reinstatement, back pay, and damages. 42 U.S.C.A. § 2000e-5(g). In addition, in the ordinary course, Title VII violations must be addressed first through the administrative processes available under federal law. *See* 42 U.S.C.A. § 2000e-5(f)(1), *see also Rodriguez v. United States*, 852 F.3d 67, 78 (1st Cir. 2017) ("It is settled that a federal court will not entertain employment discrimination claims brought under Title VII unless administrative remedies have first been exhausted.").

The Plaintiffs have not shown that the injuries they have suffered or may suffer—the loss of their employment and economic harm—meet the high standard for preliminary injunctive relief required to restrain an employer from terminating an employee's employment. Administrative remedies are available to the Plaintiffs that have not been exhausted. For

these reasons, Plaintiffs have not demonstrated a likelihood of success on their Title VII claims to the degree needed to support preliminary injunctive relief.

C. Equal Protection Clause

The Plaintiffs argue that the COVID-19 vaccine mandate impermissibly creates a class of religious objectors and then subjects them to disparate treatment, in violation of the Equal Protection Clause. "[W]here a law subject to an equal protection challenge 'does not violate [a plaintiff's] right of free exercise of religion,' courts do not 'apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.' " *W.D.*, 521 F. Supp. 3d at 410 (second alteration in original) (quoting *A.M. ex rel. Messineo v. French*, 431 F. Supp. 3d 432, 446 (D. Vt. 2019)); *accord Wirzburger v. Galvin*, 412 F.3d 271, 282-83 (1st Cir. 2005) ("Because we [hold] that the [challenged law] does not violate the Free Exercise Clause, we apply rational basis scrutiny to the fundamental rights based claim that [the law] violates equal protection.").

As described above, because the Plaintiffs have not demonstrated a likelihood of success on their Free Exercise Clause claim and I have found, at this stage, that the vaccine mandate is rationally based, the Plaintiffs have not demonstrated a likelihood of success that their Equal Protection claim is warranted, and no additional analysis is required.

D. Conspiracy

The Plaintiffs claim that the State and Hospital Defendants conspired to violate their civil rights in violation of 42 U.S.C.A. § 1985, but provide only conclusory, nonfactual allegations in support. Because a violation of Plaintiffs' First Amendment rights has not been demonstrated, and the Plaintiffs have not submitted any declarations or other documentary evidence showing a conspiracy among the Defendants, no additional analysis regarding the claimed conspiracy is warranted.

E. Supremacy Clause

Finally, the Plaintiffs contend that the Defendants violated the Supremacy Clause of the U.S. Constitution by ignoring federal law and proceeding as if Maine law supersedes federal law.

The Supremacy Clause "is not the 'source of any federal rights,' and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015) (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989)). Rather, the Supremacy Clause "creates a rule of decision" that "instructs courts what to do when state and federal law clash." *Id.* Additionally, the Plaintiffs' assertion that "Defendants have explicitly claimed to healthcare workers in Maine, including Plaintiffs, that federal law does not apply" in Maine is wholly unsupported by the record. ECF No. 1 at ¶ 1.

The Plaintiffs have not demonstrated a likelihood of success on their Supremacy Clause claim.

F. Irreparable Harm, Balancing of the Equities, and Effect of the Court's Action on the Public Interest

Where plaintiffs fail to meet their burden to show a likelihood of success on the merits, "failure to do so is itself preclusive of the requested relief." *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 158 (1st Cir. 2021). In the interest of completeness, though, I address the three remaining prongs of the preliminary injunction inquiry.

First, the harm faced by Plaintiffs Jane Does 1 through 6 and John Does 2 through 3 is the loss of their employment, which, while serious and substantial, is not irreparable. These plaintiffs may pursue remedies at law for alleged discriminatory firings, including reinstatement, back pay, and damages. Although John Doe 1, as a healthcare provider, faces the possibility of more consequential harm through the potential loss of a business license, that harm does not outweigh the other factors I must consider.

Second, the balance of equities favors the Defendants because of the strong public interest promoted by the vaccine mandate, which includes preventing facility-based COVID-19 outbreaks that risk the health of vulnerable patients, healthcare workers, and the infrastructure of Maine's healthcare system itself. If Plaintiffs were granted injunctive

relief preventing the Rule from being enforced, these objectives would be thwarted. *See Bayley's Campground Inc. v. Mills*, 463 F. Supp.3d 22, 38 (D. Me. 2020) (denying injunctive relief against Maine's COVID-19 quarantine requirement for out-of-state visitors because "[t]he type of injunctive relief Plaintiffs seek would upset the bedrock of the state's public health response to COVID-19, an area this Court does not wade into lightly"), *aff'd*, 985 F.3d 153 (1st Cir. 2021).

Finally, the vaccine mandate is directly aimed at promoting the public interest. This factor weighs heavily against granting preliminary injunctive relief in this case. Many courts that have examined requests for preliminary injunctions against COVID-19 restrictions have come to this same conclusion, as it is clear that "[w]eakening the State's response to a public-health crisis by enjoining it from enforcing measures employed specifically to stop the spread of COVID-19 is not in the public interest." *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 789 (W.D.N.Y. 2020); *see also Harris*, 2021 WL 3848012, at *8 ("[G]iven the public health efforts promoted by the [COVID-19] Vaccine Policy, enjoining the continuation of same is not in the public interest."); *Klaassen*, 2021 WL 3073926, at *43 (noting that when individuals refuse vaccination, "the evidence reasonably shows that they aren't the only ones harmed by refusing to get vaccinated: refusing while also not complying with heightened safety precautions could 'sicken and even kill many others who did not consent to that trade-off,' " which "certainly impacts the public interest") (quoting

Cassell v. Snyders, 990 F.3d 539, 550 (7th Cir. 2021)). So too, here. Enjoining the Rule is not in the public interest.

Thus, in addition to failing to show a likelihood of success on the merits, I find that the Plaintiffs have not demonstrated an entitlement to relief under any of the three other factors in the preliminary injunction inquiry.

V. CONCLUSION

Both the serious risk of illness and death associated with the spread of the COVID-19 virus and the efforts by state and local governments to reduce that risk have burdened most aspects of modern life. In this case, the Plaintiffs—healthcare workers and a healthcare provider—have shown that their refusal to be vaccinated based on their religious beliefs has resulted or will result in real hardships as it relates to their jobs. They have not, however, been prevented from staying true to their professed religious beliefs which, they claim, compel them to refuse to be vaccinated against COVID-19. Neither have they seriously challenged the compelling governmental interest in mandating vaccinations for Maine's healthcare workers, nor have they demonstrated that, as they contend, the vaccine mandate was motivated by any improper animus toward religion.

Because the Plaintiffs have not established grounds that would warrant the entry of a preliminary injunction enjoining the enforcement of Maine's Covid-19 vaccine mandate for healthcare workers, the

Motion for Preliminary Injunction (ECF No. 3) is **DENIED**.

SO ORDERED.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
Bangor Division

ALICIA LOWE, DEBRA CHALMERS, JENNIFER BARBALIAS, NATALIE SALAVARRIA, NICOLE GIROUX, GARTH BERENYI, ADAM JONES,	)	Case No. 1:21-cv-00242-JDL
Plaintiffs,	)	
v.	)	
JANET T. MILLS, in her official capacity as Governor of the State of Maine, JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services, NIRAV D. SHAH, in his official capacity as Director of the Maine Center for Disease Control and Prevention, MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, GENESIS HEALTHCARE, LLC,	)	

NORTHERN LIGHT	)
EASTERN MAINE	)
MEDICAL CENTER,	)
MAINEGENERAL HEALTH,	)
	)
Defendants.	

"I believe we must do everything in our power not to fan the flames of fear but to encourage public health professionals . . . to continue their brave humanitarian work." **– Janet Mills**[1]

FIRST AMENDED VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, AND DAMAGES

For their FIRST AMENDED VERIFIED COMPLAINT against Defendants, JANET T. MILLS, in her official capacity as Governor of the State of Maine, JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services, NIRAV D. SHAH, in his official capacity as Director of the Maine Center for Disease Control and Prevention, MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, GENESIS HEALTHCARE, LLC, NORTHERN LIGHT EASTERN MAINE MEDICAL CENTER, and MAINEGENERAL HEALTH, Plaintiffs, ALICIA

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[1] Jacob Sullum, *Ebola Panic Control*, Reason.com (Nov. 5, 2014), https://reason.com/2014/11/05/ebola-panic-control/ (quoting then-Attorney General Janet Mills concerning unwarranted quarantine orders against healthcare professionals) (emphasis added)).

LOWE, DEBRA CHALMERS, JENNIFER BARBALIAS, NATALIE SALAVARRIA, NICOLE GIROUX, GARTH BERENYI, and ADAM JONES, allege and aver as follows:

INTRODUCTION

1. The seminal issue before this Court can be boiled down to a simple question: Does federal law apply in Maine? Though the question borders on the absurd, so does Defendants' answer to it. Defendants have explicitly claimed to healthcare workers in Maine, including Plaintiffs, that federal law does not apply, and neither should they. Defendants have informed Plaintiffs, who have sincerely held religious objections to the Governor's mandate that all healthcare workers in Maine must receive a COVID-19 vaccine by October 1, 2021 (the "**COVID-19 Vaccine Mandate**"), that no protections or considerations are given to religious beliefs in Maine. That deadline was subsequently extended to October 29, 2021. Indeed, Defendants' answer has been an explicit claim that federal law does not provide protections to Maine's healthcare workers. When presented with requests from Plaintiffs for exemption and accommodation for their sincerely held religious beliefs, Defendants responded in the following ways:

- "I can share MaineHealth's view that **federal law does not supersede state law in this instance**." (*See infra* ¶ 77 (emphasis added).)

