APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OPINIONS AND ORDERS

REGULATIONS AND STATUTES

OTHER DOCUMENTS

APPENDIX TABLE OF CONTENTS (Cont.)

JUDGMENT, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT (APRIL 18, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; SUSAN PROVENZANO; ROBERT EGRI; KATALIN EGRI; MONICA GRANFIELD; ANN LINSEY HURLEY,

Plaintiffs-Appellants,

JOSEPH PROVENZANO; KATE HENDERSON; IAN SAMPSON; ANITA OPITZ,

Plaintiffs,

v.

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE,

Defendants-Appellees,

JOHN DOE; JANE DOE,

Defendants.

No. 22-1755

Before: BARRON, Chief Judge,
HOWARD and MONTECALVO, Circuit Judges.

JUDGMENT

Entered: April 18, 2024

The judgment dismissing this challenge to the rescinded COVID-19 mask mandates previously adopted by the Town of Carlisle's Board of Health and Gleason Public Library is affirmed essentially for the reasons stated in the district court's Memorandum and Order of September 12, 2022. *See* 1st Cir. R. 27.0(c). The appellants' requests for injunctive and declaratory relief are moot. Post-mandate developments have only made this controversy less likely to recur in its original form. To the extent that intervening caselaw may have strengthened the claim for damages from the Board's rescinded mandate, that possibility (concerning which we express no opinion) only underscores the fact that no clearly established Constitutional right was violated by appellees during the period in question.

Affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:

Michael Bush
Linda Taylor
Lisa Tiernan

Kate Henderson
Robert Egri
Katalin Egri
Anita Opitz
Monica Granfield
Ann Linsey Hurley
Ian Sampson
Susan Provenzano
Joseph Provenzano
John Joseph Davis Jr.
Justin Lee Amos
Heidi Kaiter
Jill Owens

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (SEPTEMBER 12, 2022)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL BUSH, ET. AL.,

Plaintiffs,

v.

LINDA FANTASIA, ET. AL.,

Defendants.

Civil Action No. 21-cv-11794-ADB

Before: Allison D. BURROUGHS,
U.S. District Judge.

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

BURROUGHS, D.J.

Plaintiffs[1] brought this suit to challenge the constitutionality of mask mandates implemented by the

[1] Plaintiffs are Michael Bush, Linda Taylor, Lisa Tiernan, Kate Henderson, Robert Egri, Katalin Egri, Anita Opitz, Monica

Town of Carlisle Board of Health ("Carlisle BOH" or "BOH") and the Gleason Public Library ("Gleason Library" or "Library") to prevent the spread of the COVID-19 virus. Before the Court is Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). [ECF No. 21]. Plaintiffs opposed the motion, and the parties then filed additional briefing, supplemental notices of authority, and responses thereto. *See* [ECF Nos. 23, 26, 28, 31, 32]. For the reasons set forth below, Defendants' motion, [ECF No. 21], is GRANTED.

I. Background

The following facts are taken primarily from the complaint, [ECF No. 1 ("Compl.")], the factual allegations of which are assumed to be true when considering a motion to dismiss, *Ruivo v. Wells Fargo Bank, N.A.*, 766 F.3d 87, 90 (1st Cir. 2014). As it may on a motion to dismiss, the Court has also considered "documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice." *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008) (alteration in original) (quoting *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003)).

On August 25, 2021, the Carlisle BOH unanimously voted to adopt an indoor face mask mandate to prevent the spread of COVID-19 pursuant to their authority under Mass. Gen. Laws ch. 111, §§ 31, 104. [Compl. at 9, 13]; *see also* [ECF No. 1-2 at 7]. The vote was "[i]n response to the recent increase in positive COVID-19

Granfield, Ann Linsey Hurley, Ian Sampson, Susan Provenzano, and Joseph Provenzano.

cases in Carlisle and throughout Middlesex County, including break-through cases among those who have been fully vaccinated." [ECF No. 1-2 at 7]. The mandate required face masks to be worn in "all indoor public spaces, or private spaces open to the public within the Town of Carlisle. . . . " [Compl. at 9, 13; ECF 1-2 at 7]. Individuals who are "unable to wear a face mask due to a medical condition or disability. . . . " were excluded from the mandate. [ECF 1-2 at 7]. In the face of the ongoing pandemic, the BOH renewed the mask mandate at public meetings held on October 6, 2021, November 17, 2021, and December 15, 2021. *See* [ECF No. 22 at 4-5; Compl. at 9].

Similarly, "throughout much of 2020 and 2021," the Director of the Gleason Library, Martha Feeney-Patten ("Feeney-Patten"), also implemented a face mask requirement for Library visitors aged two and up "in consideration of . . . high usage [of the library] by as-yet-unvaccinated children and medically vulnerable individuals." [Compl. at 10; ECF No. 1-2 at 4].

Starting in October 2020 and continuing into 2021, Plaintiff Michael Bush contacted Carlisle BOH Health Agent Linda Fantasia ("Fantasia") and Feeney-Patten to protest the implementation of the mask mandates. [Compl. at 12; ECF No. 1-2 at 1-3]. He alleged that the mandates were unwarranted, that "the town officials' messaging about face masks had contributed to harassment and discrimination against people for whom face masks are medically inappropriate[,]" and that he had been subjected to such discrimination himself due to the published face mask policies. [*Id.*]. Plaintiff Monica Granfield also alleges that, in October 2021, Library staff asked her to wear a face mask in accordance with the policy. [Compl. at

14]. The complaint does not allege any other instances in which any Plaintiff was ordered to comply with a mask mandate or denied access to a facility due to the mask mandates. Following up on his emails, Bush, with some of the other Plaintiffs co-signing, sent "Notice and Demand Letters" to Fantasia, Feeney-Patten, and Town Administrator Timothy Goddard ("Goddard"), which alleged that the mask mandates violated both federal and state law, were ineffective tools for preventing the spread of COVID-19, and that masks themselves were "harmful." [ECF No. 1-2 at 8-26; Compl. at 13].

Ultimately, Plaintiffs, proceeding *pro se,* filed the instant action on November 4, 2021. *See* [Compl.]. They named as defendants the Town of Carlisle ("Carlisle"), Fantasia, Feeney-Patten, and Goddard, as well as Carlisle BOH Chair Anthony Mariano, and BOH Members Catherine Galligan, Jean Jasaitis Barry, Patrick Collins, and David Erickson. [*Id.*]. Put simply, Plaintiffs argue that Defendants did not have the authority to institute the mask mandates and that they violated Plaintiffs' rights under federal, state, and even international law by doing so. [*Id.* at 7, 17]. Plaintiffs request the Court declare the face mask policies "unlawful and void" and "[o]rder that Defendants henceforth refrain from uninformed non-consensual medical experimentation and other religious or medical discrimination" and also ask for compensatory and punitive damages. [*Id.* at 17].

While this motion was pending, on February 23, 2022, the BOH rescinded the mask mandate at issue and replaced it with a mask advisory, and, on March 8, 2022, the Carlisle Select Board voted to support the BOH's decision. [ECF No. 28]. The Gleason Library

has also adopted a similar policy, which does not require guests to wear masks but advises that masks are "strongly recommended[.]" [ECF No. 32 ¶ 5; ECF No. 32-1].[2]

II. Legal Standard

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all well-pleaded facts, analyze those facts in the light most favorable to the plaintiff, and

---

[2] The Court will address mootness briefly. Plaintiffs' request that the Court declare the mandates unlawful, and/or to enjoin their enforcement, became moot once the mast mandates were rescinded. Plaintiffs are no longer subject to the mandates and, as such, a ruling from this Court would not have any effect on their legal interests. *See, e.g.*, *City of Lynn v. Murrell*, 185 N.E.3d 912, 916 (2022) (plaintiff's challenge to COVID-19 regulations were mooted upon expiration of the orders); *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 9 (1st Cir. 2021) (same); *see also Medas-King v. Ocean Breeze Athletic Complex*, No. 21-cv-6424, 2022 WL 3019931, at *2 (E.D.N.Y. July 30, 2022) (constitutional challenges to vaccine requirement found moot once order rescinded).

Nor do the facts of this case invoke any exception to mootness as Plaintiffs have argued. *See* [ECF No. 31 at 5-6]. There is no evidence that Defendants "voluntarily ceased" conduct in order to avoid review, or that the conduct is "capable of repetition, yet evade[s] review." *Id.* In contrast, there is ample evidence in the record that Defendants' reasons for rescinding the mandates were due to changes in circumstances of the pandemic entirely unrelated to this litigation and that pandemic measures, like mask mandates and vaccination requirements, have proven to be reviewable by the courts time and again. *See Bos. Bit Labs, Inc.*, 11 F.4th at 10; *Resurrection Sch. v. Hertel*, 35 F.4th 524, 528-29 (6th Cir. 2022); *Fortuna v. Town of Winslow*, No. 21-cv-00248, 2022 WL 2117717, at *2 (D. Me. June 13, 2022).

Nevertheless, Plaintiffs' claims for damages for injuries incurred under the past mandates remain reviewable.

draw all reasonable factual inferences in the plaintiff's favor. *See Gilbert v. City of Chicopee*, 915 F.3d 74, 76, 80 (1st Cir. 2019). "[D]etailed factual allegations" are not required, but the complaint must set forth "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The alleged facts must be sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570.

"To cross the plausibility threshold a claim does not need to be probable, but it must give rise to more than a mere possibility of liability." *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44-45 (1st Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A determination of plausibility is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* at 44 (quoting Iqbal, 556 U.S. at 679). "[T]he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 103 (1st Cir. 2013) (quoting *Ocasio-Hernandez v. Fortufio-Burset*, 640 F.3d 1, 14 (1st Cir. 2011)). "The plausibility standard invites a two-step pavane." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) (citing *Grajales*, 682 F.3d at 45). First, the Court "must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." *Id.* (quoting *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012)). Second, the Court "must determine whether the remaining factual content allows a `reasonable inference that the defendant is liable for the misconduct alleged.' *Id.* (quoting *Morales-Cruz*, 676 F.3d at 224).

Because Plaintiffs are proceeding *pro se,* the Court must generously construe the arguments in their complaint and briefing. *Bahiakina v. U.S. Postal Serv.*, 102 F. Supp. 3d 369, 371 (D. Mass. 2015) ("[A] document filed *pro se* is to be liberally construed. . . ." (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007))). However, a *pro se* litigant still must comply with procedural and substantive law. *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997). Dismissal of *a pro se* complaint is appropriate when the complaint fails to state an actionable claim. *Muller v. Bedford VA Admin. Hosp.*, No. 11-cv-10510, 2013 WL 702766, at *3 (D. Mass. Feb. 25, 2013) (citing *Overton v. Torruella*, 183 F. Supp. 2d 295, 303 (D. Mass. 2001)).

III. Discussion

Defendants assert that dismissal of the complaint is warranted because the BOH had the statutory authority to implement the mandates, and that Plaintiffs have failed to state a claim under any count of their complaint.[3] *See* [ECF Nos. 22, 23].

---

[3] Defendants also contend that Plaintiffs lack standing to challenge the Library mandate specifically because no Plaintiff alleges that they were barred from the Gleason Library for failing to wear a mask at any time during which only the Library had an active mask mandate. [ECF No. 22 at 10 n. 12]. Defendants assert that when, on October 20, 2021, Plaintiff Granfield was directed to wear a mask in the Library, this was done according to the Carlisle BOH mask mandate already in place. [*Id.*]. As the Court understands it, Defendants are arguing that Plaintiffs have failed to plead that Granfield's injury was "fairly traceable" to the Library's mask policy, but instead attributable to the overarching town policy. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, *as revised* (May 24, 2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs respond that they were injured by the Library's mandate before the BOH mandate was

in effect because "several of us have refrained from even entering the library for fear of being harassed or discriminated against." [ECF No. 23 at 13]. Because the BOH mandate was consistent with the Library mandate, the Court is not inclined to find that the injury was not "fairly traceable" to the Library's mandate. *See Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013) (an "intervening cause of the plaintiffs injury . . . is not necessarily a basis for finding that the injury is not 'fairly traceable' to the acts of the defendant).

No other Plaintiff, however, has specifically alleged that they were denied access to any facility because of the mask mandates or that they were forced to wear a mask. Thus, the Court is not convinced that each Plaintiff has alleged the concrete and particularized injury necessary for Article III standing, rather than a speculative injury. *See, e.g., Bechade v. Baker*, No. 20-cv-11122, 2020 WL 5665554, at *2 (D. Mass. Sept. 23, 2020) (finding that plaintiff's complaint was "nothing more" than a policy disagreement with the mask requirement where she did not allege that she had "personally been forced to wear a mask" and "thus [did] not establish that she suffered any concrete or particularized injury with respect to the mask requirement"); *Health Freedom Def. Fund, Inc. v. City of Hailey*, No. 21-cv-00389, 2022 WL 716789, at *5 (D. Idaho Mar. 10, 2022) ("mere objection" to City mask mandate "does not qualify as a concrete or particularized injury"); *Carlone v. Lamont*, 21-cv-00871, 2021 WL 5049455, at *2-3 (2d Cir. Nov. 1, 2021) (holding that a plaintiff who challenged Connecticut's mask mandate did not have standing simply by virtue of being "subject" to that mandate, since his "complaint d[id] not state that [he] ha[d] ever actually been required to wear a mask or ha[d] been subject to enforcement of the mask mandate").

Nevertheless, given that one of the Plaintiffs has alleged an injury sufficient to confer standing, however tenuously, and that Defendants have not offered any other challenge to Plaintiffs' standing, the Court will reach the merits of each claim.

A. Statutory Grounds for the Defendants' Mask Mandates

As a preliminary matter, the Court finds that the Carlisle BOH had the statutory authority to issue the mask mandates. Mass. Gen. Law ch. 111, § 31 provides that "[b]oards of health may make reasonable health regulations" and further states that

> If the board of health determines that an emergency exists, the board or its authorized agent, acting in accordance with section 30 of chapter 111, may, without notice of hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to address the emergency.

Mass. Gen. Laws ch. 111, § 31.

Mass. Gen. Laws ch. 111, § 104 adds that "[i]f a disease dangerous to the public health exists in a town, the selectmen and board of health shall use all possible care to prevent the spread of the infection and may give public notice of infected places by such means as in their judgment may be most effectual for the common safety."

The issuance of a mask mandate during the COVID-19 pandemic was a decision properly made under this statutory authority. Plaintiffs' attempts to convince the Court that this statutory authority is too limited to include the instant circumstances *(i.e.,* that Section 31 does not "pertain to infectious diseases transmitted between persons" or include "any authority to mandate personal usage of medical devices[,]" or that the phrase "all possible care" somehow does not suggest the use of "all possible means" to prevent the

spread of disease) are entirely unpersuasive. [ECF No. 23 at 9-10]. Because these are unambiguous statutes that contain no such limitations, the Court will not credit Plaintiffs' wholly unsupported limitations to the statutory language.

Indeed, case law instructs this Court to do the opposite. Courts in this state have repeatedly held that § 31 grants boards of health "plenary power to promulgate reasonable health regulations that are general in application and take effect prospectively[,]" *Independence Park, Inc. v. Bd. of Health of Barnstable*, 403 Mass. 477, 480 (1988), that "[h]ealth regulations have a strong presumption of validity, and, when assessing a regulation's 'reasonableness,' all rational presumptions are made in favor of the validity of the regulation[,]" *see Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 41 (2001) (citations omitted), and that "the Legislature has granted the boards particular authority regarding health emergencies in general, and outbreaks of infectious diseases in particular[,]" *Avila v. Ojikutu*, No. 21-J-620, 2022 WL 480005, at *3 (Mass. App. Ct. Feb. 14, 2022), *vacated on other grounds*, No. 2022-P-0155, 2022 WL 2288672 (Mass. App. Ct. June 22, 2022). State courts have taken the same approach in interpreting comparable statutory authority as applied to pandemic-related regulations. In *Family Freedom Endeavor, Inc. v. Riley*, No. 2179-cv-00494 (Mass. Superior Ct., Nov. 16, 2021), plaintiffs argued that Massachusetts state entities did not have the authority to implement mask mandates in schools because the applicable state laws did not explicitly grant them such authority. The court rejected Plaintiffs' narrow reading of the law, holding that the relevant statute,

which provided that "[t]he [education] board shall establish standards to ensure that every student shall attend classes in a safe environment" and "shall establish such other policies as it deems necessary to fulfill the purposes of this chapter," "unambiguously evinces a legislative intent that the State defendants ensure that students attend classes in a healthy and safe educational environment" and that "[t]he statute's intended applicability to any health risks . . . is common sense." *Id.* at *2-4.

Here, too, the Court finds that it is obvious that §§ 31 and 104 provide the authority to issue reasonable regulations, like mask mandates, during an epidemic caused by a novel and highly contagious infectious disease. Indeed, the language that "[b]oards of health may make reasonable health regulations"; "that such action be taken as the board of health deems necessary to address the emergency"; and that the board "shall use all possible care to prevent the spread of the infection" are arguably even broader than those discussed in *Family Freedom*. The Plaintiffs have not demonstrated otherwise. Certainly, the Court is not persuaded by Plaintiffs' colorful, and verging on absurd, suggestions that its interpretation of the statutes permit local boards of health to act barbarously, including by "beheading and cremating inhabitants suspected of being infected; [and] requiring persons accused of being infectious to wear a conspicuous sign to that effect on their front and back when outside their home[.]" [ECF No. 23 at 10].

Plaintiffs' argument that even if the BOH had the authority to act as it did, it exceeded that authority because COVID-19 did not rise to the level of "a disease dangerous to public health" sufficient to justify

a mask mandate under § 104 is equally illogical. In Family Freedom, the court noted that

> The Centers for Disease Control (CDC) has reported that over 720,000 persons in the United States have died from COVID-19. The Massachusetts Department of Public Health (DPH) has reported that over 18,000 people in Massachusetts had died of COVID-19 as of October 2021. . . . Over the course of summer 2021 . . . the Delta variant of COVID-19 arrived in Massachusetts and the number of COVID-19 cases began rising again. In July 2021, the seven-day COVID-19 case average in Massachusetts was 223, but by August 18, that figure had climbed to 1,237.[4]

Family Freedom, No. 2179-cv-00494, at *1; *see also* [ECF No. 22 at 3-4].

In light of these facts, Plaintiffs' denial of the rationale for face masks is misguided at best. Defendants responsibly relied on guidance from state and federal officials, including "overwhelming medical evidence" regarding the utility of face masks in reducing the spread of COVID-19. [ECF No. 22 at 3-4,7 (describing CDC recommendation); ECF No. 26 at 3-4]. Nothing in the record suggests that Defendants' actions, whether it be the BOH mask mandate or the Library mask mandate, were unreasonable or unsupported. The fact that there was only one reported COVID-19-related death in Carlisle around the time the mandate was implemented does not alter this conclusion, *see* [ECF No. 23 at 5; ECF No. 23-3 at 2-3],

---

[4] The Court may take judicial notice of facts from the CDC. See Fortuna, 2022 WL 2117717, at *3-4.

where the BOH was being confronted with state data reporting an uptick in breakthrough cases and increased hospitalizations due to the Delta variant, even in places with high vaccination rates, see [ECF No. 22 at 3-4].

For these reasons, the Court finds that Defendants acted well within their statutory authority when they implemented the mask mandates.

B. Constitutional Claims (Count II)

Plaintiffs also bring a panoply of constitutional challenges to mask mandates. They all fail.

The complaint originally alleged a claim only under the Equal Protection Clause of the Fourteenth Amendment, [ECF No. 1 at 7], but in their opposition to Defendants' motion to dismiss, Plaintiffs stated that they intended to assert claims under the Due Process Clause of the Fourteenth Amendment and the First Amendment as well, [ECF No. 23 at 15]. While amending the complaint would be the appropriate method to add theories of liability, the Court will consider all suggested claims given Plaintiffs' *pro se* status and the clear futility of amending the complaint to properly encompass these theories.

Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations omitted). The statute "supplies a private right of action against a person who, under color of state law, deprives another of 'any rights, privileges, or immunities secured by the Constitution and [federal] laws.' *Gray v. Cummings*, 917 F.3d 1, 7 (1st Cir. 2019)

(alteration in original) (quoting 42 U.S.C. § 1983). "[T]o state a claim under § 1983, a plaintiff must allege (1) the violation of a right protected by the Constitution or laws of the United States and (2) that the perpetrator of the violation was acting under color of law." *Cruz-Erazo v. Rivera-Montafiez*, 212 F.3d 617, 621 (1st Cir. 2000).

With regard to the appropriate standard of review, Plaintiffs insist the Court apply strict scrutiny in its review of the mask mandates, [ECF No. 23 at 12, 15-16], while Defendants ask the Court to apply rational basis review, [ECF No. 22 at 12-13]. While the parties do not discuss it, courts have reviewed COVID-19 regulations either under these traditional tiers of scrutiny or under the test set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which preexisted the tiers of scrutiny and articulated a highly deferential standard for laws enacted to address public health crises. *Jacobson* remains good law, but its holding has been narrowed as courts have been forced to grapple with how it interacts with the tiers of scrutiny. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70-72 (2020) (Gorsuch, J., concurring); *Fortuna*, 2022 WL 2117717, at *13; *Denis v. Ige*, 538 F. Supp. 3d 1063, 1076 (D. Haw. 2021); *Hopkins Hawley LLC v. Cuomo*, 518 F. Supp. 3d 705, 712 (S.D.N.Y. 2021). Here, however, the Court need not resolve whether to analyze the claims under Jacobson or the traditional tiers of scrutiny because Plaintiffs' constitutional claims fail under either. *See Let Them Play MN v. Walz*, 517 F. Supp. 3d 870, 880 (D. Minn. Feb. 8, 2021) ("[I]f Jacobson does establish a different standard of review that applies only during a public-health crisis,

that standard would certainly be more deferential than the typical constitutional analysis.").

1. First Amendment

Plaintiffs assert that the mask mandates violated their right to freedom of religion under the Free Exercise clause of the First Amendment because they "have sincerely held religious beliefs that proscribe our wearing face masks and/or submitting to coerced medical devices/products such as face masks." [ECF No. 23 at 15].

Plaintiffs' allegations do not permit the court to infer that mask mandates placed a substantial burden on the exercise of their religion. As an initial matter, Plaintiffs have failed to allege the basic elements of a free exercise claim. "A plaintiff alleging a Free Exercise violation must show that a government action has a coercive effect on her religious practice." *Perrier-Bilbo v. United States*, 954 F.3d 413, 429 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 818 (2020) (quoting *Parker v. Hurley*, 514 F.3d 87, 103 (1st Cir. 2008)). Plaintiffs do not identify a religious practice or explain the coercive effect the mask mandates had on that practice. A mere vague allegation that mask mandates violate their religion is not enough to survive even the most a generous pleading standard. *Denis*, 538 F. Supp. 3d at 1076.

Even assuming *arguendo* that Plaintiffs have sufficiently alleged a burden on their exercise of religion, their claims would still fall. The mask mandates were facially neutral and generally applicable, *i.e.*, they did not single out, or make any reference to, a religion or any religious practice and applied equally to all, unlike the regulations at issue in *Roman*, 141 S. Ct. at 66-67. *See, e.g., Does 1-6 v. Mills*, 16 F.4th 20, 31-

32 (1st Cir. 2021), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022) (distinguishing the regulations in *Roman* from a COVID-19 vaccine mandate for healthcare workers, which the First Circuit found to be facially neutral and generally applicable). Beginning with the tiers of scrutiny, "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." *Does 1-6 v. Mills*, 566 F. Supp. 3d 34, 45 (D. Me. 2021).

This Court, in line with so many others around the country, finds that these types of mask mandates easily withstand rational basis review. Preventing the spread of COVID-19 is a legitimate government interest. Indeed, the Supreme Court has gone so far as to state that is "unquestionably a compelling" one. *Roman*, 141 S. Ct. at 67, and the implementation of indoor mask mandates is indisputably rationally related to that interest. *See Delaney v. Baker*, 511 F. Supp. 3d 55, 74 (D. Mass. 2021) (finding that Governor Charlie Baker's statewide mask mandate was facially neutral and generally applicable because it "burden[ed] the conduct of all residents, not exclusively conduct motivated by religious belief' and was "rationally related to the interest of stemming the spread of COVID-19"); *Dr. T. v. Alexander-Scott*, 579 F. Supp. 3d 271, 283-84 (D.R.I. Jan. 7, 2022), *appeal dismissed sub nom. Dr. T. v. McKee*, No. 22-1073, 2022 WL 2962029 (1st Cir. Apr. 13, 2022) (applying rational basis review and upholding COVED-19 vaccine requirement for healthcare workers).

Under these same facts, the mandates also withstand the far more deferential Jacobson review, which

provides that, during a public health crisis, courts should only overturn state action when that action "lacks a 'real or substantial relation to the protection of the public health' or represents 'a plain, palpable invasion of rights secured by the fundamental law.'" *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273, 284 (quoting *Jacobson*, 197 U.S. at 31 and upholding Governor Baker's indoor mask mandate); *see also Roman*, 141 S. Ct. at 70 (Gorsuch, J., concurring) (explaining that Jacobson is "essentially . . . rational basis review"). Plaintiffs' reliance on non-binding case law, *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822 (N.D. Tex. 2022), is unpersuasive, especially when that opinion has been called into question by other courts, see Navy SEAL 1 v. Austin, No. 22-cv-0688, 2022 WL 1294486, at *9 (D.D.C. Apr. 29, 2022) (stating that the Northern District of Texas' finding that the military had no compelling or even rational basis interest in the health of its troops was supported by "neither law or science").

Because Plaintiffs have neither alleged the preliminary elements of a free exercise claim nor shown that the mask mandates were irrational measures in response to the COVID-19 epidemic, their free exercise claims must be dismissed.

Plaintiffs' vague allegation of an infringement of their right to peaceably assemble also fails. The right to freedom of assembly "has been largely subsumed into a broad right of expressive association." *Gattineri v. Town of Lynnfield*, No. 20-cv-11404, 2021 WL 3634148, at *9 (D. Mass. Aug. 17, 2021). "[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress

of grievances, and the exercise of religion." *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)). "To violate the constitution, government action that interferes with such associational rights must 'affect in [a] significant way the existing members' ability to carry out their various purposes.'" *Gattineri*, 2021 WL 3634148, at *9 (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)). Plaintiffs have alleged no facts to support the contention that the mask mandates inferred with their rights to engage with activities protected by the First Amendment in public places or to associate with others with shared ideals or beliefs.

2. Equal Protection

Construing the complaint as generously as possible, it also asserts that the mask mandates created a religion-based class and subjected them to disparate treatment in violation of the Equal Protection Clause. [Compl. at 7]. That claim, to the extent even made, is equally unlikely to succeed. "When a free exercise challenge fails, any equal protection claims brought on the same grounds are subject only to rational-basis review." *Mills*, 16 F.4th 20, 35; *see also Wirzburger v. Galvin*, 412 F.3d 271, 283 (1st Cir. 2005) (because the court found the provisions of the state constitution did not violate the Free Exercise Clause, the court applied rational basis scrutiny to the fundamental rights-based claim and found the regulations passed such review); *Lowe v. Mills*, No. 21-cv-00242, 2022 WL 3542187, at *14 (D. Me. Aug. 18, 2022) (challenge to vaccine mandate brought under Equal Protection Clause dismissed once the court found that the mandate did not violate the Free Exercise Clause). Be-

cause the Court has determined that the mask mandates were rational, the Equal Protection claim is accordingly dismissed.

3. Substantive Due Process

In a last-ditch effort to save their constitutional challenge, Plaintiffs, in their opposition to Defendants' motion, assert that they also intended to bring a Due Process challenge under the Fourteenth Amendment. [ECF No. 23 at 15]. Such a claim also fails because Plaintiffs have not demonstrated that the mask mandates implicated a fundamental right or were an irrational response to COVID-19.

"In order to assert a valid substantive due process claim, [Plaintiffs] have to prove that they suffered the deprivation of an established life, liberty, or property interest, and that such deprivation occurred through governmental action that shocks the conscience[,]" *Clark v. Boscher*, 514 F.3d 107, 112 (1st Cir. 2008), or that such action was "legally irrational in that it is not sufficiently keyed to any legitimate state interests[,]'" *Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001) (quoting *PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991)).

Once again construing the pleadings charitably, Plaintiffs assert that the mask mandates violated their "fundamental liberty interests in medical autonomy[.]" [ECF No. 23 at 16]. Courts, however, "have uniformly found that public mask mandates do not implicate fundamental rights[.]" *Doe v. Franklin Square Union Free Sch. Dist.*, 568 F. Supp. 3d 270, 288 (E.D.N.Y. 2021), *appeal withdrawn*, No. 21-cv-2759, 2022 WL 1316221 (2d Cir. Mar. 17, 2022); *see, e.g., Lloyd v. Sch. Bd. of Palm Beach Cnty.*, 570 F.

Supp. 3d 1165, 1180 (S.D. Fla. 2021); *Health Freedom Def. Fund*, No. 21-cv-00389, 2022 WL 716789, at *8; *see also Harris v. Univ. of Mass., Lowell*, 557 F. Supp. 3d 304, 312 (D. Mass. 2021), *appeal dismissed*, 43 F.4th 187 (1st Cir. 2022) (substantive due process challenge to vaccine mandate failed where plaintiffs failed to identify a fundamental right). This is because requiring individuals to wear cloth masks does not amount to "compulsory bodily intrusion," *Lloyd*, 570 F. Supp. 3d at 1180, and is no more a "medical treatment" "than requiring shoes in public places . . . or helmets while riding a motorcycle," *Franklin Square Union Free Sch. Dist.*, 568 F. Supp. 3d at 290; *see also Gunter v. N. Wasco Cnty. Sch. Dist. Bd. of Educ.*, 577 F. Supp. 3d 1141, 1156 (D. Or. 2021) (same).

Accordingly, because a fundamental right has not been implicated and the Court has already concluded that the mask mandates were both reasonable and rationally related to a compelling government interest, and certainly do not "shock the conscience," Plaintiffs' due process claim cannot survive rational basis scrutiny or evaluation under the *Jacobson* standard.

4. Qualified Immunity

Plaintiffs claim that their complaint is alleged against the individual Defendants in both their individual and official capacities. [Compl. at 11-12; ECF No. 23 at 16-17]. Defendants respond that the individual Defendants are entitled to qualified immunity on the constitutional claims asserted against them in their individual capacities. [ECF No. 22 at 14-15].[5] To the

[5] Defendants also argue that Plaintiffs have failed to state claims against Fantasia and Goddard specifically because they did not participate in the BOH vote and are not decisionmakers, [ECF

extent Plaintiffs seek monetary damages from the individual Defendants for any constitutional violations, those claims fail because the individual Defendants are protected by qualified immunity.

"The Supreme Court has long established that, when sued in their individual capacities, government officials are immune from damages claims unless '(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time." *Eves v. LePage*, 927 F.3d 575, 582-83 (1st Cir. 2019) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)). Because the complaint fails to allege any viable constitutional claims, the individual Defendants are entitled to qualified immunity.

C. Americans with Disabilities Act ("ADA") Claim (Count I)

Plaintiffs have abandoned their ADA claim against the Carlisle BOH because that policy contained a carveout for medical exceptions, but they maintain that the Gleason Library's mask mandate violated the ADA because it did not include such a carveout. *See* [ECF No. 23 at 14; Compl. at 7].

Title II of the ADA prohibits discrimination by governmental entities in the operation of public services, programs, and activities. *See Buchanan v. Maine*, 469 F.3d 158, 170 (1st Cir. 2006). To prevail on a Title II claim, a plaintiff must show:

No. 22 at 17-18], but the Court need not delve into this dispute as it dismisses Plaintiffs' claims on other grounds.

> (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

Buchanan, 469 F.3d at 170-71.

Plaintiffs have not alleged a plausible claim under Title II of the ADA. First, Plaintiffs have failed to allege facts to show they are "disabled" within the mean of the ADA. A disability is "a physical or mental impairment that substantially limits one or major life activities. . . . " 42 U.S.C. § 12102(1)(A); *see also Carroll v. Xerox Corp.*, 294 F.3d 231, 238 (1st Cir. 2002). As Defendants note, Plaintiff Bush alleges only that "'face masks are medically inappropriate for him to wear' . . . but identifies no physical or mental impairment that substantially limits one or more of his major life activities. The other eleven plaintiffs make no allegations of impairment whatsoever." [ECF No. 22 at 11]; *see* [Compl. at 12].

Even if Plaintiffs had plausibly alleged that they were disabled within the meaning of the ADA, their claim still fails because they plead no facts that plausibly suggest that they were excluded from the Library or otherwise discriminated against by reason of this disability.

The Court also notes that the ADA allows public entities to consider whether even otherwise qualified applicants for accommodation pose a direct threat to the health and safety of others. *Theriault v. Flynn*,

162 F.3d 46, 48 (1st Cir. 1998); *see* [ECF No. 22 at 11-12 (Defendants assert that "[t]he failure to wear face masks in indoor public places during the COVID-19 pandemic poses a significant risk to the health or safety of other visitors")]. And, finally, as Defendants note, any claims for individual liability that Plaintiffs purport to bring under Title II of the ADA automatically fail because the provision does not provide for individual liability claims. *Logie v. Mass. Bay Transp. Auth.*, 323 F. Supp. 3d 164, 177 (D. Mass. 2018).

D. Civil Rights Act Claim (Count IV)

Plaintiffs also attempt to bring a claim under the Civil Rights Act.

Title II of the Civil Rights Act provides that "[a]ll persons should be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a).

> To state a *prima facie* case of discrimination under § 2000a, a plaintiff must plausibly plead that he: (1) is a member of a protected class; (2) attempted to exercise the right to full benefits and enjoyment of a place of public accommodations; (3) was denied those benefits and enjoyment; and (4) was treated less favorably than similarly situated persons who are not members of the protected class.

Drake v. Mitch Rosen Extraordinary Gunleather, LLC, No. 16-cv-00527, 2017 WL 1076396, at *2 (D.N.H. Jan. 17, 2017), *R&R adopted*, No. 16-cv-00527, 2017 WL

1066585 (D.N.H. Mar. 21, 2017) (citations omitted). Plaintiffs assert that some of them have religious beliefs that prohibit them from wearing a mask, [ECF No. 23 at 18], but they fail to allege any facts that suggest that they were treated any differently than others who do not share their religious beliefs or that Defendants' actions were motivated by their religious beliefs. In fact, the complaint says that Defendants treated everyone the same and that everyone was subject to the mask mandates. Therefore, Plaintiffs have failed to allege sufficient facts to support this claim.

The Court also notes that Title II includes a notice provision which bars plaintiffs from bringing such an action "before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority[.]" 42 U.S.C. § 2000a-3(c). As will be discussed further below, Plaintiffs failed to properly notify the appropriate authority before bringing their claim under Title II. *See Manning v. Whole Foods Mkt. Grp., Inc.*, No. 21-cv-10833, 2022 WL 194999, at *6 (D. Mass. Jan. 21, 2022).

E. Counts III and V-X

The remaining counts will also be dismissed.

First, 42 U.S.C. § 242 (Count V) and 18 U.S.C. § 1001 (Count VI) are federal criminal statutes that do not provide private rights of action.

Second, the UNESCO Universal Declaration on Bioethics and Human Rights (Count VIII) is a non-binding declaration that also provides no private right of action. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004); *Wolf v. Idaho State Bd. of Correction*, No.

20-35600, 2021 WL 3721434, at *2 (9th Cir. Aug. 23, 2021).

Third, the Food, Drug & Cosmetic Act (FDCA) (Count VII) explicitly prohibits private enforcement of the statute, stating that "all such proceedings for the enforcement, or to restrain violations, of this [Act] shall be by and in the name of the United States." 21 U.S.C. § 337(a); *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010); *see also Talbott v. C.R. Bard, Inc.*, 865 F. Supp. 37, 39 **(D.** Mass. 1994), *aff'd*, 63 F.3d 25 (1st Cir. 1995) ("there is no private right of action to enforce the FDA's standards"); *Lloyd*, 570 F. Supp. 3d at 1173 (plaintiffs' challenges to mask mandates brought under 21 U.S.C. § 360bbb-3 are not cognizable claims under § 1983). Moreover, because the FDCA does not create a private right of action, neither can regulations issued pursuant to FDCA, such as those contained in Title 21 of the Code of Federal Regulations (Count III). *Boata v. Pfizer, Inc.*, No. 10-cv-04390, 2010 WL 4878872, at *5 (S.D.N.Y. Dec. 1, 2010); *cf. Nasuti v. U.S. Sec'y of State John Forbes Kerry*, 137 F. Supp. 3d 132, 140 (D. Mass. 2016) (recognizing that OSHA and related regulations from the federal code do not contain private rights of action).

Fourth and finally, counts brought under Mass. Gen. Laws ch. 272, § 98 (Count IX) and Mass. Gen. Laws ch. 272, § 92A (Count X) will also be dismissed. Defendants erroneously argue that these are criminal statutes that do not provide private rights of actions, [ECF No. 22 at 17], but these are, in fact, Massachusetts' Public Accommodation Laws, *see Brooks v. Martha's Vineyard Transit Auth.*, 433 F. Supp. 3d 65, 70 (D. Mass. 2020). Nevertheless, "Massachusetts law

requires that all of Plaintiffs' state-law discrimination claims be brought before the MCAD [Massachusetts Commission Against Discrimination] before a lawsuit may be filed."

Quarterman v. City of Springfield, 716 F. Supp. 2d 67, 77 (D. Mass. 2009); *Do Corp. v. Town of Stoughton*, No. 13-cv-11726, 2013 WL 6383035, at *14 (D. Mass. Dec. 6, 2013). Plaintiffs have not alleged that they have filed a complaint with the MCAD. And even if Plaintiffs had complied with this requirement, Counts IX and X would still fail to state a claim for relief for reasons already discussed at length. *See Soltys v. Wellesley Country Club*, No. 0000050, 2002 WL 31998398, at *6 (Mass. Super. Oct. 28, 2002) ("The plaintiff has three elements to establish for a *prima facie case:* (1) plaintiff is a member of a protected category under the statute, and (2) plaintiff was denied access to or restricted in the use of (3) a place of public accommodation.").

IV. Conclusion

Accordingly, Defendants' motion to dismiss, [ECF No. 21], is GRANTED.

SO ORDERED.

/s/ Allison D. Burroughs
U.S. District Judge

September 12, 2022

**ORDER OF DISMISSAL,
U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
(SEPTEMBER 12, 2022)**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL BUSH, ET. AL.,

Plaintiffs,

v.

LINDA FANTASIA, ET. AL.,

Defendants.

Civil Action No. 21-cv-11794-ADB

Before: Allison D. BURROUGHS,
U.S. District Judge.

ORDER OF DISMISSAL

BURROUGHS, D.J.

In accordance with the Court's Order dated September 12, 2022 it is hereby ORDERED that the above-entitled action be and hereby is DISMISSED.

By the Court,

/s/ Caetlin McManus
Deputy Clerk

Date 9/12/2022

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT (JUNE 18, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; SUSAN PROVENZANO; ROBERT EGRI; KATALIN EGRI; MONICA GRANFIELD; ANN LINSEY HURLEY,

Plaintiffs-Appellants,

JOSEPH PROVENZANO; KATE HENDERSON; IAN SAMPSON; ANITA OPITZ,

Plaintiffs,

v.

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE,

Defendants-Appellees,

JOHN DOE; JANE DOE,

Defendants.

No. 22-1755

BARRON, Chief Judge,
HOWARD, KAYATTA, GELPÍ, MONTECALVO,
RIKELMAN and AFRAME, Circuit Judges.