- "**[W]e are no longer able to consider religious exemptions for those who work in the state of Maine**." (*See infra* ¶ 74 (bold emphasis original).)

- "All MaineGeneral employees will have to be vaccinated against COVID-19 by Oct. 1 unless they have a medical exemption. The mandate also states that only medical exemptions are allowed, **no religious exemptions are allowed**." (*Infra* ¶ 84 (emphasis added).)

- "Allowing for a religious exemption would be a violation of the state mandate issued by Governor Mills. So, unfortunately, that is not an option for us." (*Infra* ¶ 85.)

2. The answer to the question before this Court is clear: **federal law and the United States Constitution are supreme over any Maine statute or edict, and Maine cannot override, nullify, or violate federal law**. *See* U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). "**This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures**." *Haywood v. Drown*, 556 U.S. 729, 734

(2009) (emphasis added). Indeed, "**[i]t is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause . . . state law is nullified to the extent that it actually conflicts with federal law**." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (emphasis added) (cleaned up).

3. Thus, there can be no dispute that **Maine is required to abide by federal law and provide protections to employees who have sincerely held religious objections to the COVID-19 vaccines**. And, here, the federal law is clear: There can be no dispute that Title VII of the Civil Rights Act prohibits Defendants from discriminating against Plaintiffs on the basis of their sincerely held religious beliefs. 42 U.S.C. §2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion."). And, Defendants have a duty under Title VII to provide religious exemptions and accommodations to those with sincerely held religious objections to the COVID-19 Vaccine Mandate. In direct contrast to this unquestionable principle of black letter law, however, every Defendant in this suit has seen fit to claim to its healthcare workers that the converse is true, and that Maine law is supreme over federal law; has engaged in a conspiracy and scheme to discourage employees with religious objections to the mandatory vaccines

from even seeking religious exemptions from such a policy; has informed Plaintiffs that their requests for an exemption and accommodation from the mandate cannot even be evaluated or considered; and has flatly denied all requests for religious exemption and accommodation from the mandate that all healthcare workers receive a COVID-19 vaccine. Employers bent on discrimination "usually don't post help wanted signs reading 'blacks need not apply.'" *Lewis v. City of Unity City*, 918 F.3d 1213, 1261 (11th Cir. 2019) (Rosenbaum, J., concurring in part). But Maine and its healthcare employers have no problem being direct: "**religious misbelievers need not apply**."

4. The dispute in this case is not about what accommodations are available to Plaintiffs or whether accommodation of Plaintiffs' sincerely held religious objections can be conditioned on compliance with certain reasonable requirements. Plaintiffs have already acknowledged to Defendants that they are willing to comply with reasonable health and safety requirements that were deemed sufficient mere weeks before this action was commenced. **The dispute is about whether Defendants are required to even consider a request for reasonable accommodation of Plaintiffs' sincerely held religious beliefs**. The answer is clear: **yes**. And this Court should require Defendants to acknowledge and accept that federal law mandates accommodation for Plaintiffs' sincerely held religious beliefs and order Defendants to extend such protections.

5. **Plaintiffs were given a deadline to become vaccinated by October 29, 2021, or face termination and deprivation of their abilities to feed their families. No American should be faced**

with this unconscionable choice, especially the healthcare heroes who have served us admirably for the entire duration of COVID-19. Plaintiffs suffered irreparable harm by being forced to choose between their jobs and their sincerely held religious beliefs. All Plaintiffs have also now been terminated from their positions for failure to accept or receive a COVID-19 vaccine that violates their sincerely held religious beliefs. Relief from this unconscionable and unlawful deprivation of Plaintiffs' liberties should not wait another day.

6. Early last year, the Governor rightfully declared that Maine's healthcare workers were "Superheroes" and requested that "all Maine people join me in thanking all of our healthcare workers who have heeded the call of duty and worked long hours, days, and weeks, often at great sacrifice to themselves and their families, to protect Maine people during this extraordinary crisis." Office of Governor Janet T. Mills, *Governor Mills Announces Four Maine Healthcare Superheroes to Attend Super Bowl LV Thanks to Generosity of New England Patriots' Kraft Family* (Feb. 2, 2021), https://www.maine.gov/governor/mills/news/governor-mills-announces-four-maine-healthcare-superheroes-attend-super-bowl-lv-thanks. Every word of that statement is equally as true today as it was the day the Governor uttered it. **Yet, on August 12, 2021, those same superheroes were cast as evil villains for requesting exemption and accommodation for their sincerely held religious beliefs**.

7. Neither the Governor nor any of the Defendant employers is permitted to blatantly ignore federal protections under the First Amendment and Title VII, yet that is precisely why relief is needed in the instant action: Plaintiffs need **an order mandating that Defendants follow federal protections for religious objectors to the COVID-19 Vaccine Mandate.**

8. Plaintiffs are all healthcare workers in Maine who have sincerely held religious beliefs that preclude them from accepting any of the COVID-19 vaccines because of the vaccines' connections to aborted fetal cell lines and for other religious reasons that have been articulated to Defendants. Since COVID-19 first arrived in Maine, Plaintiffs have risen every morning, donned their personal protective equipment, and fearlessly marched into hospitals, doctor's offices, emergency rooms, operating rooms, and examination rooms with one goal: to provide quality healthcare to those suffering from COVID-19 and every other illness or medical need that confronted them. They did it bravely and with honor. They answered the call of duty to provide healthcare to the folks who needed it the most and worked tirelessly to ensure that those ravaged by the pandemic were given appropriate care. **All Plaintiffs seek in this lawsuit is to be able to continue to provide the healthcare they have provided to patients for their entire careers, and to do so under the same protective measures that have sufficed for them to be considered superheroes for over two years**. Defendants shamelessly seek to throw these healthcare workers out into the cold and ostracize them from the very medical facilities for

which they have sacrificed so much solely because of Plaintiffs' desire to continue to provide quality healthcare while still exercising their sincerely held religious beliefs.

9. The law mandates that Defendants permit them to do both. Regardless of whether Maine sees fit to extend protections to religious objectors under its own statutory framework, **federal law demands that these Plaintiffs and all employees in Maine receive protections for their sincerely held religious beliefs**. This Court should hold Maine to the bargain it made with its citizens when it joined the union and ensure that Maine extends the required protections that federal law demands. As the Supreme Court recently held, "**even in a pandemic, the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (emphasis added). When we have demanded so much of our healthcare heroes, we owe them nothing less than the full measure of our own commitment to constitutional principles. Anything less would be desecrating the sacrifice these medical heroes made for untold numbers of people—including Defendants—when the call of duty demanded it of them.

PARTIES

10. Plaintiff Alicia Lowe is a citizen of the State of Maine and is a healthcare worker previously employed by Defendant MaineHealth at one of its healthcare facilities in Maine. Plaintiff Lowe submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon her sincerely held

religious beliefs but was denied an exemption because MaineHealth informed her that the Governor does not allow MaineHealth to consider or grant religious exemption or accommodation requests. Plaintiff Lowe was terminated from her position for refusing to accept a vaccine that violates her sincerely held religious beliefs. After submitting a notice of discrimination to the EEOC, Plaintiff Lowe received a Notice of Right to Sue.

11. Plaintiff Debra Chalmers is a citizen of the State of Maine and is a healthcare worker previously employed by Genesis Healthcare at one of its healthcare facilities in Maine. Plaintiff Chalmers submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon her sincerely held religious beliefs but was denied an exemption because Genesis Healthcare informed her that the Governor does not allow Genesis Healthcare to consider or grant religious exemption or accommodation requests. Plaintiff Chalmers was given until August 23rd to receive the vaccination or be terminated from her employment in the healthcare industry. Plaintiff Chalmers has received notification that the exercise of her religious beliefs has resulted in her termination from Genesis Healthcare. After submitting a notice of discrimination to the EEOC, Plaintiff Chalmers received a Notice of Right to Sue.

12. Plaintiff Jennifer Barbalias is a citizen of the State of Maine and is a healthcare worker previously employed by Northern Light Eastern Maine Medical Center at one of its healthcare facilities in Maine. Plaintiff Barbalias submitted a written request for an exemption and accommodation

from the Governor's COVID-19 Vaccine Mandate based upon her sincerely held religious beliefs but was denied an exemption because Northern Light EMMC informed her that the Governor does not allow Northern Light EMMC to consider or grant religious exemption or accommodation requests. Plaintiff Barbalias was terminated from her position for refusing to accept a vaccine that violates her sincerely held religious beliefs. After submitting a notice of discrimination to the EEOC, Plaintiff Barbalias received a Notice of Right to Sue.

13. Plaintiff Natalie Salavarria is a citizen of the State of Maine and is a healthcare worker previously employed by Northern Light Eastern Maine Medical Center at one of its healthcare facilities in Maine. Plaintiff Salavarria submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon her sincerely held religious beliefs but was denied an exemption because Northern Light EMMC informed her that the Governor does not allow Northern Light EMMC to consider or grant religious exemption or accommodation requests. Plaintiff Salavarria was terminated from her position for refusing to accept a vaccine that violates her sincerely held religious beliefs. After submitting a notice of discrimination to the EEOC, Plaintiff Salavarria received a Notice of Right to Sue.

14. Plaintiff Nicole Giroux is a citizen of the State of Maine and is a healthcare worker previously employed by MaineGeneral Health at one of its healthcare facilities in Maine. Plaintiff Giroux submitted a written request for an exemption and accommodation from the Governor's COVID-19

Vaccine Mandate based upon her sincerely held religious beliefs but was denied an exemption because MaineGeneral Health informed her that the Governor does not allow MaineGeneral Health to consider or grant religious exemption or accommodation requests. Plaintiff Giroux was terminated from her position for refusing to accept a vaccine that violates her sincerely held religious beliefs. After submitting a notice of discrimination to the EEOC, Plaintiff Giroux received a Notice of Right to Sue.

15. Plaintiff Garth Berenyi is a citizen of the State of Maine and is a healthcare worker previously employed by Genesis Healthcare at one of its healthcare facilities in Maine. Plaintiff Berenyi submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon his sincerely held religious beliefs but was denied an exemption because Genesis Healthcare informed him that the Governor does not allow Genesis Healthcare to consider or grant religious exemption or accommodation requests. Plaintiff Berenyi was terminated from his position for refusing to accept a vaccine that violates his sincerely held religious beliefs. After submitting a notice of discrimination to the EEOC, Plaintiff Berenyi received a Notice of Right to Sue

16. Plaintiff Adam Jones is a citizen of the State of Maine and is a healthcare worker previously employed by Northern Light Eastern Maine Medical Center at one of its healthcare facilities in Maine. Plaintiff Jones submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon his sincerely held religious beliefs but was denied an exemption

because Northern Light EMMC informed him that the Governor does not allow Northern Light EMMC to consider or grant religious exemption or accommodation requests. Plaintiff Jones was terminated from his position for refusing to accept a vaccine that violates his sincerely held religious beliefs. After submitting a notice of discrimination to the EEOC, Plaintiff Jones received a Notice of Right to Sue.

17. Defendant, Janet T. Mills, in her official capacity as Governor of the State of Maine ("the Governor") is responsible for enacting the COVID-19 Vaccine Mandate. Governor Mills is sued in her official capacity

18. Defendant Jeanne M. Lambrew, in her official capacity as the Commissioner of the Maine Department of Health and Human Services is responsible for overseeing the healthcare industry in Maine and is responsible for the Governor's COVID-19 Vaccine Mandate and enforcing the provisions of threatened loss of licensure for those healthcare providers who refuse to mandate the COVID-19 vaccine. Defendant Lambrew is sued in her official capacity.

19. Defendant Nirav D. Shah in his official capacity as the Director of the Maine Center for Disease Control and Prevention is responsible for overseeing the healthcare industry in Maine and is responsible for the Governor's COVID-19 mitigation measures and COVID-19 Vaccine Mandate and enforcing the provisions of threatened loss of licensure for those healthcare providers who refuse to mandate the COVID-19 vaccine. Defendant Shah is sued in his official capacity.

20. Defendant MaineHealth is a nonprofit corporation incorporated under the laws of the State of Maine, employees a number of Plaintiffs in this action, has refused to even consider requests for religious accommodations, and has terminated Plaintiffs for their refusal to accept a vaccine that violates their sincerely held religious beliefs.

21. Defendant Genesis Healthcare of Maine, LLC is a limited liability company organized under the laws of the State of Maine, employees a number of Plaintiffs in this action, has refused to even consider requests for religious accommodations, and has terminated Plaintiffs for their refusal to accept a vaccine that violates their sincerely held religious beliefs. Defendant Genesis Healthcare, LLC is a foreign limited liability company organized under the laws of the State of Delaware and is a corporate parent of Genesis Healthcare of Maine, LLC. Plaintiffs collectively refer to the parent and subsidiary corporations as Genesis Healthcare in this Verified Complaint.

22. Defendant Northern Light Eastern Maine Medical Center is a nonprofit corporation incorporated under the laws of the State of Maine, employees a number of Plaintiffs in this action, has refused to even consider requests for religious accommodations, and has terminated Plaintiffs for their refusal to accept a vaccine that violates their sincerely held religious beliefs.

23. Defendant MaineGeneral Health is a nonprofit corporation incorporated under the laws of the State of Maine, employees a number of Plaintiffs in this action, has refused to even consider requests for religious accommodations, and has terminated

Plaintiffs for their refusal to accept a vaccine that violates their sincerely held religious beliefs.

JURISDICTION AND VENUE

24. This action arises under the First and Fourteenth Amendments to the United States Constitution and is brought pursuant to 42 U.S.C. § 1983. This action also arises under federal statutory laws, namely 42 U.S.C. § 1985(3) and 42 U.S.C. § 2000e-2.

25. This Court has jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 1331 and 1343.

26. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

27. This Court is authorized to grant declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, implemented through Rule 57 of the Federal Rules of Civil Procedure.

28. This Court is authorized to grant Plaintiffs' prayer for permanent injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

29. This Court is authorized to grant Plaintiffs' prayer for damages under 42 U.S.C. § 2000e-5.

30. This Court is authorized to grant Plaintiffs' prayer for costs, including a reasonable attorney's fee, pursuant to 42 U.S.C. § 1988.

GENERAL ALLEGATIONS

A. THE GOVERNOR'S COVID-19 VACCINE MANDATE FOR HEALTHCARE WORKERS.

31. On August 12, 2021, Governor Mills announced that Maine will now require health care workers to accept or receive one of the three, currently available COVID-19 vaccines in order to remain employed in the healthcare profession. *See* Office of Governor Janet Mills, *Mills Administration Requires Health Care Workers To Be Fully Vaccinated Against COVID-19 By October 1* (Aug. 12, 2021), https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october (last visited Aug. 24, 2021) (hereinafter "COVID-19 Vaccine Mandate"). (A true and correct copy of the Governor's COVID-19 Vaccine Mandate was attached to the original Verified Complaint and is incorporated herein as **EXHIBIT A**, and is located at ECF No. 1-1.)

32. The Governor's COVID-19 Vaccine Mandate defines health care workers as "any individual employed by a hospital, multi-level health care facility, home health agency, nursing facility, residential care facility, and intermediate care facility for individuals with intellectual disabilities that is licensed by the State of Maine" as well as "those employed by emergency medical service organizations or dental practices."

33. The Governor's COVID-19 Vaccine Mandate also says that "[t]he organizations to which this requirement applies must ensure that each

employee is vaccinated, with this requirement being enforced as a condition of the facilities' licensure."

34. **Thus, the Governor has threatened to revoke the licenses of all health care employers who fail to mandate that all employees receive the COVID-19 vaccine**.

35. In addition to the Governor's mandate, Plaintiffs and all health care workers in Maine were also stripped of their rights to request a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

36. On August 14, 2021, Dr. Shah and the Maine Center for Disease Control and Prevention ("MCDC") amended 10-144 C.M.R. Ch. 264 to eliminate the ability of health care workers in Maine to request and obtain a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

37. The only exemptions Maine now lists as available to health care workers are those outlined in 22 M.R.S. § 802.4-B, which purports to exempt only those individuals for whom an immunization is medically inadvisable and who provide a written statement from a doctor documenting the need for an exemption.

38. Under the prior version of the rule, 10-144 C.M.R. Ch. 264, §3-B a health care worker could be exempt from mandatory immunizations if the "employee states in writing an opposition to immunization because of a sincerely held religious belief." *Id.*

39. In fact, as acknowledged by MCDC, Maine removed the religious exemption to mandatory immunizations in early August 2021. *See* Division of Disease Surveillance, *Maine Vaccine Exemption Law*

Change 2021, https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/maine-vaccine-exemption-law-changes.shtml (last visited July 11, 2022) ("The health care immunization law has removed the allowance for philosophical and religious exemptions . . . .").

B. PLAINTIFFS' SINCERELY HELD RELIGIOUS OBJECTIONS TO COVID-19 VACCINE MANDATE.

40. Plaintiffs all have sincerely held religious beliefs that preclude them from accepting or receiving any of the three available COVID-19 vaccines because of the connection between the various COVID-19 vaccines and the cell lines of aborted fetuses, whether in the vaccines' origination, production, development, testing, or other inputs.

41. A fundamental component of Plaintiffs' sincerely held religious beliefs is that all life is sacred, from the moment of conception to natural death, and that abortion is a grave sin against God and the murder of an innocent life.

42. Plaintiffs' sincerely held religious beliefs are rooted in Scripture's teachings that "[a]ll Scripture is given by inspiration of God, and is profitable for doctrine, for reproof, for correction, [and] for instruction in righteousness." *2 Timothy* 3:16 (KJV).

43. Because of that sincerely held religious belief, Plaintiffs believe that they must conform their lives, including their decisions relating to medical care, to the commands and teaching of Scripture.