ORDER OF COURT

Entered: June 18, 2024

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Michael Bush
Linda Taylor
Lisa Tiernan
Kate Henderson
Robert Egri
Katalin Egri
Anita Opitz
Monica Granfield
Ann Linsey Hurley
Ian Sampson
Susan Provenzano

Joseph Provenzano
John Joseph Davis Jr.
Justin Lee Amos
Heidi Kaiter
Jill Owens

28 C.F.R. § 35.139—DIRECT THREAT

Title 28-Judicial Administration
Chapter I-Department of justice

Part 35-Nondiscrimination on the Basis of Disability in State and Local Government Services

Subpart B-General Requirements

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a.

Source: Order No. 1512-91, 56 FR 35716, July 26, 1991, unless otherwise noted.

§ 35.139 Direct Threat

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk, the probability that the potential injury will actually occur, and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 36.208—DIRECT THREAT

Title 28-Judicial Administration
Chapter I-Department of justice

Part 36-Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities

Subpart B-General Requirements

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b), 12205a.

Source: Order No. 1513-91, 56 FR 35592, July 26, 1991, unless otherwise noted.

§ 36.208 Direct Threat

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk, the probability that the potential injury will actually occur, and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

42 U.S.C. § 12101—Findings and Purpose

§ 12101—Findings and Purpose

(a) Findings

The Congress finds that-

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of arch-

itectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102—DEFINITION OF DISABILITY

§ 12102—Definition of Disability

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)

(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph—

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

D. MASS L.R. 7.1—MOTION PRACTICE

(a) Control of Motion Practice.

(1) Plan for the Disposition of Motions. At the earliest practicable time, the judicial officer shall establish a framework for the disposition of motions, which, at the discretion of the judicial officer, may include specific deadlines or general time guidelines for filing motions. This framework may be amended from time to time by the judicial officer as required by the progress of the case.

(2) Motion Practice. No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue.

(3) Unresolved Motions. The court shall rule on motions as soon as practicable, having in mind the reporting requirements set forth in the Civil Justice Reform Act.

(b) Submission of Motion and Opposition to Motion.

(1) Submission of Motion. A party filing a motion shall at the same time file a memorandum of reasons, including citation of supporting authorities, why the motion should be granted. Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be filed with the motion.

(2) Submission of Opposition to a Motion. A party opposing a motion shall file an opposition within 14 days after the motion is served, unless (1) the motion is for summary judgment, in which case the opposition shall be filed within 21 days after the motion is served,

or (2) another period is fixed by rule or statute, or by order of the court. A party opposing a motion shall file in the same (rather than a separate) document a memorandum of reasons, including citation of supporting authorities, why the motion should not be granted. Affidavits and other documents setting forth or evidencing facts on which the opposition is based shall be filed with the opposition. The 14-day period is intended to include the period specified by the civil rules for mailing time and provide for a uniform period regardless of the use of the mails.

(3) Additional Papers. All other papers not filed as indicated in subsections (b)(1) and (2), whether in the form of a reply brief or otherwise, may be submitted only with leave of court.

(4) Length of Memoranda. Memoranda supporting or opposing allowance of motions shall not, without leave of court, exceed 20 pages, double-spaced.

M.G.L. CH. 111 § 31

Part I	Administration of the Government
Title XVI	Public Health
Chapter 111	Public Health
Section 31	Health Regulations; Summary Publication; Hearings; Impact on Farming or Agriculture; Filing Sanitary Codes and Related Rules, etc

Section 31. Boards of health may make reasonable health regulations. A summary which shall describe the substance of any regulation made by a board of health under this chapter shall be published once in a newspaper of general circulation in the city or town, and such publication shall be notice to all persons. No regulation or amendment thereto which relates to the minimum requirements for subsurface disposal of sanitary sewage as provided by the state environmental code shall be adopted until such time as the board of health shall hold a public hearing thereon, notice of the time, place and subject matter of which, sufficient for identification, shall be given by publishing in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days prior to the date set for such hearing, or if there is no such newspaper in such city or town, then by posting notice in a conspicuous place in the city or town hall for a period of not less than fourteen days prior to the date set for such hearing. Prior to the adoption of any such regulation or amendment which exceeds the minimum requirements for subsurface disposal of sanitary sewage as provided by the state environmental code,

a board of health shall state at said public hearing the local conditions which exist or reasons for exceeding such minimum requirements. Whoever, himself or by his servant or agent, or as the servant or agent of any other person or any firm or corporation, violates any reasonable health regulation, made under authority of this section, for which no penalty by way of fine or imprisonment, or both, is provided by law, shall be punished by a fine of not more than one thousand dollars.

In a municipality with a municipal agricultural commission established pursuant to section 8L of chapter 40, the board of health shall, prior to enacting any regulation that impacts: (i) farmers markets as defined in department regulations; (ii) farms as defined in section 1A of chapter 128; (iii) the non-commercial keeping of poultry, livestock or bees; or (iv) the non-commercial production of fruit, vegetables or horticultural plants, provide the municipal agricultural commission with a copy of the proposed regulation. The municipal agricultural commission shall have a 45-day review period during which the commission may hold a public meeting and may provide written comments and recommendations to the board of health relative to the proposed regulation. Upon a majority vote of the members, the agricultural commission may waive the 45-day review period,

If the board of health determines that an emergency exists, the board or its authorized agent, acting in accordance with section 30 of chapter 111, may, without notice of hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to address the emergency. The board of health

shall comply with the local enforcement emergency procedures set forth in department regulations, as amended from time to time.

Boards of health shall file with the department of environmental protection, attested copies of sanitary codes, and all rules, regulations and standards which have been adopted, and any amendments and additions thereto, for the maintenance of a central register pursuant to section eight of chapter twenty-one A.

M.G.L. CH. 111 § 95

Part I Administration of the Government

Title XVI Public Health

Chapter 111 Public Health

Section 95 Powers and Duties of Boards in Cases of Infectious Diseases

Section 95. If a disease dangerous to the public health breaks out in a town, or if a person is infected or lately has been infected therewith, the board of health shall immediately provide such hospital or place of reception and such nurses and other assistance and necessaries as is judged best for his accommodation and for the safety of the inhabitants, and the same shall be subject to the regulations of the board. The board may cause any sick or infected person to be removed to such hospital or place, if it can be done without danger to his health; otherwise the house or place in which he remains shall be considered as a hospital, and all persons residing in or in any way connected therewith shall be subject to the regulations of the board, and, if necessary, persons in the neighborhood may be removed. When the board of health of a town shall deem it necessary, in the interest of the public health, to require a resident wage earner to remain within such house or place or otherwise to interfere with the following of his employment, he shall receive from such town during

the period of his restraint compensation to the extent of three fourths of his regular wages; provided, that the amount so received shall not exceed two dollars for each working day.

M.G.L. CH. 111 § 104

Part I	Administration of the Government
Title XVI	Public Health
Chapter 111	Public Health
Section 104	Prevention of Spread of Infection; Public Notice; Removal

Section 104. If a disease dangerous to the public health exists in a town, the selectmen and board of health shall use all possible care to prevent the spread of the infection and may give public notice of infected places by such means as in their judgment may be most effectual for the common safety. Whoever obstructs the selectmen, board of health or its agent in using such means, or whoever wilfully and without authority removes, obliterates, defaces or handles such public notices which have been posted, shall forfeit not less than ten nor more than one hundred dollars.

M.G.L. CH. 111 § 181

Part I	Administration of the Government
Title XVI	Public Health
Chapter 111	Public Health
Section 181	Enforcement of Vaccination of Inhabitants of Towns

Section 181. Boards of health, if in their opinion it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants of their towns, and shall provide them with the means of free vaccination. Whoever refuses or neglects to comply with such requirement shall forfeit five dollars.

PETITION FOR REHEARING
(MAY 1, 2024)

No.22-1755

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; SUSAN PROVENZANO; ROBERT EGRI; KATALIN EGRI; MONICA GRANFIELD; ANN LINSEY HURLEY,

Pro Se Plaintiffs-Appellants,

JOSEPH PROVENZANO; KATE HENDERSON; IAN SAMPSON; ANITA LOPEZ,

Pro Se Plaintiffs,

v.

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

Pro se Plaintiffs-Appellants' Petition for Rehearing En Banc and Panel Rehearing

[. . .]

Argument

1.0 Fed. R. App. P. 35(b)(1)(A) Statement

The panel's decision and judgment dated April 18, 2024 conflict with multiple decisions of the United States Supreme Court and of this Court—those decisions are specified in the applicable sections below. Consideration by the full Court is therefore necessary to secure and maintain uniformity of this Court's decisions.

2.0 The panel's judgment conflicts with this Court's and the Supreme Court's decisions regarding mootness

2.1 The judgment overlooked that the Plaintiffs seek monetary relief, which according to the Supreme Court's consistent holdings absolutely precludes mootness

In addressing declaratory and injunctive relief, the panel's judgment overlooked the issue of monetary relief here. The U.S. Supreme Court has repeatedly made clear that any chance of monetary relief absolutely keeps a case from being moot *(Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019)):

> "For better or worse, nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents. See 13C C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.3, p. 2 (3d ed.

> 2008) (Wright & Miller) (IA] case is not moot so long as a claim for monetary relief survives"). Ultimate recovery on that demand may be uncertain or even unlikely for any number of reasons, in this case as in others. But that is of no moment. If there is any chance of money changing hands, [the] suit remains live. *See Chafin*, 568 U. S. at 172, 133 S.Ct. 1017."

In this case, the pro se Plaintiffs did seek specific amounts of monetary relief in their complaint that the District Court erroneously dismissed and they argued this in § 6.3 of their opening brief to this Court. Thus, the panel's judgment in this appeal stands at stark odds with clear and consistent instruction from the Supreme Court that any chance of monetary relief precludes mootness. That thereby violates this Court's own holding on *stare decisis:* "Under the doctrine of *stare decisis*, all lower federal courts must follow the commands of the Supreme Court, and only the Supreme Court may reverse its prior precedent." reh'g en banc granted, opinion vacated, 982 F.3d 50 (mem.) (1st Cir. Dec. 9, 2020). Thus, to restore conformity with this Court's holding on *stare decisis* and uniformity between its decisions and the Supreme Court's decisions on monetary relief and mootness, rehearing en banc is necessary.

2.2 The judgment overlooked the critical factor that according to this Court's and the Supreme Court's precedents, the Defendants here have not only failed to meet their heavy burden to assure their challenged conduct will not recur, they have made assertions that preclude mootness

The U.S. Supreme Court has long-held—including in COVID mandate cases—that the heavy burden of proving mootness lies with the party asserting it and that voluntary cessation of the challenged conduct will not ordinarily moot the case. In *Bos. Bit Labs v. Baker*, 11 F.4th 3, 9-10 (1st Cir. 2021) this Court reiterated and applied those standards to the COVID mandate case before it:

> ""[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation," our judicial superiors tell us, "that does not necessarily moot the case." *See Tandon v. Newsom*, ___ U.S. ___, 141 S. Ct. 1294, 1297, 209 L.Ed.2d 355 (2021) (per curiam). That is so because of the voluntary-cessation doctrine, which "can apply when a defendant voluntar[ily] ceases the challenged practice in order to moot the plaintiff's case and there exists a reasonable expectation that the challenged conduct will be repeated" after the suit's "dismissal." *See Lewis*, 813 F.3d at 59 (quotation marks and citations omitted and alteration by Lewis court); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc. ("Friends")*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610

> (2000) (stating that for the voluntary cessation of contested conduct to moot a suit, it must be "absolutely clear" that the conduct "could not reasonably be expected to recur" (quotation marks omitted)). And the burden of showing that the voluntary-cessation doctrine does not apply still lies with the party claiming mootness. *See, e.g., Friends*, 528 U.S. at 190, 120 S.Ct. 693."

This Court distinguished *Bos. Bit Labs* from this case by noting that Bos. Bit Labs did not seek money damages and did not raise the voluntary cessation while evading judicial review exception as the Plaintiffs have in this case. This Court also clarified that Baker's written assurance to this Court that his challenged conduct would not recur was "critical" to this Court's finding of mootness.

In contrast, the Defendants here have not executed any consent decree acknowledging their mandates were *ultra vires* and agreeing to refrain from such mandates henceforth. On the contrary, the Board of Health Defendants in this case publicly stated that their challenged conduct may very well recur and they reserve the right to repeat it. The Board of Health member physician Jean Barry even went on to state that a future variant of the virus could be dangerous. This was all argued to the District Court—with a public record documenting the Defendants' assertions. And this and other key points precluding mootness were argued in §§ 6.0 to 6.4 of the opening brief in this appeal, which the panel appears to have missed.

Thus, the panel's judgment stating that the Plaintiffs' requests for declaratory and injunctive relief are moot contradicts the Supreme Court's and this Court's

own longstanding holdings that the heavy burden of proving mootness lies with the party asserting mootness and that potential monetary relief absolutely precludes mootness.

3.0 The judgment has created a drastic change in what sources courts use to draw facts from and the party in whose favor courts may draw inferences at this stage of litigation

In its judgment the panel stated "Post-mandate developments have only made this controversy less likely to recur in its original form", which conflicts with this Court's longstanding instruction on permissible sources of facts and how to draw inferences at this stage of litigation. Because the District Court dismissed this case before allowing the Plaintiffs to even conduct discovery, the only allegations of a factual nature that may be considered are in the complaint and its attachments and all reasonable inferences must be drawn in favor of the Plaintiffs. That record reveals that, similar to the annual influenza virus that has existed for over a century, SARS-CoV-2 cannot be eradicated and COVID-19 will be a part of life indefinitely—as argued in § 4.3 of the opening brief to this Court. And as further argued in § 4.3 of the opening brief, the District Court substituted its preferred allegations from sources this Court had long held may not be used at this stage. But now, with this judgment, the panel has relied upon allegations from previously impermissible, undisclosed sources and drawn inferences in favor of the Defendants, creating a U-turn in decisions on this issue:

1st Circuit Court of Appeals' holding:	Decisions reflecting this holding:
When considering dismissal of a complaint or reviewing a dismissal, courts must take the complaint's plausible allegations of a factual nature as true; facts are limited to those in the complaint and its attachments; and all reasonable inferences must be drawn in favor of the plaintiff(s).	*Kaufman v. CVS Caremark Corp.*, 836 F.3d 88, 90 (1st Cir. 2016). *Kleiner v. Cengage Learning Holdings II, Inc.*, 22-1451 (1st Cir. 2023) *Massachusetts Laborers' Health and Welfare Fund v. Blue Cross Blue Shield of Massachusetts*, 22-1317 (1st Cir. 2023) *Douglas v. Hirshon*, 63 F.4th 49, 52 (1st Cir. 2023) *Lowe v. Mills*, 22-1710 (1st Cir. 2023) *Lawrence General Hospital v. Continental Casualty Company*, 23-1286 (1st Cir. 2024)

Implicit holding: When considering dismissal of a complaint or reviewing a dismissal, courts may draw allegations and assumptions *from sources other than the complaint* and may draw inferences in favor of the *defendant(s).*	The panel's judgment in this appeal, dated April 18, 2024.

4.0 This Court and the Supreme Court strongly disfavored *sua sponte* dismissal—especially when plaintiffs are denied an opportunity to respond—until the panel's judgment tacitly condoned that conduct

This Court and the Supreme Court have long held that *sua sponte* dismissals should be used sparingly and will generally not be upheld without the court having given the plaintiffs notice and opportunity to amend the complaint. In §§ 3.0 and 5.1 to 5.5 of their opening brief, the Plaintiffs-Appellants argued:

1. this precedent,
2. that the District Court's dismissal on legal standing grounds was *sua sponte* because the Defendants had only moved under Fed. R. Civ. P. 12(b)(6) for failure to state a claim eligible for relief—they had not challenged legal standing under Fed. R. Civ. P. 12(b)(1),
3. the District Court denied them the hearing they requested in writing, and

4. the District Court deprived them of any opportunity to respond or amend their complaint.

In their brief, the Appellees did not dispute that the dismissal on legal standing grounds was *sua sponte* or that the District Court improperly denied the Plaintiffs the hearing they had requested. And this Court holds that arguments (and counter-arguments) not raised in the briefs are waived.[1] Yet in its judgment, the panel overlooked these key facts, events, and legal precedent that the District Court had violated, thereby creating a chasm in handling of *sua sponte* dismissals:

Holding on *sua sponte* dismissals:	**1st Circuit Court of Appeals and Supreme Court decisions reflecting this holding:**
Sua sponte orders of dismissal will be upheld only if the allegations contained in the complaint, taken in the light most favorable to the plaintiff, are patently meritless and beyond all hope of redemption or the plaintiffs have been given an opportunity to respond and amend the complaint before dismissal.	*Literature, Inc. v. Quinn*, 482 F.2d 372, 374 (1st Cir. 1973) *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827 (1989) *Clorox Co. v. Proctor Gamble Comm'l Co.*, 228 F.3d 24, 32 (1st Cir. 2000) *Gonzalez-Gonzalez v. U.S.*, 257 F.3d 31 (1st Cir. 2001)

[1] *Gattineri v. Town of Lynnfield*, 58 F.4th 512 (1st Cir. 2023)

	Chute v. Walker, 281 F.3d 314 (1st Cir. 2002) *Garayalde-Rijos v. Municipality of Carolina*, 747 F.3d 15 (1st Cir. 2014)
Sua sponte dismissal may be upheld regardless of: 1. the merit of the complaint's claims, 2. whether the court gave the plaintiff a hearing, and 3. whether the court gave the plaintiff opportunity to respond or amend the complaint.	The panel's judgment in this appeal, dated April 18, 2024.

5.0 The panel's judgment overlooked that there is an Americans with Disabilities Act claim here, thereby effectively contradicting this Court's and the Supreme Court's holdings in ADA cases

In accordance with the explicit textual requirements of the Americans with Disabilities Act ("ADA"), this Court and the Supreme Court have long held that failure to reasonably modify policy or otherwise rea-

sonably accommodate a person's disability constitutes a violation of the ADA.[2]

In this case, at least one Plaintiff pled that he had medical contraindications to wearing a face mask; he informed the Gleason Public Library that it was violating the ADA by failing to accommodate such disabilities while it exempted certain people by their age; and the Gleason Public Library failed to modify its mandate so as to stop violating the ADA. This was thoroughly argued to this Court in §§ 4.0 to 4.8 of the pro se Appellants' opening brief and §§ 8.0 to 8.2 of their reply brief. The Appellees failed to even address the multiple portions of the ADA and its corresponding CFR their library's mandate violated that the Appellants specified in their brief.

By overlooking the ADA claim in its judgment, the panel contradicted longstanding holdings on ADA claims. The panel also overlooked that (according to holdings) ADA claimants are entitled to injunctive relief[3] in addition to monetary damages.

---

[2] *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S. Ct. 1879 (2001); *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004); *Bell v. O'Reilly Auto Enters.*, 972 F.3d 21 (1st Cir. 2020)

[3] *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259 (1st Cir. 2022)

6.0 This Court and the Supreme Court held that violation of a *constitutional right* and violation of a *clearly-established right* were separate and distinct legal issues—until the panel's judgment that has conflated the two

6.1 Contrary to the judgment, whether a municipal government official's conduct violated a constitutional or statutory right that was clearly-established determines only whether that individual forfeited qualified immunity—not whether the plaintiff is entitled to relief

This Court and the Supreme Court have long held that municipal government personnel forfeit their qualified immunity if they violate a constitutional or statutory right that was clearly-established. *Eves v. Lepage*, 927 F.3d 575, 582-83 (1st Cir. 2019) (en banc):

> "The Supreme Court has long established that, when sued in their individual capacities, government officials are immune from damages claims unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012))."

Thus, whether a right was clearly-established has only to do with government personnel's individual liability, not whether the government entity is liable for the violation of the person's rights—a separate issue that we address in § 6.2. But in its judgment, the

panel addressed only whether there was violation of a "clearly established Constitutional right". It did not address whether there was violation of a clearly-established statutory right. Nor did it address whether there was a violation of a Constitutional right irrespective of whether it was clearly-established.

6.2 According to this Court's and the Supreme Court's longstanding holding, treating secular activity more favorably than a person's comparable religious exercise constitutes a violation of the Free Exercise Clause—but not according to this judgment

This Court and the Supreme Court long held the government treating secular (*i.e.* non-religious) activity more favorably than a person's comparable religious exercise constituted a violation of the Free Exercise Clause of the Constitution's 1st Amendment. Or rather, this Court adhered to that precedent until its judgment in this appeal, when the panel reversed course on Free Exercise Clause claims:

Holding on Free Exercise Clause claims	**1st Circuit Court of Appeals and Supreme Court decisions reflecting this holding:**	**COVID mandate case?**
If the government treats secular	*Church of the Lukumi Babalu Aye Inc. v. City of*	

activity more favorably than comparable religious exercise, that constitutes a violation of the person's right to free exercise of their religion under the 1st Amendment.	*Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993)	No
	Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (per curiam)	Yes
	Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889, 208 L. Ed. 2d 448 (2020)	Yes
	Tandon v. Newsom, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) (per curiam)	Yes
	Kennedy v. Bremerton School Dist., No. 21-418 (U.S. Jun. 27, 2022)	No Yes

	Lowe v. Mills, 68 F.4th 706 (1st Cir. 2023)	
Government mandates that exempted people by their age, work status, and disabilities while allowing for no accommodation of religious beliefs / practices could not possibly constitute a violation of the Free Exercise Clause.	The panel's judgment in this appeal, dated April 18, 2024.	Yes

In its judgment, the panel stated "To the extent that intervening caselaw may have strengthened the claim for damages from the Board's rescinded mandate, that possibility (concerning which we express no opinion) only underscores the fact that no clearly established Constitutional right was violated by appellees during the period in question." There are two aspects in which that reasoning conflicts with pertinent, long-standing holdings from this Court and the Supreme Court.

First, as explained above in § 6.1, whether the right was "clearly-established" is irrelevant to mootness, injunctive relief, declaratory relief, monetary relief, or other issues. It pertains only to individual government personnel's personal liability for the violation(s).

Second, as revealed in the table immediately above, the Supreme Court had made clear in multiple decisions over decades—including in COVID mandate cases decided before the mandates occurred in this case—that treating secular activity more favorably than a person's comparable religious exercise constituted a violation of the Free Exercise Clause. (§§ 2.0 to 2.4 of the opening brief.) There was no ambiguity about that. Accordingly, this Court had no difficulty reversing the dismissal of the Free Exercise Clause claim in *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023) and vacating the denial of injunctive relief for the Free Exercise Clause claim in *Brox v. Hole*, 83 F.4th 87 (1st Cir. 2023). Therefore, the aberrant judgment in this case needs to be brought en Banc into alignment with this Court's and the Supreme Court's longstanding Free Exercise Clause holdings.

7.0 In its judgment, the panel appeared to overlook several of the Appellants' key arguments—to which the Appellees have waived counter-arguments because they did not raise any in their brief

In their citation of supplemental authority dated November 9th, 2023, the pro se Appellants cited this Court's holding in *Gattineri v. Town of Lynnfield*, 58 F.4th 512 (1st Cir. 2023). According to that holding, by failing to raise counter-arguments in their brief, the Appellees have waived all counter-arguments to

the Appellants' arguments that the District Court committed reversible errors by:

a. Ignoring and arguing against the facts of our complaint. (Brief Pp. 15-16, 23, 28-32, 47, 50)

b. Drawing inferences in favor of the Defendants. (Brief Pp. 28-30, 50)

c. Dismissing the complaint *sua sponte* on the basis of legal standing when the Defendants had not challenged the Plaintiffs' legal standing. (Brief Pp. 33-35)

d. Declaring the Plaintiffs' request for injunction moot while knowing that the Plaintiffs sought money damages and the challenged mandates might recur while evading judicial review. (Brief Pp. 41-42)

e. Allowing the Defendants to file their motion to dismiss without having held the conference with us Plaintiffs required by Local R. Civ. P. 7.1(a)(2). (Brief p. 40)

f. Allowing the Defendants to file documents without the leave required by Local R. Civ. P. 7.1(b)(3)—documents the District Court subsequently and improperly relied upon. (Brief Pp. 40-41)

g. Denying the Plaintiffs' written request for a hearing. (Brief Pp. 15, 26, 50)

h. Violating several canons of construction. (Brief Pp. 45-48)

i. Violating Fed. R. Civ. P. 16(b). (Brief Pp. 25-26)

j. Violating the U.S. Constitution's Supremacy Clause (Brief p. 17) and this Court's instruction on *stare decisis* (Brief p. 18).

k. Disregarding that the public library had no statutory authority to issue its face mask mandate. (Brief Pp. 42-43). (In footnote 17, the Defendants/Appellees stated that they declined to present counter-arguments because we had not challenged the library's authority. But we did so in Complaint Pp. 10, 17.)

In its judgment, the panel appears to have missed that citation of supplemental authority, its arguments, and the implications of those arguments in this appeal.

7.1 Fed. R. App. P. 28(j) requires that any response to a citation of supplemental authority must be made promptly, therefore the Appellees' failure to file any responses within the last several months constitutes waiver

Fed. R. App. P. 28(j) allows for citations of supplemental authorities.

Regarding responses to such citations, it states simply "Any response must be made promptly and must be similarly limited."

The Appellees filed a single citation of supplemental authority, to which the Appellants filed a response nine days later.

In contrast, the Appellants filed six distinct citations of supplemental authorities, the latest one

having been filed December 27th, 2023. The Appellees have filed no response to any of the Appellants' citations of supplemental authorities, thereby waiving the right to make any response at this point in the appeal. That leaves the Appellants' citations of supplemental authorities and their attendant arguments unopposed.

Summary & Conclusion

Given the volume and complexity of appeals this Court must handle in any given period of time, the pro se Appellants are not the least bit inclined to trade places with the Judges of this Court. And were the panel's judgment here affirming the District Court's dismissal to be aligned with the case's operative facts and applicable legal precedents from this Court and the Supreme Court, the Appellants would nod in agreement (perhaps begrudgingly) and be on their way. But they cannot be on their way just yet.

The Supreme Court holds that any chance of monetary relief absolutely precludes mootness and that the chance a defendant may repeat their challenged conduct also precludes mootness. The Plaintiffs here seek specific amounts of monetary damages and the Defendants made documented statements indicating they reserve the right to repeat their challenged conduct. Thus, the panel's judgment here characterizing this case as moot is in conflict with the Supreme Court's holdings on mootness.

This Court and the Supreme Court have long held that *sua sponte* dismissals—particularly when the plaintiff is denied an opportunity to respond as in this case—are strongly disfavored and will generally not be upheld. By failing to present it in their brief, the Appellees waived any counter-argument to the Appel-

lants' argument that the District Court dismissed their case *sua sponte* on the grounds of legal standing and improperly denied them the hearing they requested.

The panel's judgment overlooked that there is an Americans with Disabilities Act claim here and that one of the Defendants' mandates was clearly and remained willfully in violation of the ADA.

The judgment mistakenly conflated whether there was a violation of the Free Exercise Clause—which has its own distinct standards—with whether there was a violation of a clearly-established right—which pertains only to qualified immunity of individual government officials. This rendered the judgment in striking conflict with both this Court's and the Supreme Court's holdings on these two distinct legal issues.

This Court holds that arguments not raised in the briefs are waived. And the Appellees here failed to raise counter-arguments to the majority of reversible errors that the Appellants identified in their opening brief. The Appellees also failed to promptly file any responses to the Appellants' citations of supplemental authorities, thereby also waiving any counter-arguments to those.

According to the Fed. R. App. P. 40(a)(2), panel rehearing is only for correcting points that were overlooked or misapprehended. Per Fed. R. App. P. 35(a)(1), rehearing en banc is necessary to secure or maintain uniformity of the court's decisions. Since there are substantial conflicts between this appeal's judgment and this Court's and the Supreme Court's relevant decisions, rehearing en banc is necessary.

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
Phone: 978-734-3323
Email: bmoc54@verizon.net

May 1, 2024

/s/ Lisa Tiernan
Pro Se
116 Lowell Street
Westford, MA 01886

April 30, 2024

/s/ Monica Granfield
Pro Se
110 Carlisle Pines Drive
Carlisle, MA 01741

April 30, 2024

/s/ Ann Linsey Hurley
Pro Se
10 Half Moon Hill
Acton, MA 01720

May 1, 2024

/s/ Robert Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

April 30, 2024

/s/ Katalin Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

April 30, 2024

/s/ Susan Provenzano
Pro Se
80 Mill Pond Lane
Carlisle, MA 01741

May 1, 2024

/s/ Linda Taylor
Pro Se
879 Concord Street
Carlisle, MA 01741

May 1, 2024

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the word limit of Fed. R. App. P. 35(b)(2)A), 35(b)(3) and 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the document contains 3,842 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in 14 point proportionally spaced typeface with serifs (other than for headings).

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2024 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

John J. Davis, BBO #115890
10 Post Office Square, Suite 1100N
Boston, MA 02109

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
Phone: 978-734-3323
Email: bmoc54@verizon.net

APPELLANTS OPENING BRIEF
(NOVEMBER 18, 2022)

No. 22-1755

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; SUSAN PROVENZANO; ROBERT EGRI; KATALIN EGRI; MONICA GRANFIELD; ANN LINSEY HURLEY,

Pro Se Plaintiffs-Appellants,

JOSEPH PROVENZANO; KATE HENDERSON; IAN SAMPSON; ANITA LOPEZ,

Pro Se Plaintiffs,

v.

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants-Appellees.

No. 22-1755

On Appeal from the United States District Court
for the District of Massachusetts

Brief for the Pro Se Plaintiffs-Appellants

[. . .]

Jurisdictional Statement

This appeal is from a final order or judgment that disposes of all parties' claims. The pro se Plaintiffs-Appellants and Defendants-Appellees are all located in eastern Massachusetts, within the geographical jurisdiction of both the District Court for the District of Massachusetts and this Court. The Plaintiffs brought claims in the District Court under 42 U.S.C. § 1983. The District Court issued its order dismissing the Plaintiffs' case on September 12, 2022 (Addendum). The Appellants timely filed their Joint Notice of Appeal on September 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

1. This Court holds that before a scheduling order's applicable deadline, Fed. R. Civ. P. 15(a)'s "freely given" leave to amend standard applies. The District Court never convened a scheduling conference nor issued a scheduling order. Did the District Court err by dismissing the entire case without giving the pro se Plaintiffs leave to amend their original complaint?

2. One of the Defendants' challenged face mask mandates had a medical exemption carveout while the other mandate made no allowance for medical exemptions whatsoever. Did the District Court err by dismissing Plaintiff Michael Bush's Americans with Disabilities Act claim challenging the mandate lacking allowance for medical exemptions?

3. The U.S. Supreme Court holds that an asserted compelling interest in denying a religious accommoda-

tion to a particular claimant is undermined by evidence that exemptions or accommodations have been granted for other interests. Did the District Court err by dismissing the Plaintiffs' free exercise of religion claim when the challenged mandates allowed for secular exemptions but not religious exemptions?

4. The public library failed to identify any statutory authority for its face mask mandate. For its separate mandate the Board of Health cited statutes that made no mention of face masks or equivalent measures. Did the District Court err by declaring the Plaintiffs' request for an injunction moot after the Board of Health publicly stated it reserved the right to repeated its challenged mandate?

Statement of the Case

On March 10th, 2020 Massachusetts Governor Charlie Baker declared a state of emergency due to the outbreak of COVID-19 in the state. On May 1st, 2020 Governor Baker issued COVID-19 Order No. 31 imposing a statewide face mask requirement effective May 6th, 2020 that exempted those with medical contraindications "who shall not be required to produce documentation verifying the condition."

Throughout much of 2020 and 2021 the Gleason Public Library of the Town of Carlisle in Massachusetts imposed a face mask mandate of its own which barred anyone from the library over the age of two years who did not wear a face mask. The Gleason Public Library's mandate allowed for no medical or religious exemptions. Neither the library nor the Town of Carlisle of which it is a part has identified any statutory authority to have imposed the library's mandate.

On October 20th and 21st of 2020 Plaintiff Michael Bush exchanged email messages with Defendant Town of Carlisle Health Agent Linda Fantasia in which Bush informed Fantasia that Town officials' messaging about face masks contributed to harassment and discrimination against people for whom face masks are medically inappropriate, in violation of the Americans with Disabilities Act. *See* Complaint ("Cmp.") P. 12 ¶¶ 2 and 3 and Exhibit 1.

On March 22nd, 2021 Bush emailed Fantasia and Gleason Public Library Director Martha Feeney-Patten and informed them that—among other things—face masks are medically inappropriate for him to wear and that he had been subjected to harassment and discrimination on that basis due to the Defendants' published face mask policies. (Cmp. P. 12 ¶ 4 and Exhibit 2). On March 22nd, 2021 Fantasia and Feeney-Patten each replied to Bush's email message from earlier that day. Neither Fantasia nor Feeney-Patten offered any solution to the discrimination and exclusion of which Bush notified them. Instead, Feeney-Patten offered suggestions for Bush to receive partial service while being barred from the public library. (Cmp. P. 12 ¶ 5 and Exhibit 2).

During much of 2020 and into 2021 Feeney-Patten persisted in communicating via her public library's website and her official public library email newsletter the face mask mandate whose legality Bush had challenged. (Cmp. P. 12 ¶ 6 and Exhibit 3).

Governor Baker terminated the COVID-19 state of emergency on June 15, 2021. The Governor's order also rescinded most COVID-19 restrictions at that time, including face mask requirements in most settings.

In early August 2021 the Wall Street Journal published an article by eminent epidemiologist and professor of medicine at Stanford University Dr. Jay Bhattacharya and professor of economics at George Mason University Donald J. Boudreaux. As the professors explained, no degree of vaccination, oppressive measures, or violations of civil liberties can eradicate or contain COVID-19. Furthermore, they pointed out what had been self-evident to anyone willing to acknowledge the obvious: attempting to chase and suppress at all costs this germ and infectious disease that cannot be contained or eliminated had done immense harm to public health and the well-being of our society. (Cmp. P. 13 ¶ 7 and Exhibit 4).

Soon after Governor Baker terminated the COVID-19 state of emergency and most related restrictions, on August 25, 2021 the Town of Carlisle's Board of Health unanimously voted to adopt an indoor face mask mandate. (Cmp. p. 13 ¶ 8 and Exhibit 5.) In its memorandum issuing its face mask mandate the Board of Health also requested the Town's Select Board issue an emergency declaration for the implementation of a local face mask mandate. (Cmp. P. 13 ¶ 9 and Exhibit 5.) The indoor face mask mandate exempted those "unable to wear a face mask due to a medical condition or disability and in employee's private work space where face masks are encouraged." As purported statutory authority for its face mask mandate, the Board of Health cited Massachusetts General Laws Chapter 111 §§ 31 and 104. (Cmp. Exhibit 5.)

On September 8th, 2021 several of the Plaintiffs had the United States Postal Service deliver by mail their "Notice and Demand Letters" to the Defendants-

Appellees Town of Carlisle's Administrator Timothy Goddard, Health Agent Linda Fantasia, and Director of the Gleason Public Library Martha Feeney-Patten. (Cmp. P. 13 ¶ 10.) The Notice and Demand Letters (Cmp. Exhibits 6, 7, and 8) were accompanied by several exhibits. The Notice and Demand Letters notified the recipients that they did not have the legal authority to issue the mandates, that the mandates violated the Plaintiffs' rights, that the Plaintiffs demanded resolution within 15 days, and a range of other matters. For brevity's sake those matters will not be fully rehashed here but will be referenced with specificity where appropriate in the Argument section below.

Goddard has never responded to the Letter delivered to him. (Cmp. P. 14 ¶ 16.) Feeney-Patten has never responded to the Letter delivered to her. (Cmp. P. 14 ¶ 15.) On September 22nd, 2021 Bush received an email message from Fantasia consisting of a single sentence acknowledging her receipt of the Letter. (Cmp. P. 13 ¶ 12 and Exhibit 9.) Fantasia has provided no other response to the Letter delivered to her. (Cmp. P. 14 ¶ 13.) Fantasia has never addressed the legal violations of which she was notified in the Letter. (Cmp. P. 14 ¶ 14.)

The Defendants persisted with their challenged face mask mandates without modification until they lifted the mandates several months later in 2022.

On November 4th, 2021 several of the pro se Plaintiffs-Appellants filed their complaint against the Defendants-Appellees in the United States District Court for the District of Massachusetts. On January 5th, 2022 the Defendants filed their motion to dismiss for failure to state a claim eligible for relief. On Janu-

ary 18th, 2022 the Plaintiffs filed their opposition to the motion to dismiss.

On March 11, 2022 the Defendants filed an ex parte letter without leave of the court informing the court that the Board of Health had lifted its face mask mandate (ECF 28). On March 12th, 2022 the Plaintiffs moved to strike it (ECF 29). On March 13, 2022 the District Court denied the motion to strike (ECF 30). On March 30th, 2022 the Plaintiffs filed a reply to that letter (ECF 31). On April 13th, 2022 the Defendants filed a reply to the Plaintiff's reply (ECF 32).

On May 6th, 2022 the Plaintiffs served their initial disclosures, two interrogatories to the Board of Health member Defendants, and three interrogatories to Defendant Feeney-Patten. On May 17th, 2022 two of the Plaintiffs held the Fed. R. Civ. P. 26(f) conference by phone with the Defendants' attorney. On June 3rd, 2022 the Defendants served their initial disclosures with attendant documents. On June 22nd, 2022 the Plaintiffs served two other sets of interrogatories. The Defendants failed to serve any objection or response whatsoever to any of the interrogatories within the 30 days required by Fed. R. Civ. P. 33(b)(2). The Defendants eventually responded to one of the four sets of interrogatories. The Defendants refused to respond to the other three sets of interrogatories, refused to produce any more documents, and refused to submit to any depositions at all until the District Court ruled on their motion to dismiss. The Defendants filed a motion to stay discovery on August 19th, 2022 (ECF 33). The Plaintiffs filed a motion to compel discovery on August 29th, 2022 (ECF 36).

On September 12th, 2022 the District Court issued its Memorandum and Order dismissing the entire case

and the pending motions while denying the Plaintiffs their requested hearing (ECF 30) and neither giving nor mentioning leave to amend the original complaint. (Addendum).

Standard of Review

This Court reviews a District Court's decision on a motion to dismiss de novo. The Court must accept as true all well-pleaded facts, analyze those facts in the light most favorable to the plaintiff, and draw all reasonable factual inferences in the plaintiff's favor. *See Gilbert v. City of Chicopee*, 915 F.3d 74, 76, 80 (1st Cir. 2019).

Summary of the Argument

While disregarding much of the key facts of the pro se Plaintiffs' complaint, analyzing some of the facts in the Defendants' favor, and drawing some inferences in the Defendants' favor, the District Court erred even further by dismissing the Plaintiffs' entire case without giving leave to amend the complaint.

Though the Board of Health Defendants' face mask mandate allowed for medical exemptions to avoid discrimination on the basis of disability, the Gleason Public Library's face mask mandate allowed for no medical exemptions. The District Court reasoned that this discrimination on the basis of disability was reasonable and lawful due to the Court's concern about COVID-19. But to draw that conclusion the Court had to disregard the facts of the Plaintiffs' complaint, much of the Americans with Disabilities Act, and the applicable federal regulations' instruction.

The Plaintiffs intended to make a free exercise of religion claim but acknowledged in their opposition to the motion to dismiss that they had not pled that claim clearly in their complaint. The proper remedy was to give the Plaintiffs leave to file an amended complaint. But the District Court instead wrongly treated the Plaintiffs' 1st amendment free exercise of religion claim as a claim for violation of medical autonomy. The District Court also erred by ignoring what the Supreme Court deems an automatic violation of free exercise of religion: The Defendants allowing secular exemptions while denying religious exemptions to their mandates.