44. Plaintiffs have sincerely held religious beliefs that God forms children in the womb and knows them prior to their birth, and that because of this, life is sacred from the moment of conception. *See Psalm* 139:13–14 (ESV) ("For you formed my inward parts; you knitted me together in my mother's womb. I praise you, for I am fearfully and wonderfully made."); *Psalm* 139:16 (ESV) ("Your eyes saw my unformed substance; in your book were written, every one of them, the days that were formed for me, when as yet there was none of them."); *Isaiah* 44:2 (KJV) ("the LORD that made thee, and formed thee from the womb"); *Isaiah* 44:24 (KJV) ("Thus saith the LORD, thy redeemer, and he that formed thee from the womb, I am the LORD that maketh all things."); *Isaiah* 49:1 (KJV) ("The LORD hath called my from the womb; from the bowels of my mother hath he made mention of my name."); *Isaiah* 49:5 (KJV) ("the LORD that formed me from the womb to be his servant"); *Jeremiah* 1:5 (KJV) ("Before I formed thee in the belly I knew thee; and before thou camest forth out of the womb I sanctified thee, and I ordained thee.").

45. Plaintiffs also have sincerely held religious beliefs that every child's life is sacred because they are made in the image of God. *See Genesis* 1:26–27 (KJV) ("Let us make man in our image, after our likeness. . . . So God created man in his own image; in the image of God created he him; male and female created he them.").

46. Plaintiffs also have sincerely held religious beliefs that because life is sacred from the moment of conception, the killing of that innocent life is the murder of an innocent human in violation of Scripture. *See, e.g.*, *Exodus* 20:13 (KJV) ("Though

shalt not kill."); *Exodus* 21:22–23 (setting the penalty as death for even the accidental killing of an unborn child); *Exodus* 23:7 (KJV) ("the innocent and righteous slay thou not, for I will not justify the wicked"); *Genesis* 9:6 (KJV) ("Whoso sheddeth a man's blood, by man shall his blood by shed: for in the image of God made he man."); *Deuteronomy* 27:25 (KJV) ("Cursed be he that taketh reward to slay an innocent person."); *Proverbs* 6:16–17 (KJV) ("These six things doth the LORD hate: yea, seven are an abomination to him . . . hands that shed innocent blood.").

47. Plaintiffs also have the sincerely held religious belief that it would be better to tie a millstone around their necks and be drowned in the sea than bring harm to an innocent child. *See Matthew* 18:6; *Luke* 17:2.

48. Plaintiffs have sincerely held religious beliefs, rooted in the Scriptures listed above, that anything that condones, supports, justifies, or benefits from the taking of innocent human life via abortion is sinful, contrary to the Scriptures, and must be denounced, condemned, and avoided altogether.

49. Plaintiffs have sincerely held religious beliefs, rooted in the Scriptures listed above, that it is an affront to Scripture's teaching that all life is sacred when any believer uses a product derived from or connected in any way with abortion.

50. Plaintiffs' sincerely held religious beliefs, rooted in the above Scriptures, preclude them from accepting any one of the three currently available COVID-19 vaccines derived from, produced or manufactured by, tested on, developed with, or otherwise connected to aborted fetal cell lines.

51. Plaintiffs have sincerely held religious objections to the Johnson & Johnson (Janssen Pharmaceuticals) vaccine because it unquestionably used aborted fetal cells lines to produce and manufacture the vaccine.

52. As reported by the North Dakota Department of Health, in its handout literature for those considering one of the COVID-19 vaccines, "[t]he non-replicating viral vector vaccine produced by Johnson & Johnson **did require the use of fetal cell cultures, specifically PER.C6, in order to produce and manufacture the vaccine**." *See* North Dakota Health, *COVID-19 Vaccines & Fetal Cell Lines* (Dec. 1, 2021), *available at* https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf.

53. The Louisiana Department of Health likewise confirms that the PER.C6 fetal cell line, which is used in producing the Johnson & Johnson COVID-19 vaccine, "is a retinal cell line that was **isolated from a terminated fetus in 1985**." Louisiana Department of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 21, 2020), https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf (emphasis added).

54. Scientists at the American Association for the Advancement of Science have likewise published research showing that the Johnson & Johnson vaccine used aborted fetal cell lines in the development and production phases of the vaccine. Meredith Wadman, *Vaccines that use human fetal*

cells draw fire, Science (June 12, 2020), *available at* https://science.sciencemag.org/content/368/6496/1170.full.

55. Plaintiffs have sincerely held religious objections to the Moderna and Pfizer/BioNTech COVID-19 vaccines because both of these vaccines, too, have their origins in research on aborted fetal cells lines.

56. As reported by the North Dakota Department of Health, in its handout literature for those considering one of the COVID-19 vaccines, the Moderna and Pfizer mRNA vaccines are ultimately derived from research and testing on aborted fetal cell lines. In fact, "[e]arly in the development of mRNA vaccine technology, **fetal cells were used for 'proof of concept' (to demonstrate how a cell could take up mRNA and produce the SARS-CoV-2 spike protein) or to characterize the SARS-CoV-2 spike protein**." *See* North Dakota Health, *COVID-19 Vaccines & Fetal Cell Lines* (Dec. 1, 2021), *available at* https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf (emphasis added).

57. The Louisiana Department of Health's publications again confirm that aborted fetal cells lines were used in the "proof of concept" phase of the development of their COVID-19 mRNA vaccines. Louisiana Department of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 21, 2020), https://ldh.la.gov/assets/oph/Center-PHCH/Center-

PH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf.

58. Because all three of the currently available COVID-19 vaccines are developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell lines HEK-293 and PER.C6, Plaintiffs' sincerely held religious beliefs compel them to abstain from obtaining or injecting any of these products into their body, regardless of the perceived benefit or rationale.

59. Plaintiffs have sincerely held religious beliefs that their bodies are temples of the Holy Spirit, and that to inject medical products that have any connection whatsoever to aborted fetal cell lines would be defiling the temple of the Holy Spirit. (*See 1 Corinthians* 6:15-20 (KJV) ("Know ye not that your bodies are the members of Christ? shall I then take the members of Christ and make them members of an harlot? God forbid. . . . What? Know ye not that your body is the temple of the Holy Ghost which is in you, which have of God, and ye are not your own? For ye are bought with a price: therefore glorify God in your body, and in your spirit, which are God's.").

60. In addition to their sincerely held religious beliefs that compel them to abstain from any connection to the grave sin of abortion, Plaintiffs have sincerely held religious beliefs that the Holy Spirit—through prayer and the revelation of Scripture—guide them in all decisions they make in life.

61. Plaintiffs have sincerely held religious beliefs that Jesus Christ came to this earth, died on the cross for their sins, and was resurrected three days later, and that when He ascended to Heaven, He sent the Holy Spirit to indwell His believers and to

guide them in all aspects of their lives. *See John* 16:7 (KJV) ("Nevertheless I tell you the truth, It is expedient for you that I go away: for if I go not away, the Comforter will not come unto you; but if I depart, I will send him unto you."); *John* 14:26 (KJV) ("But the Comforter, which is the Holy Ghost, whom the Father will send in my name, he shall teach you all things, and bring all things to your remembrance, whatsoever I have said unto you.").

62. Plaintiffs have sincerely held religious beliefs that the Holy Spirit was given to them by God to reprove them of righteousness and sin and to guide them into all truth. *See John* 16:8, 13 (KJV) ("And when he is come, he will reprove the world of sin, and of righteousness, and of judgment . . . . [W]hen he, the Spirit of truth, is come, he will guide you into all truth: for he shall not speak of himself; but whatsoever he shall hear, that shall he speak: and he will shew you things to come.").

63. Plaintiffs also have sincerely held religious beliefs that they shall receive all answers to their questions through prayer and supplication, including for decisions governing their medical health. *See James* 1:5 (KJV) ("If any of you lack wisdom, let him ask of God, that giveth to all men liberally, and upbraideth not; and it shall be given him."); *Mark* 11:24 (KJV) ("Therefore I say unto you, What things soever ye desire, when ye pray, believe that ye receive them, and ye shall have them."); *Philippians* 4:6–7 (KJV) ("Be careful for nothing, but in everything by prayer and supplication with thanksgiving let your request be made known to God. And the peace of God, which passeth all understanding, shall keep your hearts and minds through Christ Jesus."); *1 John*

4:14–15 (KJV) ("And this is the confidence we have in him, that, if we ask anything according to his will, he heareth us. And if we know that he hear us, whatsoever we ask, we know that we have the petitions that we desired of him.").

64. Through much prayer and reflection, Plaintiffs have sought wisdom, understanding, and guidance on the proper decision to make concerning these COVID-19 vaccines, and Plaintiffs have been convicted by the Holy Spirit in their beliefs that accepting any of the three currently available vaccines is against the teachings of Scripture and would be a sin.

C. PLAINTIFFS' WILLINGNESS TO COMPLY WITH ALTERNATIVE SAFETY MEASURES.

65. Plaintiffs have offered, and are ready, willing, and able to comply with all reasonable health and safety requirements to facilitate their religious exemption and accommodation from the COVID-19 Vaccine Mandate.

66. Plaintiffs have all informed their respective employers that they are willing to wear facial coverings, submit to reasonable testing and reporting requirements, monitor symptoms, and otherwise comply with reasonable conditions that were good enough to permit them to do their jobs for the last 18 months with no questions asked.

67. In fact, early in the pandemic the State said Plaintiffs were heroes because of their willingness to abide by the same conditions and

requirements that Plaintiffs are willing to abide by now.

68. In fact, Defendant Shah and the MCDC continues to say that facial coverings are one of the most effective ways to prevent COVID-19. In its Face Covering FAQs page, the MCDC states:

> How does wearing a face covering prevent the spread of COVID-19?
>
> COVID-19 is an airborne virus that most commonly spreads between people who are in close contact with one another. It spreads through respiratory droplets or small particles, such as those in aerosols, produced when an infected person coughs, sneezes, sings, talks, or breathes. Because it helps contain respiratory droplets, **wearing a face covering has been proven to be one of the most significant, effective, and easiest ways to reduce the spread of COVID-19**.

COVID-19 Response, *Face Covering FAQs* (July 29, 2021), https://www.maine.gov/covid19/faqs/face-coverings (emphasis added).

69. In fact, the MCDC still recommends that vaccinated individuals wear a masks. And the reason for this is simple:

> A preliminary study has shown that in the case of a breakthrough infection, the Delta variant is able to grow in the noses of vaccinated people **to the same degree as if they were not vaccinated at all**. The virus that grows is just as infectious as that in unvaccinated people,

> meaning vaccinated people can transmit the virus and infect others.

National Geographic, *Evidence mounts that people with breakthrough infections can spread Delta easily* (Aug. 20, 2021), https://www.nationalgeographic.com/science/article/evidence-mounts-that-people-with-breakthrough-infections-can-spread-delta-easily (emphasis added).

70. Masking and testing protocols remain sufficient to prevent the spread of COVID-19 among healthcare workers, and constitute a reasonable alternative to vaccination as an accommodation of sincerely held religious beliefs.

71. In fact, the United States District Court for the Western District of Louisiana issued a temporary restraining order against a medical school for the school's failure to grant religious exemptions when reasonable accommodations were available (such as masking, testing, etc.) and mandatory vaccination was not the least restrictive means of achieving the school's interest in protecting the school's student body. *See Magliulo v. Edward Via College of Osteopathic Medicine*, No. 3:21-CV-2304, 2021 WL 3679227 (W.D. La. Aug. 17, 2021).

D. DEFENDANTS' RESPONSES CLAIMING FEDERAL LAW IS IRRELEVANT IN MAINE.

72. Consistent with her sincerely held religious beliefs, Plaintiff Lowe submitted to her employer, Defendant MaineHealth, a request for a

religious exemption from the Governor's COVID-19 Vaccine Mandate.

73. On August 17, 2021, MaineHealth denied Plaintiff Lowe's request for a religious exemption and accommodation. (A true and correct copy of the communications between MaineHealth and Plaintiff Lowe was attached to the original Verified Complaint and is incorporated herein as **EXHIBIT B**, and is located at ECF No. 1-2.)

74. In its response, MaineHealth stated:

> Please be advised that due to the addition of the COVID-19 vaccine to Maine's Healthcare Worker Immunization law announced by the governor in a press conference on 8/12/21, **we are no longer able to consider religious exemptions for those who work in the state of Maine. This also includes those of you who submitting [sic] influenza exemptions as well.** The State of Maine now requires all healthcare workers to be fully vaccinated by October 1st, which means you are two weeks beyond the completion of a COVID-19 vaccination series. (i.e. Both doses of the mRNA vaccine, or the single dose of J & J) as of that date.
>
> You submitted a religious exemption, your request is unable to be evaluated due to a change in the law. Your options are to receive vaccination or provide documentation for a medical exemption to meet current requirements for continued employment.

(ECF No. 1-2 at 2 (bold emphasis original).)

75. On August 20, 2021, after receiving her first denial from MaineHealth, Plaintiff Lowe responded to MaineHealth, stating:

> My request for an exemption was made under federal law, including Title VII of the Civil Rights [Act] of 1964. The Constitution provides that federal law is supreme over state law, and Maine cannot abolish the protections of federal law. You may be interested in this press release from Liberty Counsel, and the demand letter they have sent to Governor Mills on this issue (which is linked in the press release): https://lc.org/newsroom/details/081821-maine-governor-must-honor-religious-exemptions-for-shot-mandate. Regardless of what the Governor chooses to do, Franklin Memorial has a legal obligation under federal law to consider and grant my proper request for a religious exemption. Please let me know promptly if you will do so.

(ECF No. 1-2 at 1.)

76. That same day, MaineHealth responded to Plaintiff Lowe stating that federal law does not supersede state law or the Governor's COVID-19 Vaccine Mandate and that MaineHealth would not be following federal law on the issue.

77. Specifically, MaineHealth stated:

> Although I cannot give legal guidance to employees, **I can share MaineHealth's view that federal law does not supersede state law in this instance**. The EEOC is clear in its guidance that employers need only provide religious accommodations when doing so does not impose an undue hardship on operations.

> Requiring MaineHealth to violate state law by granting unrecognized exemptions would impose such a hardship. **As such, we are not able to grant a request for a religious exemption from the state mandated vaccine**.

(EFCF No. 1-2 at 1 (emphasis added).)

78. Plaintiff Lowe was terminated from her employment for refusing to accept a vaccine that violates her sincerely held religious beliefs.

79. Plaintiff Chalmers submitted to her employer, Genesis Healthcare, a request for a religious exemption and accommodation from the Governor's COVID-19 Vaccine Mandate. After reviewing Plaintiff Chalmers's submission, which articulated her sincerely held religious beliefs, Genesis Healthcare sent Plaintiff Chalmers a cursory response stating that her religious beliefs did not qualify for an exemption from the vaccine mandate. **Plaintiff Chalmers was given until August 23 to become vaccinated, and when her request for a religious objection and accommodation was denied, Plaintiff Chalmers was terminated from her employment**.

80. Plaintiff Barbalias submitted a request to her employer, Defendant Northern Light EMMC, seeking an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate. Northern Light EMMC responded to Plaintiff Barbalias, denying her request and stating that the Governor's COVID-19 Vaccine Mandate does not permit exemptions or accommodations for sincerely held religious beliefs. (A true and correct copy of Northern Light's denial of Plaintiff Barbalias's request for a

religious exemption and accommodation was attached to the original Verified Complaint and is incorporated herein as **EXHIBIT C**, and is located at ECF No. 1-3.)

81. Specifically, Northern Light EMMC informed Plaintiff Barbalias that her request for a religious exemption could not be granted because Maine law and the Governor do not permit "non-medical exemptions," and stated, "the only exemptions that may be made to this requirement are medical exemptions supported by a licensed physician, nurse practitioner, or physician assistant." (ECF No. 1-3 at 1.)

82. Northern Light EMMC therefore ignored federal law on the basis that the Governor has removed any exemptions for sincerely held religious beliefs, and it terminated Plaintiff Barbalias's employment for her refusal to accept a vaccine that violates her sincerely held religious beliefs.

83. On August 19, 2021, Plaintiff Giroux submitted a request to her employer, Defendant MaineGeneral Health, stating that she has sincerely held religious objections to the COVID-19 vaccines and requesting an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate. MaineGeneral responded to Plaintiff Giroux, stating that no religious exemptions were permitted under the Governor's mandate and that her request for a religious exemption and accommodation was denied. (A true and correct copy of MaineGeneral's denial of Plaintiff Giroux's request for a religious exemption was attached to the original Verified Complaint and is incorporated herein as **EXHIBIT D**, and is located at ECF No. 1-4.)

84. Specifically, MaineGeneral stated:

> MaineGeneral Health must comply with Governor's Mill's [sic] COVID-19 vaccination mandate for all health care employees. All MaineGeneral employees will have to be vaccinated against COVID-19 by Oct. 1 unless they have a medical exemption. **The mandate also states that only medical exemptions are allowed, no religious exemptions are allowed**.

(ECF No. 1-4 at 1 (emphasis added).)

85. Thus, MaineGeneral has made it abundantly clear to its employees that religious exemptions are not available because of the Governor's Mandate. But, if its initial denials left any room for doubt, its follow-up response to Plaintiff Giroux put all doubt to rest: "**Allowing for a religious exemption would be a violation of the state mandate issued by Governor Mills. So, unfortunately, it is not an option for us.**" (ECF No. 1-4 at 2.)

86. The responses from Defendants MaineHealth, Genesis Healthcare, Northern Light EMMC, and MaineGeneral Health have been virtually identical for all other Plaintiffs as well, indicating that the various Defendants were not permitted by the Governor's COVID-19 Vaccine Mandate to allow for (or even consider) an exemption and accommodation for sincerely held religious beliefs.

E. DEFENDANTS ADMIT THAT OTHER, NON-RELIGIOUS EXEMPTIONS ARE AVAILABLE.

87. Defendants' responses to Plaintiffs' requests for exemption and accommodation for their sincerely held religious beliefs confirm that Maine is, indeed, willing to grant other exemptions from the Governor's COVID-19 Vaccine Mandate but have relegated religious exemption requests to constitutional orphan status.

88. In its response to Plaintiff Lowe, Defendant MaineHealth has indicated it is perfectly willing to accept and grant medical exemptions but will not allow religious exemptions. Specifically, it told Plaintiff Lowe:

> You submitted a religious exemption, your request is unable to be evaluated due to a change in the law. Your options are to receive vaccination or provide documentation for a medical exemption to meet current requirements for continued employment.