In declaring that the Board of Health had the legal authority to issue a face mask mandate, the District Court had to disregard the facts of the complaint as well as multiple cardinal rules of judicial interpretation and canons of construction. The District Court also erred by ruling the Plaintiffs' request for injunctive relief moot while knowing multiple exceptions to the mootness doctrine were present.

Argument

1.0 Supremacy and Controlling Authority

1.1 The Plaintiffs' Federal Rights Take Priority

The U.S. Constitution's Supremacy Clause had a good run until it was flipped on its head and its pockets emptied on September 12th, 2022 in the United States District Court for the District of Massachusetts. A number of other interesting developments took place then, as we will explore.

Article VI of the U.S. Constitution states:

> "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The District Court, however, would treat the Plaintiffs' federal rights as subordinate to the town-level mandates the Plaintiffs challenged. The U.S. Supreme Court has made clear such an inversion of the hierarchy of law is impermissible:

> "For even though that Clause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979).

See also Swift Co. v. Wickham, 382 U.S. 111, 120 (1965):

> "Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. *Gibbons v. Ogden*, 9 Wheat. 1."

1.2 Lower Courts Must Follow the Supreme Court's Instruction

This Court has recognized that lower courts must follow the Supreme Court's instruction. "Under the

doctrine of *stare decisis*, all lower federal courts must follow the commands of the Supreme Court, and only the Supreme Court may reverse its prior precedent." reh'g en banc granted, opinion vacated, 982 F.3d 50 (mem.) (1st Cir. Dec. 9, 2020).

One could sense the Supreme Court's exasperation in *Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98 (2021) at lower courts' careless disregard for the precedents the Supreme Court set:

> "This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. *See Harvest Rock Church v. Newsom*, 592 U. S. ___, 141 S.Ct. 889, 208 L.Ed.2d 448 (2020); *South Bay*, 592 U.S. ___, 141 S.Ct. 716; *Gish v. Newsom*, 592 U.S. ___, 141 S.Ct. 1290, ___ L.Ed.2d ___ (2021); *Gateway City*, 592 U.S. ___, ___ S.Ct. ___. It is unsurprising that such litigants are entitled to relief."

2.0 The Plaintiffs' Free Exercise of Religion Claim

2.1 The Constitution and Supreme Court Give Religious Liberty the Highest Priority

Let's take a step back for a moment and consider three distinct scenarios.

1st scenario: We live in a country whose Constitution explicitly forbids the people to practice religions of their own. In such a country, no person would be entitled to assert exemption from the Defendants' face

mask mandates due to the person's religious beliefs/convictions/practices.

2nd scenario: We live in a country whose Constitution neither forbids nor protects the people's practice of religion. In such a country, it could be argued that religious interests are on equal footing with secular interests. But it would be ambiguous.

3rd scenario: We live in a country whose Constitution explicitly forbids all levels of government from prohibiting a person's free exercise of religion. And it doesn't just forbid the government to mess with people's religious beliefs. It forbids the government to prohibit people's free exercise of their religions. This third scenario is, of course, not hypothetical. It is the United States of America. And in our country, if the government gives consideration or an exemption for secular reasons, it must also give equal or greater consideration or exemption for religious reasons. The right and requirement are unambiguous.

Our U.S. Supreme Court gets that principle—and insists on it—as explained next.

2.2 Strict Scrutiny Applies Here

The District Court cited some court rulings dismissing "medical autonomy" challenges to face mask mandates. But the Plaintiffs-Appellants are seeking to plead a free exercise of religion claim, not a medical autonomy claim. The *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) ruling the District Court cited predates judicially-established tripartite nuanced tiers of review. And the lower court rulings the District Court cited regarding religious challenges to face mask mandates were either flawed, involved cases

materially different than this one, and/or conflicted with U.S. Supreme Court instruction. Thus, we will now turn our attention to the Supreme Court's modern instruction.

The Supreme Court's latest ruling and instruction on free exercise of religion claims is in *Kennedy v. Bremerton School Dist.*, No. 21-418 (U.S. Jun. 27, 2022). And in *Kennedy* at 2-3 the Supreme Court made clear strict scrutiny applies in such cases:

> "Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiffs protected rights serve a compelling interest and are narrowly tailored to that end. *See Lukumi*, 508 U.S., at 533."

2.3 The Mandates Fail Strict Scrutiny Because They Treated Secular Interests More Favorably

The District Court asserted that the Defendants' face mask mandates were neutral and generally applicable and thus strict scrutiny does not apply. But they were not generally applicable.

In *Kennedy* at 16-18 the Supreme Court explains how general applicability and strict scrutiny work:

> "Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." *Id.*, at 879-881. Should a plaintiff make a showing like that, this Court

> will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Lukumi*, 508 U.S., at 546 . . . A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Fulton*, 593 U.S., at (slip op., at 6). Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. *See Lukumi*,508 U.S., at 546."

For years the U.S. Supreme Court has consistently held that an asserted compelling interest in denying a religious accommodation to a particular claimant is undermined by evidence that exemptions or accommodations have been granted for other interests. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. at 433, 436-37 (2006) and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780 (2014). The Supreme Court has held fast to this position regarding COVID-19 related mandates. See *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Applying that principle here, we see the Defendants allowed secular exemptions to their face mask mandates due to people's age (Cmp. Exhibit 3), work status, medical needs and/or disability (Cmp. Exhibit 5) while denying the Plaintiffs their religious exemptions to the mandates. Thus, the Defendants' mandates were not

generally applicable. Furthermore, the Plaintiffs were preparing an amended complaint with an exhibit revealing that the Board of Health Defendants granted an exemption for wind instrument players when the District Court flung out the whole case.

Following the Supreme Court's instruction in *Kennedy*, next we examine whether the Defendants had a compelling government interest to deny the Plaintiffs religious exemptions from their mandates. As explained above, the fact that the Defendants allowed other exemptions undermines any compelling interest they might have otherwise been able to claim in denying the Plaintiffs religious exemptions. "The Constitution neither mandates nor tolerates that kind of discrimination." *Kennedy v. Bremerton School Dist.*, No. 21-418,4 (U.S. Jun. 27, 2022).

Because the Defendants cannot claim a compelling government interest to deny the Plaintiffs' religious exemptions, according to the Supreme Court in *Kennedy*, this creates a violation of the Plaintiffs' right to free exercise of religion. However, let's suppose hypothetically that the Defendants had a compelling government interest to deny the Plaintiffs' religious exemptions. Then the Supreme Court would have us examine whether the means the Defendants used was narrowly tailored. Accepting the complaint's factual allegations as true and drawing all reasonable inferences in the Plaintiff's favor, we would find that the Defendants' means were ineffective, harmful, futile, not approved for the purpose, and certainly not narrowly tailored (Cmp. Exhibits 4 and 6 including their medical facts and citations). (Not that it's necessary, but the amended complaint the Plaintiffs were preparing included more facts further establishing that the

means were not narrowly tailored.) Moreover, "narrow 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*, 141 S. Ct. 1294, 1296-97 (2021). Hence, the Defendants' mandates and conduct fail the strict scrutiny test in multiple ways.

2.4 The Plaintiffs are Entitled to Injunctive Relief

As it is a ruling this Court cited in one of its related cases last year, the Plaintiffs present the Supreme Court's take on injunctive relief in situations as this:

> "Applicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights "for even minimal periods of time"; and the State has not shown that "public health would be imperiled" by employing less restrictive measures. *Roman Catholic Diocese*, 592 U. S., at, 141 S.Ct., at 68. Accordingly, applicants are entitled to an injunction pending appeal." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

3.0 The District Court Failed to Give the Requisite Leave to Amend

The Plaintiffs can certainly bring valid claims of violation of their right to free exercise of religion and other civil rights in this case. But the Plaintiffs would like to acknowledge a significant weakness of their complaint the District Court dismissed: their 1st

amendment free exercise of religion claim was not pled clearly.

This was the pro se Plaintiffs' first foray into a federal lawsuit. Though they did learn about litigation, read applicable Federal and Local Rules of Civil Procedure, read statutes upon which they relied, consulted with the Court Clerk's staff, used the template for a civil rights complaint for pro se non-prisoner plaintiffs provided online by the District Court, and made a continuous good faith effort to abide by the rules and meet the requirements, they nonetheless stumbled here and there.

One of the Plaintiffs' mistaken understandings was that merely pleading a claim for violation of their rights under the 14th Constitutional amendment was sufficient to plead violation of rights in the Bill of Rights. In retrospect, though, the Plaintiffs recognize a flaw in that reasoning. How can a court be expected to know which particular Constitutional right(s) the Plaintiffs claim were violated if the complaint does not specify them?

When confronted with their mistake, the Plaintiffs addressed it on pages 15-16 of their opposition (ECF 23) to the Defendant's motion to dismiss. There, they did mention medical autonomy in two sentences. But their argument emphasized their free exercise of religion claim and the District Court acknowledged that the Plaintiffs were attempting to plead that claim.

In *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994), this Court made clear that under Fed. R. Civ. P. 12(b)(6), a district court must give plaintiffs notice of what the court perceives as the complaint's deficiencies and an opportunity to amend it. *Trans-*

Spec Truck v. Caterpillar, 524 F.3d 315, 327 (1st Cir. 2008) ("Rule 16(b) requires that the district court enter a scheduling order setting the deadlines for subsequent proceedings in the litigation, including amendment of the pleadings. Fed. R. Civ. P. 16(b)(1), (3)(A). One purpose of the rule is "to assure 'that at some point . . . the pleadings will be fixed.'" *O'Connell*, 357 F.3d at 154 (quoting Adv. Comm. Notes to 1983 Amends, to Fed. R. Civ. P. 16(b)).") But the District Court did not give the Plaintiffs leave to file an amended complaint in order to better state their free exercise of religion claim. Nor did the District Court convene a scheduling conference or issue a scheduling order in the 10 months the lawsuit was live before the District Court perfunctorily dismissed it. Thus, the "freely given" leave to amend requirement of Fed. R. Civ. P. 15(a)(2) applied. The District Court thereby violated both Fed. R. Civ. P. 16(b) and 15(a)(2)—while also denying the Plaintiffs the hearing they requested on the Defendants' motion to dismiss (ECF 30).

Furthermore, "A motion to dismiss should be granted only if it 'appears to a certainty that the plaintiff would be unable to recover under any set of facts.' *Roma Const. Co. v. aRusso*,96 F.3d 566, 569 (1st Cir. 1996); *see also LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 509 (1st Cir. 1998)." *State St. Bk. and Tr. Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001). The District Court failed to establish that the Plaintiffs could not recover under any set of facts.

4.0 Plaintiff Bush's A.D.A. Claim

4.1 One of the Defendants' Mandates Obviously Violated the A.D.A.

Before we delve into what the Americans with Disabilities Act ("A.D.A.") statute and its federal regulations have to say about this matter, let's take a quick look at the mandates in question and apply common sense. The Board of Health's face mask mandate (Cmp. Exhibit 5) allowed people to self-exempt themselves for medical/disability reasons without requiring their personal medical information or documentation. In contrast, the Gleason Public Library's face mask mandate (Cmp. Exhibit 3) allowed for no medical/disability exemptions at all. At first glance, does the Board of Health's mandate appear to violate or abide by federal and state civil rights laws prohibiting disability-based discrimination? Can the same be said for the Gleason Public Library's mandate?

Under such federal and state civil rights laws prohibiting discrimination on the basis of disability, Plaintiff Michael Bush challenged the Gleason Public Library's mandate and not the Board of Health's mandate.

4.2 The Gleason Public Library Is a Public Accommodation

42 U.S.C. § 12181(7)(H) provides one of the several definitions of public accommodations under the A.D.A.: "a museum, library, gallery, or other place of public display or collection". M.G.L. Ch. 272 § 92A also defines a public accommodation for the purposes of §§ 92A and 98 as including a public library. A part of the Defendant Town of Carlisle, the Gleason Public

Library is therefore a public accommodation covered by subchapter III of the A.D.A. and M.G.L. Ch. 272 §§ 92A and 98.

4.3 The Court Substituted the Defendants' Allegations for the Plaintiffs'

On Page 11 of their memorandum in support of their motion to dismiss, the Defendants asserted that "The failure to wear face masks in indoor public places during the COVID-19 pandemic poses a significant risk to the health or safety of other visitors." The District Court accepted those factual allegations as true and reiterated them in the Court's Memorandum and Order dismissing the Plaintiffs' case. There are at least two logical and legal defects of that position.

First, to assume those as facts, the District Court had to substitute the Defendants' factual allegations that 1) wearing any sort of face mask prevents the spread of COVID-19 indoors and 2) the existence of COVID-19 was of limited duration for the Plaintiffs' factual allegations that: "relevant facts and the most credible scientific studies reveal that masks are not effective for prevention of the spread of COVID-19 3", "similar to the annual influenza virus that has existed for over a century, SARS-CoV-2 cannot be eradicated and COVID-19 will be a part of life indefinitely.", and "The U.S. Food and Drug Administration's (FDA) Emergency Use Authorization (EUA) for surgical and/or cloth masks requires that, 'The product is not labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or related uses or is for use such as infection prevention or reduction.'" (Cmp. Exhibits

4, 6, 7, and 8 with medical citations). This Court holds that exhibits attached to the complaint are properly considered part of the pleading "for all purposes," including Rule 12(b)(6). *Trans-Spec Truck v. Caterpillar*, 524 F.3d 315, 321 (1st Cir. 2008). Once the District Court substituted the Defendants' memorandum's factual allegations for the Plaintiffs' complaint's facts, it then analyzed those "facts" in a light most favorable to the Defendants and drew inferences in the Defendants' favor.

Second, the Board of Health's mandate (Cmp. Exhibit 5) exempted those "unable to wear a face mask due to a medical condition or disability and in employee's private work space". Thus, the Defendants' own mandate undermined their assertion in their memorandum that failing to wear some sort of face mask in indoor public spaces posed a threat to the health and safety of other visitors. Yet despite this contradiction, the District Court accepted the Defendants' factual allegations in their memorandum as true and drew inferences from those in the Defendants' favor rather than accepting the facts in the Plaintiffs' complaint and drawing inferences from those in the Plaintiffs' favor. And to leave no doubt as to its disregard for the Plaintiffs' facts, the District Court cited dismissal of the *Delaney v. Baker*, 511 F. Supp. 3d 55, 74 (D. Mass. 2021) case while failing to note that dismissal relied upon those particular litigants' stipulation two years ago that "It has been proven that the wearing of masks can slow the transmission of the spread of the coronavirus."

4.4 A Person Cannot Be Treated as a "Threat" Without an Individualized Assessment

The District Court cited case law indicating "the ADA allows public entities to consider whether even otherwise qualified applicants for accommodation pose a direct threat to the health and safety of others." But the District Court omitted that 28 C.F.R. §§ 36.208 and 35.139 instruct that public accommodations and public entities such as the Defendants may only allege a person poses a direct threat to the health or safety of others after conducting an objective assessment individualized to that person. (Those C.F.R. are attached at pages 24-25 of the Addendum.) If only the District Court had accepted the facts of the complaint and its exhibits as true, it could have reasonably inferred that the Defendants did not conduct any such individualized assessments of the Plaintiffs.

4.5 The District Court Omitted Two of the Three Definitions of Disability

In its memorandum and order the District Court asserted "A disability is "a physical or mental impairment that substantially limits one or major life activities. . . . " 42 U.S.C. § 12102(1)(A)". But that is only one of the three definitions of disability that the A.D.A. provides. The complete list from 42 U.S.C. § 12102(1) is attached at page 26 of the Addendum.

4.6 If the Disability Was Inadequately Pled, the Remedy Was Amendment

Bush provided a short and plain statement of his disability in the complaint, as that's all that Fed. R. Civ. P. 8(a)(2) requires. Nevertheless, he can see how

a District Court may have wanted it to be more fully fleshed out to align with the A.D.A.'s definitions. However, 28 C.F.R. § 36.101(b) instructs, "The primary object of attention in cases brought under the A.D.A. should be whether entities covered under the A.D.A. have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of 'disability.' The question of whether an individual meets the definition of 'disability' under this part should not demand extensive analysis."

The District Court asserted that Bush had not adequately pled his disability under the A.D.A. It then simply tossed out Bush's A.D.A. claim altogether rather than giving Bush leave to file an amended complaint to cure the supposed deficiency.

4.7 The Defendants Unlawfully Screened Out Disabled Persons

The District Court asserted that "their claim still fails because they plead no facts that plausibly suggest that they were excluded from the Library or otherwise discriminated against by reason of this disability." That is false, for—as specified above—the library's face mask mandate allowed for no exemptions/accommodations due to disability. Thus, the District Court was either disregarding the facts of the complaint or reasoning that discrimination is perfectly lawful as long as it's in the form of a written mandate. If it's the latter, that would undermine the explicit findings of the A.D.A. (attached at page 28 of the Addendum) and its purpose which is "a clear and *comprehensive* national mandate for the *elimination* of discrimination" (Italics added.)

Such reasoning by the Court would also fail to recognize that in 42 U.S.C. § 12182(b)(2)(A)(i), the A.D.A. specifies that unlawful discrimination includes but is not limited to "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations . . . ". The library's mandate that allowed for no medical exemptions screened out such persons, thereby violating Bush's rights.

4.8 The Defendants Failed to Make Necessary Modifications

Additionally, 42 U.S.C. § 12182(b)(2)(A)(ii) instructs that "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . . " also constitutes unlawful discrimination. Thus, the Defendants violated Bush's rights by failing to make necessary modifications to the library's mandate when Bush informed them that the mandate violated the A.D.A. (Cmp. P. 12 ¶¶ 4, 5, 6, and P. 13 ¶ 10 and Exhibits 2, 3, 6, 7, and 8.)

4.9 Bush Made Reasonable Effort to File an MCAD Complaint

The District Court asserted that Bush could not bring claims under M.G.L. Ch. 272 §§ 92A and 98 because he had not stated in his complaint that he had filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD"). Bush could have

asserted in an amended complaint that he did in fact attempt to file such a complaint but was stymied by that agency's absurd process that disallowed an aggrieved person to even file a complaint until a far-off "intake interview". But Bush was not given the opportunity to plead this, as the District Court just threw the whole case out without giving leave to amend the original complaint.

5.0 The Plaintiffs Have Legal Standing to Bring Claims

5.1 The District Court Raised Legal Standing *Sua Sponte*

Page 6 of the Memorandum & Order mostly consists of a massive footnote. In it the District Court essentially argues that the Plaintiffs cannot possibly have legal standing to bring claims since face mask mandates are presumptively impervious to legal challenge. The District Court raised this argument for dismissing the Plaintiffs' whole case *sua sponte*—the Defendants had not challenged the Plaintiffs' legal standing under Fed. R. Civ. P. 12(b)(1). Incidentally, on page 19 of the Memorandum & Order, the District Court cited as support for its dismissal of this case its other *sua sponte* dismissal of another pro se plaintiff's (Ryan Manning's) challenge to a face mask policy without giving leave to amend. Both orders were issued by the same Judge.

This Court has held that this sort of *sua sponte* dismissal of complaints is virtually always improper:

> "The type of sua sponte dismissal here at issue — a dismissal on the court's own initiative, without affording the plaintiff either notice

> or an opportunity to be heard — is disfavored in federal practice. If a defendant files a motion to dismiss for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), the plaintiff, as a practical matter, has notice of the motion and an opportunity to amend the complaint as of right, *see* Fed. R. Civ. P. 15(a). But where, as here, a court jettisons an action sua sponte, the dismissal deprives the plaintiff of these core protections." *Gonzalez-Gonzalez v. U.S.*, 257 F.3d 31, 36 (1st Cir. 2001). "In short, *sua sponte* dismissals are risky business. We will uphold a sua sponte order of dismissal only if the allegations contained in the complaint, taken in the light most favorable to the plaintiff, are patently meritless and beyond all hope of redemption." *Id.*

The allegations and claims the District Court knew the Plaintiffs were making and attempting to make in this case are far from meritless or "beyond all hope of redemption". And the District Court failed to give the requisite leave to amend. The District Court thereby committed reversible error by dismissing this case for lack of legal standing *sua sponte*. For its *sua sponte* argument and dismissal, the District Court also relied on case law incongruent with this case, as we explore next.

5.2 The District Court Used Red Herrings

Momentarily we turn to what the Supreme Court has to say about legal standing to bring claims in federal courts. But let's first address the red herrings the District Court threw into its whopping footnote on page 6. In the *Bechade v. Baker*, Civil Acton No. 20-

11122-RGS (D. Mass. Sep. 23, 2020) case: 1) the defendants moved to dismiss under Rule 12(b)(1), not solely 12(b)(6) as the Defendants have in this case, 2) the facts were considerably different than those of this case, 3) the District Court disregarded the Supreme Court's instruction that "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance" (more on this below), 4) Bechade did not seek monetary damages as the Plaintiffs do in this case, and 5) Bechade brought entirely different claims than the Plaintiffs do in this case.

In the *Health Freedom Def. Fund, Inc. v. City of Hailey*, 1:21-cv-00389-DCN (D. Idaho Aug. 23, 2022) case: 1) the defendants moved to dismiss for lack of standing, not solely under Rule 12(b)(6) as the Defendants have in this case, 2) the facts were considerably different than those of this case, and 3) Health Freedom brought entirely different claims than the Plaintiffs do in this case.

In the *Carlone v. Lamont* No. 21-871, (2d Cir. Nov. 1, 2021) case: 1) the defendants moved to dismiss on jurisdictional grounds, not solely under Rule 12(b)(6) as the Defendants have in this case, 2) the facts were very different than those of this case, and 3) Carlone brought entirely different claims than the Plaintiffs do in this case. "Under Carlone's theory, we would have to infer that every practicing lawyer in Connecticut has suffered an injury in fact by the closure of the State's civil courts-which of course is not the case, because lawyers' practices and circumstances vary so widely." *Id.*

5.3 The Plaintiffs Pled Particularized, Concrete Injuries

As for the governing authority on legal standing to sue in federal court, the U.S. Supreme Court wrote in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." The Plaintiffs in this case did suffer injuries in fact that were fairly traceable to the Defendants' face mask mandates and are likely to be redressed by a favorable judicial decision, as follows.

"To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." . . . "For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." . . . "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm." *Id.* As established in their original complaint and its exhibits, the Plaintiffs' federal rights under the free exercise of religion clause, peaceable assembly clause, A.D.A., and/or M.G.L. Ch. 272 §§ 92A and 98 were violated by the Defendants' mandates which effectively barred the Plaintiffs from public indoor spaces. Thus, the Plaintiffs' injuries were particularized and fairly traceable to the Defendants' challenged conduct.

As for the element of concreteness, in *Spokeo* the Supreme Court further explained "A concrete injury must be de facto; that is, it must actually exist . . . Concrete is not, however, necessarily synonymous with tangible. Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. *See, e.g., Pleasant Grove City v. Summum*,555 U.S. 460, 129 S. Ct. 1125, 172 L.Ed.2d 853 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,508 U.S. 520,113 S. Ct. 2217, 124 L.Ed.2d 472 (1993) (free exercise)." (Internal quotation marks omitted.) The Plaintiffs' injuries in this case were concrete, as the Defendants' mandates barred the Plaintiffs from indoor public spaces due to their disabilities and religions and the Defendants failed to correct those violations upon the Plaintiffs informing the Defendants in writing of them. Whether the Defendants barred the Plaintiffs individually is irrelevant. The issue is whether the Defendants' mandates barred classes of people (*e.g.* disabled and/or religious) to which the Plaintiffs belonged and/or violated the Plaintiffs' rights (*e.g.* peaceable assembly).

5.4 The Medium by Which the Plaintiffs' Rights Were Violated Is Irrelevant

In its footnote on this topic the District Court seemed to imply that only Plaintiff Monica Granfield could potentially assert a claim in this suit because Granfield was the only one who was accosted about wearing a face mask in the public library. That assertion by the District Court both defies common sense and lacks legal basis. Neither the U.S. Constitution nor the Supreme Court hold that people can sue in federal court only if their rights were violated in

person, or by telephone, or on horseback, or in writing, or by any other particular medium. In this case, the Plaintiffs' rights were violated by the Defendants' written mandates, the Plaintiffs notified the Defendants in writing and demanded resolution, and the Defendants blew them off.

The implications of the District Court's reasoning are grave. When their rights have been violated, litigation is the last resort of peaceable Americans. And if—according to the District Court's reasoning—people may not bring suit against government personnel or entities for violation of their rights unless those people first confront those government personnel in person, this would both unjustly hinder people in upholding their rights and undermine peace and order in society. "The courts play an integral role in maintaining the rule of law, particularly when they hear the grievances voiced by minority groups or by those who may hold minority opinions." ~ Overview-Rule of Law at https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (Last visited November 15, 2022.)

5.5 If Elaboration on Injury Was Needed, the Remedy Was Amendment

If the District Court wanted the Plaintiffs' injuries spelled out more explicitly in the complaint (*e.g.* "The Defendants' face mask mandates allowed for certain secular exemptions. The mandates failed to allow for religious exemptions. Plaintiffs A, B, and C's sincerely held religious beliefs/practices kept them from following the Defendants' mandates to wear face masks. The mandates effectively barred the Plaintiffs from public indoor spaces due to their religious beliefs/practices."),

then the proper remedy was to grant the Plaintiffs leave to file an amended complaint.

6.0 The Court Wrongly Declared Mootness

6.1 The Court Relied on Documents Filed Improperly

The documents the District Court relied upon (ECF 28 and 32) to declare the Plaintiffs' request for injunctive relief moot were filed by the Defendants without leave of the Court, in violation of Local R. Civ. P. 7.1(b)(3). The District Court gave no explanation for why it granted the Defendants' motion to dismiss that was filed without the litigants' conference required by Local R. Civ. P. 7.1(a)(2). Likewise, the Court also gave no explanation why it relied on documents the Defendants filed without requisite leave. (Those Rules are attached at 32 of Addendum.)

6.2 The Court Ignored Existing Exceptions to Mootness Doctrine

In response to the Defendants' ex parte letter filed without leave in the District Court, the Plaintiffs filed a letter regarding the mootness doctrine (ECF 31). In it the Plaintiffs informed the Court that their case and request for injunctive relief could not be moot because the Defendants' face mask mandates were capable of repetition while evading judicial review; that a Defendant stated at a February 23rd, 2022 public meeting they may reissue their challenged mandates at their discretion; and there is a chance of money changing hands as a result of the lawsuit and thus according to the U.S. Supreme Court it "remains

live." In its Memorandum and Order the District Court distorted and/or skirted those facts.

6.3 The District Court Disregarded This Court's Instruction

As purported support for its declaration of mootness here, the District Court cited this Court's ruling of mootness in *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 9 (1st Cir. 2021). But the District Court disregarded that this Court noted in its *Bit Labs* ruling that the Plaintiff in that case did not seek "money damages". In contrast, the Plaintiffs in this case do seek money, which precluded their case being ruled moot.

Moreover, this Court deemed Baker's written assurance that his challenged order would not recur to be "critical" in its finding of mootness. In contrast, the Board of Health Defendants in this case publicly stated that their challenged conduct may very well recur and they reserve the right to repeat it. The Plaintiffs raised these key distinctions—and additional important points—in their letter regarding the issue of mootness. But the District Court disregarded those distinctions. And it misrepresented this Court's ruling in *Bos. Bit Labs, Inc.* as supporting the District Court's ruling when in truth it did not.

6.4 The District Court Disregarded Supreme Court Instruction

Just as it disregarded this Court's instruction regarding mootness in *Bos. Bit Labs, Inc.* in order to declare the Plaintiffs' request for injunctive relief moot, the District Court also disregarded the Supreme Court's instruction on mootness and exceptions to it.

The Plaintiffs cited this extensive case law from the Supreme Court in their letter regarding mootness doctrine, so they will not rehash it. But particularly on point here is the Supreme Court's instruction in *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (which is a ruling this Court actually cited in *Bos. Bit Labs, Inc.*):

> "... even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants remain under a constant threat that government officials will use their power to reinstate the challenged restrictions. *Roman Catholic Diocese*, 592 U.S., at ___, 141 S.Ct., at 68; *see also High Plains Harvest Church v. Polis*, 592 U.S. ___, 141 S.Ct. 527, 208 L.Ed.2d 503 (2020)." (Internal quotation marks omitted.)

7.0 The Court Wrongly Declared the Defendants Had Authority

7.1 The Library Has Cited No Authority Because It Has None

Let's remove the elephant from the room that the District Court ignored: The Gleason Public Library and its Director Defendant Martha Feeney-Patten have identified no statutory authority to have issued their face mask mandate.

"Police powers" traditionally belonging to the state do not empower municipal personnel or entities to do

whatever they want. Police powers enable the legislature to pass laws regarding public safety, morality, peace and quiet, law and order, etc. But without a law authorizing public libraries, their trustees, or their directors to issue face mask mandates, those entities and personnel do not have that authority. Thus, the Plaintiffs-Appellants request this Court issue an injunction to stop that conspicuously *ultra vires* conduct. And next we turn to the Board of Health and its authority—or lack thereof.

7.2 The Court Cited Cases Inapplicable Here

For purported support of its assertion that the Board of Health Defendants had legal authority to issue face mask mandates, the District Court cited on page 8 of its Memorandum & Order four other court cases. Two of those rulings (*Independence Park,* and *Tri-Nel Mgmt. Inc.*) did not hold that Boards of Health or municipal entities of any kind had authority to issue face mask mandates.

The Plaintiffs can neither find any trace of the *Avila v. Ojikutu* ruling online, nor did the District Court provide any evidence it was truly applicable here.

As for the *Family Freedom Endeavor, Inc.* case, in its Memorandum Of Decision And Order On Plaintiffs' Motions For Preliminary Injunction that state court substituted its preferred "facts" for the plaintiffs' facts, largely focused on the state's authority rather than municipalities' authority, committed some of the same judicial errors the District Court did in this case (§§ 7.3 through 7.7 below), and did not address the M.G.L. Ch. 111 §§ 31 and 104 statutes upon which the Board of Health Defendants in this case rely for their purported authority to issue face mask mandates.

Thus, that court's denial of those plaintiffs' motion for preliminary injunction was both flawed and inapplicable here.

7.3 The Legislature Has Been Explicit, Not Cryptic

Boards of Health in MA have mainly dealt with and issued regulations regarding environmental matters affecting public health, such as septic systems, agriculture, food safety, licensing food establishments, etc. In the limited instances where the MA legislature intended to authorize Boards of Health to impose on or restrict persons, it passed laws that were explicit and precise both in their title and content:

M.G.L. Ch. 111 § 95 titled "Powers and duties of boards in cases of infectious diseases" authorized Boards of Health to quarantine an infected person. (Addendum at 33)

M.G.L. Ch. 111 § 181 titled "Enforcement of vaccination of inhabitants of towns" authorized Boards of Health to do what the title states and nothing else. (Addendum at 34)

Thus, if the legislature intended to authorize Boards of Health to mandate people wear face masks, it would have passed a law to that effect.

7.4 Words Must Be Presumed to Bear Their Ordinary Meanings

A cardinal rule of judicial interpretation of laws is that words are presumed to bear their ordinary meanings. On page 7 of its Memorandum & Order the Court interpreted the word care to mean the same thing as means. But the word care has a meaning

distinct from the word means, so the District Court's reasoning violates this rule of judicial interpretation.

7.5 No Interpretation Should Render a Provision Superfluous, Unlawful, or Invalid

Another rule important here is that no interpretation should be adopted that renders the provision in question—or any other provision superfluous, unlawful, or invalid. But the District Court's interpretation of M.G.L. Ch. 111 §§ 31 and 104 (Addendum at 35) would render those provisions invalid by authorizing the Board of Health to issue any regulations it wishes to.

The District Court's interpretation of §§ 31 and 104 also renders both §§ 95 and 181 (which authorize compelled quarantine and vaccination, respectively) superfluous. Logically, there is no need for the legislature to have given Boards of Health authority to impose on or restrict people in §§ 95 and 181's two precise ways if it intended in §§ 31 and 104 to authorize Boards of Health to mandate any measures they wish to dream up and impose on people.

Moreover, the District Court's interpretation that M.G.L. Ch. 111 § 31 authorizes Boards of Health to adopt face mask mandates renders the bulk of the statute (regulating sewage, farming, etc.) superfluous. Thus, the District Court has violated this important rule of judicial interpretation in numerous ways.

7.6 The Board of Health's Actions Belie Its Claims

M.G.L. Ch. 111 § 95 ("Powers and duties of boards in cases of infectious diseases") states that if a person is infected with a disease dangerous to public health, the town's Board of Health "shall immediately provide such hospital or place of reception and such nurses and other assistance and necessaries as is judged best for his accommodation and for the safety of the inhabitants". The statute does not say that a Board of Health may take those specific actions. The statute says the Board of Health shall take those actions and it shall take them immediately.

With that understanding, if: 1) people in a MA town were infected (and sick) with a particular infectious disease, and 2) the town's Board of Health did not take the actions that M.G.L. Ch. 111 § 95 dictates must be taken if the disease is dangerous to the public health, then we can only deduce that the Board of Health is either grossly negligent and lawless or that it did not truly deem the infectious disease to rise to the level of being dangerous to public health.

The Board of Health in this case never took any of the actions § 95 requires or authorizes Boards of Health to take in the event of an outbreak of an infectious disease dangerous to public health. Yet the Board of Health Defendants claimed that COVID-19 suddenly became a disease dangerous to public health in August 2021 thereby authorizing them to issue a face mask mandate pursuant to M.G.L. Ch. 111 § 104. And the District Court fell hook, line, and sinker for that shell game.

7.7 Every Word Should Be Given Effect; None are Surplusage

Another rule of judicial interpretation of laws is that if possible, every word should be given effect; no word should be read as surplusage. The District Court notes that M.G.L. Ch. 111 § 31 states "Boards of Health may make reasonable health regulations". According to this rule of judicial interpretation the word reasonable in that sentence must be given effect; it cannot be read as surplusage. And if the District Court had accepted the Plaintiffs' facts (§ 4.3 above) and drawn all reasonable inferences from them in the Plaintiffs' favor, the Court would have concluded the mask mandate was futile, harmful, and reckless rather than reasonable.

7.8 *Inclusio Unius Est Exclusio Alterius*

A canon of construction that is critical here translates from the Latin to "the inclusion of one implies the exclusion of others". By including a particular measure (giving public notice of infected places) in its title and body, M.G.L. Ch. 111 § 104 implies the exclusion of other measures. The District Court's assertion that § 104 authorizes a Board of Health to mandate measures that were not included in the statute violates this canon of construction.

The District Court's interpretation of the other statute the Board of Health cited for its purported authority, M.G.L. Ch. 111 § 31, also violates this same canon of construction. § 31 specifies "farming", "agriculture", "subsurface disposal of sanitary sewage", the "state environmental code", "farmers markets", and "poultry, livestock, or bees". By including in its title and body the specific matters about which Boards

of Health are authorized to issue regulations and take action, § 31 thereby excluded other matters such as face masks and infectious disease. And to leave no doubt as to the intended nature and limited range of regulations § 31 authorizes, in its last sentence it states "Boards of health *shall* file with the department of *environmental protection*, attested copies of sanitary codes, and all rules, regulations and standards which have been adopted . . . " (Italics added.)

8.0 The Defendants Forfeited Qualified Immunity

8.1 The Defendants Knew They Were Violating Federal Rights

The District court cited case law from this Court stating that government officials are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time." The Plaintiffs-Appellants agree with that assertion. But the District Court's conclusion that the Defendants are therefore entitled to qualified immunity in their official and individual capacities is incorrect. The free exercise of religion and the A.D.A. are clearly established federal rights. The Defendants also knew their face mask mandates were violating those rights, as the Plaintiffs informed them of that. (Cmp. P. 13 ¶ 10 and Exhibits 6, 7, and 8.)

8.2 The Defendants Failed to Correct Those Violations

That the Defendants could retain qualified immunity while issuing face mask mandates that

failed to allow for medical and religious exemptions is a questionable notion at best. And according to the Supreme Court's precedents, the Defendants forfeited all qualified immunity when they failed to correct their violations after being informed of them. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) ("But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?") *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.")

CONCLUSION

In order to dismiss the pro se Plaintiffs-Appellants' entire case without giving leave to amend, the District Court:

1. Ignored and even argued against the facts of the complaint.
2. Analyzed the "facts" and drew inferences in the Defendants' favor.
3. Flouted multiple Federal and Local Rules of Civil Procedure.
4. Misrepresented and misapplied case law while ignoring what the Constitution, applicable statutes, and their regulations actually state.
5. Sidestepped substantial, clear instruction from this Court and the U.S. Supreme Court.

6. Disregarded multiple cardinal rules of judicial interpretation and canons of construction.

7. Denied the Plaintiffs' written request for a hearing (ECF 30).

The pro se Plaintiffs-Appellants simply ask this Court to rectify those errors. Specifically, the Appellants request this Court:

1. Reverse the District Court's order dismissing the Plaintiffs' claims specifically under the A.D.A., M.G.L. Ch. 272 §§ 92A and 98, free exercise of religion, right to peaceably assemble, 42 U.S.C. § 1983, and the 14th Amendment.

2. Reverse the District Court's declaration that the Defendants have qualified immunity in their individual capacities.

3. Enjoin the Defendants from implementing a face mask policy of any kind unless and until a statute explicitly authorizes them to implement a face mask policy.

4. Grant the Plaintiffs' motion to compel discovery (ECF 36).

5. Give the Plaintiffs leave to file an amended complaint.

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
Phone: 978-734-3323
Email: bmoc54@verizon.net

November 18, 2022

/s/ Robert Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741
Rge11@yahoo.com
978 656 6756

November 18, 2022

/s/ Katalin Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741
978 656 6756

November 18, 2022

/s/ Linda Taylor
Pro Se
879 Concord Street
Carlisle, MA 01741

November 18, 2022

/s/ Lisa Tiernan
Pro Se
116 Lowell Street
Westford, MA 01886

November 18, 2022

/s/ Susan Provenzano
Pro Se
80 Mill Pond Lane
Carlisle, MA 01741

November 18, 2022

/s/ Monica Granfield
Pro Se
110 Carlisle Pines Drive
Carlisle, MA 01741

November 18, 2022

/s/ Ann Linsey Hurley
Pro Se
10 Half Moon Hill
Acton, MA 01720

November 18, 2022

BRIEF OF AMICUS CURIAE JILL OWENS IN SUPPORT OF APPELLANTS (NOVEMBER 25, 2022)

No. 22-1755

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; SUSAN PROVENZANO; ROBERT EGRI; KATALIN EGRI; MONICA GRANFIELD; ANN LINSEY HURLEY,

Pro Se Plaintiffs-Appellants,

JOSEPH PROVENZANO; KATE HENDERSON; IAN SAMPSON; ANITA LOPEZ,

Pro Se Plaintiffs,

v.

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants-Appellees.

No. 22-1755

On Appeal from the United States District Court
for the District of Massachusetts

Brief of amicus curiae Jill Owens in support of Appellants

As I am not an attorney and don't have much in the way of legal arguments to present, this brief will be short.

The Defendants' face mask mandates barred me and my child from indoor public spaces in the town in which we reside and pay taxes, Carlisle Massachusetts. Based on my individual religious and philosophical beliefs, I intend to join the Plaintiffs' lawsuit. I am a practicing Anthroposophist and have been for over thirty years. The central tenet of my religion and its associated philosophy is individual freedom. This includes the freedom "to care for myself and others in community" as I see fit, as long as I do no harm.

I take exception to this precedent of mandating masks for asymptomatic individuals because it affords unchecked power to the public health officials who now get decide what the definition of "diseased" is. If this decision is not based on symptoms (tested for or otherwise evidenced), what then is it based on? That unchecked power threatens my individual freedom as an Anthroposophist and as a citizen.