(ECF No. 1-2 at 2.)

89. Thus, while MaineHealth says it will consider and grant the preferred medical exemptions, **it will not even consider the constitutionally orphaned religious exemption requests**.

90. To make matters even more clear, MaineHealth subsequently informed Plaintiff Lowe that she was permitted to seek any other exemption, except a religious one: "If you seek an accommodation **other than a religious exemption** from the state mandated vaccine, please let us know." (ECF No. 1-2 at 1 (emphasis added).)

91. Defendant Northern Light EMMC gave a similar response to Plaintiff Barbalias, indicating that only medical exemptions would be considered or approved. Specifically, it stated that "the only

exemptions that may be made to this requirement are medical exemptions" and that all Northern Light EMMC employees must comply with the Governor's COVID-19 Vaccine Mandate "except in the case of an approved medical exemption." (ECF No. 1-3 at 1.)

92. Defendant MaineGeneral issued a similar response to Plaintiff Giroux, stating that all healthcare workers must comply with the Governor's COVID-19 Vaccine Mandate "unless they have a medical exemption," and that the Governor's "mandate states that only medical exemptions are allowed, no religious exemptions are allowed." (ECF No. 1-4 at 1.)

93. The Governor, through her COVID-19 Vaccine Mandate, has created a two-tiered system of exemptions, and placed religious beliefs and those who hold them in a class less favorable than other exemptions that Defendants are perfectly willing to accept.

94. Under the Governor's scheme of creating a disfavored class of religious exemptions, Defendants are not even willing to consider religious exemptions, much less grant them to those who have sincerely held religious objections to the COVID-19 vaccines.

F. IRREPARABLE HARM SUFFERED BY PLAINTIFFS.

95. Because Plaintiff Lowe's request for an exemption and accommodation of her sincerely held religious beliefs was denied by MaineHealth, Plaintiff Lowe faced the unconscionable choice of accepting a vaccine that conflicts with her religious beliefs or losing her job. Because Plaintiff Lowe refused to

violate her conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, she was terminated from her employment.

96. Plaintiff Chalmers's employer, Genesis Healthcare, mandated that she receive the vaccine by August 23, even though the Governor did not require compliance until October 1. Plaintiff Chalmers was informed that her religious beliefs would not be accommodated because religious exemptions were not available in Maine. Plaintiff Chalmers was informed that her employment was terminated on August 23 at 11:59 p.m.

97. Because Plaintiff Barbalias's request for an exemption and accommodation of her sincerely held religious beliefs was denied by Northern Light EMMC, she faced the unconscionable choice of accepting a vaccine that conflicts with her religious beliefs or losing her job. Because Plaintiff Barbalias refused to violate her conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, she was terminated from her employment.

98. Because Plaintiff Salavarria's request for an exemption and accommodation of her sincerely held religious beliefs was denied by Northern Light EMMC, she faced the unconscionable choice of accepting a vaccine that conflicts with her religious beliefs or losing her job. Because Plaintiff Salavarria refused to violate her conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, she was terminated from her employment.

99. Because Plaintiff Giroux's request for an exemption and accommodation of her sincerely held religious beliefs was denied by MaineGeneral, she faced the unconscionable choice of accepting a vaccine that conflicts with her religious beliefs or losing her job. Because Plaintiff Giroux refused to violate her conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, she was terminated from her employment.

100. Because Plaintiff Berenyi's request for an exemption and accommodation of his sincerely held religious beliefs was denied by Genesis Healthcare, he faced the unconscionable choice of accepting a vaccine that conflicts with his religious beliefs or losing his job. Because Plaintiff Berenyi refused to violate his conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, he was terminated from his employment.

101. Because Plaintiff Jones's request for an exemption and accommodation of his sincerely held religious beliefs was denied by Northern Light EMMC, he faced the unconscionable choice of accepting a vaccine that conflicts with his religious beliefs or losing his job. Because Plaintiff Jones refused to violate his conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, he was terminated from his employment.

102. As a result of the Governor's COVID-19 Vaccine Mandate, Plaintiffs have suffered and are suffering irreparable injury by being prohibited from engaging in their constitutionally and statutorily protected rights to the free exercise of their sincerely held religious beliefs.

103. As a result of the Governor's COVID-19 Vaccine Mandate, Plaintiffs have suffered and are suffering irreparable injury by being forced to choose between maintaining the ability to feed their families and the free exercise of their sincerely held religious beliefs.

104. As a result of the Governor's COVID-19 Vaccine Mandate, Plaintiffs have suffered and are suffering irreparable injury by being stripped of their rights to equal protection of the law and being subjected to disfavored class status in Maine.

G. PLAINTIFFS' ATTEMPTS TO SECURE RELIEF PRIOR TO SEEKING A TRO AND PRELIMINARY INJUNCTION.

105. On August 18, 2021, Plaintiffs' counsel sent the Governor, Director Shah, and Commissioner Lambrew a letter informing them that their COVID-19 Vaccine Mandate, on its own, and in its interpretation and application by others deprives Plaintiffs of their rights to request a sincerely held religious exemption and accommodation under federal law. (A true and correct copy of the Letter sent to the Governor, Director, and Commissioner was attached to the original Verified Complaint and is incorporated herein as **EXHIBIT E**, and is located at ECF No. 1-5.)

106. Plaintiffs requested that the Governor withdraw her unlawful directives and publicly announce that any interpretation of her mandate to deprive Plaintiffs and all healthcare workers in Maine of their right to request and receive an exemption and accommodation for their sincerely held religious

objections to the mandatory COVID-19 vaccine was unlawful and impermissible.

107. Plaintiffs requested the response and the public announcement from the Governor prior to August 20, 2021, as that was the given deadline for compliance with the vaccine mandate for those individuals choosing a particular vaccine and because some of Defendants were demanding that their employees receive the first dose of a vaccine by that date.

108. Plaintiffs' counsel requested a response informing counsel that the Governor's directives, and the interpretation of the Governor's COVID-19 Vaccine Mandate to deprive Plaintiffs of their federal rights were impermissible, and that the Governor would permit Plaintiffs and other healthcare workers with sincere religious objections to the vaccine to request and receive reasonable accommodation to the mandate.

109. Neither Governor Mills, Director Shah, nor Commissioner Lambrew responded to Plaintiffs' counsel, nor announced that federal law would continue to apply in Maine, nor provided any information to healthcare employers in Maine that federal law required Defendants to accept and permit their healthcare employees to request and receive religious exemptions and accommodation to the COVID-19 Vaccine Mandate.

COUNT I—VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.
(All Plaintiffs v. Government Defendants)

110. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-109 above as if fully set forth herein.

111. The Free Exercise Clause of the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, prohibits the State from abridging Plaintiffs' rights to free exercise of religion.

112. Plaintiffs have sincerely held religious beliefs that Scripture is the infallible, inerrant word of the Lord Jesus Christ, and that they are to follow its teachings.

113. Plaintiffs reallege the discussion of their sincerely held religious beliefs (*supra* Section B) as if fully set forth herein.

114. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, targets Plaintiffs' sincerely held religious beliefs by prohibiting Plaintiffs from seeking and receiving exemption and accommodation for their sincerely held religious beliefs against the COVID-19 vaccine.

115. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, impermissibly burdens Plaintiffs' sincerely held religious beliefs, compels Plaintiffs to either change those beliefs or act in contradiction to them, and forces Plaintiffs to choose between the teachings and requirements of their sincerely held religious beliefs in the commands of Scripture and the State's imposed value system.

116. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, places Plaintiffs in an irresolvable conflict between compliance with the mandate and their sincerely held religious beliefs.

117. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, puts substantial pressure on Plaintiffs to violate their sincerely held religious beliefs or face loss of their ability to feed their families.

118. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, is neither neutral nor generally applicable.

119. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, specifically targets Plaintiffs' religious beliefs for disparate and discriminatory treatment.

120. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, creates a system of individualized exemptions for preferred exemption requests while discriminating against requests for exemption and accommodation based on sincerely held religious beliefs.

121. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, constitutes a religious gerrymander by unconstitutionally orphaning exemption and accommodation requests based solely on sincerely held religious beliefs of healthcare workers in Maine while permitting the more favored medical exemptions to be granted.

122. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, constitutes a substantial burden on Plaintiffs' exercise of their sincerely held religious beliefs.

123. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, fails to accommodate Plaintiffs' sincerely held religious beliefs.

124. There is no legitimate, rational, or compelling interest in the Governor's COVID-19 Vaccine Mandate's exclusion of exemptions and accommodations for sincerely held religious beliefs.

125. The Governor's COVID-19 Vaccine Mandate is not the least restrictive means of achieving an otherwise permissible government interest.

126. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

127. Plaintiffs have no adequate remedy at law to protect the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT II—DEFENDANTS' WILLFUL DISREGARD OF FEDERAL PROTECTIONS VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BY ATTEMPTING TO MAKE MAINE LAW SUPERSEDE FEDERAL LAW
(All Plaintiffs v. All Defendants)

128. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-109 above as if fully set forth herein.

129. The Supremacy Clause provides:

> **This Constitution, and the Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 22 (emphasis added).

130. "**When federal law forbids an action that state law requires, the state law is without effect**." *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 486 (2013) (emphasis added).