We homeschool our disabled son, Thomas, and so our being barred from the library each week was a hardship. The resources at the library had been an integral part of his lessons over the last eight years. It was after great consideration that we decided it was more important to align with my strongly held convictions than to have access those important resources. Therefore, we found those resources elsewhere at our own expense.

We wish to join this lawsuit to redress the violation of our right to religious freedom under the constitution. On September 11, 2022 I signed the enclosed affidavit in support of the Plaintiffs' motion for leave to file an amended complaint so that I could be added as a Plaintiff. But before the Plaintiffs had a chance to file the motion for leave to file an amended complaint, the District Court threw the case out.

Pro se appellant Michael Bush is not an attorney and did not provide me legal advice. But Mr. Bush did provide information on this case so that I could accurately identify it to this Court. He also directed me to Federal Rule of Appellate Procedure 29 so that I could understand the procedure for filing a brief as an amicus curiae. And he offered to electronically file the brief for me. But the statements here are my own and I file this brief of my own accord.

I ask that this Court of Appeals reverse the District Court's dismissal and give the Plaintiffs leave to file an amended complaint.

Date: November 25, 2022

Signature: /s/ Jill Owens

132 Pheasant Hill Lane
Carlisle MA 01741
Email: jillmowens63@gmail.com

REPLY BRIEF OF
PRO SE PLAINTIFFS-APPELLANTS
(FEBRUARY 19, 2023)

No. 22-1755

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; SUSAN PROVENZANO; ROBERT EGRI; KATALIN EGRI; MONICA GRANFIELD; ANN LINSEY HURLEY,

Pro Se Plaintiffs-Appellants,

JOSEPH PROVENZANO; KATE HENDERSON; IAN SAMPSON; ANITA LOPEZ,

Pro Se Plaintiffs,

v.

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants-Appellees.

No. 22-1755

On Appeal from the United States District Court
for the District of Massachusetts

Reply Brief for the Pro Se Plaintiffs-Appellants

[. . .]

An Abbreviated Recap of How We Got Here

Throughout much of 2020 and 2021 the Gleason Public Library of the Town of Carlisle in Massachusetts imposed a mandate that barred anyone from the library over the age of two years who did not wear a face mask. The library allowed for no medical or religious exemptions. The Town of Carlisle has identified no statutory authority for the library's mandate.

During much of 2020 and into 2021 Library Director Martha Feeney-Patten persisted in communicating the face mask mandate whose legality resident Michael Bush had challenged.

On August 25, 2021 the Town of Carlisle's Board of Health adopted an indoor face mask mandate for all indoor spaces open to the public. The mandate exempted those "unable to wear a face mask due to a medical condition or disability and in employee's private work space where face masks are encouraged." As purported statutory authority for its mandate, the Board of Health cited Massachusetts General Laws Chapter 111 §§ 31 and 104.

On September 8th, 2021 several of the Plaintiffs-Appellants ("Aggrieved Residents") delivered by mail their "Notice and Demand Letters" to the Defendants-Appellees Town of Carlisle's Administrator Timothy Goddard, Health Agent Linda Fantasia, and Library Director Martha Feeney-Patten. The Letters were accompanied by several exhibits. The Letters notified the Administrators that they did not have the legal authority to issue the mandates, that the mandates violated the Aggrieved Residents' rights, that the Aggrieved Residents demanded resolution within 15 days, and related matters.

The Administrators did not correct their violations of the Aggrieved Residents' rights and have never provided a substantive response to the Letters.

The Administrators persisted with their challenged face mask mandates until they lifted the mandates several months later in 2022.

On November 4th, 2021 several of the pro se Aggrieved Residents filed their complaint against the Administrators in the United States District Court for the District of Massachusetts. On January 5th, 2022 the Defendants filed their motion to dismiss for failure to state a claim eligible for relief. On January 18th, 2022 the Plaintiffs filed their opposition to the motion to dismiss.

On September 12th, 2022 the District Court issued its Memorandum and Order granting the Administrators' motion to dismiss for failure to state a claim and *sua sponte* dismissing the case on the grounds of legal standing. The District Court did not give or mention leave to amend the pro se Plaintiffs' original complaint.

Argument

1.0 The Town Administrators attempted to introduce conflicting factual allegations, which is impermissible at this stage.

In their brief the Appellees / Town Administrators attempted to introduce factual allegations of their preference. They included everything from the Administrators' opinions of COVID-19 to grossly misrepresenting data on deaths associated with COVID-19 published by the Massachusetts Department of Public Health.

The Appellants/Aggrieved Residents could counter by pointing out that according to the death certificates, no town residents died of COVID-19 during 2020 and 2021. But that is neither here nor there. Since the District Court never even allowed the Aggrieved Residents to reach discovery, much less trial, the only operative facts and allegations at this stage are those in the complaint and its accompanying documents and citations. Thus, for this Court's clarity and convenience the Aggrieved Residents have attached in the Addendum a copy of the Administrators' brief with their impermissible factual allegations struck through.

The Aggrieved Residents acknowledge that they did put some factual allegations regarding Governor Baker in their first brief's statement of the case. Since those do not appear in the complaint or its accompanying documents, the Aggrieved Residents invite this Court to disregard those particular factual allegations. To be fair to the Administrators, if this Court is to disregard the Administrators' factual allegations that cannot be considered at this stage, this Court should also disregard the particular allegations newly-introduced by the Aggrieved Residents in their brief.

2.0 The Administrators failed to refute any of the District Court's errors the Aggrieved Residents listed in the conclusion of their brief.

Of the District Court's errors listed in the conclusion of the Aggrieved Residents' brief, the Administrators failed to even address six of the seven. The Aggrieved Residents will not revisit those errors. Instead, so that this is truly a reply, the Aggrieved Residents will focus this brief on addressing arguments the Administrators raised in their brief.

2.1 The Administrators falsely asserted that the Aggrieved Residents missed their opportunity to amend their complaint by not taking the Administrators' word regarding the complaint's deficiencies.

The only one of the District Court's errors the Administrators addressed was the District Court's failure to give the Aggrieved Residents leave to file an amended complaint. The Administrators argued that the only opportunity to file an amended complaint the Aggrieved Residents were entitled to was in immediate response to the Administrators' motion to dismiss. But that is not accurate.

If, as the Administrators suggest, a plaintiff were obligated to rely solely upon the defendant's list of purported deficiencies in the complaint and amend it accordingly, it is not difficult to imagine how this would undermine the litigation process and plaintiffs' rights. In that scenario, defendants would lead the plaintiffs astray by asserting all manner of deficiencies in the complaints—including decoys. As it would be the plaintiffs' only opportunity to amend, they would

have to amend their complaints according to the defendants' guidance. The defendants—being the clever creatures they often are—would thereby lead their adversaries to warp the amended complaints into something unsuitable for a court's consumption. The cases, along with the plaintiffs' rights, would then be tossed out. Such would be the fate of lawsuits. And the federal courts (other than their handling of criminal cases) would be transformed into gyms for exercises in futility.

Thus, to preserve the function of litigation and protect Americans' rights, this Court has articulated that under Fed. R. Civ. P. 12(b)(6) it is up to the district court—not a defendant—to specify to a plaintiff what deficiencies it perceives so that the plaintiff may cure them in an amended complaint. *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994). A plaintiff needs a district court to fulfill its role as the impartial referee in that way.

As this Court noted, "Our case law clearly establishes that Rule 16(b)'s "good cause" standard, rather than Rule 15(a)'s "freely give[n]" standard, governs motions to amend filed after scheduling order deadlines." *Trans-Spec Truck v. Caterpillar*, 524 F.3d 315, 327 (1st Cir. 2008). In that same ruling this Court explained that "Rule 16(b) requires that the district court enter a scheduling order setting the deadlines for subsequent proceedings in the litigation, including amendment of the pleadings. Fed. R. Civ. P. 16(b)(1), (3)(A). One purpose of the rule is to assure 'that at some point . . . the pleadings will be fixed.'" But the Administrators' argument would render that statement of this Court meaningless, for the District Court gave the Aggrieved Residents neither a scheduling

order nor any opportunity to amend their original complaint in response to its memorandum and order of dismissal.

The Aggrieved Residents observe that other judges in the same District Court—when granting a motion to dismiss—inform the plaintiffs of the deficiencies they perceive and give the plaintiffs a period of time to file a motion for leave to file an amended complaint. The judge in this case, however, skipped that requisite step.

3.0 The Administrators have pivoted to defending the District Court's *sua sponte* dismissal on legal standing grounds.

Upon deciding not to address most of the District Court's errors identified in the Aggrieved Residents' brief, the Administrators pivoted to arguing that the Aggrieved Residents do not have legal standing to sue in federal court. But the Administrators never made such a motion or argument to the District Court under Fed. R. Civ. P. 12(b)(1). Thus, the Administrators are now attempting to persuade this Court to uphold the District Court's *sua sponte* dismissal on the grounds of legal standing.

3.1 There is no precedent for the Administrators' assertion that the Aggrieved Residents must have attempted to violate the mandates in order to have standing.

The Administrators assert that in order to have legal standing the Aggrieved Residents must have attempted to violate the Administrators' mask mandates. But the Administrators failed to present anything from the U.S. Constitution, the U.S. Supreme

Court, or this Court setting such a requirement. And as cited in § 3.7 below, this Court's precedents refute the Administrators' assertion.

3.2 The Administrators falsely asserted that the complaint did not allege the Aggrieved Residents were barred from public spaces due to the mandates.

The Administrators state that "there can be no real dispute" that the complaint does not allege that any Plaintiff other than Monica Granfield was told to wear a mask or barred from public spaces by the Administrators' mask mandates. Yet elsewhere in their brief the Administrators admit they barred all the Plaintiffs with their mandates.

The inference that the other Plaintiffs were barred from public spaces by the Administrators' mandates can readily be drawn from the complaint and its accompanying documents (which form part of the complaint). But if those allegations need to be articulated more explicitly or precisely, it can be done in an amended complaint. And the Supreme Court has had something to say about complaints from pro se plaintiffs. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed pro se is "to be liberally construed," *Estelle*, 429 U.S., at 106, 97 S. Ct. 285, 50 L. Ed. 2d 251, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid. (internal quotation marks omitted). *Cf.* Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice").")

3.3 The U.S. Supreme Court holds that petitioners of even greater variety than the Aggrieved Residents have legal standing.

In *Massachusetts et al. v. Environmental Protection Agency*, 549 U.S. 497 (2007) the Supreme Court held that the petitioners had legal standing. If that bunch of petitioners as varied as individuals, private organizations, and state and local governments have legal standing to sue in federal court, the more cohesive group of Aggrieved Residents here have legal standing. Notably, in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (which this Court cites and uses for guidance on legal standing), the Supreme Court cited its prior ruling on the E.P.A. case, considering it to remain valid case law.

3.4 The Court holds that even petitioners with injuries far less particularized than those of the Aggrieved Residents have standing.

In that E.P.A. case those petitioners brought a claim for injury suffered by literally all people worldwide. *Id.* And the Supreme Court held they had legal standing. Thus, the Aggrieved Residents here who have suffered far more particularized injuries not shared with other people certainly have legal standing.

3.5 The Court holds that if a respondent has merely contributed to a petitioner's injury, that is sufficient for legal standing.

In that case the Supreme Court noted that the E.P.A.'s conduct could only have merely contributed to the injury those petitioners alleged they might suffer.

Yet the Court still held those petitioners had legal standing. *Id.*

The Aggrieved Residents in this case have far stronger standing, as the Administrators did not merely contribute to their injuries, the Administrators wholly caused their injuries.

3.6 The Court holds that injury far less concrete than that suffered by the Aggrieved Residents is sufficient for standing.

The Supreme Court held those petitioners had legal standing despite their claim being the mere risk of future harm. *Id.* The Aggrieved Residents here have far stronger standing, as their injuries have already occurred and are at risk of recurring.

3.7 Just months ago this Court held that even injury far more tenuous than that of the Aggrieved Residents is sufficient for legal standing.

Deborah Laufer was an admitted "tester" who sued hundreds of facilities across the country over their websites' alleged non-compliance with the A.D.A.'s regulations. She even acknowledged to this Court that she had no intention of lodging at Acheson's hotel in Maine. When Laufer appealed the dismissal of her case on the grounds of legal standing, this Court explained "We said just a year ago that a plaintiff's status as a tester does not destroy her standing. *See Suarez-Torres v. Panaderia Y Reposteria Espana, Inc.*, 988 F.3d 542, 550-51 (1st Cir. 2021). That is, a plaintiff's deliberate choice to see if accommodations are obeying a statute doesn't mean that her injury in fact

is any less real or concrete. *Id.* And Suarez broke no new ground—the Supreme Court reached the same result forty years ago. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)." *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 268 (1st Cir. 2022).

If Deborah Laufer had legal standing to sue a hotel for its alleged A.D.A. non-compliance when 1) she had no intention of even lodging at the hotel and 2) had given the hotel no prior warning before suing, the Aggrieved Residents in this case—who 1) were barred by local town officials from a wide range of indoor spaces due to their disabilities and/or religions and 2) gave advance warning before suing that the Administrators disregarded—certainly have legal standing.

4.0 The Administrators relied on case law that either does not support their conduct or points to the illegality of it.

The Administrators touched on the statutes pertaining to Boards of Health in MA. But they failed to address—much less refute—the District Court's numerous errors in interpreting the statutes that the Aggrieved Residents identified in their brief. The Aggrieved Residents will not rehash those errors here.

The Administrators proclaimed that "Abundant case law supports the BOH's actions." But the case law they went on to cite has nothing do with Boards of Health issuing face mask mandates.

In the *Train v. Boston Disinfecting Co.* 144 Mass. 523 (1887) ruling, the Massachusetts Supreme Court ruled that the Board of Health could lawfully order

the disinfection of imported rags at the owner's expense. It had nothing to do with face masks or even quarantining people.

Regarding quarantining people, as noted in the Aggrieved Residents' brief, M.G.L. Ch. 111 § 95 requires Boards of Health to quarantine an infected person. The Administrators completely failed to perform that duty in response to COVID-19, belying their assertion in their brief that "In adopting the face mask mandate, the Carlisle BOH simply performed its official duties and responsibilities."

As for the *Cornpagnie Francaise c. v. Board of Health*, 186 U.S. 380, 22 S. Ct. 811 (1902) ruling, it also had nothing to do with municipal entities implementing face mask mandates or anything of the sort. It stemmed from a Louisiana law section 8 of Act 192 of 1898 in existence at that time that empowered Boards of Health to exclude healthy persons from a locality infested with a contagious or infectious disease. The Administrators did not even attempt to connect it to the issues in this case or this appeal.

Then the Administrators cited the *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905) ruling. That does not support the Administrators' conduct, either. That case had to do with a vaccination that eventually eradicated smallpox. As established in this case's complaint and its exhibits, smallpox was the only human infectious disease eradicated whereas COVID-19 cannot be eradicated. As also established in the complaint's exhibits, face masks do not stop the spread of COVID-19—unlike the vaccination that wiped out smallpox. And as the U.S. Supreme Court stated while striking down COVID-19 mandates, the

Jacobson ruling is not applicable in a case such as this. (See § 7.1)

The *Desrosiers v. Governor*, 486 Mass. 369, 158 N.E.3d 827 (Mass. 2020) ruling had nothing to do with municipal entities such as the Administrators.

The *Southwell v. McKee*, C. A. PC-2021-05915 (R.I. Super. Nov. 12, 2021) ruling had nothing to do with Massachusetts, libraries, municipalities, or their Boards of Health.

Not only did the *Harris v. Univ. of Mass. Lowell*, 43 F.4th 187, (1st Cir. 2022) case have nothing to do with Boards of Health, face mask mandates, or municipalities, this Court distinguished that appeal from this one by explaining: "In the period since judgment was entered below, however, both students have disenrolled from the universities—one by transfer, and one by graduation. Finding, as we do, that the students' claims are now moot, we dismiss the appeal without reaching the merits."

The *Together Emps. v. Mass. Gen. Brigham*, No. 21-1909, 7 (1st Cir. Apr. 27, 2022) case had nothing to do with Boards of Health or any other government entity, nor did it have to do with face mask mandates. Put simply, this Court distinguished it from this appeal by clarifying: "MGB is not a state actor and is not bound by the Free Exercise Clause."

Not only did the *Stepien v. Murphy*, 574 F. Supp. 3d 229, 233 (D.N.J. 2021) case have nothing do with the free exercise of religion, the A.D.A., Boards of Health, Massachusetts, or municipalities, the judge warned "It is tempting to view the question before the court as 'Should students and others be required to

wear masks in school buildings?' That is a temptation a court must resist."

The *W.S. v. Ragsdale*, 540 F. Supp. 3d 1215 (N.D. Ga. 2021) case had nothing to do with Massachusetts, municipalities, the free exercise of religion, the A.D.A., or Boards of Health.

The Administrators finished by proclaiming "In short, the Carlisle BOH acted well within its authority by issuing a mask mandate" despite none of the above case law they listed actually affirming that the Carlisle BOH—much less the town library—had authority to issue a mask mandate. Moreover, regardless of authority, no municipal entity or personnel may violate people's constitutional and civil rights as the Administrators did in this case.

5.0 The Administrators' mask mandates fail to pass the rational basis test.

The Administrators assert that the rational basis test applies to their face mask mandates. Though as explained in § 6 the Administrators' mask mandates are actually subject to at least strict scrutiny, for the following reasons the mandates also fail the rational basis test.

5.1 The Administrators' mandates cannot meet the rational basis test without statutory authority.

As federal courts including the U.S. Supreme Court have held, a government entity cannot implement such mandates without statutory authority. *Nat'l Fed'n of Indep. Bus. v. Dept of Labor*, 142 S. Ct. 661,

662 (2022) (overruling the obsolete appeals court's ruling the Administrators cited):

> "The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force . . . Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule . . . if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little."

Health Freedom Def. Fund v. Biden, 8:21-cv-1693-KKM-AEP, 1 (M.D. Fla. Apr. 18, 2022):

> "The Court concludes that the Mask Mandate exceeds the CDC's statutory authority and violates the procedures required for agency rulemaking under the APA. Accordingly, the Court vacates the Mandate and remands it to the CDC."

5.2 The record here reveals the Administrators' mandates were irrational.

Additionally, even with statutory authority, a mandate must have a *rational* basis to pass the rational basis test. As the Administrators quoted from the *Family Freedom* case ruling, it was the record that led Judge Hodge to conclude the mandate in question

met the rational basis test. And the record here is the Plaintiffs' complaint, its exhibits, and their cited references. This record reveals that the Administrators' mask mandates were futile, reckless, violated the Food and Drug Administration's explicit prohibition against making antiviral claims about masks, and harmful rather than rational.

6.0 The Administrators claim their mandates were generally applicable but the variety of exemptions refute that assertion.

The Administrators assert that "the mask mandate [sic] was generally applicable because it did not permit secular conduct in such a way that undermined the Town's asserted interest in addressing an increase in COVID-19 cases." But their challenged mandates exempted people by age, medical needs/disability, and work status. Thus, neither of the mandates were generally applicable and both treated constitutionally-protected religious liberty less favorably than secular interests—that have no constitutional protection.

The Administrators also asserted that "the BOH mask mandate applied even handedly across the board to 'all indoor public spaces, or private spaces open to the public within the Town of Carlisle. . . . " to argue that the mandate was therefore generally applicable. But the Administrators completely missed the point. What renders their mandates not generally applicable and triggers strict scrutiny is the fact that their mandates allowed exemptions for various secular reasons while denying the Aggrieved Residents' religious exemptions.

6.1 The Administrators argue that this Court's ruling in *Does v. Mills* should guide, but it is factually and legally different.

The Administrators also asserted that this case "bears a striking resemblance" to this Court's ruling in *Does v. Mills*, 16 F.4th 20 (1st Cir. 2021). They argued that this Court should therefore rule the same way in this appeal. But for the following reasons, that case is distinguishable from this one and different standards of judicial review apply here.

6.2 The U.S. Supreme Court holds that a regulation is not generally applicable if it treats *any* comparable secular activity more favorably than religious exercise.

The Administrators asserted that this Court held in *Does v. Mills* that the covid shot mandate in question was generally applicable because it only allowed for a single objective medical exemption. And the Administrators asserted that their mandates should be treated the same. But one of their mandates did not even include a medical exemption, and the other mandate included a variety of secular exemptions—while both denied all religious exemptions. That is not equivalent to the mandate this Court reviewed in *Does v. Mills*.

Further, the U.S. Supreme Court has not set some number or type of secular exemptions (versus religious exemptions) that would render a mandate not generally applicable. In *Does v. Mills,* No. 21A90, 5 (U.S. Oct. 29, 2021) the Supreme Court's opinion denying the application for injunctive relief did not address the underlying merits. The dissenting opinion,

however, did address the underlying merits by explaining that strict scrutiny applied and Maine's rule failed that test because it: 1) created a mechanism for individualized (medical) exemptions, and 2) it treated secular activity (medical exemption) more favorably than religious exercise. The Court went on to explain that any comparable secular activity (such as the medical exemption) triggers strict scrutiny:

> "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. ___, (2021) (per curiam) (slip op., at 1); *see also Fulton*, 593 U.S., at ___ (slip op., at 6); *Lukumi*,508 U.S., at 542-546. And again, this description applies to Maine's rule." (Italicized *any* is in the Supreme Court's opinion)

6.3 Understanding of the facts surrounding *Does v. Mills* has shifted considerably since this Court's ruling in 2021.

In October 2021 when this Court issued its ruling in *Does v. Mills*, this Court stated Maine's asserted interests as: "(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." But in *Does v. Mills*, No. 21A90, 5 (U.S. Oct. 29, 2021) the Supreme Court warned that this Court misstated the 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*, ___ F. 4th ___, 2021 WL 4860328, *6 (CA1, 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 ___ (slip op., at 6); *Tandon*, 593 U.S., at ___ (slip op., at 2); *Lukumi*, 508 U.S., ___ at 544-545."

This Court then assessed the challenged mandate against those three asserted interests using the following assumptions about the covid shots:

1. The shots were safe.
2. The shots stopped transmission of COVID-19.
3. At least 90% of a population must be vaccinated to prevent community transmission of the delta variant.
4. The shots prevented severe illness and death from COVID-19.

This Court then concluded that the shot mandate for healthcare workers served the three interests. But that ruling depended upon all the assumptions being true. And it has since come to light that none of those assumptions were true:

1. Though the adverse effects and deaths from the covid shots are severely underreported[1], even the reported data has revealed that they have an exponentially higher rate of severe adverse effects and death than all other vaccines for all other types of infectious disease that have been in use for decades[2] [3] And in an F.D.A. report, mortality was much higher in those who got Pfizer's covid shots than in those who got placebo shots from clinical trials.[4]

2. Not only did the covid shots never stop transmission, there was actually never any sound basis for the claim that they did, as the clinical trials did not test or determine that effect. By late 2021 large studies started

---

[1] https://www.wnd.com/2021/12/4968311/

[2] https://vaersanalysis.info/2023/02/10/vaers-summary-for-covid-19-vaccines-through-2-3-2023/

[3] https://open.substack.com/pub/stevekirsch/p/exclusive-stunning-new-data-pulled?utm_campaign=post&utm_medium=web

[4] https://www.fda.gov/media/151733/download

revealing the shots exacerbated rather than lessened the spread of COVID-19.[5] and [6]

3. There was never any vaccinated percentage of a population that would have stopped the spread.[7] and [8]

4. Unlike effective vaccines against other infectious diseases, the shots do not prevent severe illness or death from COVID-19.[9] and [10]

Since that ruling in October 2021, other courts have noticed those facts that have come to light, including a New York Supreme Court. Accordingly, that court struck down an equivalent regulation adopted by the New York State Department of Health requiring covered healthcare entities to ensure that their "personnel" are "fully vaccinated" against COVID-19.

---

[5] Subramanian, S.V., Kumar, A. Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States. Eur J Epidemiol 36, 1237-1240 (2021). https://doi.org/10.1007/s10654-021-00808-7

[6] https://www.medrxiv.org/content/10.1101/2022.12.17.22283625v1.full.pdf

[7] Blaylock RL. COVID UPDATE: What is the truth? Surg Neurol Int. 2022 Apr 22;13:167.doi:10.25259/SNI_150_2022. PMID: 35509555; PMCID: PMC9062939.

[8] https://open.substack.com/pub/alexberenson/p/urgent-two-new-studies-show-mrna? utm_campaign=post&utm_medium=web

[9] Breakthrough Deaths Are 59% of All Maine COVID-19 Deaths, 10/15-10/22/21. https://edfolsomlaw.com/2021/10/breakthrough-deaths-are-59-of-all-maine-covid-19-deaths-10-15-10-22/

[10] https://alexberenson.substack.com/p/stunning-official-canadian-data-show/comments?utm_source=%2Fsearch%2Fdeaths%2520vaccinated&utm_medium=reader2

Medical Professionals for Informed Consent et al. v. Mary T. Bassett, et al., Index No. 008575/2022, Decision and Order Motion #1 and Motion #2, NYSCEF Doc. No. 87, (Onondaga Cty. Supreme Ct. Jan. 13, 2023):

> "The sections cited by Respondents provide nothing more than general grants of power. Reading those sections in the manner urged by Respondents would render Public Health Law §§ 206, 613, 2164, and 2165 meaningless. . . . [I]t is clear such expertise was not utilized as the COVID-19 shots do not prevent transmission. . . . [T]he Court finds the Mandate is arbitrary and capricious." (Emphasis in original)

6.4 As courts do not hold expertise in non-legal matters, they must rely on the facts legally operative in each case.

This Court's misapprehension in 2021 regarding the relation of the covid shots to the state of Maine's asserted interests was understandable. Courts cannot be expected to wield expertise in medicine and public health management any more than in aircraft maintenance or paleontology. And at that time the plaintiffs in *Does v. Mills* may not have pled facts sufficient for the Court to discern the incongruencies between the defendants' mandate and their asserted interests.

Rather, the point here is to reinforce the criticality of:

1. courts relying for facts and inferences only on a plaintiff's complaint and its accompanying documents when at the pleading

stage or when reviewing de novo a district court's dismissal; and

2. bearing in mind that "even in a pandemic, the Constitution cannot be put away and forgotten . . . before allowing [infringement of religious liberty], we have a duty to conduct a serious examination of the need for such a drastic measure." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020)

Hypothetically, though, if the Aggrieved Residents' complaint established the opposite (that people spread COVID-19 unless they're wearing any sort of masks), then the various exemptions in the Administrators' mandates undermine the mandates' purported purpose of stopping the spread of COVID-19—still triggering strict scrutiny.

7.0 The Administrators assert that the BOH's mandate was narrowly tailored because they did not apply it beyond their town, but that is not how narrow tailoring works.

As noted in the Aggrieved Residents' brief, the library's mandate was not narrowly tailored to avoid infringement of their free exercise of religion. And the Administrators do not address or rebut that in their brief.

The Administrators' only explanation for how the Board of Health's mask mandate was supposedly narrowly tailored is that "it did not purport to reach beyond public and private spaces owned by the Town." It is indeed fortunate that the Administrators confined their *ultra vires* and unlawfully-discriminatory man-

dates to the town over which they have domain so as not to create exponentially more Aggrieved Residents throughout the state. But according to the U.S. Supreme Court (and common sense), that is not how narrow tailoring works.

Narrow tailoring requires the government to use the means that is the least restrictive on the free exercise of religion. The Administrators could have accomplished that in any of a number of ways:

- The Administrators stated in their brief that they were one of only a small minority of MA municipalities that issued mask mandates in response to COVID-19. They could have not issued mask mandates, like the majority of municipalities.
- They could have taken the steps that MA laws authorize them to take in response to an outbreak of infectious disease. They did not.
- They could have taken the steps that MA laws require them to take in response to an outbreak of infectious disease dangerous to public health. They did not.
- They could have issued advisories rather than mandates.
- They could have exempted those with religious objections, just as they exempted other people for secular reasons.

7.1 The Administrators argued the *Jacobson* ruling applies here but the Supreme Court stated it does not apply.

The Administrators argued that the *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) ruling applies here. But when addressing covid mandates' infringement on people's free exercise of religion, the U.S. Supreme Court explained that the Jacobson ruling is uninformative and inapplicable in such cases *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70-71 (2020):

> "Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise. . . . Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument." *Id.*, at 25, 25 S.Ct. 358. Tellingly no Justice now disputes any of these points. Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic."

8.0 The Administrators failed to refute their violations of the A.D.A.

The Administrators failed to even address—much less refute—the multiple portions of the A.D.A.

and its corresponding C.F.R. their library's mandate violated that the Aggrieved Residents specified in their brief.

8.1 The Administrators contradicted themselves by asserting mask-less people pose a threat to others

The Administrators alleged in their brief that "the failure to wear face masks in indoor public places during the COVID-19 pandemic posed a significant risk to the health or safety of other visitors". They cannot make such allegations at this stage, as they contradict the complaint. But if they could, then their allegation would actually be undermined by the facts that:

- For more than the first year of COVID-19's circulation in town, they did not mandate usage of face masks.
- They have not reinstated their mandates since lifting them one year ago despite COVID-19 having continued to infect and sicken numerous residents.
- Their two mandates exempted people for a variety of secular reasons, none of which served to mitigate the supposed risk those people would then pose to others.

So why, then, do the Administrators make such an allegation at this stage? Because they want to characterize only the Aggrieved Residents (not themselves and the countless other people they exempted) as posing a threat to others.

8.2 The Administrators fell into their own booby traps one after the other.

Perhaps forgetting they elsewhere asserted that they only denied Monica Granfield access to the library without a mask, they went on to admit they denied access to all the plaintiffs: "in denying the plaintiffs access to public indoor spaces unless they were face masks, the BOH and Library Trustees were not discriminating against the plaintiffs because of their disability." With that statement, the Administrators also totally missed the fact that their library issued the first mask mandate, which barred all people who for reasons of disability could not wear face masks. So yes, they did bar people from the library because of disability. It was the BOH's mandate issued many months later that did not discriminate on the basis of disability and did not violate the A.D.A.

In the very next sentence of the same paragraph the Administrators stated "All mask-less visitors were treated alike; no visitors could enter indoor public spaces unless they donned a mask." That is patently false. As revealed in the complaint and its exhibits of the mandates, all mask-less visitors were not treated alike. If mask-less visitors fit the Administrators' preferred criteria, they were not required to wear masks at all.

They then wrapped up that paragraph by stating "Those with and without disabilities were treated equally." That's only half true. The library's mandate did indeed treat the disabled the same as the able, thereby violating the A.D.A. But the BOH's mandate exempted those with disabilities, as required by the A.D.A.

9.0 The Administrators have confused procedural due process with substantive due process.

The Administrators cited quite a bunch of case law to purportedly argue that their mask mandates did not violate the Aggrieved Residents' substantive due process rights under the 14th amendment. Not only did most of that case law have little to nothing to do with the issues here, the Administrators confused substantive due process with procedural due process.

Moreover, in some of the cases cited in these briefs, the Supreme Court struck down covid mandates restricting the number of people who could gather in buildings for religious purposes. The Court found such mandates violated the petitioners' free exercise of religion. In this case, however, the Administrators did not just bar the Aggrieved Residents from buildings for religious purposes. They barred the Aggrieved Residents from their town hall, school, and library the Aggrieved Residents paid for with their taxes. They barred the Aggrieved Residents from insurance agencies, a café, a museum, and all other indoor spaces open to the public in town.

Conclusion

Of the District Court's reversible errors listed in the conclusion of the Aggrieved Residents' brief, the Administrators failed to even address six of the seven. The Administrators barely touched on and failed to refute the other error.

Instead, the Administrators pivoted to arguing that the Aggrieved Residents have no legal standing

at all and the purported rational basis of the challenged mandates renders them unchallengeable.

But the Aggrieved Residents do indeed meet the criteria the U.S. Supreme Court has established for legal standing to sue in federal court. And both the Supreme Court and this Court have deemed plaintiffs with less particularized and far more nebulous injuries than those of the Aggrieved Residents to have sufficient legal standing. Thus, the District Court's *sua sponte* dismissal on the grounds of legal standing still needs reversal.

As for rational basis, the Supreme Court has made clear there can be no valid basis for a mandate when the government entity lacks statutory authority to issue it—authority that none of the Administrators had. And were the Administrators to have had statutory authority, the only operative facts the District Court could properly use at this stage were the facts in the Plaintiffs' complaint and its accompanying documents and references. Those facts reveal the mandates were not only irrational but reckless. Moreover, even if the mandates had been issued with statutory authority and had rational basis, in this case they still violated the Aggrieved Residents' rights under the A.D.A. and the Bill of Rights.

According to the Supreme Court, when the free exercise of religion is implicated it is not rational basis but at least strict scrutiny that applies. And the Court says strict scrutiny is triggered if any secular activity is treated more favorably than comparable religious exercise. Further, the Court holds that narrow tailoring (including the means least restrictive on the exercise of the claimant's religion) must be used—which the

Administrators never attempted even after being notified of their infringement.

Thus, the U.S. Constitution's Supremacy Clause remains upside down with its pockets emptied as the District Court left it—exactly as the Administrators want it. The Aggrieved Residents request that this Court set it upright and restore its pockets' belongings to their rightful place.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 426 (1886).

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
Phone: 978-734-3323
Email: bmoc54@verizon.net

February 19, 2023

/s/ Lisa Tiernan
Pro Se
116 Lowell Street
Westford, MA 01886

February 17, 2023

/s/ Ann Linsey Hurley
Pro Se
10 Half Moon Hill
Acton, MA 01720

February 18, 2023

/s/ Robert Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

February 18, 2023

/s/ Katalin Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

February 18, 2023

/s/ Monica Granfield
Pro Se
110 Carlisle Pines Drive
Carlisle, MA 01741

February 19, 2023

/s/ Linda Taylor
Pro Se
879 Concord Street
Carlisle, MA 01741

February 19, 2023

/s/ Susan Provenzano
Pro Se
80 Mill Pond Lane
Carlisle, MA 01741

February 19, 2023

LETTER TO FIRST CIRCUIT CITING *GATTINERI V. TOWN OF LYNNFIELD* CASE (NOVEMBER 9, 2023)

Michael Bush
280 Lowell Street
Carlisle MA 01741

Maria R. Hamilton, Clerk
United States Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston MA 02210

Re: Michael Bush, et al. v. Linda Fantasia, et al.
Appeal No.: 22-1755

Dear Clerk Hamilton:

Per Fed. R. App. P. 28(j), we pro se Appellants bring to this Court's attention *Gattineri v. Town of Lynnfield*, 58 F.4th 512 (1st Cir. 2023) because:

1. This Court noted that, "Lynnfield failed to pick up on the [ ] Appellants['] [ ] claims, so we don't have the benefit of their opposing arguments at all."

2. This Court explained that arguments not made in the briefs are waived.

3. This Court's above explanations in *Gattineri v. Town of Lynnfield* clarify that in our appeal the Defendants/Appellees have waived any counter-arguments to our arguments that the District Court committed reversible errors by:

a. Ignoring and arguing against the facts of our complaint. (Brief Pp. 15-16, 23, 28-32, 47, 50)

b. Drawing inferences in favor of the Defendants. (Brief Pp. 28-30, 50)

c. Dismissing the complaint *sua sponte* on the basis of legal standing when the Defendants had not challenged the Plaintiffs' legal standing. (Brief Pp. 33-35)

d. Declaring the Plaintiffs' request for injunction moot while knowing that the Plaintiffs sought money damages and the challenged mandates might recur while evading judicial review. (Brief Pp. 41-42)

e. Allowing the Defendants to file their motion to dismiss without having held the conference with us Plaintiffs required by Local R. Civ. P. 7.1(a)(2). (Brief p. 40)

f. Allowing the Defendants to file documents without the leave required by Local R. Civ. P. 7.1(b)(3)—documents the District Court subsequently and improperly relied upon. (Brief Pp. 40-41)

g. Denying the Plaintiffs' written request for a hearing. (Brief Pp. 15, 26, 50)

h. Violating several canons of construction. (Brief Pp. 45-48)

i. Violating Fed. R. Civ. P. 16(b). (Brief Pp. 25-26)

j. Violating the U.S. Constitution's Supremacy Clause (Brief p. 17) and this Court's instruction on *stare decisis* (Brief p. 18).

k. Disregarding that the public library had no statutory authority to issue its face mask mandate. (Brief Pp. 42-43). (In footnote 17, the Defendants/Appellees stated that they declined to present counter-arguments because we had not challenged the library's authority. But we did so in Complaint Pp. 10, 17.)

This authority is enclosed.

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
Phone: 978-734-3323
Email: bmoc54@verizon.net

November 9, 2023

/s/ Linda K. Taylor
Pro Se
879 Concord Street
Carlisle, MA 01741

November 9, 2023

/s/ Ann Linsey Hurley
Pro Se
10 Half Moon Hill
Acton, MA 01720

November 9, 2023

/s/ Monica Granfield
Pro Se
110 Carlisle Pines Drive
Carlisle, MA 01741

November 9, 2023

/s/ Susan Provenzano
Pro Se
80 Mill Pond Lane
Carlisle, MA 01741

November 9, 2023

/s/ Katalin H. Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

November 9, 2023

/s/ Robert G. Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

November 9, 2023

/s/ Lisa Tiernan
Pro Se
116 Lowell Rd
Westford, MA 01886

November 9, 2023

**OPINION IN *GATTINERI V. LYNNFIELD*,
U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT
(JANUARY 23, 2023)**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANTHONY GATTINERI;
BOSTON CLEAR WATER COMPANY, LLC,

Plaintiffs-Appellants,

v.

TOWN OF LYNNFIELD, MASSACHUSETTS;
PHILIP B. CRAWFORD; JAMES M. BOUDREAU;
ROBERT J. DOLAN; ROBERT CURTIN;
DAVID J. BREEN; PAUL MARTINDALE;
ELIZABETH ADELSON; KRISTIN MCRAE;
JOSEPH O'CALLAGHAN; WINNIE BARRASSO;
PATRICK MCDONALD; JENNIFER WELTER;
EMILIE CADEMARTORI,

Defendants-Appellees.

No. 21-1729

Appeal from the United States District Court
for the District of Massachusetts
[Hon. Indira Talwani, U.S. District Judge]

Before: GELPI, HOWARD, and
THOMPSON, Circuit Judges.

THOMPSON, Circuit Judge.

Appellants Anthony Gattineri (Gattineri) and Boston Clearwater Company LLC (BCW, and with Gattineri, Appellants) appeal from the dismissal of their sweeping complaint brought against the Town of Lynnfield, Massachusetts and a slew of the town's agencies and employees (Lynnfield, to keep it simple) after animosity between the parties over Appellants' spring water business boiled over. Because we write primarily for the parties—all of whom are familiar with the facts in the operative complaint and how the case got here—we offer only a brief summary of the relevant background before cutting to the chase: We affirm the dismissal below.

Since 2014, Appellants have owned and operated the Pocahontas Spring (the Spring) in Lynnfield, Massachusetts, where they sought to revive a once-thriving spring water business and maintain the Spring as a source of healing water for Native Americans. Appellants' ambitions on both fronts clashed with Lynnfield's authority to regulate any work done to alter the Spring's property, as it sits on protected wetlands subject to certain state and local regulations. *See, e.g.*, Mass. Gen. Laws ch. 131, § 40 (2014) (Wetlands Protection Act); 310 Mass. Code Regs. §§ 10.02(2), 10.04, 10.05(4) (Wetlands Regulations). The gist of Appellants' complaint is that Lynnfield wanted to drive BCW and Gattineri out of town: Lynnfield wanted BCW gone so they could use the Spring to supplement the town's own water supply, garner additional tax revenue, and aid a nearby real estate development; and regarding Gattineri, Lynnfield despised his association with Native Americans and suspected that his

Italian heritage meant he had mob ties. So, Appellants charge, Lynnfield hatched a vast conspiracy between the town's agencies (the Lynnfield Conservation Commission, Board of Selectmen, Building Department and Police Department), employees, and several neighbors (some named, others not) where the neighbors would lodge false complaints about allegedly unlawful activities at the Spring and Lynnfield would respond, using their regulatory authority, under the guise of legitimate enforcement, to intimidate Appellants and interfere with their business and Gattineri's constitutional rights.[1]

Certain that Lynnfield's actions were unlawful, Appellants claimed violations of their First and Fourteenth Amendment rights, *see* 42 U.S.C. § 1983, and that Lynnfield conspired to violate those rights, *see* 42 U.S.C. § 1985, and failed to prevent violations of those rights, *see* 42 U.S.C. § 1986, among other claims not relevant here (ten in all). The district court granted Lynnfield's motion to dismiss, and Appellants brought their case to us.[2]

---

[1] For the curious reader wanting more of the backstory, we point to the district court's recap of the facts, which aptly took on the formidable task of stitching together a coherent narrative based upon Appellants' seventy-page complaint, which we note overflowed with conclusory allegations yet omitted critical context. *See Gattineri v. Town of Lynnfield*, No. 1:20-CV-11404-IT, 2021 WL 3634148, at *1-7 (D. Mass. Aug. 17, 2021).

[2] Our de novo review of a complaint owes no deference to the district court's review of the same. *See Dagi v. Delta Airlines, Inc.*, 961 F.3d 22, 27 (1st Cir. 2020). Yet as a threshold argument Appellants spill considerable ink attacking the scope of the district court's review on two fronts: (1) that it erroneously considered facts from related state court decisions, and (2) that it miscalculated the statute of limitations start date on their

On appeal, we consider whether Appellants' arguments compel us to revive their First Amendment claims.[3] In short, they do not.

---

§ 1983 claims. Given our standard of review and the reasons behind our affirmance, we need not resolve these arguments, let alone address them, but we offer a brief note on the first.

Appellants argue that the district court should not have pulled in facts from judicial opinions in BCW's related state court litigation to discredit allegations in their complaint because these judgments did not warrant preclusive effect—that is, they were not final, and the facts within them were contested. In response, Lynnfield simply asserts, without explanation, that Appellants are wrong on the law, and the district court was right, because a court may judicially notice another court's opinion on a motion to dismiss, full stop. These arguments miss all the nuance to our inquiry—as we have explained, the extent to which a court may consider a public record (here, facts from another opinion) outside the four corners of the complaint depends upon whether that record, or the facts within it, are susceptible to judicial notice under Federal Rule of Evidence 201. *See Freeman v. Town of Hudson*, 714 F.3d 29, 36-37 (1st Cir. 2013); *Rodi v. S. New England Sch. Of L.*, 389 F.3d 5, 18-19 (1st Cir. 2004). Though our court has not addressed a scenario like this one, where the district court assumed the truth of facts from another judicial opinion to kick out contrasting allegations in a complaint, our sister circuits agree that Rule 201 does not support such a move. *See, e.g., Est. of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1111 (10th Cir. 2016); *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008); *Lee v. City of L.A.*, 250 F.3d 668, 689-90 (9th Cir. 2001); *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999); *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998). We say no more today; not only does this issue have no bearing on our reasons for affirming the dismissal, but the parties have also not properly briefed us on the issue.

[3] In their complaint, Appellants roughly described their First Amendment counts as a "Deprivation" of Gattineri's rights, one "Freedom of Assembly" and one "Free Exercise" claim (counts 1

To state a First Amendment retaliation claim, Appellants' complaint "must allege that '(1) [Gattineri] engaged in constitutionally protected conduct, (2) [he was] subjected to an adverse action by [Lynnfield], and (3) the protected conduct was a substantial or motivating factor in the adverse action.'" *Falmouth Sch. Dep't v. Doe on behalf of Doe*, 44 F.4th 23, 47 (1st Cir. 2022) (quoting *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 43 (1st Cir. 2012)). The third prong of this test asks whether Appellants have alleged that Lynnfield had "retaliatory animus." *Id.* (quoting *Maloy v. Ballori-Lage*, 744 F.3d 250, 253 (1st Cir. 2014)). And to succeed, Appellants must show that Lynnfield's "retaliatory animus" was the "but-for" cause of Gattineri's injuries, "meaning that the adverse action against [him] would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (citing *Hartman v. Moore*, 547 U.S. 250, 259-60 (2006)).

Unfortunately, both sides' briefs provide little guidance on these claims. Lynnfield failed to pick up on the basic fact that Appellants argued First Amendment retaliation claims, so we don't have the benefit

---

and 2, respectively). The district court analyzed the claims as such, concluding that Appellants failed to plausibly state substantive violations of either clause of the First Amendment. But Appellants have made no argument before us, and likewise did not argue below, that they have stated freedom to associate or free exercise claims. Instead, they argue only that they have stated First Amendment retaliation claims, so we follow their lead in assessing counts 1 and 2. *See Rosaura Bldg. Corp. v. Mun. of Mayaguez*, 778 F.3d 55, 65 (1st Cir. 2015) (following Appellants' framing of their First Amendment claims as retaliation claims rather than substantive violations of the First Amendment).

of their opposing arguments at all. And Appellants' argument, as briefed for us, boils down to a bare-naked statement that their complaint "sets forth specific factual allegations of multiple adverse acts" against Gattineri "based on his exercise of First Amendment rights," and that "the protected conduct was a substantial or motivating factor" behind those actions. They then simply cite some twenty allegations in their complaint with a "*see, e.g.*"—containing, we gather, the "multiple adverse acts" supposedly taken against Gattineri because he exercised his First Amendment rights. That's it.

Appellants' failure to adequately brief the two claims that could revive their lawsuit proves fatal. Appellants have not fleshed out or explained any of the allegations they cite to at all, so we would be left to our own devices trying to guess the basics from the complaint's turgid paragraphs, some spanning close to a page. For example, we have no idea from the briefing what the adverse act in each complaint paragraph even is, since some contain several events packed into one. After telling us about each adverse act, Appellants should have then explained its connection to Gattineri's exercise of his rights. But they didn't. Compounding the utter lack of factual explanation, Appellants also fail to cite or analyze any on-point authority to convince us that their allegations state a claim as a legal matter—we have decades of First Amendment retaliation case law to pull from. When, like here, briefing comes up this short, we find the issues waived. *See Rodriguez v. Mun. of San Juan*, 659 F.3d 168, 175 (1st Cir. 2011) (finding waiver and noting that "[j]udges are not mind-readers, so parties

must spell out their issues clearly, highlighting the relevant facts and analyzing on-point authority").

Separate and apart from the First Amendment retaliation claim we just discussed, Appellants say they've stated a retaliation claim based upon, what they call, their "fundamental right to earn a living." But this flavor of a retaliation claim is doomed from the start because they have not shown that the "right to earn a living" is constitutionally protected conduct (element one of a retaliation claim).

The district court tossed this claim, citing our decision in *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005), where we explained that "[t]he right to 'make a living' is not a 'fundamental right,' for either equal protection or substantive due process purposes." Attempting to skirt around *Medeiros*, Appellants say they have not alleged an equal protection or substantive due process violation; rather, that their "right to earn a living" is constitutionally protected by the Constitution's Privileges and Immunities Clause.

Appellants' arguments about the Privileges and Immunities Clause come up short. Appellants attempt to argue that our precedents have recognized that the Privileges and Immunities Clause protects a fundamental right to earn a living. *See Piper v. Supreme Ct. of New Hampshire*, 723 F.2d 110, 118 (1st Cir. 1983), *aff'd* 470 U.S. 274 (1985). We first note that there are two versions of the Clause, the first in Article IV § 2 (Privileges and Immunities Clause) and the second in the Fourteenth Amendment (Privileges or Immunities Clause), with distinct applications. *See Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 382 (1978) (Article IV § 2 "prevents a State from discriminating against citizens of other States in favor

of its own.") (citations omitted); *Saenz v. Roe*, 526 U.S. 489, 503 (1999) (quoting *Slaughter-House Cases*, 16 Wall. 36, 80 (1872), and explaining that the Fourteenth Amendment's Privileges or Immunities Clause provides a citizen of one State "with the same rights as other citizens of that State"). Appellants appear to have pled and argued the latter, but they rely upon *Piper*, which addressed Article IV § 2 and, if anything, would protect the right to pursue work in a state where that individual is a nonresident. *See Piper*, 470 U.S. at 280-81, 281 n.10. Here, even if Appellants claimed the Article IV § 2 version, all parties are Massachusetts residents, so they get nowhere. As to the Fourteenth Amendment version of the Clause, Appellants have pointed to no authority, nor have we found any, holding that it provides for a fundamental right to earn a living. *Cf. Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 432 n.12 (1963) ("[T]he Privileges [or] Immunities Clause of the Fourteenth Amendment does not create a naked right to conduct a business free of otherwise valid state regulation.") (citing *Madden v. Kentucky*, 309 U.S. 83, 92-93 (1940)).[4]

We make quick work of the rest of Appellants' claims. Without any viable § 1983 claims to anchor Appellants' § 1985(3) conspiracy to violate their civil rights claim, we, like the district court, see no need to delve into it. *See United Bhd. of Carpenters & Joiners of Am., Loc. 610, AFL-CIO v. Scott*, 463 U.S. 825, 833 (1983) (explaining that because "[t]he rights, privileges, and immunities that § 1985(3) vindicates

---

[4] Without any new life to Appellants' § 1983 claims, we need not address Lynnfield's argument that the officials enjoy qualified immunity. *See Falmouth Sch. Dep't*, 44 F.4th at 47.

must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment," claimant must be able to state infringement of that right); *accord Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005) (noting that a plaintiff cannot state a § 1985(3) claim where they are unable to state a § 1983 claim based upon the same facts). That conclusion extinguishes the § 1986 claim (failure to prevent the conspiracy), too, because violations of § 1986 necessarily depend upon a preexisting violation of § 1985. *See* 42 U.S.C. § 1986; *accord Hahn v. Sargent*, 523 F.2d 461, 470 (1st Cir. 1975). And with no viable federal claims, we decline to exercise our supplemental jurisdiction over the state-law claims, which covers the rest. *See Cruz-Arce v. Mgmt. Admin. Servs. Corp.*, 19 F.4th 538, 546 n.5 (1st Cir. 2021).

With that, we affirm the district court's dismissal. Each side shall bear its own costs.

COMPLAINT
(NOVEMBER 3, 2021)

Pro Se 15 (Rev. 12/16) Complaint for Violation of Civil Rights (Non-Prisoner)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

MICHAEL BUSH, Pro Se, LINDA TAYLOR, Pro Se, LISA TIERNAN, Pro Se, KATE HENDERSON, Pro Se, ROBERT EGRI, Pro Se, KATALIN EGRI, Pro Se, ANITA OPTIZ, Pro Se, MONICA GRANFIELD, Pro Se, ANN LINSEY HURLEY, Pro Se, IAN SAMPSON, Pro Se, SUSAN PROVENZANO, Pro Se, JOSEPH PROVENZANO, Pro Se,

Plaintiffs,

v.

LINDA FANTASIA, MARTHA FEENEY-PATTEN, ANTHONY MARIANO, CATHERINE GALLIGAN, JEAN JASAITIS BARRY, PATRICK COLLINS, DAVID ERICKSON, TIMOTHY GODDARD, TOWN OF CARLISLE, JOHN DOE, JANE DOE

Defendants.

Case. No.
Jury Trial-Yes

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

(Non—Prisoner Complaint)

NOTICE

Federal Rules of Civil Procedure 5.2 addresses the privacy and security concerns resulting from public access to electronic court files. Under this rule, papers filed with the court should not contain: an individual's full social security number or full birth date; the full name of a person known to be a minor; or a complete financial account number. A filing may include only: the last four digits of a social security number; the year of an individual's birth; a minor's initials; and the last four digits of a financial account number.

Except as noted in this form, plaintiff need not send exhibits, affidavits, grievance or witness statements, or any other materials to the Clerk's Office with this complaint.

In order for your complaint to be filed, it must be accompanied by the filing fee or an application to proceed in forma pauperis.

I. The Parties to This Complaint

A. The Plaintiff(s)

Please see the enclosed document titled *The Plaintiffs.*

B. The Defendant(s)

Provide the information below for each defendant named in the complaint, whether the defendant is an individual, a government agency, an organization, or

a corporation. For an individual defendant, include the person's job or title (if known) and check whether you are bringing this complaint against them in their individual capacity or official capacity, or both. Attach additional pages if needed.

Defendant No. 1

Name: Linda Fantasia
Job or Title: Health Agent, Town of Carlisle
Address: 142 Park Road, Chelmsford, MA 01824
County: Middlesex
Telephone Number: 978-369-0283
E-Mail Address: lfantasia@carlislema.gov
Individual capacity
Official capacity

Defendant No. 2

Name: Martha Feeney-Patten
Job or Title: Director of Gleason Public Library
Address: 53 Park Street, Hudson, MA 01749
County: Middlesex
Telephone Number: 978-369-4898
E-Mail Address: mpatten@gleasonlibrary.org
Individual capacity
Official capacity

Defendant No. 3

Name: Anthony Mariano
Job or Title: Member, Town of Carlisle Board of Health
Address: 1134 North Road, Carlisle, MA 01741
County: Middlesex
Telephone Number: 978-287-0441
E-Mail Address: tbdmmariano@aol.com
Individual capacity

Official capacity

Defendant No. 4

Name: Jean Jasaitis Barry
Job or Title: Member. Town of Carlisle Board of Health
Address: 161 Nathan Lane, Carlisle MA 01741
County: Middlesex
Telephone Number: 978-238-8172
E-Mail Address: jean.j.barry@gmail.com
Individual capacity
Official capacity

Defendant No. 5

Name: Timothy Goddard
Job or Title: Town of Carlisle Administrator & ADA Coordinator
Address: 62 Edsel Road, Littleton, MA 01460
County: Middlesex
Telephone Number: 978-371-6688
E-Mail Address: tgoddard@carlislema.gov
Individual capacity
Official capacity

Defendant No. 6

Name: Catherine Galligan
Job or Title: Member, Town of Carlisle Board of Health
Address: 224 South Street, Carlisle, MA 01741
County: Middlesex
E-Mail Address: catgalligan@comcastnet
Individual capacity
Official capacity

Defendant No. 7

Name: David Erickson
Job or Title: Member, Town of Carlisle Board of Health
Address: 237 Fiske Street, Carlisle, MA 01741
County: Middlesex
E-mail Address: daveeric@alum.mit.edu
Individual capacity
Official capacity

Defendant No. 8

Name: Patrick Collins
Job or Title: Member, Town of Carlisle Board of Health
Address: 90 Applegrove Lane, Carlisle, MA 01741
County: Middlesex
E-mail address: patrickjcollins@hotmail.com
Individual capacity
Official capacity

Defendant No. 9

Name: Town of Carlisle
Address: 66 Westford Street, Carlisle, MA 01741
County: Middlesex

Defendant No. 10

Name: John Doe

Defendant No. 11

Name: Jane Doe

II. Basis for Jurisdiction

Under 42 U.S.C. § 1983, you may sue state or local officials for the "deprivation of any rights, privileges, or immunities secured by the Constitution and [feder-

al laws]." Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388(1971), you may sue federal officials for the violation of certain constitutional rights.

A. Are you bringing suit against (check all that apply):

State or local officials (a § 1983 claim)

B. Section 1983 allows claims alleging the "deprivation of any rights, privileges, or immunities secured by the Constitution and [federal laws]." 42 U.S.C. § 1983. If you are suing under section 1983, what federal constitutional or statutory right(s) do you claim is/are being violated by state or local officials?

1. U.S. Title 42 Chapter 126 Equal Opportunity For Individuals With Disabilities, commonly known as the Americans with Disabilities Act or "ADA"
2. U.S. Constitution, Amendment XIV Section 1, commonly known as the Equal Protection Clause
3. Code of Federal Regulations 50.20 "General Requirements For Informed Consent"
4. U.S. Title 42 Chapter 21 Subchapter II § 2000a "Prohibition against discrimination or segregation in places of public accommodation"
5. Title 18 U.S.C. § 242-"Deprivation of Rights Under Color Of Law"
6. Title 18 U.S.C. § 1001-"Statements or Entries Generally"

7. Title 21 U.S.C. § 360bbb-3. — "Authorization for medical products for use in emergencies"
8. United Nations' 2006 Universal Declaration on Bioethics and Human Rights, Article 6
9. Massachusetts General Law Chapter 272 Section 98 "Discrimination in admission to, or treatment in, place of public accommodation; punishment; forfeiture; civil right"
10. Massachusetts General Law Chapter 272 Section 92A "Advertisement, book, notice, or sign relative to discrimination; definition of place of public accommodation, resort or amusement"

This District Court has original jurisdiction over claims under laws 1 through 7. Laws 7, 8, and 9 are simple, clear, and certainly within this Court's capacity to interpret and apply in this case. The Plaintiffs' claims under laws 7, 8, and 9 "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Therefore, the Plaintiffs request that this Court exercise its jurisdiction over their claims under laws 7, 8, and 9 pursuant to 28 U.S.C. § 1367 - Supplemental Jurisdiction.

D. Section 1983 allows defendants to be found liable only when they have acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983. If you are suing under section 1983, explain how each defendant acted under color of state or local law. If you are suing under *Bivens*, explain how each defendant acted under

color of federal law. Attach additional pages if needed.

In August, September, and/or October 2021 Town of Carlisle Board of Health members Linda Fantasia, Anthony Mariano, Catherine Galligan, Jean J. Barry, David Erickson, and Patrick Collins issued mandates requiring all persons in public indoor spaces to wear face masks, in violation of the laws cited in section II(B) above. When they issued such face mask mandates, they used the color of Massachusetts General Law Chapter 111, § 104 as rationale for their unlawful mandates. That statute does not give a Board of Health authority to mandate that people wear or use medical devices such as face masks. It merely gives the Board of Health the authority to, "give public notice" of "infected places."

The Board of Health members knew and/or had reason to know that they did not have the legal authority to issue such a face mask mandate. The Plaintiffs already have evidentiary support for this claim and expect to uncover further details and potentially further evidence of this malfeasance via formal discovery.

Furthermore, were the Board of Health members to have truly had the legal authority to issue some sort of mandate, the particular mandates the Board issued are nonetheless in violation of the Plaintiffs' constitutional and civil rights. Witness that unlawful enforcement of an otherwise valid statute demonstrates unreasonable behavior depriving a government official of qualified immunity. *See Pierce v. Multnomah Cty., Or.*, 76 F.3d 1032, 1037 (9th Cir. 1996); *Chew v. Gates*, 27 F.3d 1432, 1450 (9th Cir. 1994)

Additionally, the Board of Health Agent and members/Defendants had reason to know the Understanding Masks To Protect Children From COVID19 document they published on the town government's website made materially false and fraudulent representations in violation of Title 18 U.S.C. § 1001, yet they published it anyway under the color of law as municipal employees/officials.

Throughout much of 2020 and 2021 the Director of the Gleason Public Library, Martha Feeney-Patten, implemented and communicated a face mask requirement of her own in the public library, in violation of the laws cited in section II(B) above.

To the best of the Plaintiffs' understanding, Director Feeney-Patten has never claimed that a specific law authorized her to make such an unlawful rule in a place of public accommodation. Instead, Director Feeney-Patten used her position as a municipal employee to imply that she had the legal authority to create and implement such an unlawful policy.

The Plaintiffs have further evidence that Defendant Feeney-Patten may face supervisory liability for legal violations of her staff, as "'The requisite causal connection can be established . . . by setting in motion a series of acts by others or by knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury.'" *Rodriguez*, 891 F.3d at 798 (quoting *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011); *see also King*, 885 F.3d at 559.

If qualified immunity applies at all to the Defendants, it could only apply in their individual capacities.

Municipal employees sued in their official capacities are not entitled to qualified immunity. *See Eng. v. Cooley*, 552 F.3d 1062, 1064 n.1 (9th Circuit 2009); *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Circuit 1992).

Additionally, these named Defendants are not entitled to qualified immunity in their individual capacities either, as (1) they violated the Plaintiffs' statutory and constitutional rights, and (2) those rights were 'clearly established' at the time of the challenged conduct.

III. Statement of Claim

State as briefly as possible the facts of your case. Describe how each defendant was personally involved in the alleged wrongful action, along with the dates and locations of all relevant events. You may wish to include further details such as the names of other persons involved in the events giving rise to your claims. Do not cite any cases or statutes. If more than one claim is asserted, number each claim and write a short and plain statement of each claim in a separate paragraph. Attach additional pages if needed.

A. Where did the events giving rise to your claim(s) occur?

The town of Carlisle, Middlesex County, Massachusetts, U.S.A.

B. What date and approximate time did the events giving rise to your claim(s) occur?

Please see the facts listed in item C below.

C. What are the facts underlying your claim(s)? (*For example: What happened to you? Who did what?*

Was anyone else involved? Who else saw what happened?)

1. All of the Defendants are municipal employees and/or officials of the Town of Carlisle, Massachusetts.

2. On October 20th and 21st, 2020 Plaintiff Michael Bush exchanged email messages with Defendant Linda Fantasia in which Bush informed Fantasia that—among other things—the town officials' messaging about face masks had contributed to harassment and discrimination against people for whom face masks are medically inappropriate, in violation of the Americans with Disabilities Act.

3. Thus, Defendant Fantasia and (according to Fantasia's reply) the other Board of Health members named as Defendants had reason to know that their public messaging on that topic was contributing to violations of—at a minimum—the Americans with Disabilities Act. That email exchange is enclosed as Exhibit 1.

4. On March 22nd, 2021 Plaintiff Michael Bush emailed Defendants Linda Fantasia and Martha Feeney-Patten and informed them that—among other things—face masks are medically inappropriate for him to wear and that he had been subjected to harassment and discrimination on that basis due to the Defendants' published face mask policies. (A copy of that email exchange is enclosed as Exhibit 2.) Thus, the Defendants had reason

to know that their communications and policies as municipal employees were violating the Plaintiff's civil rights.

5. On March 22nd, 2021 the Defendants Linda Fantasia and Martha Feeney-Patten each replied to Plaintiff Michael Bush's email message from earlier that day. Neither Fantasia nor Feeney-Patten offered any solution to the discrimination and exclusion of which the Plaintiff notified them. Instead, Feeney-Patten offered suggestions for the Plaintiff to receive partial service while being barred from the public library.

6. Despite Plaintiff Michael Bush's notice to Defendant Martha Feeney-Patten of the discriminatory nature of her policy, during much of 2020 and well into 2021 Feeney-Patten persisted in communicating via her public library's website and her official public library email newsletter to subscribers her face mask policy in violation of the laws specified in section II(B) above. (See Exhibit 3 enclosed.)

7. In early August 2021 the Wall Street Journal published an article by eminent epidemiologist and professor of medicine at Stanford University Dr. Jay Bhattacharya and professor of economics at George Mason University Donald. J. Boudreaux. As the professors explained, no degree of vaccination, face mask usage, or violations of civil liberties can eradicate or contain COVID19. Furthermore, they pointed out what has been self-evident to anyone willing to acknowledge the

obvious: attempting to chase and suppress at all costs this germ and infectious disease that cannot be contained or eliminated has done immense harm to public health and the well-being of our society. (See Exhibit 4 enclosed.)

8. On August 25th, 2021 the Board of Health members named as Defendants unanimously voted to adopt an indoor face mask mandate. (See Exhibit 5 enclosed.)

9. In its memorandum dated August 26th, 2021 the Board of Health also requested that the Select Board issue an emergency declaration for the implementation of a local face mask mandate when the Board of Health members named as Defendants had reason to know that circumstances did not constitute an emergency or warrant an emergency declaration. The Plaintiffs have evidentiary support for this claim and expect to gather further evidentiary support via formal discovery.

10. On September 8th, 2021 several of the Plaintiffs had the United States Postal Service deliver by mail their "Notice and Demand Letters" to Defendants Timothy Goddard, Linda Fantasia, and Martha Feeney-Patten. (See Exhibits 6, 7, and 8 enclosed.)

11. In those Notice and Demand Letters, several of the Plaintiffs notified the Defendants that —among other things—the Board of Health's and Gleason Public Library Director Martha Feeney-Patten's face mask policies violated the Plaintiffs' civil rights and subjected mem-

bers of the public to uninformed medical experimentation without disclosing known harms.

12. On September 22nd, 2021 Plaintiff Michael Bush received an email message from Defendant Linda Fantasia acknowledging receipt of what the Defendant termed "Notice of Claim Pursuant to M.G.L. Ch 260 and 42 U.S.C.-1983 and Demand For Resolution". A copy of that email message is enclosed as Exhibit 9.
13. Defendant Fantasia has provided no other response to the Notice and Demand Letter delivered to her.
14. Defendant Fantasia has never addressed the legal violations of which she was notified in the Notice and Demand Letter.
15. Defendant Martha Feeney-Patten has never provided any response to the Notice and Demand Letter delivered to her.
16. Defendant Timothy Goddard has never provided any response to the Notice and Demand Letter delivered to him.
17. In defiance of the Plaintiffs' Notice and Demand Letters and in continued violation of the legal rights they had been informed of, the Board of Health members voted to renew their unlawful face mask mandate in October 2021.
18. On October 20th, 2021 Plaintiff Monica Granfield was in the Gleason Public Library and a staff member told Granfield that she must wear a mask in the library.

19. On October 26th, 2021 the Gleason Public Library emailed another edition of its newsletter to its subscribers which again repeated the face mask requirement that Director of the library Defendant Martha Feeney-Patten had previously been informed violated the Plaintiffs' constitutional and statutory rights. Defendant Feeney-Patten faces personal and/or supervisory liability for this persistent pattern of willful violations of the laws cited in section II(B) above.

20. The Plaintiffs have pursued and exhausted administrative remedies in this case. The Plaintiffs submitted a formal report (record number 105970-HNC) of civil rights violations by the Defendants via the Department of Justice's official online portal for that purpose. Weeks later, Plaintiff Michael Bush called the Department of Justice's Civil Rights Division Complaint Line twice during regular business hours to follow up on the submitted report, could not reach a representative during either call, and left a voicemail message. The Department of Justice subsequently replied and referred the complaint to the Civil Rights Division of the Department of Education. Plaintiff Michael Bush later called and left a voicemail message at that Department of Education's office regarding the referred complaint. The Plaintiffs now choose to exercise their legal rights via this Court.

IV. Injuries

If you sustained injuries related to the events alleged above, describe your injuries and state what medical treatment, if any, you required and did or did not receive.

No physical injuries are alleged to have been inflicted on the Plaintiffs via direct physical assault by the Defendants. Instead, the injuries suffered by the Plaintiffs due to the Defendants' misconduct under the color of law have been violation of their constitutional, statutory, and human rights cited above, deprivation of services, and infliction of harassment, segregation, uninformed non-consensual medical experimentation, and mental and emotional distress.

V. Relief

State briefly what you want the court to do for you. Make no legal arguments. Do not cite any cases or statutes. If requesting money damages, include the amounts of any actual damages and/or punitive damages claimed for the acts alleged. Explain the basis for these claims.

Whereas the Defendants:

1. knowingly and willfully created and communicated unlawful and harmful messages and policies in violation of the Plaintiffs' constitutional, statutory, and other legal rights,
2. persisted with and renewed those unlawful policies even after being informed they were violating the Plaintiffs' constitutional, statutory, and other legal rights, inflicting mental

and emotional distress, and endangering members of the public, and

3. did so under the color of law in their roles as municipal employees and officials,

And whereas those Defendants as municipal employees and officials cannot have qualified immunity in their official capacities and have by their conduct forfeited qualified immunity in their individual capacities as mentioned in section II(D) above,

Therefore, the Plaintiffs respectfully request the Court:

1. Order that Defendants Linda Fantasia and Martha Feeney-Patten each personally pay $40,000 in compensatory, presumed and/or punitive damages to each Plaintiff
2. Order that Defendants Linda Fantasia and Martha Feeney-Patten reimburse the Plaintiffs for their expenses incurred in the course of this litigation
3. Order that Defendants Catherine Galligan, Anthony Mariano, Patrick Collins, David Erickson, and Jean Barry each personally pay $30,000 in compensatory, presumed and/or punitive damages to each Plaintiff
4. Order that Defendant Timothy Goddard pay $5,000 in presumed or nominal damages to each Plaintiff
5. Declare the Defendants' face mask policies unlawful and void
6. Order that The Defendants henceforth refrain from uninformed non-consensual medical

experimentation and religious and medical discrimination

7. Order the Defendants in their roles as municipal officials to mail within 15 days to all businesses open to the public in the town of Carlisle MA copies of:
   a. The Court's order
   b. The full text of each of the laws in section 11(8) above.
8. Order the Defendants to publish at their personal expense in the local Carlisle Mosquito printed newspaper a copy of the Court's order.

The Plaintiffs claim their right to trial by jury.

VI. Certification and Closing

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (I) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

A. For Parties Without an Attorney

I agree to provide the Clerk's Office with any changes to my address where case-related papers may

be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Date of signing: November 3, 2021

Plaintiff's signature

/s/ Michael Bush Pro Se

Plaintiff's printed name

Michael Bush (agrees to accept case-related papers for the group of Plaintiffs)

Address: 280 Lowell Street
Carlisle MA 01741
E-mail: bmoc54@verizon.net
Phone: 978-734-3323

EXHIBIT 1
EMAIL CORRESPONDENCE
(OCTOBER 21, 2020)

From: Linda Fantasia
To: bmoc54@verizon.net
Date: October 21, 2020 at 12:51 PM

Hi Mike. Thank you for your comments. Navigating the COVID Pandemic has been difficult. I will forward you request to the Board of Health and the COVID Task Force for consideration. I understand that people may have different opinions on the what to do about COVID, but I would hope that Carlisle residents would behave in a non-judgmental way when dealing with people not wearing masks.

Linda Fantasia
Health Agent
Town of Carlisle
66 Westford Street
Carlisle MA 01741
(978) 369-0283

Due to unprecedented public health conditions at this time, non-emergency Health Department responses may be delayed. We will provide responses as soon as possible and appreciate your patience.

From: Mike Bush <bmoc54@verizon.net>
Sent: Tuesday, October 20, 2020 9:11 AM
To: Linda Fantasia <lfantasia@carlislema.gov>
Subject: Shifting to a healthier response to COVID-19

Hi Linda,

I hope you're well.

Fortunately my impression has been that we have handled COVID-19 in Carlisle with less strife than some other MA towns and cities. But there are some aspects in which we could be doing better.

I've been concerned that signs on town property and town Web pages such as https://www.carlislema.gov/902/Hazardous-Waste-Collection-2020 have contributed to harassment of and discrimination against those with conditions that make it inappropriate for them to wear face coverings—a violation of the Americans with Disabilities Act as well as basic decency. Those signs and messaging have also misled people as to what Governor Baker's COVID-19 orders actually state for indoor and outdoor mask use. I can attest that even out in fresh open air I've been harassed at the transfer station for not wearing a face mask (not by staff but by a resident). So at a minimum I ask that the inaccurate signs and messaging be removed at this time.

Additionally, this month thousands of physicians including epidemiologists and public health specialists have signed the Great Barrington Declaration, which was co-authored by a professor of medicine at Harvard University here in MA. https://gbdeclaration.org It clearly articulates that we need to end the oppressive measures in response to COVID-19 that have done more harm than good to our people and society and

instead shift to protecting the most vulnerable while having most people interact freely and normally to facilitate natural herd immunity.

The shutting of and restrictions imposed on our school, town buildings, and businesses needs to end, as do mask mandates. Though people can of course be allowed to wear masks if they wish, the preponderance of evidence clearly shows they don't actually reduce the spread of flu or COVID-19 infections https://swprs.org/face-masks-evidence/

I have also communicated these points to our legislators and officials at the state level. But I wanted to provide this input at our town level as well so that:

1. We now remove the signs and town messaging regarding masks that have been misleading and harmful

2. We shift to a healthier response to COVID-19 and future viruses in accordance with the more sound guidance in the Great Barrington Declaration (as soon as state requirements allow us to)

Kind Regards,
Mike Bush
280 Lowell Street

EXHIBIT 2
EMAIL CORRESPONDENCE
(MARCH 22, 2021)

From: Martha Feeney-Patten
To: Linda Fantasia, bmoc54@verizon.net
Date: March 22, 2021 at 2:49 PM

Hi, Mike,

Thank you for your comments. As Linda said, we will continue to follow the Governor's orders and CDC advisories, while looking forward to being more fully open in the future. To help replace a little bit of the experience of browsing and chatting about books with staff, we are offering book bundles: http://gleason library.org/book-bundles/

We'd also be happy to send you pictures of what's on the shelf in our new book section or other areas that you're interested in, or chat about what you're looking for by phone or over Zoom. Let me know if you'd be interested in any of that.

Best regards,

From: Linda Fantasia <lfantasia@carlislema.gov>
Sent: Monday, March 22, 20212:28 PM
To: Mike Bush <bmoc54@verizon.net>; Martha Feeney-Patten <mpatten@gleasonlibrary.org>
Subject: RE: We want to fully enjoy Gleason Library again

Hi Mike — I am sharing your comments with the Board of Health. I believe that Carlisle will continue to follow the Governor's Orders and CDC Advisories.

We would all like to return to a more "normal" lifestyle — but safely.

Linda Fantasia
Health Agent
Town of Carlisle
66 Westford Street
Carlisle MA 01741
(978) 369-0283

From: Mike Bush [mailto:bmoc54@verizon.net]
Sent: Monday, March 22, 2021 1:05 PM
To: Martha Feeney-Patten; Linda Fantasia
Subject: We want to fully enjoy Gleason Library again
Hi Martha & Linda,

I hope you're well and prospering in 2021.

Just wanted to share a few positive thoughts and input about the library and town as well as our response to COVID-19.

My wife and I moved to Carlisle three years ago and love both the town and the library. We enjoy and appreciate the online services and curbside pickup of materials that have been provided over the past year. We also really enjoyed stopping in, browsing, researching, and chatting before the library was closed to varying degrees to COVID-19. I also still get a kick out of walking or driving by and reading the witticisms posted on the sign out front. "No pop up ads in books"

and "was reading the dictionary and thought it was a poem" ones still make me grin.

Face masks are medically inappropriate for me, as they are for some other adults and children as well. Though the governor's COVID orders regarding face masks do allow for such exemptions, some businesses and facilities in MA have been understanding and others have not over the past year. It's been saddening and stressful to be harassed or discriminated against in buildings and even out in open fresh air in Carlisle over the past year.

As Harvard University's professor of medicine and infectious disease expert Dr. Martin Kulldorff has wisely reminded us over the past year, the oppressive measures we have used in MA are ineffective at controlling COVID-19 while at the same you or others are concerned about COVID-19, I do sympathize. I just wanted to share some feedback and a broader perspective that I hope the town and library can incorporate.

Kind Regards
Mike Bush

http://twitter.com/MartinKulldorff/status/1371433589498384389?s=20

EXHIBIT 3
NOTICE FROM GLEASON PUBLIC LIBRARY
(AUGUST 31, 2021)

LIBRARY LATEST

FROM THE DIRECTOR

Thank you to everyone who helped make our "Tales and Tails" summer reading program fun for all ages, including our youth services librarians Jenn and Tahleen; our teen volunteers and pages; the Friends of Gleason Public Library and the Susan Zielinski Natural Science Fund; and everyone who participated in the reading challenges or enjoyed an event!

We are excited to be headed into the fall, with back-to-school, a Gleason Endowment fundraiser, and a busy lineup of programs coming up. Read on below for all the details.

-Martha

LIBRARY HOURS

The Library is open without having to make an appointment. Masks are still required for all visitors age 2 and up, in consideration of our high usage by as-yet-unvaccinated children and medically vulnerable individuals. Please contact us at 978-369-4898 or director@gleasonlibrary.org with any questions.

The Library will be closed on Saturday, September 4 and Monday, September 6 in observance of Labor Day. The Library returns to regular Saturday hours, 10 a.m. to 5 p.m., starting Saturday, September 11.

Library Hours:

Monday, Tuesday, and Thursday: 10 a.m. to 9 p.m.
Wednesday: 1 p.m. to 9 p.m.
Friday: 10 a.m. to 5 p.m.
Saturday: 10 a.m. to 5 p.m.

NEW HOT SPOTS AVAILABLE FOR LENDING

We have added 5 T-Mobile T9 Hotspots to our collection. This was made possible by the Massachusetts Board of Library Commissioners. You can reserve one through the catalog or by calling the Library at (978) 369-4898.

Our policy and procedures can be found by clicking here, and you can request one now by searching our catalog for "hotspot".

EXHIBIT 4
THE WALL STREET JOURNAL
(AUGUST 4, 2021)

Eradication of Covid Is a Dangerous and Expensive Fantasy; It Seemed to Work in New Zealand and Australia, But Now Ruinous, Oppressive Lockdowns are Back.

By Jay Bhattacharya and Donald J. Boudreaux

Much of the pathology underlying Covid policy arises from the fantasy that it is possible to eradicate the virus. Capitalizing on pandemic panic, governments and compliant media have used the lure of zero-Covid to induce obedience to harsh and arbitrary lockdown policies and associated violations of civil liberties.

Among all countries, New Zealand, Australia and especially China have most zealously embraced zero-Covid. China's initial lockdown in Wuhan was the most tyrannical. It infamously locked people into their homes, forced patients to take untested medications, and imposed 40-day quarantines at gunpoint.

On March 24, 2020, New Zealand imposed one of the most onerous lockdowns in the free world, with sharp restrictions on international travel, business closures, a prohibition on going outside, and official encouragement of citizens to snitch on neighbors. In May 2020, having hit zero-Covid, New Zealand lifted lockdown restrictions, except quarantines for international travelers and warrantless house searches to enforce lockdown.

Australia also took the zero-Covid route. While the initial steps focused on banning international travel,

the lockdowns there also involved closed schools, occasional separation of mothers from premature newborns, brutal suppression of protests, and arrests for wandering more than 3 miles from home.

New Zealand's and Australia's temporary achievement of zero-Covid and China's claimed success were greeted with fanfare by the media and scientific journals. China's authoritarian response seemed so successful—despite the country's record of lying about the virus—that panicked democratic governments around the world copied it. The three countries lifted their lockdowns and celebrated.

Then, when Covid came back, so did the lockdowns. Each government has had multiple opportunities to glory in achieving zero-Covid by hairshirt. Australia's current lockdowns in Sydney are now enforced by military patrols alongside strict warnings from health officials against speaking with neighbors. After Prime Minister Boris Johnson announced that the U.K. must "learn to live with" the virus, New Zealand's minister for Covid-19 response, Chris Hipkins, imperiously responded, "That's not something that we have been willing to accept in New Zealand."

Humanity's unimpressive track record of deliberately eradicating contagious diseases warns us that lockdown measures, however draconian, can't work. Thus far, the number of such diseases so eliminated stands at two—and one of these, rinderpest, affected only even-toed ungulates. The lone human infectious disease we've deliberately eradicated is smallpox. The bacterium responsible for the Black Death, the 14th-century outbreak of bubonic plague, is still with us, causing infections even in the U.S.

While the eradication of smallpox—a virus 100 times as deadly as Covid—was an impressive feat, it shouldn't be used as a precedent for Covid. For one thing, unlike smallpox, which was carried only by humans, SARS-CoV-2 is also carried by animals, which some hypothesize can spread the disease to humans. We will need to rid ourselves of dogs, cats, mink, bats and more to get to zero.

For another, the smallpox vaccine is incredibly effective at preventing infection and severe disease, even after exposure to disease, with protection lasting five to 10 years. The Covid vaccines are far less effective at preventing spread.