131. Simply put, "**It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause . . . state law is nullified to the extent that it actually conflicts with federal law**." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (emphasis added) (cleaned up).

132. By claiming that the protections of Title VII are inapplicable in the State of Maine, which all Defendants have either explicitly or tacitly stated, Defendants are running roughshod over the Supremacy Clause and appointing themselves independent of the protections of federal law.

133. As demonstrated by Defendant MaineHealth's response to Plaintiff Lowe, MaineHealth believes that "**federal law does not supersede state law in this instance**" because it believes granting the religious exemptions required

by Title VII would "[r]equir[e] MaineHealth to violate state law." (ECF No. 1-2 at 1 (emphasis added).)

134. Similarly, in its response to Plaintiff Giroux, MaineGeneral explicitly stated that "**[a]llowing for a religious exemption would be a violation of the state mandate issued by Governor Mills**." (ECF No. 1-4 at 2 (emphasis added).)

135. Further, MaineGeneral noted that the Governor's "mandate also states that . . . no religious exemptions are allowed." (ECF No. 1-4 at 1.)

136. Thus, all Defendants have purported to remove the availability of religious exemptions and accommodations within the State of Maine, have ignored Title VII's commands that employers provide reasonable accommodations to individuals with sincerely held religious beliefs, and have claimed that the Governor's COVID-19 Vaccine Mandate prohibits employers in Maine from even considering a religious exemption or accommodation request.

137. By purporting to place itself outside of the protections of Title VII and the First Amendment, Maine and each individual Defendant have violated the most basic premise that "**federal law is as much the law of the several States as are the laws passed by their legislatures**." *Haywood v. Drown*, 556 U.S. 729, 734 (2009) (emphasis added).

138. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

139. Plaintiffs have no adequate remedy at law for the continuing deprivation of their most

cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT III—VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION
(All Plaintiffs v. Government Defendants)

140. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-109 above as if fully set forth herein.

141. The Fourteenth Amendment to the United States Constitution guarantees Plaintiffs the right to equal protection under the law.

142. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, is an unconstitutional abridgment of Plaintiffs' right to equal protection under the law, is not neutral, and specifically targets Plaintiffs' sincerely held religious beliefs for discriminatory and unequal treatment.

143. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, is an unconstitutional abridgement of Plaintiffs' right to equal protection because it permits the State to treat Plaintiffs differently from other similarly situated healthcare workers on the basis of Plaintiffs' sincerely held religious beliefs.

144. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, singles out Plaintiffs for selective treatment based upon their

sincerely held religious objections to the COVID-19 vaccines.

145. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, is intended to inhibit and punish the exercise of Plaintiffs sincerely held religious beliefs and objections to the COVID-19 vaccines.

146. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, creates a system of classes and categories that permit the Governor to accommodate the exemptions of some healthcare workers while denying consideration of those individuals requesting religious exemptions to the COVID-19 Vaccine Mandate.

147. By removing statutorily required religious accommodations from consideration in Maine, the Governor has created and singled out for disparate treatment a specific class of healthcare employees (*i.e.*, religious objectors to COVID-19 vaccinations) as compared to other similarly situated healthcare workers (*i.e.*, those with medical exemption requests).

148. There is no rational, legitimate, or compelling interest in the Governor's COVID-19 Vaccine Mandate's application of different standards to the similarly situated field of healthcare workers.

149. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, discriminates between religion and nonreligion by allowing certain, nonreligious exemptions to the COVID-19 Vaccine Mandate while prohibiting religious exemptions to the same mandate for the same similarly situated field of healthcare workers.

150. The Governor's COVID-19 Vaccine Mandate and the MCDC's removal of religious exemptions for healthcare workers in Maine, on their face and as applied, are each a "status-based enactment divorced from any factual context" and "a classification of persons undertaken for its own sake," which "the Equal Protection Clause does not permit." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

151. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, "identifies persons by a single trait [religious beliefs] and then denies them protections across the board." *Id.* at 633.

152. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, along with the MCDC's removal of religious exemptions from immunizations—while keeping medical exemptions as perfectly acceptable in the healthcare field—results in a "disqualification of a class of persons from the right to seek specific protection [for their religious beliefs]." *Id.*

153. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek [an exemption from the COVID-19 Vaccine Mandate] is itself a denial of equal protection of the laws in the most literal sense." *Id.* The Governor's COVID-19 Vaccine Mandate, on its face and as applied, and the MCDC's removal of religious exemptions for healthcare workers, are each such a law.

154. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

155. Plaintiffs have no adequate remedy at law to protect the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT IV—VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e, *et seq.* (All Plaintiffs v. Private Employer Defendants)

156. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-109 above as if fully set forth herein.

157. Title VII prohibits discrimination against employees on the basis of their religion. 42 U.S.C. §2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . .").

158. Title VII defines the protected category of religion to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Moreover, as the EEOC has made clear, Title VII's protections also extend nonreligious beliefs if related to morality, ultimate ideas about life, purpose, and death. *See EEOC, Questions and Answers: Religious Discrimination in the Workplace* (June 7, 2008),

https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace ("Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs."); (*Id.* ("Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.' Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns 'ultimate ideas' about 'life, purpose, and death.'").)

159. Each of Defendants MaineHealth, Genesis Healthcare, Northern Light EMMC, and MaineGeneral Health is an employer within the meaning of Title VII and employs more than 15 employees.

160. By refusing to even consider, much less grant, any religious accommodation or exemption to the Governor's COVID-19 Vaccine Mandate, Defendants have discriminated against Plaintiffs' sincerely held religious beliefs with respect to the terms, conditions, and privileges of employment.

161. By threatening to fire Plaintiffs unless they violate their sincerely held religious beliefs and comply with the Governor's COVID-19 Vaccine Mandate, Defendants have unlawfully discriminated against Plaintiffs by discharging them or constructively discharging them for the exercise of their religious beliefs.

162. Each Plaintiff has a bona fide and sincerely held religious belief against the COVID-19 vaccines, as outlined above.

163. Plaintiffs' sincerely held religious beliefs conflict with Defendants' policies in collusion with the Governor to impose the Governor's COVID-19 Vaccine Mandate and to withhold from Plaintiffs any consideration of sincerely held religious objections.

164. Plaintiffs have all raised their sincerely held religious beliefs with their respective Defendant employers, have brought their objections and their desire for a religious accommodation and exemption to the Defendants' attention, and have requested a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

165. Defendants termination, threatened termination, denial of benefits, and other adverse employment actions against Plaintiffs are the result of Plaintiffs' exercise of their sincerely held religious beliefs.

166. Defendants' refusal to consider or grant Plaintiffs' requests for accommodation and exemption from the Governor's COVID-19 Vaccine Mandate has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

167. Plaintiffs have no adequate remedy at law for the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT V—DEFENDANTS HAVE ENGAGED IN AN UNLAWFUL CONSPIRACY TO VIOLATE PLAINTIFFS' CIVIL RIGHTS IN VIOLATION OF 42 U.S.C. § 1985
(All Plaintiffs v. All Defendants)

168. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-109 above as if fully set forth herein.

169. Section 1985 provides a cause of action against public and private defendants who unlawfully conspire to deprive an individual of his constitutionally protected liberties. 42 U.S.C. § 1985(3) ("If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws").

170. The elements of the claim of conspiracy to violate civil rights under § 1985 include (1) a conspiracy, (2) a conspiratorial purpose to deprive the plaintiff of the equal protection of the laws or of a constitutionally protected liberty, (3) an overt act in furtherance of the conspiracy, and (4) a deprivation of a constitutionally protected right. *See Parker v. Landry*, 935 F.3d 9, 17–18 (1st Cir. 2019).

171. The Governor's COVID-19 Vaccine Mandate, combined with the Defendant employers' agreements to enforce its provisions and revoke any potential for a religious exemption for healthcare workers in Maine, constitutes a conspiracy to violate Plaintiffs' civil and constitutional rights.

172. The Governor, Director Shah, and Commissioner Lambrew have all reached an

agreement with the Defendant employers to deprive all healthcare workers in Maine with any exemption or accommodation for the exercise of their sincerely held religious beliefs.

173. MaineHealth's agreement with the Governor to deprive Plaintiffs of their constitutionally protected liberties is evidenced in its denial of Plaintiff Lowe's request for a religious exemption and accommodation. Specifically, its statement that MaineHealth is "**no longer able to consider religious exemptions for those who work in the state of Maine**." (ECF No. 1-2 at 2 (emphasis added).) By agreeing to refuse to even consider its employees' requests for religious exemption and accommodation, MaineHealth has reached an express or tacit agreement to deprive Plaintiffs of their constitutionally protected rights to equal protection and religious exercise.

174. Even if MaineHealth's denials of its employees' requests for religious exemptions was somehow insufficient to demonstrate an agreement, the Governor's own Official Statement concerning the imposition of the COVID-19 Vaccine Mandate shows that MaineHealth entered into an agreement with the Governor by noting the Governor's mandate was "welcomed by . . . MaineHealth" and its CEO's statement that it "*applauds Gov. Mills' decision to make COVID-19 vaccination a requirement for the state's health care workforce for the same reasons our organization chose to require vaccination for all of its care team members*." (Exhibit A). *See also* Office of Governor Janet Mills, *Mills Administration Requires Health Care Workers To Be Fully Vaccinated Against COVID-19 By October 1* (Aug. 12, 2021),

https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october.