And smallpox eradication required a concerted global effort lasting decades and unprecedented cooperation among nations. Nothing like this is possible today, especially if it requires a perpetual lockdown in every country on earth. That's simply too much to ask, especially of poor countries, where lockdowns have proved devastatingly harmful to public health. If even one nonhuman reservoir or a single country or region that fails to adopt the program, zero-Covid would fail.

The costs of any eradication program are immense and must be justified before the government pursues such a goal. These costs include a sacrifice of non-health-related goods and services and other health priorities—forgone prevention and treatment of other diseases. The consistent failure of government officials to recognize the harms of lockdowns—often citing the precautionary principle—disqualifies Covid as a candidate for eradication.

The only practical course is to live with the virus in the same way that we have learned to live over

millennia with countless other pathogens. A focused protection policy can help us cope with the risk. There is a thousand-fold difference in the mortality and hospitalization risk posed by virus to the old relative to the young. We now have good vaccines that have helped protect vulnerable people from the ravages of Covid wherever they have been deployed. Offering the vaccine to the vulnerable everywhere, not the failed lockdowns, should be the priority to save lives.

We live with countless hazards, each of which we could but sensibly choose not to eradicate. Automobile fatalities could be eradicated by outlawing motor vehicles. Drowning could be eradicated by outlawing swimming and bathing. Electrocution could be eradicated by outlawing electricity. We live with these risks not because we're indifferent to suffering but because we understand that the costs of zero-drowning or zero-electrocution would be far too great. The same is true of zero-Covid.

Dr. Bhattacharya is a professor of medicine at Stanford and a research associate at the National Bureau of Economic Research. Mr. Boudreaux is a professor of economics at George Mason University.

Eradication of Covid is a Dangerous and Expensive Fantasy

EXHIBIT 5
LETTER FROM BOARD OF HEALTH
(AUGUST 26, 2021)

TOWN OF CARLISLE
OFFICE OF BOARD OF HEALTH
66 Westford Street
Carlisle, MA 01741
Tel.: (978) 369-0283
Fax: (978) 369-4521

MEMORANDUM

To: Carlisle Select Board
Town Administrator
Town Counsel

From: Carlisle Board of Health
Tony Mariano, Chairman

Date: August 26, 2021

In Re: Town of Carlisle Face Mask Mandate

Acting under its authority stated in Mass. General Laws, Chapter III, Section 31, the Carlisle Board of Health at a duly posted public meeting held on August 25, 2021, unanimously voted as follows:

> In response to the recent increase in positive COVID-19 cases in Carlisle and throughout Middlesex County, including break-through cases among those who have been fully vaccinated, the Carlisle Board of Health hereby adopts an indoor face mask mandate for all indoor public spaces, or private spaces open to the public within the Town of Carlisle

> except where an individual is unable to wear a face mask due to a medical condition or disability and in employee's private work space where face masks are encouraged. This mandate will be revisited by the Board of Health in early October, 2021.

Massachusetts General Laws Chapter 111, Section 104 permits "the selectmen and the board of health [to] use all possible care to prevent the spread of [an] infection" that is dangerous to public health. The Board of Health therefor requests that the Carlisle Select Board also issue an emergency declaration for the implementation of a local face mask mandate within the Town of Carlisle.[1]

---

[1] *See* Massachusetts General Laws Chapter 111, Sections 31 and 104

EXHIBIT 6
NOTICE OF CLAIM PURSUANT TO M.G.L. CH. 260 AND 42 U.S.C. § 1983 AND DEMAND FOR RESOLUTION (SEPTEMBER 7, 2021)

Timothy Goddard
Town of Carlisle Administrator & ADA Coordinator
66 Westford Street
Carlisle MA 01741

Administrator & ADA Coordinator Goddard:

This letter constitutes a Notice of Claim for unlawful conduct by town of Carlisle personnel, violations of civil rights pursuant to 42 U.S.C. § 1983 and Massachusetts General Laws Chapter 260 § 5B as well as demand for resolution within the next fifteen (15) days. This letter is being mailed and/or delivered to you as the prospective respondents, pursuant to the Massachusetts Civil Rights Act.

We are concerned by the town of Carlisle's violations of applicable civil rights laws, improper promotion of misleading propaganda, the Board of Health and Select Board overstepping their authority, and those transgressions' adverse impacts on us and others.

The Gleason Public Library's current mask policy published on its website (enclosed as Exhibit 1) states that, "Masks are required out of consideration for our high usage by children who are not yet able to be vaccinated." And a recent edition of the library's email newsletter to subscribers (enclosed as Exhibit 2) states that, "Masks are still required for all visitors age 2 and up, in consideration of our high usage by as-

yet-unvaccinated children and medically vulnerable individuals."

Such a policy implies that:

1. Library personnel know and assume responsibility for the medical conditions, vaccination status. medical vulnerabilities, and medical needs of each individual in the library, and
2. By wearing masks, persons protect others from airborne germs from which certain unspecified vaccinations could otherwise protect those other people.

It is unreasonable and unwarranted for library or other town personnel to assume or claim that they know the medical conditions. vaccination status, medical vulnerabilities, and medical needs of each person in the library or other town facilities. By creating and/or implementing such a policy, the town and its personnel have effectively assumed responsibility and liability for infections and resulting illnesses that persons may contract in the library.

Additionally, on the town's website www.carlislema .gov, a pop up window displays stating that effective September 1. 2021 the Carlisle Board of Health has issued an "indoor face mask mandate for all indoor public spaces, or private spaces open to the public within the Town of Carlisle except where an individual is unable to wear a face mask due to a medical condition or disability and in employee's private work space where face masks are encouraged." This announcement is also posted at https://www.carlislema.gov/ CivicAlerts.aspx?AID-220 (See Exhibit 3 enclosed.)

The website's face mask policy announcement claims that the Board of Health issued the face mask mandate with the concurrence of the Carlisle Select Board. The statute the website's announcement cites for the Board of Health's order is M.G.L. Ch. 111 § 104. That statute does not give the Board of Health or Select Board the authority to mandate the use of face masks. That statute merely authorizes the "selectmen and board of health" to "give public notice of infected places." It does not give the Select Board or Board of Health the authority to issue widespread notices of infection that are not specific to a particular place. It certainly does not give the authority to mandate or recommend the use of medical procedures or devices, such as face masks.

Additionally, the logic for the unlawful face mask mandate the Carlisle Board of Health has issued with the concurrence of the Select Board is fundamentally flawed. It implies that the mandate is only temporary. while COVID-19 exists. The virus associated with the infectious disease COVID-19—SARS-CoV-2—mutates readily to evade suppression by vaccines, is airborne and highly transmissible, and has non-human animal reservoirs. Hence, similar to the annual influenza virus that has existed for over a century, SARS-CoV-2 cannot be eradicated and COVID-19 will be a part of life indefinitely)[1]

On the website's COVID-19 page at https://www.carlislema.gov/845/Coronavirus-COVID-19 (see Exhibit 4 enclosed), it refers to the Massachusetts Department of Public Health's latest mask advisory. Yet the

---

[1] https://www.wsj.com/articles/zero-covid-coronavirus-pandemic-lockdowns-china-australia-new-zealand-11628101945

page misleadingly lists places that mask advisory "requires" people to be masked while omitting the fact that Massachusetts advisory also states that: "The following persons are exempt from the face coverings requirement:

- Children under 5 years old.
- Persons for whom a face mask or covering creates a health risk or is not safe because of any of the following conditions or circumstances:
    - the face mask or covering affects the person's ability to breathe safely;
    - the person has a mental health or other medical diagnosis that advises against wearing a face mask or covering;
    - the person has a disability that prevents them from wearing a face mask or covering; or
    - the person depends on supplemental oxygen to breathe."

By requiring persons to wear masks without having specified that those masks be tested, effective, or approved for the function of preventing the spread of infections, the town of Carlisle has made false and misleading claims. The U.S. Food and Drug Administration's (FDA) Emergency Use Authorization (EUA) for surgical and/or cloth masks requires that, "The product is not labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or

related uses or is for use such as infection prevention or reduction."

The statute granting the FDA the power to authorize a medical product for emergency use requires that the person being administered the product be advised of his or her right to refuse administration of the product. This statute further recognizes the well-settled doctrine that medical experiments, or "clinical research." may not be performed on human subjects without the express, informed consent of the individual receiving treatment. As C.F.R. § 50.20 states, "An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative."

The COVID-19 page on the Carlisle website links to a document titled Understanding Masks To Protect Children Against COVID-19 (enclosed as Exhibit 5). That document is misleading in a number of respects. First, the title and theme of it implies that children need protection from COVID-19, which is false.[2] (See Exhibit 6 enclosed.) Influenza presents a minuscule mortality risk to children in the first place, yet COVID-19 presents even less of a risk to children than influenza does. Second, the document implies that putting masks that do not block viruses on children protects children from COVID-19. That is illogical and

---

[2] https://wsj.com/articles/cdc-covid-19-coronavirus-vaccine-side-effects-hospitalization-kids-11626706868

nowhere in that document was that assertion truly substantiated. Instead, the basis of the document was speculation and wishful thinking. While much pseudo-science has been quoted in that document and elsewhere to suggest wearing masks to prevent viral respiratory infections, truly relevant facts and the most credible scientific studies reveal that masks are not effective for prevention of the spread of COVID-19.[3] Additionally, wearing masks has known harms to children and adults.[4 and 5] For the town of Carlisle to publish or promote such phobia-mongering, specious propaganda as that document is an egregious misuse of taxes and town resources. We as residents and taxpayers do not consent to that.

The fact is, masks are not approved to prevent the spread of viral respiratory infections. An EUA from the FDA, mentioned above, is for products of an investigational or experimental nature. The town's and Gleason Library's websites policies and COVID pages failed to disclose that the mask requirement and advisory is experimental and that wearing masks is known to be harmful.

As Article II of the Constitution of the Commonwealth of Massachusetts states, "no subject shall be hurt, molested, or restrained, in his person. liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience . . . " Some religions, creeds, physical disabilities, and/or mental disabilities prohibit or contraindicate the

---

[3] https://www.acpjournals.org/doj/10.7326/M20-6817

[4] https://bmj.com/content/370/bmj.m3021/rr-6

[5] https://www.mdpi.com/1660-4601/18/8/4344/htm

wearing of masks or face coverings or the partaking of vaccinations. Therefore, the town's published mask policies violate both our Massachusetts Constitutional rights as well as M.G.L. Chapter 272 § 92A, which prohibits public accommodations from depriving people of any, "religious sect, creed . . . deafness or blindness, or any physical or mental disability" of the "full enjoyment of the accommodations. advantages, facilities or privileges offered to the general public." Further, the statute states that, "Any person who shall violate any provision of this section, or who shall aid in or incite, cause or bring about. in whole or in part, such a violation shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both."

Michael Bush informed town of Carlisle personnel Board of Health Agent Linda Fantasia and Gleason Public Library Director Martha Feeney-Patten via email in March 2021 that because of such propaganda and longstanding face mask policies put forth by the town, he had been subjected to harassment and unlawful discrimination. Both Board of Health Agent Fantasia and Director Feeney-Patten replied to Mr. Bush's message, acknowledging his concerns yet providing no resolution in accordance with the law.

We will no longer tolerate such callous, unlawful discrimination by town entities or personnel. Nor will we tolerate the Select Board or Board of Health overstepping their authority. As these mask policies have violated our and others' federal and Massachusetts civil rights, pursuant to M.G.L. Ch. 265 Section 37, Select Board members, Board of Health staff and members, library personnel, or any other personnel communicating or implementing such unlawful policies

may each personally be, "fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both."

The mask policies are in violation of Title 18 U.S.C. § 242 - Deprivation Of Rights Under Color Of Law. Personnel having created, communicated, or attempted to enforce such policies in violation of civil rights laws may be charged and/or sued for such violation(s) pursuant to Title 42 U.S.C. § 1983 - Civil Rights Action For Deprivation Of Rights.

We therefore demand that within the next fifteen (15) days the town of Carlisle:

1. Rescind and remove the above-identified misleading and unlawful documents and policies pertaining to face masks and vaccinations.
2. The Board of Health inform businesses open to the public in town of that face mask mandate's rescission and that no one may be denied entry or service due to their religious sect, deafness or blindness, or any physical or mental disability that keeps them from wearing a face mask and they are not to be questioned about it,
3. Notify the Carlisle Mosquito newspaper of the rescission of the policies,
4. And choose either of the following:
    a. If the town and its personnel wish to assume legal liability for airborne viral

infections. the harassment such a policy causes people, as well as the harms of masks, issue a town policy (1) suggesting people wear masks in town facilities with the acknowledgment that masks are experimental and have known and unknown harms (2) acknowledging that masks are not approved by the FDA to prevent infections, and (3) regardless of whether people wear masks or have been vaccinated, they shall not be questioned or approached about either and shall be afforded full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public. or

b. If the town and its personnel prefer to avoid collective and/or personal legal liability for harassment, airborne viral infections, discrimination, unlawful actions, and harms related to masks or vaccinations, simply refrain from issuing rules, policies, mandates, or advisories regarding masks or vaccinations and refrain from communicating or attempting to implement any other entities' such mandates. advisories. etc.

Should you fail to provide the demanded relief within fifteen days, we may collectively and/or individually pursue the remedies available to us in preserving our legal rights and obtaining monetary and/or other redress. You may respond in writing to us collectively using Michael Bush's name and address.

Sincerely,

/s/ Michael Bush
280 Lowell Street
Carlisle, MA 01741

/s/ Robert Egri
80 Wildwood Drive
Carlisle, MA 01741

/s/ Katalin Egri
80 Wildwood Drive
Carlisle, MA 01741

/s/ Linda Taylor
879 Concord Street
Carlisle, MA 01741

/s/ Anita Opitz
51 Bingham Road
Carlisle, MA 01741

/s/ Monica Granfield
110 Carlisle Pines Drive
Carlisle, MA 01741

/s/ Ian Sampson
315 Fiske Street
Carlisle, MA 01741

/s/ Wojciech Krajewska
/s/Andrea Krajewska
/s/ Sharon Madeiro
89 Robbins Drive
Carlisle, MA 01741

EXHIBIT 7
NOTICE OF CLAIM PURSUANT TO M.G.L. CH. 260 AND 42 U.S.C. § 1983 AND DEMAND FOR RESOLUTION (SEPTEMBER 7, 2021)

Martha Feeney-Patten
Director
Gleason Public Library
22 Bedford Road
Carlisle MA 01741

Director Martha Feeney-Patten:

This letter constitutes a Notice of Claim for unlawful conduct by town of Carlisle personnel, violations of civil rights pursuant to 42 U.S.C. § 1983 and Massachusetts General Laws Chapter 260 § 5B as well as demand for resolution within the next fifteen (15) days. This letter is being mailed and/or delivered to you as the prospective respondents, pursuant to the Massachusetts Civil Rights Act.

We are concerned by the town of Carlisle's violations of applicable civil rights laws, improper promotion of misleading propaganda, the Board of Health and Select Board overstepping their authority, and those transgressions' adverse impacts on us and others.

The Gleason Public Library's current mask policy published on its website (enclosed as Exhibit 1) states that, "Masks are required out of consideration for our high usage by children who are not yet able to be vaccinated." And a recent edition of the library's email newsletter to subscribers (enclosed as Exhibit 2) states

that, "Masks are still required for all visitors age 2 and up, in consideration of our high usage by as-yet-unvaccinated children and medically vulnerable individuals."

Such a policy implies that:

1. Library personnel know and assume responsibility for the medical conditions, vaccination status. medical vulnerabilities, and medical needs of each individual in the library, and
2. By wearing masks, persons protect others from airborne germs from which certain unspecified vaccinations could otherwise protect those other people.

It is unreasonable and unwarranted for library or other town personnel to assume or claim that they know the medical conditions. vaccination status, medical vulnerabilities, and medical needs of each person in the library or other town facilities. By creating and/or implementing such a policy, the town and its personnel have effectively assumed responsibility and liability for infections and resulting illnesses that persons may contract in the library.

Additionally, on the town's website www.carlislema.gov, a pop up window displays stating that effective September 1. 2021 the Carlisle Board of Health has issued an "indoor face mask mandate for all indoor public spaces, or private spaces open to the public within the Town of Carlisle except where an individual is unable to wear a face mask due to a medical condition or disability and in employee's private work space where face masks are encouraged." This announcement is also posted at https://www.carlislema.gov/CivicAlerts.aspx?AID-220 (See Exhibit 3 enclosed.)

The website's face mask policy announcement claims that the Board of Health issued the face mask mandate with the concurrence of the Carlisle Select Board. The statute the website's announcement cites for the Board of Health's order is M.G.L. Ch. 111 § 104. That statute does not give the Board of Health or Select Board the authority to mandate the use of face masks. That statute merely authorizes the "selectmen and board of health" to "give public notice of infected places." It does not give the Select Board or Board of Health the authority to issue widespread notices of infection that are not specific to a particular place. It certainly does not give the authority to mandate or recommend the use of medical procedures or devices, such as face masks.

Additionally, the logic for the unlawful face mask mandate the Carlisle Board of Health has issued with the concurrence of the Select Board is fundamentally flawed. It implies that the mandate is only temporary. while COVID-19 exists. The virus associated with the infectious disease COVID-19—SARS-CoV-2—mutates readily to evade suppression by vaccines, is airborne and highly transmissible, and has non-human animal reservoirs. Hence, similar to the annual influenza virus that has existed for over a century, SARS-CoV-2 cannot be eradicated and COVID-19 will be a part of life indefinitely)[1]

On the website's COVID-19 page at https://www.carlislema.gov/845/Coronavirus-COVID-19 (see Exhibit 4 enclosed), it refers to the Massachusetts Department of Public Health's latest mask advisory. Yet the

---

[1] https://www.wsj.com/articles/zero-covid-coronavirus-pandemic-lockdowns-china-australia-new-zealand-11628101945

page misleadingly lists places that mask advisory "requires" people to be masked while omitting the fact that Massachusetts advisory also states that: "The following persons are exempt from the face coverings requirement:

- Children under 5 years old.
- Persons for whom a face mask or covering creates a health risk or is not safe because of any of the following conditions or circumstances:
    - the face mask or covering affects the person's ability to breathe safely;
    - the person has a mental health or other medical diagnosis that advises against wearing a face mask or covering;
    - the person has a disability that prevents them from wearing a face mask or covering; or
    - the person depends on supplemental oxygen to breathe."

By requiring persons to wear masks without having specified that those masks be tested, effective, or approved for the function of preventing the spread of infections, the town of Carlisle has made false and misleading claims. The U.S. Food and Drug Administration's (FDA) Emergency Use Authorization (EUA) for surgical and/or cloth masks requires that, "The product is not labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or

related uses or is for use such as infection prevention or reduction."

The statute granting the FDA the power to authorize a medical product for emergency use requires that the person being administered the product be advised of his or her right to refuse administration of the product. This statute further recognizes the well-settled doctrine that medical experiments, or "clinical research." may not be performed on human subjects without the express, informed consent of the individual receiving treatment. As C.F.R. § 50.20 states, "An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative."

The COVID-19 page on the Carlisle website links to a document titled Understanding Masks To Protect Children Against COVID-19 (enclosed as Exhibit 5). That document is misleading in a number of respects. First, the title and theme of it implies that children need protection from COVID-19, which is false.[2] (See Exhibit 6 enclosed.) Influenza presents a minuscule mortality risk to children in the first place, yet COVID-19 presents even less of a risk to children than influenza does. Second, the document implies that putting masks that do not block viruses on children protects children from COVID-19. That is illogical and

---

[2] https://wsj.com/articles/cdc-covid-19-coronavirus-vaccine-side-effects-hospitalization-kids-11626706868

nowhere in that document was that assertion truly substantiated. Instead, the basis of the document was speculation and wishful thinking. While much pseudo-science has been quoted in that document and elsewhere to suggest wearing masks to prevent viral respiratory infections, truly relevant facts and the most credible scientific studies reveal that masks are not effective for prevention of the spread of COVID-19.[3] Additionally, wearing masks has known harms to children and adults.[4 and 5] For the town of Carlisle to publish or promote such phobia-mongering, specious propaganda as that document is an egregious misuse of taxes and town resources. We as residents and taxpayers do not consent to that.

The fact is, masks are not approved to prevent the spread of viral respiratory infections. An EUA from the FDA, mentioned above, is for products of an investigational or experimental nature. The town's and Gleason Library's websites policies and COVID pages failed to disclose that the mask requirement and advisory is experimental and that wearing masks is known to be harmful.

As Article II of the Constitution of the Commonwealth of Massachusetts states, "no subject shall be hurt, molested, or restrained, in his person. liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience . . . " Some religions, creeds, physical disabilities, and/or mental disabilities prohibit or contraindicate the

---

[3] https://www.acpjournals.org/doj/10.7326/M20-6817

[4] https://bmj.com/content/370/bmj.m3021/rr-6

[5] https://www.mdpi.com/1660-4601/18/8/4344/htm

wearing of masks or face coverings or the partaking of vaccinations. Therefore, the town's published mask policies violate both our Massachusetts Constitutional rights as well as M.G.L. Chapter 272 § 92A, which prohibits public accommodations from depriving people of any, "religious sect, creed . . . deafness or blindness, or any physical or mental disability" of the "full enjoyment of the accommodations. advantages, facilities or privileges offered to the general public." Further, the statute states that, "Any person who shall violate any provision of this section, or who shall aid in or incite, cause or bring about. in whole or in part, such a violation shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both."

Michael Bush informed town of Carlisle personnel Board of Health Agent Linda Fantasia and Gleason Public Library Director Martha Feeney-Patten via email in March 2021 that because of such propaganda and longstanding face mask policies put forth by the town, he had been subjected to harassment and unlawful discrimination. Both Board of Health Agent Fantasia and Director Feeney-Patten replied to Mr. Bush's message, acknowledging his concerns yet providing no resolution in accordance with the law.

We will no longer tolerate such callous, unlawful discrimination by town entities or personnel. Nor will we tolerate the Select Board or Board of Health overstepping their authority. As these mask policies have violated our and others' federal and Massachusetts civil rights, pursuant to M.G.L. Ch. 265 Section 37, Select Board members, Board of Health staff and members, library personnel, or any other personnel communicating or implementing such unlawful policies

may each personally be, "fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both."

The mask policies are in violation of Title 18 U.S.C. § 242 - Deprivation Of Rights Under Color Of Law. Personnel having created, communicated, or attempted to enforce such policies in violation of civil rights laws may be charged and/or sued for such violation(s) pursuant to Title 42 U.S.C. § 1983 - Civil Rights Action For Deprivation Of Rights.

We therefore demand that within the next fifteen (15) days the town of Carlisle:

1. Rescind and remove the above-identified misleading and unlawful documents and policies pertaining to face masks and vaccinations.
2. The Board of Health inform businesses open to the public in town of that face mask mandate's rescission and that no one may be denied entry or service due to their religious sect, deafness or blindness, or any physical or mental disability that keeps them from wearing a face mask and they are not to be questioned about it,
3. Notify the Carlisle Mosquito newspaper of the rescission of the policies,
4. And choose either of the following:
    a. If the town and its personnel wish to assume legal liability for airborne viral

infections. the harassment such a policy causes people, as well as the harms of masks, issue a town policy (1) suggesting people wear masks in town facilities with the acknowledgment that masks are experimental and have known and unknown harms (2) acknowledging that masks are not approved by the FDA to prevent infections, and (3) regardless of whether people wear masks or have been vaccinated, they shall not be questioned or approached about either and shall be afforded full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public. or

b. If the town and its personnel prefer to avoid collective and/or personal legal liability for harassment, airborne viral infections, discrimination, unlawful actions, and harms related to masks or vaccinations, simply refrain from issuing rules, policies, mandates, or advisories regarding masks or vaccinations and refrain from communicating or attempting to implement any other entities' such mandates. advisories. etc.

Should you fail to provide the demanded relief within fifteen days, we may collectively and/or individually pursue the remedies available to us in preserving our legal rights and obtaining monetary and/or other redress. You may respond in writing to us collectively using Michael Bush's name and address.

Sincerely,

/s/ Michael Bush
280 Lowell Street
Carlisle, MA 01741

/s/ Robert Egri
80 Wildwood Drive
Carlisle, MA 01741

/s/ Katalin Egri
80 Wildwood Drive
Carlisle, MA 01741

/s/ Linda Taylor
879 Concord Street
Carlisle, MA 01741

/s/ Anita Opitz
51 Bingham Road
Carlisle, MA 01741

/s/ Monica Granfield
110 Carlisle Pines Drive
Carlisle, MA 01741

/s/ Ian Sampson
315 Fiske Street
Carlisle, MA 01741

/s/ Wojciech Krajewska

/s/Andrea Krajewska

/s/ Sharon Madeiro

89 Robbins Drive
Carlisle, MA 01741

EXHIBIT 8
NOTICE OF CLAIM PURSUANT TO M.G.L. CH. 260 AND 42 U.S.C. § 1983 AND DEMAND FOR RESOLUTION (SEPTEMBER 7, 2021)

Linda Fantasia
Board of Health Agent
66 Westford Street
Carlisle MA 01741

Board of Health Agent Linda Fantasia:

This letter constitutes a Notice of Claim for unlawful conduct by town of Carlisle personnel, violations of civil rights pursuant to 42 U.S.C. § 1983 and Massachusetts General Laws Chapter 260 § 5B as well as demand for resolution within the next fifteen (15) days. This letter is being mailed and/or delivered to you as the prospective respondents, pursuant to the Massachusetts Civil Rights Act.

We are concerned by the town of Carlisle's violations of applicable civil rights laws, improper promotion of misleading propaganda, the Board of Health and Select Board overstepping their authority, and those transgressions' adverse impacts on us and others.

The Gleason Public Library's current mask policy published on its website (enclosed as Exhibit 1) states that, "Masks are required out of consideration for our high usage by children who are not yet able to be vaccinated." And a recent edition of the library's email newsletter to subscribers (enclosed as Exhibit 2) states that, "Masks are still required for all visitors age 2

and up, in consideration of our high usage by as-yet-unvaccinated children and medically vulnerable individuals."

Such a policy implies that:

1. Library personnel know and assume responsibility for the medical conditions, vaccination status. medical vulnerabilities, and medical needs of each individual in the library, and
2. By wearing masks, persons protect others from airborne germs from which certain unspecified vaccinations could otherwise protect those other people.

It is unreasonable and unwarranted for library or other town personnel to assume or claim that they know the medical conditions. vaccination status, medical vulnerabilities, and medical needs of each person in the library or other town facilities. By creating and/or implementing such a policy, the town and its personnel have effectively assumed responsibility and liability for infections and resulting illnesses that persons may contract in the library.

Additionally, on the town's website www.carlislema .gov, a pop up window displays stating that effective September 1, 2021 the Carlisle Board of Health has issued an "indoor face mask mandate for all indoor public spaces, or private spaces open to the public within the Town of Carlisle except where an individual is unable to wear a face mask due to a medical condition or disability and in employee's private work space where face masks are encouraged." This announcement is also posted at https://www.carlislema.gov/CivicAlerts.aspx?AID-220 (See Exhibit 3 enclosed.)

The website's face mask policy announcement claims that the Board of Health issued the face mask mandate with the concurrence of the Carlisle Select Board. The statute the website's announcement cites for the Board of Health's order is M.G.L. Ch. 111 § 104. That statute does not give the Board of Health or Select Board the authority to mandate the use of face masks. That statute merely authorizes the "select-men and board of health" to "give public notice of infected places." It does not give the Select Board or Board of Health the authority to issue widespread notices of infection that are not specific to a particular place. It certainly does not give the authority to mandate or recommend the use of medical procedures or devices, such as face masks.

Additionally, the logic for the unlawful face mask mandate the Carlisle Board of Health has issued with the concurrence of the Select Board is fundamentally flawed. It implies that the mandate is only temporary. while COVID-19 exists. The virus associated with the infectious disease COVID-19—SARS-CoV-2—mutates readily to evade suppression by vaccines, is airborne and highly transmissible, and has non-human animal reservoirs. Hence, similar to the annual influenza virus that has existed for over a century, SARS-CoV-2 cannot be eradicated and COVID-19 will be a part of life indefinitely)[1]

On the website's COVID-19 page at https://www.carlislema.gov/845/Coronavirus-COVID-19 (see Exhibit 4 enclosed), it refers to the Massachusetts Department of Public Health's latest mask advisory. Yet the

---

[1] https://www.wsj.com/articles/zero-covid-coronavirus-pandemic-lockdowns-china-australia-new-zealand-11628101945

page misleadingly lists places that mask advisory "requires" people to be masked while omitting the fact that Massachusetts advisory also states that: "The following persons are exempt from the face coverings requirement:

- Children under 5 years old.
- Persons for whom a face mask or covering creates a health risk or is not safe because of any of the following conditions or circumstances:
    - the face mask or covering affects the person's ability to breathe safely;
    - the person has a mental health or other medical diagnosis that advises against wearing a face mask or covering;
    - the person has a disability that prevents them from wearing a face mask or covering; or
    - the person depends on supplemental oxygen to breathe."

By requiring persons to wear masks without having specified that those masks be tested, effective, or approved for the function of preventing the spread of infections, the town of Carlisle has made false and misleading claims. The U.S. Food and Drug Administration's (FDA) Emergency Use Authorization (EUA) for surgical and/or cloth masks requires that, "The product is not labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or

related uses or is for use such as infection prevention or reduction."

The statute granting the FDA the power to authorize a medical product for emergency use requires that the person being administered the product be advised of his or her right to refuse administration of the product. This statute further recognizes the well-settled doctrine that medical experiments, or "clinical research." may not be performed on human subjects without the express, informed consent of the individual receiving treatment. As C.F.R. § 50.20 states, "An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative."

The COVID-19 page on the Carlisle website links to a document titled Understanding Masks To Protect Children Against COVID-19 (enclosed as Exhibit 5). That document is misleading in a number of respects. First, the title and theme of it implies that children need protection from COVID-19, which is false.[2] (See Exhibit 6 enclosed.) Influenza presents a minuscule mortality risk to children in the first place, yet COVID-19 presents even less of a risk to children than influenza does. Second, the document implies that putting masks that do not block viruses on children protects children from COVID-19. That is illogical and

---

[2] https://wsj.com/articles/cdc-covid-19-coronavirus-vaccine-side-effects-hospitalization-kids-11626706868

nowhere in that document was that assertion truly substantiated. Instead, the basis of the document was speculation and wishful thinking. While much pseudoscience has been quoted in that document and elsewhere to suggest wearing masks to prevent viral respiratory infections, truly relevant facts and the most credible scientific studies reveal that masks are not effective for prevention of the spread of COVID-19.[3] Additionally, wearing masks has known harms to children and adults.[4][5] For the town of Carlisle to publish or promote such phobia-mongering, specious propaganda as that document is an egregious misuse of taxes and town resources. We as residents and taxpayers do not consent to that.

The fact is, masks are not approved to prevent the spread of viral respiratory infections. An EUA from the FDA, mentioned above, is for products of an investigational or experimental nature. The town's and Gleason Library's websites policies and COVID pages failed to disclose that the mask requirement and advisory is experimental and that wearing masks is known to be harmful.

As Article II of the Constitution of the Commonwealth of Massachusetts states, "no subject shall be hurt, molested, or restrained, in his person. liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience . . . " Some religions, creeds, physical disabilities, and/or mental disabilities prohibit or contraindicate the

---

[3] https://www.acpjournals.org/doj/10.7326/M20-6817

[4] https://bmj.com/content/370/bmj.m3021/rr-6

[5] https://www.mdpi.com/1660-1601/18/8/4344/htm

wearing of masks or face coverings or the partaking of vaccinations. Therefore, the town's published mask policies violate both our Massachusetts Constitutional rights as well as M.G.L. Chapter 272 § 92A, which prohibits public accommodations from depriving people of any, "religious sect, creed . . . deafness or blindness, or any physical or mental disability" of the "full enjoyment of the accommodations. advantages, facilities or privileges offered to the general public." Further, the statute states that, "Any person who shall violate any provision of this section, or who shall aid in or incite, cause or bring about. in whole or in part, such a violation shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both."

Michael Bush informed town of Carlisle personnel Board of Health Agent Linda Fantasia and Gleason Public Library Director Martha Feeney-Patten via email in March 2021 that because of such propaganda and longstanding face mask policies put forth by the town, he had been subjected to harassment and unlawful discrimination. Both Board of Health Agent Fantasia and Director Feeney-Patten replied to Mr. Bush's message, acknowledging his concerns yet providing no resolution in accordance with the law.

We will no longer tolerate such callous, unlawful discrimination by town entities or personnel. Nor will we tolerate the Select Board or Board of Health overstepping their authority. As these mask policies have violated our and others' federal and Massachusetts civil rights, pursuant to M.G.L. Ch. 265 Section 37, Select Board members, Board of Health staff and members, library personnel, or any other personnel communicating or implementing such unlawful policies

may each personally be, "fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both."

The mask policies are in violation of Title 18 U.S.C. § 242 - Deprivation Of Rights Under Color Of Law. Personnel having created, communicated, or attempted to enforce such policies in violation of civil rights laws may be charged and/or sued for such violation(s) pursuant to Title 42 U.S.C. § 1983 - Civil Rights Action For Deprivation Of Rights.

We therefore demand that within the next fifteen (15) days the town of Carlisle:

1. Rescind and remove the above-identified misleading and unlawful documents and policies pertaining to face masks and vaccinations.
2. The Board of Health inform businesses open to the public in town of that face mask mandate's rescission and that no one may be denied entry or service due to their religious sect, deafness or blindness, or any physical or mental disability that keeps them from wearing a face mask and they are not to be questioned about it,
3. Notify the Carlisle Mosquito newspaper of the rescission of the policies,
4. And choose either of the following:
    a. If the town and its personnel wish to assume legal liability for airborne viral

infections. the harassment such a policy causes people, as well as the harms of masks, issue a town policy (1) suggesting people wear masks in town facilities with the acknowledgment that masks are experimental and have known and unknown harms (2) acknowledging that masks are not approved by the FDA to prevent infections, and (3) regardless of whether people wear masks or have been vaccinated, they shall not be questioned or approached about either and shall be afforded full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public. or

b. If the town and its personnel prefer to avoid collective and/or personal legal liability for harassment, airborne viral infections, discrimination, unlawful actions, and harms related to masks or vaccinations, simply refrain from issuing rules, policies, mandates, or advisories regarding masks or vaccinations and refrain from communicating or attempting to implement any other entities' such mandates. advisories. etc.

Should you fail to provide the demanded relief within fifteen days, we may collectively and/or individually pursue the remedies available to us in preserving our legal rights and obtaining monetary and/or other redress. You may respond in writing to us collectively using Michael Bush's name and address.

Sincerely,

/s/ Michael Bush
280 Lowell Street
Carlisle, MA 01741

/s/ Robert Egri
80 Wildwood Drive
Carlisle, MA 01741

/s/ Katalin Egri
80 Wildwood Drive
Carlisle, MA 01741

/s/ Linda Taylor
879 Concord Street
Carlisle, MA 01741

/s/ Anita Opitz
51 Bingham Road
Carlisle, MA 01741

/s/ Monica Granfield
110 Carlisle Pines Drive
Carlisle, MA 01741

/s/ Ian Sampson
315 Fiske Street
Carlisle, MA 01741

/s/ Wojciech Krajewska

/s/Andrea Krajewska

/s/ Sharon Madeiro

89 Robbins Drive
Carlisle, MA 01741

EXHIBIT 9
EMAIL CORRESPONDENCE
(SEPTEMBER 22, 2021)

From: Linda Fantasia
To: bmoc54@verizon.net
Date: September 22, 2021 at 2:54 PM

I have received your 'Notice of Claim Pursuant to M.G.L. Ch 260 and 42 U.S.C.~1983 and Demand For Resolution." Dated 9/7/21.

Linda Fantasia
Health Agent
Town of Carlisle
66 Westford Street
Carlisle MA 01741
(978) 369-0283

Please be advised that all email sent and received through the Town of Carlisle system may be considered part of the public record.

Due to unprecedented public health conditions at this time, non-emergency Health Department responses may be delayed. We will provide responses as soon as possible and appreciate your patience.

MOTION OF DEFENDANTS TO DISMISS PLAINTIFFS' COMPLAINT UNDER RULE 12(B)(6) (JANUARY 5, 2022)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; KATE HENDERSON; ROBERT EGRI; KATALIN EGRI; ANITA OPTIZ; MONICA GRANFIELD; ANN LINSEY HURLEY; IAN SAMPSON; SUSAN PROVENZANO; and JOSEPH PROVENZANO,

Pro Se Plaintiffs,

v. C.A. No. 1:21-cv-11794-ADB

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; and TOWN OF CARLISLE,

Defendants.

MOTION OF DEFENDANTS TO DISMISS PLAINTIFFS' COMPLAINT UNDER RULE 12(B)(6)

The defendants, Linda Fantasia, Martha Feeney-Patten, Anthony Mariano, Catherine Galligan, Jean Jasaitis Barry, Patrick Collins, David Erickson, Timothy Goddard and Town of Carlisle, hereby move

to dismiss plaintiffs' Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state claims upon which relief can be granted. As grounds therefor, the defendants state:

1. The Carlisle Board of Health ("BOH") had the authority under Massachusetts law to issue the mask mandate on August 26, 2021.

2. The plaintiffs fail to state a claim for relief under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, et seq. (Count I).

3. The plaintiffs fail to state a claim for relief under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 (Count II).

4. The individual defendants are entitled to qualified immunity under 42 U.S.C. § 1983 (Count II).

5. The plaintiffs fail to state a claim for relief under the Civil Rights Act of 1964, 42 U.S.C. § 2000a (Count IV).

6. Counts III & V-X of plaintiffs' Complaint contain no private rights of action under which plaintiffs can recover.

7. Plaintiffs' Complaint contains insufficient allegations of wrongdoing against the individual defendants, Linda Fantasia and Timothy Goddard.

Defendants hereby submit the enclosed Memorandum of Law in support of their Motion to Dismiss. For the convenience of the Court, a copy of *Family Freedom Endeavor, Inc. v. Riley*, Hampden Super. Ct., C.A. No. 2179CV00494, at 2-3 (Nov. 16, 2021), cited in defendants' Memorandum of Law, is attached hereto as Exhibit "A."

WHEREFORE, the defendants, Linda Fantasia, Martha Feeney-Patten, Anthony Mariano, Catherine Galligan, Jean Jasaitis Barry, Patrick Collins, David Erickson, Timothy Goddard and Town of Carlisle, respectfully request that this Honorable Court dismiss plaintiffs' Complaint for failure to state claims upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

REQUEST FOR ORAL ARGUMENT

The defendants respectfully request the Court to schedule oral argument on their Motion to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6).

Respectfully submitted,

The Defendants,

LINDA FANTASIA, MARTHA FEENEY-PATTEN, ANTHONY MARIANO, CATHERINE GALLIGAN, JEAN JASAITIS BARRY, PATRICK COLLINS, DAVID ERICKSON, TIMOTHY GODDARD and TOWN OF CARLISLE,

By their Attorneys,

PIERCE DAVIS & PERRITANO LLP

/s/ John J. Davis

John J. Davis, BBO #115890
10 Post Office Square, Suite 1100N
Boston, MA 02109
(617) 350-0950
jdavis@piercedavis.com

Dated: January 5, 2022

LOCAL RULE 7.1 CERTIFICATE

I hereby certify that, on January 5, 2022, I attempted to confer in good faith with pro se plaintiff, Michael Bush, by telephone, in an effort to resolve or narrow the issues regarding this Motion. Mr. Bush is the only plaintiff whose telephone number and email address is listed on the Court docket.

/s/ John J. Davis
John J. Davis, Esq.

[. . .]

MEMORANDUM OF DECISION AND ORDER IN *THE FAMILY FREEDOM ENDEAVOR, INC. v. RILEY* (NOVEMBER 16, 2021)

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

THE FAMILY FREEDOM ENDEAVOR, INC. & others[1],

v.

JEFFREY C. RILEY, as COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, & another[2],

AND CONSOLIDATED CASES[3]

---

1 The People's Freedom Endeavor, by its individual representatives Justin McCarthy, Matthew Hall, Alecia DePesa, Joseph Boccelli, and Daniel Ashley-Silva.

2 the Massachusetts Board of Elementary and Secondary Education.

3 The cases consolidated with this lead case are: *Children's Health Rights of Massachusetts v. DESE, Andover Pub. Sch. Dist., Attleboro Pub. Sch. Dist., Easton Pub. Sch. Dist., and Sandwich Pub. Sch. Dist.*, 2173CV00672; *Children's Health Rights of Massachusetts v. DESE, Cambridge Pub. Sch. Dist., City of Cambridge, Franklin Pub. Sch. Dist., Northborough Pub. Sch. Dist., Southborough Pub. Sch. Dist., Northborough-Southborough Reg. Pub. Sch. Dist., and Tyngsborough Pub. Sch. Dist.*, 2182CV00874; *Citizens for Medical Freedom, Inc. v. DESE, Dover Pub. Sch. Dist., Sherborn Pub. Sch. Dist., Dover-Sherborn Regional Sch. Dist., and the Town of Dover*, 2182CV00878, *Children's Health Rights of Massachusetts*

Docket No. 2179CV00494

Before: David M. HODGE,
Justice of the Superior Court.

I. Introduction

This controversy arises out of health and safety measures imposed during the ongoing COVID-19 pandemic to reopen Massachusetts public K-12 schools for in-person learning. The plaintiffs in these six consolidated actions are nonprofit entities and parents of school children who challenge the authority of the Department of Elementary and Secondary Education (DESE), the Board of Elementary and Secondary Education (BESE), eighteen public school districts, and two municipalities, Cambridge and Dover, to issue and implement mask mandates for school children. The plaintiffs argue, *inter alia,* that the defendants lacked authority to issue and implement the mask mandates, that the mandates violate parents' constitutional rights to make decisions regarding their children's health, and that mask wearing is ineffective and harms children. The plaintiffs seek declaratory judgment and injunctive relief enjoining the defendants from enforcing and extending the mandates. These cases are before me on the plaintiffs' motions for a preliminary injunction. After a hearing and consideration

v. DESE, Bridgewater-Raynham Regional Sch. Dist., Carver Pub. Sch. Dist., Hingham Pub. Sch. Dist., and West Bridgewater Pub. Sch. Dist., 2183CV00766, and *Carlino, et als. v. DESE and Tewksbury Pub. Sch. Dist.*, 218I CV02076.

of the parties' submissions, I *deny* the motions for preliminary injunction.

II. The Mask Mandates

On March 10, 2020, pursuant to the Civil Defense Act, Governor Charlie Baker declared a state of emergency in Massachusetts due to the spread of COVID-19. On March 15, 2020, Baker issued an order suspending in-person instruction at all elementary and secondary schools in Massachusetts. On May 28, 2021, Baker terminated the state of emergency but declared a public health emergency under G. L. c. 17, § 2A.

The Centers for Disease Control (CDC) has reported that over 720,000 persons in the United States have died from COVID-19. The Massachusetts Department of Public Health (DPH) has reported that over 18,000 people in Massachusetts had died of COVID-19 as of October 2021. The trajectory of the pandemic has been unpredictable. More transmissible variants of COVID-19 have been linked to surges in hospitalizations and deaths, and at the same time vaccinations which reduce the risk of serious illness from COVID-19 have been distributed to many persons, now even children.

In May of 2021, COVID-19 cases, hospitalizations and deaths fell as vaccination rates increased. DESE then announced that for the fall of 2021, all districts and schools would have to provide in-person, full-time learning and that all DESE health and safety requirements would be lifted. (Johnston Aff. par. 19). Over the course of the summer of 2021, however, the Delta variant of COVID-19 arrived in Massachusetts and the number of COVID-19 cases began rising again. In July 2021, the seven-day COVID-19 case average in

Massachusetts was 223, but by August 18, that figure had climbed to 1,237.

In August of 2021, BESE met to discuss the changed circumstances and the awareness that remote learning had harmed many school children. State and local education authorities considered ways to resume in-person learning but with health requirements which would allow students and staff to return to schools safely. Both the CDC and the DPH have recommended mask wearing and other measures to reduce the risk of COVID-19 transmission. The American Academy of Pediatrics supports mask wearing in schools for children who are two years and older. *See also Derosiersv. Governor*, 486 Mass. 369, 372 (2020) ("Medical experts have identified ways in which the spread of the virus can be curtailed, which include wearing a cloth face mask, social distancing, quarantining when infected or exposed to the virus, hand washing, and cleaning frequently touched surfaces").

On August 24, 2021, BESE voted to authorize the Commissioner of DESE to issue a statewide mask mandate for all public school children aged five and up, along with faculty and staff, with exceptions. The same day, BESE voted to declare "exigent circumstances" pursuant to 603 Code Mass. Regs. § 27.08, which provides in relevant part:

> "(1) [U]pon a determination by [BESE] that exigent circumstances exist that adversely affect the ability of students to attend classes in a safe environment unless additional health and safety measures are put in place, the Commissioner, in consultation with medical experts and state health officials, shall

> issue health and safety requirements and related guidance for districts.
>
> . . . .
>
> "(7) The authorities granted in 603 Code Mass. Regs. § 27.08 shall remain in effect until [BESE] determines that students can attend classes in a safe environment without additional health and safety measures."

The mandate authorized by BESE and DESE (also referred to as the State defendants) exempts students and staff who are unable to wear a mask for medical or behavioral reasons and permits the removal of masks for eating, drinking, outdoor time, taking mask breaks, and indoors during elective classes such as while playing wind instruments. Pursuant to the mandate,

> "[s]tudents and staff who cannot wear a mask for medical reasons and students who cannot wear a mask for behavioral reasons are exempted from the requirement. Face shields may be an option for students with medical or behavioral needs who are unable to wear masks or face coverings. Transparent masks may be the best option for both teachers and students in classes for deaf and hard of hearing students."

DESE directed school districts to enforce the mandate and to provide disciplinary procedures for noncompliance, but cautioned that

> "[w]hether and when a student should be disciplined for failure to wear a mask is a local decision, guided by the district's student

> discipline policy and the particular facts. . . . [S]ome students with disabilities may need additional supports' to wear masks and may need to be accommodated. Districts are encouraged to consider and implement alternatives before resorting to disciplinary exclusion. Keeping students connected with school is especially important this year as students return to school after a challenging school year."

DESE has instructed that schools which achieved a vaccination rate above 80% by October 1, 2021, could disregard the mandate for students and staff who are vaccinated.

The mandate, by its terms, "is an exercise of [BESE's] authority to ensure students attend classes in a safe environment" and "to set policies relative to children's education, including ensuring that students receive the required amount of structured learning time through in-person education" pursuant to, *inter alia*, G. L. c. 69, §§ 1B, 1G; and 603 Code Mass. Regs. § 27.08.

The State defendants extended the mandate on September 27th and on October 26th, with the latter extension in effect until at least January 15, 2022. DESE explained in the mandate that the mask requirement "remains an important measure to keep students safe in school at this time," that it extended the mask requirement after consulting with medical experts and state health officials, and that it would continue to work with those entities "to evaluate the mask requirement beyond January 15."

Among the defendants in these actions are eighteen public school districts which have implemented this mandate and two municipalities which have separately issued mask mandates. The record discloses that such local decisions to impose or comply with the mandates have been based upon guidance from public health authorities and other professionals.[4]

III. Alleged Harms from Mask Mandates

In support of their claim that the mask mandates harm children, the plaintiffs submit an affidavit (entitled a declaration, but signed under the pains and penalties of perjury on September 23, 2021) of Andrew Bostom, M.D., who has a master's degree in epidemiology. He is an associate professor at Brown University's School of Medicine.

---

[4] For example, Scott Kmief, the Superintendent of Schools for the Carver Public Schools, states in his affidavit that Carver, in following DESE's mask mandate, is acting in accordance with guidance from the CDC, the DPH, and the Town of Carver's Board of Health.

In Cambridge, the Chief Operating Officer of the Cambridge School Department explained that the school mask mandate was considered by its COVID-19 Safety, Health & Facilities Working Group, which is comprised of scientists, doctors, educators, and families appointed by the school superintendent. That group recommended that masks be required for the first semester of this academic year and cited among its reasons that some individuals, even if fully vaccinated, were at higher risk of serious illness if exposed to COVID-19, and that the American Academy of Pediatrics recommended universal masking in schools for everyone aged two and up. The school committee voted to approve of the group's recommendation and the superintendent recommended that masks be required inside all Cambridge public school buildings for the first semester.

Bostom opines that prolonged mask wearing by K-12 school children causes significant and irreparable harm physically and psychologically. According to Bostom, prolonged mask wearing causes headaches, visual disturbances, drowsiness, dizziness, reduced concentration, orofacial skin irritation, acne, and provokes an increase in stress hormones, which, in turn, negatively impacts the immune response. He adds that chronic mask wearing can potentially cause a significant increase in socio-psychological stress and mental harm that can escalate into behavioral problems and be difficult to reverse. Bostom does not cite any documented cases of that potential phenomenon. He also states that there are reports of claustrophobic experiences and difficulty getting sufficient oxygen, but he adds no additional information, such as the number of negative reports or whether any were substantiated. He does not specify the ages of the persons who reportedly experienced the negative effects of mask wearing, nor state how long the masks were used or the types of masks used. Bostom does not explain whether exemptions and accommodations were available nor does he state that these increased risks occur in school age children where there are provisions for breaks from mask wearing, exemptions from the mandate for medical and behavioral reasons, and accommodations. Bostom does not attempt to balance the risk of potential harms from masking against the risk of harms from COVID-19 infection or from remote learning.

The plaintiffs have also submitted affidavits from John Diggs, M.D., a physician who has treated hundreds of COVID-19 patients, and Tammy Blakeslee, an industrial hygienist. Diggs emphasizes that children

are far less likely than older persons to require hospitalization or to die from COVID-19. Diggs states that there is no evidence that masking decreases the rates of hospitalizations and deaths from COVID-19. He sees mask wearing as causing a deterioration in dental health and in IQs. In his view, "uniform masking" should cease, respiratory pandemics tend to burn themselves out through herd immunity, and vaccinations prolong COVID-19 variants and drive variants.

Blakeslee devotes much of her affidavit to the different degrees of protection from N95 masks and other types of masks. She views typical cloth masks as unhelpful in protecting against infectious diseases and creating more health risks. She reasons that face coverings can be a breeding ground for bacteria and, by keeping germs within the mask, they place the wearer at greater risk of becoming sick. Both Diggs and Blakeslee conclude that the masks are ineffective and do more harm than good to school children.

IV. Legal Analysis

When a private party seeks a preliminary injunction, the moving party is required to show that an irreparable injury would occur without immediate injunctive relief *LeClair v. Town of Norwell*, 430 Mass. 328, 331 (1999). In ruling upon a motion for a preliminary injunction, the court first

> "evaluates in combination the moving party's claim of injury and chances of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance

> this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between those risks cuts in favor of the moving party may a preliminary injunction properly issue."

Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980).

A. Statutory and Regulatory Grounds for the State Defendants' Mask Mandate

General Laws c. 69, § 1B, generally provides that BESE "shall establish policies relative to the education of students in public early childhood, elementary, secondary, and vocational-technical schools." Other provisions of § 1B address specific aspects of education, including but not limited to curricula, teachers' qualifications, standards for under-performing schools, personnel evaluation guidelines, and equitable distribution of financial resources. The plaintiffs highlight one provision in particular as evidence that the State defendants only can impose school health related restrictions if the school buildings pose health risks. The provision of § 1B they highlight states that BESE

> "shall establish minimum standards for all public early childhood, elementary, secondary and vocational-technical school buildings, subject to the provisions of the state building code. The board shall establish standards to

> ensure that every student shall attend classes in a safe environment."
>
> Section 1B further states that BESE
>
> "shall establish such other policies as it deems necessary to fulfill the purposes of this chapter and chapters [15, 70, 71A, 71B, and 74]. In accordance with the provisions of [c. 30A, BESE] may promulgate regulations as necessary to fulfill said purposes. Said regulations shall be promulgated so as to encourage innovation, flexibility, and accountability in schools and school districts."

G. L. c. 69, § 1B.

The plaintiffs primarily argue that the State defendants lacked authority to issue and implement their mask mandate because the Legislature did not expressly grant them such authority. The plaintiffs narrowly interpret § 1B as authorizing BESE to impose health related restrictions only when school buildings pose health risks, due to the provision in § 1B that BESE "shall establish minimum standards for all public . . . school buildings, subject to the provisions of the state building code." The plaintiffs simply ignore the rest of the statute which unambiguously evinces a legislative intent that the State defendants ensure that students attend classes in a healthy and safe educational environment, which environment cannot be reasonably read to be limited to the condition of the buildings. The statute's intended applicability to any health risks, not just those posed by school building conditions, is common sense. It is also clear from the broad language of § 1B which requires BESE to establish policies relative to school children's education and

to "establish such other policies as it deems necessary to fulfill the purposes of this chapter and chapters [15, 70, 71A, 71B, and 74] . . . so as to encourage innovation, flexibility, and accountability in schools and school districts." The plaintiffs have not demonstrated that the State defendants lacked authority under this statute during an unprecedented pandemic to establish policies to ensure safe in-person learning in public schools.

The directive of § 1B that BESE establish policies relative to school children's education authorized the promulgation and use of 603 Code Mass. Regs. § 27.08. "An agency's powers to promulgate regulations are 'shaped by its organic statute taken as a whole and need not necessarily be traced to specific words." *Massachusetts Federation of Teachers, AFT, AFL-CIO v. Bd. of Educ.*, 436 Mass. 763, 773 (2002), quoting *Purity Supreme, Inc. v. Atty. Gen.*, 380 Mass. 762, 770 (1980). *See Grocery Manufacturers of Amer., Inc. v. Dept. of Pub. Health*, 379 Mass. 70, 75 (1979) (regulation may be authorized even where it cannot be traced to specific statutory language).

Upon BESE's determination under § 27.08 that "exigent circumstances exist that adversely affect the ability of students to attend classes in a safe environment unless additional health and safety measures are put in place," the Commissioner, in consultation with medical experts and state health officials, was required to "issue health and safety requirements and related guidance for districts." That is exactly what occurred here. The plaintiffs have not shown that the State defendants lacked authority to issue and implement their mask mandate pursuant to G. L. c. 69, § 1B,

and 603 Code Mass. Regs. § 27.08.[5] The plaintiffs are unlikely to succeed on the merits of their core claim challenging the legality of the State defendants' mask mandate.

B. The Exigent Circumstances Determination

The plaintiffs maintain that even if the State defendants had authority under G. L. c. 69, § 1B, and 603 Code Mass. Regs. § 27.08, they nonetheless exceeded their authority because there were and are no exigent circumstances concerning COVID-19 in Massachusetts, let alone concerning children, to justify invoking § 27.08. This argument merits no more than cursory attention. The governor declared a public health emergency. The Delta variant-related surge in COVID-19 infections in Massachusetts prompted school officials to reevaluate how to provide safe in-person learning. The State defendants relied upon the guidance of medical experts and public health authorities in crafting

---

[5] The plaintiffs filed a Notice of Supplemental Authority citing a decision recently issued by a Pennsylvania court in *Corman v. Acting Sec'y of Health*, No. 294 M.D. 2021 (Nov. 10, 2021) (slip op.). In that case, parents as well as private schools and some public school districts challenged the validity of an order by a state agency requiring masks in all schools. The court ruled that the order was invalid because (1) it was not issued in compliance with mandatory rule making procedures, and (2) the health regulation relied upon for the order only authorized actions where the persons affected were known to have or been exposed to persons with communicable diseases, which was not the case in the schools. *Corman* does not aid the plaintiffs in these consolidated actions. The regulation relied upon here, 603 Code Mass. Regs. § 27.08, was properly promulgated and the State defendants' application of it did not exceed their authority as explained above.

the mask requirements with exemptions, after taking into account the many concerns in this fluid and perilous situation. Nothing in the record suggests that such reliance was unreasonable or that the State defendants' determination of exigent circumstances lacked a substantial basis or relation to the protection of public health. *See Derosiers*, 486 Mass. at 385-386.

On the other hand, the plaintiffs' blanket denial of exigent circumstances and of the need for masks in schools contradicts the guidance issued by the CDC, the DPH, and the American Academy of Pediatrics. On these facts, this court will not second guess the State defendants' determination that exigent circumstances existed to invoke § 27.08. *See Kain v. Dept. of Envir. Protection*, 474 Mass. 278, 293 (2016) (where board balanced public policy concerns, it was not for court to second guess board's course of action). The plaintiffs have not established that the State defendants exceeded their authority in determining that exigent circumstances existed to impose the mask mandate.

C. Municipal Mask Mandates

Some of the plaintiffs further contend that the public school districts and two municipalities which are defendants in these actions lacked authority to issue and impose their mask mandates because the Legislature did not authorize them to do so.[6] For this

---

[6] The Family Freedom Endeavor, Inc. argues that any school mask mandates should only be issued by local school districts rather than the State defendants and that local school boards should be free to do what they deem appropriate. Other plaintiffs, including Children's Health Rights of Massachusetts, Citizens for Medical Freedom, Inc., and individual parents, take the

argument, they misplace reliance upon *Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 10 (1975), for the proposition that municipalities' authorities are limited to powers expressly stated in governing statutes. *Del Duca* does not aid the plaintiffs, but only clarifies that the Home Rule Amendment and the Home Rule Procedures Act permit municipalities to exercise any power conferred upon them by the Legislature so long as their exercise of that power is not inconsistent with the Constitution or a general law enacted pursuant to the Legislature's retained powers. *Id.* Whether the mask mandate is preempted by DPH's regulatory scheme or conflicts with parents' constitutional rights, as alleged by the plaintiffs, is addressed below.

D. Whether Mask Mandates are Preempted by DPH Regulatory Scheme

The plaintiffs maintain that the defendants cannot mandate or implement mask wearing because that subject matter is preempted by the DPH.[7] The

---

contrary position that even local authorities lack power to impose mask mandates, and that parents rather than governmental entities should determine whether their children wear masks in order to attend school in person.

[7] Some of the plaintiffs also complain that two municipalities, Cambridge and Dover, have issued mask mandates without authority. Defense counsel for one of the municipalities argued in the motion hearing that the plaintiffs lack standing on these claims because the municipalities' mandates are not applicable to schools and the plaintiffs have not alleged that they have been impacted by those mask orders. The plaintiffs responded by stating that Dover's ordinance does not exempt, and therefore applies, to its schools, and thus confers standing upon the plaintiffs. This debate does not change the focus of this litigation and

plaintiffs see the DPH's statutory and regulatory scheme concerning infectious diseases as so comprehensive that it compels the conclusion that it preempts all actions by other public entities with respect to infectious diseases. Specifically, the plaintiffs argue that because the DPH regulates this field and has not imposed a mask mandate through the Commissioner of Public Health's order dated May 28, 2021, the defendants' mask mandates exceed their authority.

The plaintiffs rely upon *LeClair v. Town of Norwell*, 430 Mass. at 337 n.11, which reads in part: "A municipal regulation will be invalidated only (1) if there is an express legislative intent that there be no municipal regulation, or (2) the local regulation would so frustrate the state statute as to warrant the conclusion that preemption was intended." A legislative intent to preempt a local regulation cannot be inferred absent a conflict between the State statute and a municipal regulation. *Cf. id.*

The plaintiffs' preemption argument fails. They have not pointed to any conflict between the DPH's order, which did not bar mask mandates, and the mandates here. Instead, the mandates were guided by the DPH, other public health authorities, and medical experts. Nor is there any evidence of an express legislative intent that municipalities not impose health related rules in their own schools.

E. Constitutional Claims

The plaintiffs also challenge the mask mandates on constitutional grounds, claiming that they infringe

---

the motions for a preliminary injunction with respect to the mask mandate in public schools.

upon parents' constitutional right to make fundamental decisions about their children's care, upbringing and education, and therefore that this court must review the challenge under a standard of strict scrutiny. *See Langone v. Sec'y of the Commonwealth*, 388 Mass. 185, 196 (1983) ("Strict scrutiny is required if the interests asserted by the plaintiffs are fundamental and the infringement of them is substantial"). From that basis, the plaintiffs argue that there is no compelling government interest in the mask mandates because COVID-19 poses no risk to children, and that masks are not effective but rather harm children.

Strict scrutiny is an inappropriate standard of review here because the plaintiffs have not demonstrated that they have a fundamental interest in not having their children masked at school or that their interest has been substantially impaired. The parents who are plaintiffs in these actions do not have limitless authority in the school context.[8] Their right to direct the care of their children is circumscribed when it jeopardizes the health or safety of children or has a "potential for significant social burdens." *See Matter of McCauley*, 409 Mass. 134, 137 (1991). Parental rights do not include the liberty to expose the community or

---

[8] For their argument that the mask mandates violate their constitutional rights as parents, the plaintiffs rely upon one ruling in Arkansas, in *Sitton v. Bentonville Schools*, Case No. 4CV-21-2181 (Ark. Cir. Ct. Oct. 12, 2021). The *Sitton* decision is not authoritative and is undercut by the reasoning of a plethora of decisions from other jurisdictions. Those decisions are cited by the defendants and need not be repeated here. They are persuasive and overwhelmingly support the conclusion that no such fundamental right exists.

a child to communicable diseases. *See Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).

Public school entities, at the State level, as explained above, and at the local level, have ample and well-established power to impose measures to protect the general welfare and best interests of their students. *See, e.g., Jacobson v. Comm. of Massachusetts*, 197 U.S. 11, 26-39 (1905) (rejecting claim that smallpox vaccination requirement was unconstitutional); *Nicholls v. Mayor and Sch. Comm'ee of Lynn*, 297 Mass. 65, 67 (1937) (school committee has power to enforce rules to promote health); *Doe v. Superintendent of Sch. of Worc.*, 421 Mass. 117, 131 (1995) (school officials' duty is to provide environment in which all children can learn). *See also* G. L. c. 76, § 15 (requiring vaccinations for students to attend schools). Therefore, the parent plaintiffs have not shown that they have a fundamental constitutional interest in not having their children be subject to the mask mandate.

Where, as here, the defendants' broad authority has not been exceeded, the court in considering a constitutional attack on the mandates assesses whether the challenged actions bear a real or substantial relation to the protection of the public health. *See Derosiers,* 486 Mass. at 386. The record compels the conclusion that the mask mandates in Massachusetts public schools bear a substantial relation to the protection of public health. At the State and local levels, the mandates were created, tailored, and implemented in consultation with medical experts and on the basis of widely accepted public health recommendations. They serve the legitimate State interest of slowing the spread of COVID-19. Accordingly, the mandates easily withstand rational basis review. *See id.* at 390 (upholding regu-

lations under rational basis review because they "as a whole were informed by public health recommendations and serve the State interest of slowing the spread of COVID-19, which is a legitimate State interest").

The plaintiffs' arguments are premised upon non-authoritative cases as well as thin and heavily contradicted evidence. Bostom's affidavit does not assess health risks under the mask mandates at issue, with exemptions, breaks, and variations depending on students' ages and the types of masks. The affidavits of Diggs and Blakeslee only confirm that not everyone agrees on whether the benefits of school mask mandates outweigh the risk of harm they may pose. The plaintiffs have not submitted any significant support for their claim that the mask mandates issued by the defendants harm school children's health, much less that COVID-19 poses no real risk to children or that masks are ineffective in reducing the risk of COVID-19 transmission.

F. Conclusion

The plaintiffs have not met their burden of demonstrating that they are likely to succeed on the merits of their claims or that they have or will suffer irreparable harm if they are not granted the injunctive relief they seek. Absent any factors weighing in their favor on this record, the plaintiffs' motions for a preliminary injunction must be denied. *See Packaging Industries Group, Inc. v. Cheney*, 380 Mass. at 617.

ORDER

For all the foregoing reasons, it is hereby ORDERED that the Plaintiffs' Motions for a Preliminary Injunction are DENIED.

/s/ David M. Hodge
Justice of the Superior Court

Dated: November 16, 2021

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION OF DEFENDANTS
TO DISMISS PLAINTIFFS' COMPLAINT
UNDER RULE 12(b)(6)
(JANUARY 5, 2022)**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; KATE HENDERSON; ROBERT EGRI; KATALIN EGRI; ANITA LOPEZ; MONICA GRANFIELD; ANN LINSEY HURLEY; IAN SAMPSON; SUSAN PROVENZANO; and JOSEPH PROVENZANO,

Pro Se Plaintiffs,

v. C.A. NO. 1:21-cv-11794-ADB

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; and TOWN OF CARLISLE,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANTS TO DISMISS PLAINTIFFS' COMPLAINT UNDER RULE 12(B)(6)

This is an action brought by twelve *pro se* plaintiffs against the Town of Carlisle and eight Town of Carlisle officials. The suit arises out of a face mask mandate adopted by the Carlisle Board of Health ("BOH") on August 26, 2021, in response to "the recent increase in positive COVID-19 cases in Carlisle and throughout Middlesex County, including breakthrough cases among those who have been fully vaccinated. . . . " (Plaintiffs' Complaint, Exhibit 5). The mandate requires face masks be worn in "all indoor public spaces, or private spaces open to the public within the Town of Carlisle. . . . " (*Id.*) Excluded from the mandate are those individuals who are "unable to wear a face mask due to a medical condition or disability. . . . " (*Id.*) Claiming the mask mandate violates their constitutional rights, statutory rights and human rights (*id.*, Sec. IV, at 15), plaintiffs now bring this action for compensatory damages, punitive damages and injunctive relief. (*Id.*, Sec. V, at 16-17).

Plaintiffs name nine defendants in their Complaint: (1) the Town of Carlisle; (2) Health Agent, Linda Fantasia; (3) Director of the Gleason Public Library, Martha Feeney-Patten; (4) BOH Chair, Anthony Mariano; (5) BOH Member, Jean Jesaitis Barry; (6) Town Administrator, Timothy Goddard; (7) BOH Member, Catherine Galligan; (8) BOH Member, David Erickson; and (9) BOH Member, Patrick Collins. The individual defendants are sued in both their individual and official capacities. Plaintiffs' Complaint sounds in ten Counts (*id.*, Sec. II, at 6-7):

COUNT	THEORY
I	Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131, et seq.
II	Equal Protection Clause of 14th Amendment, 42 U.S.C. § 1983
III	General Requirements for Informed Consent, 20 CFR § 50.20
IV	Civil Rights Act of 1964, 42 U.S.C. § 2000a
V	Deprivation of Rights Under Color of Law, 42 U.S.C. § 242
VI	Statements or Entries Generally, 18 U.S.C. § 1001
VII	Food, Drug & Cosmetic Act, 21 U.S.C. § 360bbb-3
VIII	Article 6 of United Nations' Universal Declaration on Bioethics and Human Rights
IX	Discrimination in Places of Public Accommodation, M.G.L. c. 272, § 98
X	Publication or Display of Discriminatory Notice or Sign, M.G.L. c. 272, § 92A

Plaintiffs' Complaint fails to state claims upon which relief can be granted and, therefore, must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Carlisle BOH had the authority under Massachusetts law to issue the mask mandate. More to the point, seven of plaintiffs' legal theories

(Counts III & V-X) provide no civil remedies whatsoever, and the remaining claims under the ADA (Count I), the Equal Protection Clause of the Fourteenth Amendment (Count II) and the Civil Rights Act of 1964 (Count IV), are subject to dismissal on the multiple grounds set forth below. This Memorandum of Law is submitted in support of defendants' Motion to Dismiss.

I. INTRODUCTION

COVID-19 is an infectious respiratory disease caused by a coronavirus discovered in 2019. The disease is highly contagious and can lead to severe illness and death. On March 10, 2020, Governor Charlie Baker declared a state of emergency in the Commonwealth of Massachusetts to deal with the growing COVID-19 pandemic pursuant to his authority under the Civil Defense Act, Mass. Stat. 1950, c. 639.[1] On May 1, 2020, Governor Baker issued COVID-19 Order No. 31 which required face masks to be worn in all public settings where social distancing was not possible. On November 2, 2020, in response to rising case counts and hospitalizations, Governor Baker issued COVID-19 Order No. 55 which required face masks to be worn at all times in all public locations, whether indoors or outdoors. Six months later, due to the widespread availability of vaccines and "positive trends in the public health data," Governor Baker issued COVID-19 Order No. 67 (dated April 29, 2021) which continued to require that face masks be worn in indoor public locations, but relaxed the mandate for

[1] The following day, March 11, 2020, the World Health Organization characterized the COVID-19 outbreak as a pandemic.

outdoor public locations unless social distancing was not possible.

On May 28, 2021, Governor Baker terminated the state of emergency and rescinded many prior COVID-19 Orders (including Order No. 67), but expressly declared that an emergency "detrimental to the public health" continues to exist. M.G.L. c. 17, § 2A. This declaration empowered the Commissioner of the Department of Public Health ("DPH") to take such action "as he may deem necessary to assure the maintenance of public health and the prevention of disease." *Id.*[2] That same day, the DPH Commissioner issued an Order requiring face masks to be worn in certain indoor settings, including, but not limited to, health care facilities, congregate care facilities, day care facilities and correctional facilities. In so doing, the Commissioner did not alter the authority of any agency "to make such rules or issue such guidance as it may be authorized to do, provided the terms are consistent with this Order and any guidance issued to implement it."[3] (Order of DPH Commissioner, dated May 28, 2021).

During the summer of 2021, COVID-19 cases in Massachusetts and throughout the country began to rise once again due to the arrival of the Delta variant. In July 2021, the seven-day COVID-19 case average in Massachusetts was 223. *Family Freedom Endeavor,*

---

[2] The Governor's declaration of a state of emergency and ensuing COVID-19 Orders are available for viewing at https://www.mass.gov/info-details/covid-19-state-of-emergency (last visited January 5, 2022).

[3] The Commissioner reissued this Order on June 14, 2021, together with guidance for wearing face masks in certain settings.

Inc. v. Riley, Hampden Super. Ct., C.A. No. 2179CV-00494, at 2-3 (Nov. 16, 2021).[4] On July 27, 2021, citing disturbing developments and newly emerging data regarding the spread of the Delta variant, the Centers for Disease Control and Prevention ("CDC") recommended that those in areas of substantial or high transmission wear masks in public indoor places, even if they are fully vaccinated.[5] By August 18, 2021, the seven-day COVID-19 case average in Massachusetts rose to 1,237. *Id.*

On August 26, 2021, the Carlisle BOH adopted a mask mandate requiring face masks to be worn in "all indoor public spaces, or private spaces open to the public within the Town of Carlisle . . . " pursuant to its authority under M.G.L. c. 111, §§ 31 & 104.[6] (Plaintiffs'

---

[4] For the Court's convenience, a true and accurate copy of the Family Freedom decision is attached to defendants' Motion to Dismiss as Exhibit "A."

[5] See https://www.cdc.gov/mmwr/volumes/70/wr/mm7030e2.htm?s_cid=mm7030e2_x (last visited January 5, 2022).

[6] The Carlisle BOH adopted its mask mandate only six days after the Boston Public Health Commission adopted a similar mandate within the City of Boston. See BPHC Order Requiring Face Coverings in the City of Boston, dated August 20, 2021. Like the Carlisle mandate, the Boston mandate applies to all persons in indoor places "open to members of the public." As of December 30, 2021, 69 Massachusetts municipalities have adopted mask mandates similar to Carlisle's in an effort to slow the spread of the COVID-19 disease, including the cities of Cambridge, Chelsea, Lowell, Lynn, Peabody, Somerville and Worcester. See https://boston.cbslocal.com/2021/12/30/face-mask-mandates-massachusetts-towns-cities-covid-omicron/ (last visited January 5, 2022).

Complaint, Exhibit 5).[7] The BOH subsequently renewed the mandate at public meetings held on October 6, 2021, November 17, 2021, and December 15, 2021. By the time of its last renewal, the number of deaths in America due to COVID-19 had "topped 800,000 and healthcare systems across the nation have reached the breaking point." *In Re: MCP No. 15*, 2021 WL 5989357, at *11 (6th Cir. Dec. 17, 2021) (reinstating OSHA vaccine mandate for businesses with 100 or more employees citing "pervasive danger that COVID-19 poses to workers. . . .") On December 21, 2021, DPH issued its updated Winter Advisory Regarding Face Coverings, in which it advised "all residents, regardless of vaccination status, [to] wear a mask or face covering when indoors (and not in your own home.)"[8,9]

II. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a pleading. To survive a Rule 12(b)(6) motion, a plaintiff must "provide the 'grounds'

---

[7] At an open meeting held on August 31, 2021, the Carlisle Select Board voted unanimously to support the BOH mask mandate. See minutes of meeting at https://www.carlislema.gov/AgendaCenterNiewFile/Minutes/_08312021-3247 (last visited January 5, 2022).

[8] *See* https://www.mass.gov/info-details/covid-19-mask-requirements (last visited January 5, 2022).

[9] According to the DPH COVID-19 Interactive Data Dashboard, the number of confirmed cases of COVID-19 in Massachusetts as of January 3, 2022 is 1,107,768, and the number of confirmed deaths in Massachusetts is 19,954. See https://www.mass.gov/info-details/covid-19-response-reporting (last visited January 5, 2022).

of his 'entitle[ment] to relief [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). *See Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012) (court should ignore statements "that simply offer legal labels and conclusions or merely rehash cause-of-action elements"). In other words, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Alston v. Spiegel*, 988 F.3d 564, 571 (1st Cir. 2021) (quoting *Twombly*, 550 U.S. at 555). A mere "possibility of misconduct" is not enough. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See Hamann v. Carpenter*, 937 F.3d 86, 90 (1st Cir. 2019) (conclusory allegations of ill will and spite held insufficient to cross plausibility threshold); *Hartigan v. Macy's, Inc.*, 501 F. Supp. 3d 1, 4 (D. Mass. 2020) (conclusory allegation that defendant failed to comply with own privacy policy held insufficient to meet plausibility standard).

In 2007, the Supreme Court restated the well-known standard that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Two years later, the Supreme Court clarified *Twombly* by stating that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678. "Determining whether a complaint states a plausible claim for relief will . . . be a context specific task that requires the reviewing court to draw on its judicial experience and common

sense." *Id.*, 556 U.S. at 679. *See Garcia-Catalan v. United States*, 734 F.3d 100, 103 (1st Cir. 2013).

III. ARGUMENT

A. The Carlisle BOH had Authority to Issue a Mask Mandate.

In mandating the wearing of face masks in "all indoor public spaces, or private spaces open to the public . . . ," the Carlisle BOH acted pursuant to its statutory authority under M.G.L. c. 111, §§ 31 & 104. Section 31 expressly authorizes local boards of health to make "reasonable health regulations." It further states:

> If the board of health determines that an emergency exists, the board or its authorized agent, acting in accordance with section 30 of chapter 111, may, without notice of hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to address the emergency.

M.G.L. c. 111, § 3 1.[10] That is what the Carlisle BOH did here, only it actually held a hearing. Following the guidance of Governor Baker, the DPH and the CDC, the BOH determined that a health emergency existed, then duly acted upon that emergency by issuing an appropriate order. *See also* M.G.L. c. 111, § 122 ("The board of health shall examine into all . . . causes of

---

[10] In the event of a public health emergency, a board of health is entitled to dispense with ordinary procedures and to take such action as it "deems necessary to meet the emergency." 310 CMR § 11.05(1).

sickness within its town . . . which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto. . . . "). M.G.L. c. 111, § 104 adds: "If a disease dangerous to the public health exists in a town, the selectmen and the board of health shall use all possible care to prevent the spread of the infection. . . . "[11] M.G.L. c. 111, § 104. This legislative directive is both mandatory and broad — the board of health shall use all possible care. In adopting the mask mandate, the Carlisle BOH simply performed its official duties and responsibilities.

Abundant case law supports the actions of the BOH. In *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 527 (1887), the SJC upheld the authority of the Boston Board of Health to order disinfection of plaintiffs property at plaintiffs own expense. "Quarantine laws are a familiar exercise of the police power of the state. Their enactment is within its lawful province, and the making of regulations for their enforcement has always been entrusted to subordinate boards." *Id.* In *Compagnie Francaise de Navigation a Vapeur v. State Board of Health, LA*, 186 U.S. 380, 387 (1902), the United States Supreme Court held that state health and quarantine laws do not violate the U.S. Constitution, even if they affect foreign and domestic commerce. Until Congress acts, states have police power "to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants. . . . " Three

---

[11] In their Complaint, plaintiffs omit this portion of the statute, claiming it only gives the BOH authority to "give public notice" of "infected places." (Plaintiffs' Complaint, Sec. II(D), at 9). Section 104 is not so limited.

years later, in *Jacobson v. Comm. of Mass.*, 197 U.S. 11, 27-28 (1905), the Supreme Court held that a City of Cambridge compulsory vaccination ordinance (against smallpox) was not unconstitutional. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.*

More recently, state and federal courts have repeatedly upheld both vaccination and mask requirements in the face of COVID-19. In actions filed in six Massachusetts Superior Courts on September 20, 2021, Children's Health Rights of Massachusetts (a non-profit organization of volunteer parents) and others challenged the statewide mask mandate adopted for school children by the Commissioner of the Massachusetts Department of Elementary and Secondary Education ("DESE"), as well as local mask mandates adopted by eighteen public school districts and two municipalities (Cambridge and Dover). After consolidating the cases, Hampden Superior Court Judge David Hodge denied plaintiffs' Motion for a Preliminary Injunction (seeking to enjoin enforcement of the mandates) on the grounds that plaintiffs failed to demonstrate a substantial likelihood of success on the merits or that they would suffer irreparable harm if such injunctive relief was denied. *Family Freedom, supra.*

In reaching his decision, Judge Hodge ruled that DESE has the authority to issue a mask mandate under M.G.L. c. 69, § 113 (which evinces a legislative intent that DESE shall ensure students attend classes in a healthy and safe educational environment). Further, school districts and municipalities "have ample

and well-established power to impose measures to protect the general welfare and best interests of their students." *Family Freedom*, at *13. In support of this conclusion, Judge Hodge cited *Jacobson v. Comm. of Mass.* (among other cases), as well as M.G.L. c. 76, § 15, which requires vaccinations for students to attend schools. In rejecting plaintiffs' argument that the mask mandates violate parents' constitutional rights to make decisions regarding their children's health, Judge Hodge wrote:

> The record compels the conclusion that the mask mandates in Massachusetts public schools bear a substantial relation to the protection of public health. At the State and local levels, the mandates were created, tailored, and implemented in consultation with medical experts and on the basis of widely accepted public health recommendations. They serve the legitimate State interest of slowing the spread of COVID-19. Accordingly, the mandates easily withstand rational basis review.

Family Freedom, at * 13.