175. Defendant Northern Light EMMC's explanation of its agreement with the Governor to deprive Plaintiffs of their rights to seek and receive an accommodation of their sincerely held religious beliefs was even more explicit: "*Governor Mills' decision to require vaccination of health care workers is another example of close alignment between the government and the health care community.*" *See* Office of Governor Janet Mills, *Mills Administration Requires Health Care Workers To Be Fully Vaccinated Against COVID-19 By October 1* (Aug. 12, 2021), https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october.

176. MaineGeneral's agreement with the Governor to deprive its employees of their constitutionally protected exercise of religious beliefs is plainly evidenced by its statements to Plaintiff Giroux that it was not permitted to even consider a request for a religious exemption because of the Governor's mandate. (ECF No. 1-4 at 1-2.).

177. The Governor and Defendant employers have reached an express or tacit agreement to mandate COVID-19 vaccines for their employees while explicitly agreeing to deprive them of their right to request and receive an accommodation and exemption for their sincerely held religious beliefs.

178. The purpose behind the Governor's COVID-19 Vaccine Mandate, the MCDC's removal of the option for a religious exemption in the State of Maine, and all Defendants' agreement to blatantly

ignore federal law's requirement that employees be provided with a religious exemption and accommodation for sincerely held religious beliefs is based upon a conspiratorial purpose to deprive Plaintiffs of their rights to the exercise of their religious beliefs and equal protection.

179. Defendants' conspiratorial agreement has been made express by their stating that no religious exemptions would be permitted and by informing Plaintiff employees of the legally ridiculous position that Title VII does not apply in Maine and that federal law does not supersede Maine law when it comes to the Governor's COVID-19 Vaccine Mandate.

180. The Governor has engaged in an overt act in furtherance of the conspiracy to deprive Plaintiffs of their civil rights by mandating that all healthcare workers receive a mandatory COVID-19 vaccine and by failing to recognize that federal law provides each of these employees with the option to request and receive a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

181. Defendant employers have each engaged in an overt act in furtherance of the conspiracy to deprive Plaintiffs of their civil rights by refusing to consider, evaluate, or accept any Plaintiff's request for a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

182. By denying Plaintiffs their requested religious exemption and accommodation and threatening termination and discharge from employment because of the exercise of their sincerely held religious beliefs, Defendants' conspiracy has

resulted in a deprivation of Plaintiffs' constitutionally protected right to free exercise of religion.

183. By denying Plaintiffs their requested religious exemption and accommodation and threatening termination and discharge from employment because of the exercise of their sincerely held religious beliefs while at the same time granting and accepting the preferred category and class of medical exemptions for similarly situated healthcare workers, Defendants' conspiracy has resulted in a deprivation of Plaintiffs' constitutionally protected right to equal protection of the laws under the Fourteenth Amendment.

184. Defendants' refusal to consider or grant Plaintiffs' requests for accommodation and exemption from the Governor's COVID-19 Vaccine Mandate has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

185. Plaintiffs have no adequate remedy at law for the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for relief as follows:

A. That the Court issue a permanent injunction upon judgment, restraining and enjoining Defendants, all of their officers, agents, employees,

and attorneys, and all other persons in active concert or participation with them, from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with the Governor's COVID-19 Vaccine Mandate such that:

i. Defendants immediately cease in their refusal to consider, evaluate, or accept Plaintiffs' requests for exemption and accommodation for their sincerely held religious beliefs;

ii. Defendants will immediately grant Plaintiffs' requests for religious exemption and accommodation from the Governor's COVID-19 Vaccine Mandate, provided that Plaintiffs agree to abide by reasonable accommodation provisions such as masking, testing, symptom monitoring, and reporting;

iii. Defendants will immediately cease threatening to discharge and terminate Plaintiffs from their employment for failure to accept a COVID-19 vaccine that violates their sincerely held religious beliefs; and

iv. Defendants will immediately cease proclaiming that federal law does not apply in Maine or otherwise declining Plaintiffs' requests for religious exemption

on the basis that Title VII does not apply in the State of Maine;

B. That this Court render a declaratory judgment declaring that the Governor's COVID-19 Vaccine Mandate, both on its face and as applied by Defendants is illegal and unlawful in that it purports to remove federal civil rights and constitutional protections from healthcare workers in Maine, and further declaring that

i. in imposing a mandatory COVID-19 vaccine without any provision for exemption or accommodation for sincerely held religious beliefs, the Governor has violated the First Amendment to the United States Constitution by imposing a substantial burden on Plaintiffs' sincerely held religious beliefs while granting exemptions to similarly situated healthcare workers with medical exemptions to the COVID-19 Vaccine Mandate;

ii. by refusing to consider or evaluate Plaintiffs' requests for religious exemption and accommodation, Defendants have violated Title VII and other federal protections for Plaintiffs in Maine and have blatantly ignored the Supremacy Clause's mandate that federal protections for religious objectors in Maine supersede and apply with full force in Maine;

iii. by terminating, threatening to terminate, or otherwise taking adverse employment action against Plaintiffs on the basis of their sincerely held religious beliefs, Defendants have violated Title VII of the Civil Rights Act of 1964;

iv. that by creating a class system in which religious objectors in Maine are disparately and discriminatorily denied the option of receiving an exemption or accommodation while simultaneously allowing and granting exemptions for other nonreligious reasons, Defendant Governor Mills has violated Plaintiffs' rights to equal protection of the law; and

v. that by entering into an agreement to unlawfully deprive Plaintiffs of their right to request and receive a religious exemption and accommodation from the Governor's COVID-19 Vaccine Mandate, Defendants have conspired to violate Plaintiffs' civil rights to free exercise of religious beliefs and equal protection of the law;

C. That this Court award Plaintiffs damages in an amount to be proven at trial, including damages for adverse employment action resulting in

lost wages and other compensatory damages, and further including nominal damages in the absence of proof of damages;

D. That this Court order Plaintiffs to be reinstated to their previous positions with all the compensation and benefits to which they were entitled prior to Defendants' unlawful and adverse employment actions;

E. That this Court adjudge, decree, and declare the rights and other legal obligations and relations within the subject matter here in controversy so that such declaration shall have the full force and effect of final judgment;

F. That this Court retain jurisdiction over the matter for the purposes of enforcing the Court's order;

G. That this Court award Plaintiffs the reasonable costs and expenses of this action, including a reasonable attorney's fee, in accordance with 42 U.S.C. § 1988; and

H. That this Court grant such other and further relief as the Court deems equitable and just under the circumstances.

Respectfully submitted,

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VERIFICATION

I, Alicia Lowe, am over the age of eighteen years and a Plaintiff in this action. The statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States and the State of Maine, that the foregoing statements are true and correct to the best of my knowledge.

Dated: July 11, 2022

/s/ Alicia Lowe

Alicia Lowe

(Original Signature of Alicia Lowe retained by Counsel)

VERIFICATION

I, Debra Chalmers, am over the age of eighteen years and a Plaintiff in this action. The statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States and the State of Maine, that the foregoing statements are true and correct to the best of my knowledge.

Dated: July 11, 2022

/s/ Debra Chalmers

Debra Chalmers

(Original Signature of Debra Chalmers retained by Counsel)

VERIFICATION

I, Jennifer Barbalias, am over the age of eighteen years and a Plaintiff in this action. The statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States and the State of Maine, that the foregoing statements are true and correct to the best of my knowledge.

Dated: July 11, 2022

/s/ Jennifer Barbalias
Jennifer Barbalias
(Original Signature of Jennifer Barbalias retained by Counsel)

VERIFICATION

I, Natalie Salavarria, am over the age of eighteen years and a Plaintiff in this action. The statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States and the State of Maine, that the foregoing statements are true and correct to the best of my knowledge.

Dated: July 11, 2022

/s/ Natalie Salavarria
Natalie Salavarria
(Original Signature of Natalie Salavarria retained by Counsel)

VERIFICATION

I, Nicole Giroux, am over the age of eighteen years and a Plaintiff in this action. The statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States and the State of Maine, that the foregoing statements are true and correct to the best of my knowledge.

Dated: July 11, 2022

/s/ Nicole Giroux

Nicole Giroux

(Original Signature of Nicole Giroux retained by Counsel)

VERIFICATION

I, Garth Berenyi, am over the age of eighteen years and a Plaintiff in this action. The statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States and the State of Maine, that the foregoing statements are true and correct to the best of my knowledge.

Dated: July 11, 2022

/s/ Garth Berenyi

Garth Berenyi

(Original Signature of Garth Berenyi retained by Counsel)

VERIFICATION

I, Adam Jones, am over the age of eighteen years and a Plaintiff in this action. The statements and allegations that pertain to me or which I make in this FIRST AMENDED VERIFIED COMPLAINT are true and correct, and based upon my personal knowledge (unless otherwise indicated). If called upon to testify to their truthfulness, I would and could do so competently. I declare under penalty of perjury, under the laws of the United States and the State of Maine, that the foregoing statements are true and correct to the best of my knowledge.

Dated: July 11, 2022

/s/ Adam Jones

Adam Jones

(Original Signature of Adam Jones retained by Counsel)