Admittedly, the mask mandate issued by the Carlisle BOH applies to more than only schoolchildren. Still, Judge Hodge's rationale, together with the fact that two of the local mandates challenged in *Family Freedom* applied community-wide (Cambridge and Dover) and not only in schools, support the conclusion that the mask mandate adopted by the Carlisle BOH withstands any challenge that it was issued without legal authority. Numerous other recent cases are consistent with the *Family Freedom* ruling. *See Desrosiers v. Governor*, 486 Mass. 369, 392 (2020) (upholding emergency orders issued by Governor Baker to address

health risks of COVID-19 pandemic, including mandating face masks when social distancing not possible); *Southwell v. McKee*, Providence Super. Ct. (R.I.), C.A. No. PC-2021-05915 (Nov. 12, 202 1) (denying motion for preliminary injunction to enjoin enforcement of state's school mask mandate); *Harris v. Univ. of Mass., Lowell*, 2021 WL 3848012, **5-7 (D. Mass. Aug. 27, 2021) (denying motion for preliminary injunction to enjoin school requirement that students must be fully vaccinated against COVID-19 before returning to campus); *Together Employees v. Mass. Gen'l Brigham, Inc.*, 2021 WL 5234394, at *9 (D. Mass. Nov. 10, 202 1) (denying motion for preliminary injunction to enjoin enforcement of employer's mandatory COVID-19 vaccination policy); *on appeal*, 19 F.4th 1, 8 (1st Cir. Nov. 18. 2021) (denying motion for preliminary injunction pending appeal); *Stepien v. Murphy*, 2021 WL 5822987, at *13 (D. N.J. Dec. 7, 2021) (denying motion for preliminary injunction to enjoin mask mandate in public schools); *W. S. by Sonderman v. Ragsdale*, 2021 WL 2024687, at *3 (N.D. Ga. May 12, 2021) (same). The Carlisle BOH acted within its authority.[12]

---

[12] Plaintiffs also challenge a mask mandate adopted by the Gleason Public Library Board of Trustees while COVID-19 Order No. 55 (issued by Governor Baker on November 2, 2020 and requiring face masks to be worn at all times in all public locations, whether indoors or outdoors) was still in effect. Governor Baker admittedly rescinded Order No. 55 on May 28, 2021, three months before the Carlisle BOH adopted its mask mandate on August 26, 2021. Yet, in so doing, Governor Baker confirmed that public health orders issued by the DPH were neither withdrawn nor rescinded, and remained in full force and effect. See COVID-19 Order No. 69 (May 28, 2021). He also declared that the public health emergency presented by COVID-19 continued to exist. In the face of this emergency, and supported by guidance from the CDC and DPH, the Trustees of Gleason Library allowed the

B. Count I of Plaintiffs' Complaint Fails to State a Claim for Relief Under the ADA.

The ADA prohibits public entities from discriminating against any qualified individual with a disability "by reason of such disability. . . ." 42 U.S.C. § 12132. To recover under Title II of the ADA (the section applicable to government entities), a plaintiff must allege that (1) he is a qualified individual with a disability; (2) he was either excluded from participation in, or denied the benefits of, a public entity's "services, programs or activities," or was otherwise discriminated against; and (3) such exclusion, denial of benefits or discrimination was because of his disability. *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 4 (1st Cir. 2000); *Buchanan v. Maine*, 469 F.3d 158, 170-71 (1st Cir. 2006); *Mitchell v. Massachusetts Dep't of Correction*, 190 F. Supp. 2d 204, 211 (D. Mass. 2002). The term "qualified individual with a disability" is defined as:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architec-

---

mask mandate to remain in effect at the library for the next three months (as the Delta variant began spreading) until it was effectively ratified by the Carlisle BOH on August 26, 2021. Even if the Trustees did not have the same authority as the BOH, plaintiffs' Constitutional and statutory claims (as set forth below) remain subject to dismissal. Moreover, only one plaintiff, Monica Granfield, alleges she was instructed by a member of the library staff to wear a mask. (Plaintiffs' Complaint, Sec. III(C), ¶ 18). This directive allegedly occurred on October 20, 2021, two months after the BOH adopted its mask mandate. Because no plaintiff asserts he or she was barred from the library for failing to wear a mask during the three-month period from May 28, 2021 to August 26, 2021, plaintiffs lack standing to challenge the Gleason Library mask mandate.

> tural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Plaintiffs' ADA claim (Count I) is subject to dismissal on five grounds. First, plaintiffs fail to allege sufficient facts to show they are "disabled." A disability is "a physical or mental impairment that substantially limits one or major life activities." 42 U.S.C. § 12102 (1)(A). *Carroll v. Xerox Corp.*, 294 F.3d 231, 238 (1st Cir. 2002). Without applying the three-prong test ordinarily used to determine disability, defendants merely note that none of the plaintiffs alleges he or she is actually "disabled." Plaintiff Michael Bush alleges only that "face masks are medically inappropriate for him to wear" (Complaint, Sec. III(C), ¶ 4), but identifies no physical or mental impairment that substantially limits one or more of his major life activities. The other eleven plaintiffs make no allegations of impairment whatsoever. Such omissions are fatal to establishing the first element of an ADA claim.

Second, a disabled individual is not otherwise "qualified" if he poses "a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodations." *Doe v. Univ. of Md. Med. Syst. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995). See *Together Employees*, 2021 WL 5234394, at *7 (plaintiffs who pose "direct threat" to health or safety of others in workplace are not "qualified individuals"). The failure to wear face masks in indoor public places during the COVID-19

pandemic poses a significant risk to the health or safety of other visitors. Therefore, even if plaintiffs are disabled (which defendants deny), they are not "qualified" individuals with disabilities within the meaning of 42 U.S.C. § 12131(2).

Third, in denying plaintiffs access to indoor public spaces unless they wear face masks, the BOH is not discriminating against plaintiffs because of their disability. All mask-less visitors are treated alike; no visitors can enter indoor public spaces unless they don a mask. Those with and without disabilities are treated equally.

Fourth, the remedy in Title II of the ADA is available only as against "public entities." 42 U.S.C. § 12132. A "public entity" is defined as any state or local government, or agency or department thereof. 42 U.S.C. § 12131(1). There is no individual liability under Title II of the ADA. *Wiesman v. Hill*, 629 F. Supp. 2d 106, 111 (D. Mass. 2009); *Miller v. King*, 384 F.3d 1248, 1277 (11th Cir. 2004). Thus, Count I must be dismissed as against the eight individual defendants,

Fifth, the Carlisle BOH mask mandate contains a carveout—by its express terms, the mandate does not apply to those individuals who are "unable to wear a face mask due to a medical condition or disability. . . ." (Plaintiffs' Complaint, Exhibit 5). This exception rescues the mask mandate from any ADA challenge by reasonably accommodating those who are truly disabled. Count I must be dismissed.

C. Count II of Plaintiffs' Complaint Fails to State a Claim for Relief Under the Equal Protection Clause of the Fourteenth Amendment.

To prevail under 42 U.S.C. § 1983 for the violation of their right to equal protection, plaintiffs must show that defendants treated them differently from similarly situated persons and that such disparate treatment "either burdens a fundamental right, targets a suspect class, or has no rational basis." *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (citation omitted). The so-called "right" to enter an indoor public space without wearing a mask is by no means a "fundamental" one. Nor are those who prefer to remain mask-less considered a "suspect class." Thus, the Town's mask mandate—which permits entry to those who wear masks, but bars entry to those who do not—must be upheld so long as it survives rational basis review. *W.S. by Sonderman*, 2021 WL 2024687, at *3 (rational basis test held proper standard of review for mask mandate). The Carlisle BOH mask mandate easily survives such review.

At the outset, government action analyzed under the rational basis standard "is accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Moreover, a classification for disparate treatment (*e.g.*, mask vs. no mask) "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Faced with the COVID-19 pandemic and armed with guidance from the CDC and DPH advising that the

wearing of masks (particularly indoors) helps to prevent the spread of a deadly infectious disease, the Carlisle BOH clearly had a rational basis for adopting a mask mandate. *See Stepien*, 2021 WL 5822987, at *8 (school mask mandate held rationally related to goal of slowing spread of COVID-19).[13] Defendants' interest in protecting the public health provides more than a rational basis for the mandate. "Although a government cannot use a health crisis as a pretext for trampling constitutional rights, the Supreme Court has long recognized that 'a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.'" *Delaney v. Baker*, 511 F. Supp. 3d 55, 74 (D. Mass. 2021) (quoting *Calvary Church of Bangor v. Mills*, 459 F. Supp. 3d 273, 284 (D. Me. 2020)) (upholding Governor Baker's indoor mask mandate set forth in COVID-19 Order No. 55). The Carlisle BOH has a right to protect the members of its community. Count II must be dismissed.

1. The Individual Defendants are Entitled to Qualified Immunity.

To determine whether a government official enjoys qualified immunity, a court must decide "whether a reasonable official [in the defendant's position] could have believed his actions were lawful in light of clearly established law." *Febus-Rodriguez v. Betancourt-*

---

[13] Indeed, adoption of a mask mandate would pass the compelling interest test as well. "Few interests are more compelling than protecting public health against a deadly virus." *Does 1-6 v. Mills*, 16 F.4th 20, 32 (1st Cir. 2021). *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest.")

Lebron, 14 F.3d 87, 91 (1st Cir. 1994). The doctrine of qualified immunity "requires a constitutional right to be clearly established so that public officials are on notice that this conduct is in violation of that right." *Frazier v. Bailey*, 957 F.2d 920, 930 (1st. Cir. 1992). The focus is not on the merits of the underlying claim but, instead, on the objective legal reasonableness of the official's conduct as measured by reference to clearly established law and the information the official possessed at the time of the allegedly unlawful conduct. *Lowinger v. Broderick*, 50 F.3d 61, 65 (1st Cir. 1995); F*ebus-Rodriguez*, 14 F.3d at 91. The qualified immunity standard "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Lowinger*, 50 F.3d at 65; *Hunter v. Bryant*, 502 U.S. 224,229 (1991). *See Savard v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003) ("The bottom line is that the qualified immunity defense prevails unless the unlawfulness of the challenged conduct is 'apparent.'") The framework for analyzing qualified immunity consists of three inquiries: "(i) whether the plaintiffs allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable [official], situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." *Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004).

As set forth above, plaintiffs' allegations, even if true, do not establish viable equal protection claims under the Fourteenth Amendment. But even if they do, plaintiffs' right (if any) to enter indoor public spaces in Carlisle without wearing a mask was not

clearly-established at the time of defendants' actions. By adopting a mask mandate in the face of a deadly worldwide pandemic, no reasonable official in the position of the BOH would have understood that she was violating plaintiffs' constitutional rights. *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) ("A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right'") (quoting *Reichle v. Howards*, 566 U.S. 658, 132 S.Ct. 2088, 2093 (2012)). "The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 136 S.Ct. at 308 (internal citations and quotations omitted) (emphasis in original). The individual Carlisle defendants are entitled to qualified immunity under the circumstances alleged in plaintiffs' Complaint. Therefore, Count II of plaintiffs' Complaint must be dismissed as against him.

D. Count IV of Plaintiffs' Complaint Fails to State a Claim for Relief Under the Civil Rights Act of 1964.

Adopted in response to the civil rights movement of the early 1960s, Title II of the Civil Rights Act of 1964 provides in part as follows:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. § 2000a (emphasis added). In short, the statute is directed solely at discrimination on the basis of race, color, religion or national origin. It does not prohibit discrimination in places of public accommodation on any other grounds. *See Burnette v. Bredesen*, 566 F. Supp. 2d 738, 745 (E.D. Tenn. 2008) (smokers held not a "race" for purposes of public accommodations statute); *Rose v. Springfield-Greene Count Health Dep't*, 2008 WL 11337266, at *2 (W.D. Mo. Dec. 5, 2008) (Section 2000a held inapplicable to claims of disability discrimination); *Lyons v. Port Norfolk Yacht Club, Inc.*, 1989 WL 8817, at *4 (D. Mass. Jan. 25, 1989) (Section 2000a "by its own terms applies only to racial discrimination and does not prohibit discrimination based on sex or physical impairments"); *DeCrow v. Hotel Syracuse Corp.*, 268 F. Supp. 530, 532 (N.D.N.Y. 1968) (Section 2000a held inapplicable to claims of gender discrimination).

Plaintiffs make no allegations that defendants discriminated against them on the basis of their race, color, religion or national origin. Therefore, Count IV must be dismissed.

E. Counts III & V-X of Plaintiffs' Complaint Fail to State Claims for Relief.

Plaintiffs remaining seven Counts seek relief under a federal regulation, several state and federal statutes, and a United Nations Declaration. None of these provisions contains a private right of action for civil relief. Specifically:

- Count III — The Food & Drug Administration prohibits the use of human subjects in research without the subject's "legally effective informed consent." 20 CFR § 50.20.

- Count V — 42 U.S.C. § 242 makes it a federal crime to willfully and under color of state law deprive a person of rights protected under the United States Constitution or federal laws.
- Count VI —18 U.S.C. § 1001 makes it a federal crime to make false statements to federal investigators.
- Count VII — The Food, Drug & Cosmetic Act authorizes the use of certain medical products during emergencies. 21 U.S.C. § 360bbb-3.
- Count VIII — Article 6 of the UNESCO Universal Declaration on Bioethics and Human Rights issued on October 19, 2005 provides that "[a]ny preventative, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned. . . . "[14]
- Count IX — M.G.L. c. 272, § 98 makes it a state crime to discriminate in places of public accommodation on the basis of race, color, religion, national origin, sex, gender identity, sexual orientation, disability or ancestry.
- Count X — M.G.L. c. 272, § 92A makes it a state crime to publish, distribute or display any notice or sign in a place of public accommodation intended to discriminate against any person on the basis of race, color, reli-

---

14 *See* https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights (last visited January 5, 2022).

gion, nationality, sex, gender identity, sexual orientation or disability.

In the absence of any private right of action, Counts III & V-X must be dismissed.

F. Plaintiffs' Complaint Fails to State Claims for Relief Against the Defendants, Linda Fantasia and Timothy Goddard.

In addition to the Town of Carlisle, plaintiffs name as defendants the five members of the Carlisle BOH (in both their official and individual capacities) who voted to adopt the mask mandate: Anthony Mariano (Chair); Jean Jesaitis Barry; Catherine Galligan; David Erickson; and Patrick Collins. They also name the Director of Gleason Public Library, Martha Feeney-Patten (in both her official and individual capacities), alleging that she implemented a face mask requirement of her own at the public library. (Plaintiffs' Complaint, Sec. II(D), at 9). The remaining two defendants did not participate in the BOH vote and are not decisionmakers: Health Agent, Linda Fantasia; and Town Administrator, Timothy Goddard. These two individuals merely carried out the policy of the BOH.

In their Complaint, plaintiffs allege that Ms. Fantasia had "reason to know" that a document published on the Town website "Understanding Masks to Protect Children Against COVID-19"[15] was "materially false and fraudulent." (Plaintiffs' Complaint, Sec. II(D), at 9). Plaintiffs further allege that Ms. Fantasia

---

15 *See* https://www.carlislema.gov/DocumentCenterNiew/3501/Understanding-Masks-to-Protect-Children-Against-COVID-19?bidId=%C2%A0 (last visited January 5, 2022)

had "reason to know" that public messaging on the subject of face masks was contributing to violations of the ADA and plaintiffs' civil rights. (*Id.*, Sec. III(C), ¶¶ 3 & 4). Plaintiffs make no allegations, however, that Ms. Fantasia published such documents or messages, nor do plaintiffs allege sufficient facts to show how such publications actually violated their rights to equal protection and/or under the ADA. Plaintiffs allege no facts of wrongdoing against Mr. Goddard whatsoever.

It is incumbent upon plaintiffs to support their claims as against Ms. Fantasia and Mr. Goddard with specific facts, not merely conclusions. Because of their failure to do so, plaintiffs' Complaint should be dismissed as against Ms. Fantasia and Mr. Goddard. *See Kadar Corp. v. Milbury*, 549 F.2d 230, 232 (1st Cir. 1977) (dismissing defendant from case where her "status generally as an intended defendant is so nebulous as plainly to warrant dismissal").

IV. CONCLUSION

For the reasons set forth above, the defendants, Linda Fantasia, Martha Feeney-Patten, Anthony Mariano, Catherine Galligan, Jean Jasaitis Barry, Patrick Collins, David Erickson, Timothy Goddard and Town of Carlisle, hereby request that this Honorable Court allow their Motion to Dismiss plaintiffs' Complaint and thereafter order said Complaint dismissed under Rule 12(b)(6) for failure to state claims upon which relief can be granted.

Respectfully submitted,

The Defendants,

LINDA FANTASIA, MARTHA FEENEY-PATTEN, ANTHONY MARIANO, CATHERINE GALLIGAN, JEAN JASAITIS BARRY, PATRICK COLLINS, DAVID ERICKSON, TIMOTHY GODDARD and TOWN OF CARLISLE,

By their Attorneys,

PIERCE DAVIS & PERRITANO LLP

/s/ John J. Davis

John J. Davis, BBO #115890
10 Post Office Square, Suite 1100N
Boston, MA 02109
(617) 350-0950
jdavis@piercedavis.com

Dated: January 5, 2022

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(6) (JANUARY 17, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; KATE HENDERSON; ROBERT EGRI; KATALIN EGRI; ANITA OPTIZ; MONICA GRANFIELD; ANN LINSEY HURLEY; IAN SAMPSON; SUSAN PROVENZANO; JOSEPH PROVENZANO,

Pro Se Plaintiffs,

v. Case No. 1:21-cv-11794-ADB

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER RULE 12(B)(6)

Pursuant to Local Rule of Civil Procedure 7.1(b)(2)

Plaintiffs oppose herewith the Defendants' Motion To Dismiss Plaintiffs' Complaint Under Rule 12(b)(6):

[. . .]

MEMORANDUM OF REASONS

The Defendants' Motion is defective

The Defendants' legal counsel did not meet Local R.C.P. 7.1(a)(2)'s requirement to have conferred before serving and filing this Motion. Had the Defendants' counsel conferred with the Pro Se Plaintiffs before serving this defective Motion, 1) the Plaintiffs would have assented to certain requests, and 2) several of the Defendants' assertions that are incorrect could have been corrected before being put in this defective Motion.

The Defendants' counsel waited till the afternoon of the final day by which the Defendants had to serve a responsive pleading to call undersigned Pro Se Plaintiff Michael Bush in accordance with Local Rule 7.1(a)(2). Attorney Davis left Mr. Bush a voicemail message (*See* Exhibit 1 enclosed). Before Mr. Bush could return Attorney Davis' call, before the end of that day, and before even the end of common business hours that day, Attorney Davis electronically filed this defective Motion with the Court. (*See* Exhibit 2 enclosed.)

Attorney Davis did this not at the very end of the 21-day standard period for response but on the very

last day of the 51-day period the Court granted the Defendants when it allowed the Defendants' earlier Motion For Leave To Extend Time To Respond To Complaint. Hence, Attorney Davis' claim that he, "attempted to confer in good faith" does not hold water. And Local Rule 7.1(a)(2) does not allow for merely an attempt to confer, it requires that Counsels "have conferred and have attempted in good faith to resolve or narrow the issue." (Emphasis added.)

The Defendants and their legal counsel have neither met the requirements to serve and file this Motion nor have they made any genuine good faith effort to do so. Thus, their Motion must be summarily dismissed.

If, however, this Court concludes the Defendants have in fact met the requirements of Local Rule 7.1(a)(2), then the following sections apply.

Much of the Motion is impertinent and immaterial

In their Motion's Memorandum of Law the Defendants have presented a good deal of assertions, references, and arguments that are irrelevant to a Motion to Dismiss under F.R.C.P. 12(b)(6), for, "A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case." *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984). And as F.R.C.P. Rule 12(f) states, "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Therefore, as much of the matter the Defendants presented in their Memorandum of Law is immaterial

and impertinent to a Motion to Dismiss under Rule 12(b)(6), the undersigned Pro Se Plaintiffs request this Court strike such matter from the Defendant's Motion.

For this Court's convenience, the following sections will correspond roughly to the separate sections of the Defendants' Memorandum of Law.

The Defendants' Introduction is inaccurate and impertinent

In the first paragraph of their Memorandum of Law the Defendants mischaracterize this suit as arising "out of a face mask mandate adopted by the Carlisle Board of Health . . . " That is only partly accurate, as this suit also arises out of an unlawfully discriminatory face mask policy adopted and communicated by Defendant Martha Feeney-Patten for the Gleason Public Library a year before the Board of Health's mandate was issued. This is an important point, as public library personnel have different roles and authority than a Board of Health does in Massachusetts. Additionally, as revealed in our Complaint and its Exhibits, unlike the Board of Health's mandate, Feeney-Patten's face mask policy has been and remains considerably more unlawfully discriminatory by failing to accommodate medical exemptions.

In the Introduction section of their Memorandum of Law, the Defendants give statistics about COVID-19, mention a past state of emergency, list various orders by the MA Governor and the MA Department of Public Health, drop a reference to vaccines, and cite some state and federal court cases relating to orders and policies various entities have adopted in response to COVID-19. The Defendants presented a single

Exhibit, which was a lawsuit regarding face mask policies in schools which 1) was filed in state court, not federal court, 2) involved defendants with different roles, jobs, and authority than the Defendants in this suit have, 3) cited different facts, laws and regulations than this suit does, 4) made arguments different than our suit does, and 5) was not filed pursuant to 42 U.S.C. § 1983 as this suit is. Little to none of their Memorandum of Law's Introduction's argument and exhibit is pertinent or material to this Motion to Dismiss for failure to state a claim, so we respectfully request this Court strike that matter pursuant to F.R.C.P. Rule 12(f).

Nonetheless, we would like to briefly address some aspects of the Defendants' Introduction that would be rather glaring discrepancies even if their Introduction were pertinent and material to a Motion to dismiss.

The Defendants claim that 69 Massachusetts municipalities have adopted mask mandates similar to theirs. Obviously, a Defendant does not nullify their culpability or liability by identifying instances of others' similar transgressions. And the Defendants also seem to overlook the fact that if their claim is accurate, that would mean the vast majority of the approximately 350 Massachusetts municipalities have not implemented face mask mandates.

The Defendants mentioned over 800,000 deaths in America due to COVID-19. Yet, according to Defendant Linda Fantasia in a December 2021 Board of Health meeting, there has only ever been one death associated with COVID-19 of a town of Carlisle resident, and that person had other contributing illness. (See highlighted portion of BOH meeting minutes enclosed as Exhibit 3.)

Finally, the "OSHA vaccine mandate" the Defendants' Introduction mentioned has since been stayed by the U.S. Supreme Court. *National Federation of Independent Business v. Department of Labor, OSHA.* 595 U. S. (2022)

Standard of review

The undersigned Pro Se Plaintiffs agree with the Defendants' assertion that "a motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a pleading." We also agree with the Defendants' assertion that to survive a motion to dismiss, a complaint must allege facts to state a claim that are merely plausible—not facts that are certain, not facts that are probable, but facts that are merely plausible.

The Defendants cited case law about a mere "possibility of misconduct" not being enough and that "conclusory allegations of ill will and spite held insufficient to cross plausibility threshold." Yet in our Complaint and accompanying exhibits, we did not allege a mere possibility of misconduct, we asserted facts and provided evidence of the Defendants' actual misconduct. And we made no allegations of ill will or spite. Thus, much of the case law the Defendants cited is impertinent and immaterial.

When deciding a motion to dismiss under Rule 12(b)(6), a court must "construe all factual allegations in the light most favorable to the non-moving party to determine if there exists a plausible claim upon which relief may be granted." *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 70 (1st Cir. 2020).

The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at

a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)

The Defendants provided an incomplete quote from the *Twombly* case to assert that the Plaintiffs must allege enough facts to state a claim. What they left out was the beginning of that passage, which reads, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) Thus, though our Complaint does provide multiple detailed factual allegations, it is not required to do so to survive a Motion to dismiss. Furthermore, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

District courts should read the pleadings of a pro se plaintiff "liberally" and "interpret them to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994).

The Defendants quoted from the U.S. Supreme Court case *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). We as Pro Se Plaintiffs would like to note in that case the Court also stated, "A document filed pro se is 'to be liberally construed,' Estelle, 429 U.S., at 106, 97 S. Ct. 285, 50 L. Ed. 2d 251, and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,' *ibid.* (internal quotation marks omitted). *Cf.* Fed. Rule Civ. Proc. 8(f)"

The Carlisle BOH did *not* have the authority to issue a mask mandate

The only Massachusetts statutes the Defendants claim gave the Board of Health authority to mandate that people wear face masks in the town of Carlisle are M.G.L. Ch. 111 §§ 31 and 104. We asserted in our Complaint that the Board of Health does not have such authority. According to the *Erickson v. Pardus* case law the Defendants quoted, "a judge must accept as true all of the factual allegations contained in the complaint." Yet the Defendants proceeded to argue this matter of fact that is impertinent in a Motion to dismiss. Nevertheless:

1. **There was no emergency to justify the order**

The Defendants admit in their Memorandum of Law that according to M.G.L. Ch. 111 § 31, an emergency would have to exist for a Board of Health to issue an order pursuant to that statute. The Defendants have asserted that COVID-19 suddenly constituted an emergency in town when the Board of Health first voted on August 25th, 2021 to "adopt an indoor face mask mandate." (See Exhibit 5 of our Complaint for that order. For the Court's convenience it is also enclosed as Exhibit 4 of this Opposition.) At that point in time, 1) COVID-19 had been infecting people in MA for nearly two years, 2) it had been established the prior year that COVID-19 had an infection fatality rate of less than 1% in the general population, and 3) according to Defendant Fantasia only one death of a town of Carlisle resident has ever been associated with COVID-19. Nevertheless, the Carlisle Board of Health declared COVID-19 an emergency in late August 2021. By that

reasoning, the Board of Health could and should have: 1) declared emergencies when anyone in town contracted any infectious disease whatsoever, 2) issued orders usurping the role of all residents' and visitors' personal health care practitioners and imposing the usage of medical devices not approved by the FDA to stop the spread of those infectious diseases (*e.g.* face masks), and 3) sustained those declarations of emergencies and oppressive orders cumulatively and in perpetuity. What renders the Defendants' declaration of COVID-19 to be an emergency in August 2021 all the more absurd is that by that point in time it was well understood that COVID-19 could not be eradicated or contained whether by face mask usage, administration of COVID-19 "vaccines", or any other measure. Many—perhaps even most—laypeople grasped these facts by that point in time. Defendant Health Agent Fantasia and the Board of Health member Defendants certainly had an obligation to grasp such basic facts, given their chosen roles. But just in case the Defendants did not grasp such facts about COVID-19, several of the Plaintiffs cited professor of medicine and epidemiologist Dr. Jay Bhattacharya's article published in the Wall Street Journal explaining these facts in their Notice and Demand Letter delivered to the Defendants on September 8th, 2021. We also attached that article as Exhibit 4 to our lawsuit Complaint. Yet the Board of Health Defendants have persisted in voting to renew their unlawful face mask mandate while knowing that there is no reason to expect that the single infectious disease they claim suddenly constituted an "emergency" after nearly two years will ever go away. These facts, of course, are fatal to any claims by the Defendants that COVID-19 constituted an emergency in the town of Carlisle when they declared

it to be so in August 2021 and that they had legal authority to issue any orders on that basis pursuant to M.G.L. Ch. 111 § 31.

The U.S. Supreme Court this year has cautioned that courts must not allow unwarranted or prolonged declarations of emergencies. "But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little." *National Federation of Independent Business v. Department of Labor, OSHA.* 595 U. S. (2022)

2. *Noscitur a sociis* guides and limits statutory authority

As explained in *Gustafson v. Alloyd Co.*, 513 U.S. 561, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Id.* at 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1(internal quotation marks omitted). *See also United States v. Williams*, 553 U.S. 285, 294, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ("a word is given more precise content by the neighboring words with which it is associated"). In *Gustafson*, we interpreted the word "communication" in § 2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably "notice, circular, [and] advertisement," making it "apparent that the list refer[red] to documents of wide dissemination." 513 U.S., at 575-576, 115 S. Ct. 1061, 131 L. Ed. 2d 1.

And we did so even though the list began with the word "any." *Yates v. United States*, 574 U.S. 528, 543 (2015)

The Carlisle Board of Health Defendants argue that they should be allowed to take an excerpt that authorizes them to issue an order from a statute and use that excerpt to justify issuing whatever order they want regardless of the title or content of the rest of the statute. As the U.S. Supreme Court made clear in the *Yates* case above, that is not how statutory authority works.

3. Face masks are experimental medical devices with known harms

As we asserted in our Complaint, the Board of Health's and Gleason Public Library Director Martha Feeney-Patten's face mask orders/policies subjected members of the public to uninformed medical experimentation without disclosing known harms of face mask usage. In the exhibits accompanying our Complaint we elaborated on those points and provided the relevant legal and medical references for those facts. In exhibits 7, 8, and 9 to our Complaint we established that, "The U.S. Food and Drug Administration's (FDA) Emergency Use Authorization (EUA) for surgical and/or cloth masks requires that, 'The product is not labeled in such a manner that would misrepresent the product's intended use; for example, the labeling must not state or imply that the product is intended for antimicrobial or antiviral protection or related uses or is for use such as infection prevention or reduction.'" In those exhibits we also cited and linked to a wide-ranging review of studies which revealed a range of common adverse effects of face mask usage. According

the U.S. Supreme Court in the *Erickson v. Pardus* case the Defendants quoted, the Court must accept our Complaint's and accompanying materials' asserted facts as true.

For more details this Court may review those exhibits and their cited references if it wishes. But here we will simply note that we did document for the Defendants before and with our Complaint that: 1) the FDA classifies face masks as medical devices, 2) the FDA has not approved face masks for the purposes the Defendants have mandated people wear them, and 3) there is a range of documented harms from usage of face masks. And the two MA statutes the Defendants have cited as giving the Board of Health authority to mandate face mask usage not only make no mention of face masks, they make no mention of authorizing a Board of Health to mandate the personal usage of medical devices—much less medical devices with known harms and unapproved for the purpose the Board of Health has mandated them. These Board of Health Defendants provided no informed consent to the public with their order.

4. M.G.L. Ch. 111 § 31 does not pertain to infectious disease transmitted between persons

The statute M.G.L. Ch. 111 § 31 (enclosed as Exhibit 5) the Defendants claim gives the Board of Health the authority to mandate face mask usage to stop COVID-19 transmission mentions "subsurface disposal of sanitary sewage", "farmers markets", "agriculture", "sanitary codes", "poultry, livestock, or bees", "fruit, vegetables, or horticultural plants" and the "department of environmental protection". We

find no mention of infectious diseases transmitted between people nor any authority to mandate personal usage of medical devices. Yet the Defendants have plucked a single sentence from that statute which mentions issuing an order, while disregarding the rest of the statute. And as noted above, the U.S. Supreme Court has stated we must "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." The U.S. Supreme Court has also cautioned, "If Congress could hand off all its legislative powers to unelected agency officials, it 'would dash the whole scheme' of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." *Department of Transportation v. Association of American Railroads*, 575 U. S. 43, 61 (2015) (ALITO, J., concurring); *see also* M. McConnell, The President Who Would Not Be King 326-335 (2020); I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 1502 (2021).

5. M.G.L. Ch. 111 § 104 does not authorize orders mandating usage of personal medical devices

The other statute M.G.L. Ch. 111 § 104 (enclosed as Exhibit 6) the Defendants claim gives the Board of Health the authority to mandate face mask usage to stop COVID-19 transmission also gives no authority to mandate either face mask usage or to impose personal usage of medical devices. It is such a short, clear statute that we will simply quote it here for the Court's examination. The title of the statute "Prevention of spread of infection; public notice; removal" indicates that the statute is about posting a public notice and

prohibiting removal of that public notice. The body of the statute is also simple and clear: "If a disease dangerous to the public health exists in a town, the selectmen and board of health shall use all possible care to prevent the spread of the infection and may give public notice of infected places by such means as in their judgment may be most effectual for the common safety. Whoever obstructs the selectmen, board of health or its agent in using such means, or whoever wilfully [sic] and without authority removes, obliterates, defaces or handles such public notices which have been posted, shall forfeit not less than ten nor more than one hundred dollars." (Emphases added.)

Given the facts about COVID-19 in the town of Carlisle provided in earlier sections, the Carlisle Board of Health had reason to know that COVID-19 did not rise to the level of "a disease dangerous to public health" in the town of Carlisle. Given the Defendants contend COVID-19 did rise to that level when they issued their declaration of an emergency, we have a significant factual dispute which requires the Defendants' Motion to be dismissed.

In their Memorandum of Law the Defendants have erroneously equated the statute's phrase "shall use all possible care" with meaning "shall use all possible means". If the statute authorized a Board of Health to use all possible means, that could include: beheading and cremating inhabitants suspected of being infected; requiring persons accused of being infectious to wear a conspicuous sign to that effect on their front and back when outside their home; requiring all persons in town to be tested for infection several times a day or be subjected to quarantine; or to require persons to use a medical device with known harms that is not

approved for the purpose of stopping the spread of infection—as these Defendants have done. But that is not what the statute authorizes a Board of Health to do. We scarcely even need apply the principle of *noscitur a sociis* to discern that this statute only authorizes a Board of Health to give public notice of infected places.

6. The Defendants have omitted this truly applicable statute

Why the Defendants are attempting to use Massachusetts statutes that have to do with vegetables, livestock, sewage, and placing notice on infected places to justify the Carlisle Board of Health mandating everyone use medical devices with known harms that are not approved for stopping the spread of viral infections (*i.e.* face masks) becomes clearer when we examine the two statutes that actually do empower Boards of Health to address infectious disease spread amongst persons in town.

One of these statutes, M.G.L. Ch. 111 § 95, is unsurprisingly titled "Powers and duties of boards in cases of infectious diseases" and enclosed as Exhibit 7. If a disease dangerous to the public health breaks out in a town, the statute authorizes a Board of Health to quarantine an infected person. It also requires the town to compensate the quarantined person for loss of their wages, not to exceed two dollars for each working day—yes, just two dollars a day. In their Memorandum of Law, the Defendants cite case law regarding quarantines and disinfection of a person's property. Yet this single Massachusetts statute specifying a Board of Health's powers regarding infectious diseases is conspicuously missing from their entire Motion.

Fortunately, the Defendants have not exercised their authority under this statute in response to COVID-19, as due to the nature of COVID-19 such quarantine measures would be appallingly abusive in response to a germ that cannot be eradicated or effectively contained. Clearly, if the Board of Health has chosen to not exercise its legitimate powers specified by the truly relevant statute, that does not excuse or justify the Board of Health using the wrong statutes to exercise powers they have invented and granted themselves. "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *National Federation of Independent Business v. Department of Labor, OSHA.* 595 U. S. (2022)

7. The *other* applicable statute

In their Memorandum of Law the Defendants cited but did not discuss *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That case and the Massachusetts statute (M.G.L. Ch. 111 § 181) underlying it are relevant here, as they undermine rather than support the Defendants' arguments.

As we mentioned, there are two Massachusetts statutes that specify what a Board of Health can order town inhabitants to do in response to an outbreak of dangerous infectious disease in town—neither of which the Defendants have mentioned or addressed. One is M.G.L. Ch. 111 § 95, which as we explained above only empowers a Board of Health to quarantine an infected person. The other statute is M.G.L. Ch. 111 § 181, which underlies the *Jacobson* case and in its present day form is so short and clear that we can easily quote it in its entirety here: "Boards of health,

if in their opinion it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants of their towns, and shall provide them with the means of free vaccination. Whoever refuses or neglects to comply with such requirement shall forfeit five dollars."

As the Defendants have attempted to use the *Jacobson* case and its underlying statute as justification for the Carlisle Board of Health's unlawful face mask mandate, it is important to note that statute: 1) applies to vaccinations only, not other medical devices or products such as face masks, 2) does not allow for unconditional, compulsory vaccination, nor does it authorize anyone to bar persons entry or restrict their participation in society as the Defendants have done with their face mask orders, 3) merely authorizes a Board of Health to impose a $5 fine if an individual chooses not to take the vaccination, which is an option the Defendants have not offered with their unlawful face mask mandates, 4) does not authorize mandatory usage of vaccines or other medical products lacking full efficacy and formal approval for stopping the spread of infectious disease (*e.g.* face masks), 5) does not authorize mandatory usage of medical products with a substantial degree of documented harms (*e.g.* face masks).

The Defendants' assertion that the Board of Health's face mask mandate should be assessed using the rational basis standard of review is incorrect. Clearly, if municipal officials or employees issued medical orders that they do not have the statutory authority to issue and which bar people from full participation in society unless they comply with the unlawful orders as the Defendants have done here, no standard of review need be employed, as the orders are simply

invalid and must be stricken. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 426 (1886)

Additionally, "*Jacobson* predates judicially established tripartite nuanced tiers of review to assess a statute's constitutionality. Under those tiers, if the right infringed is fundamental or the law relies upon a suspect classification, strict scrutiny is applied. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Under that standard, a law is upheld only if it is narrowly tailored to a 'compelling state interest.' *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). If the law does not infringe upon a fundamental right but 'incidentally' burdens a First Amendment right or implicates a quasi-suspect classification such as one predicated on gender, intermediate scrutiny would apply. *See United States v. O'Brien*,391 U.S. 367, 376 (1968) (First Amendment); *Craig v. Boren*, 420 U.S. 190 (1976) (gender discrimination). Under that standard the law must also be narrowly tailored but must need be 'no greater than is essential' to the furtherance of an important or substantial governmental interest." *O'Brien*, 391 U.S. at 376-77. *Doe v. Franklin Square Union Free Sch. Dist.*, 2:21-5012-FB-SIL, 4-5 (E.D.N.Y. Oct. 26, 2021)

This Court must accept as true our Complaint's factual assertion that the Board of Health exceeded its powers and must let this matter go forward to discovery as a question of fact, not a question of law subject to dismissal in our Complaint.

The Defendants' huge footnote regarding the library's policy is inaccurate

On page 10 of their Memorandum of Law, the Defendants admit that the Gleason Public Library Board of Trustees adopted the face mask policy we referenced in our Complaint and Exhibits. We had been under the impression that the Director of the Gleason Public Library, Defendant Martha Feeney-Patten, was solely responsible for the unlawful policy, as Feeney-Patten had communicated it in publicly-distributed email newsletters of the Gleason Public Library. If in fact the Board of Trustees approved the unlawfully discriminatory policy, apparently its members need to be added as Defendants and/or fact discovery is needed to determine the Board of Trustees' degree and nature of involvement in this unlawful policy.

In their huge footnote regarding the Gleason Public Library's unlawful face mask requirement, the Defendants cite orders issued by MA Governor Baker and the MA Department of Public Health. Those orders explicitly allowed for medical exemptions to face mask requirements, as the Carlisle Board of Health's order does but which the Gleason Public Library's face mask policy never has. In the Gleason Public Library's email newsletter presented as Exhibit 3 with our Complaint, Defendant Martha Feeney-Patten stated that, "Masks are still required for all visitors age 2 and up, in consideration of our high usage by as-yet-unvaccinated children and medically vulnerable individuals. Please contact us at 978-369-4898 or director@gleasonlibrary.org with any questions." That made it quite clear that those of us who cannot wear face masks are not allowed or welcome in the public library. Would tacking on "please contact us with any questions"

after stating "blind people and those prone to seizures are no longer allowed in the library as they get in the way", "to enter and remain in the library all patrons must wear a yarmulke or hijab", or "those of skin color darker than beige may not receive or use services inside the library" magically render such discriminatory policies lawful?

Additionally, the MA orders the Defendants cite to explain the public library's unlawful face mask policy do not give any powers or authority to public library personnel. As the Defendants effectively admit that neither the town/library nor Defendant Feeney-Patten had any legal authority to issue a face mask mandate, our claims against them must then survive the Defendants' Motion to dismiss.

The Defendants also mention that "only one plaintiff, Monica Granfield, alleges she was instructed by a member of the library staff to wear a mask" and claim this somehow means we "lack standing to challenge the Gleason Public Library mask mandate." The Defendants have entirely missed the point. The Gleason Public Library's unlawful face mask mandate was in effect and publicly communicated long before the Board of Health's order was issued. Because of the Gleason Public Library's unlawful face mask mandate, several of us have refrained from even entering the library for fear of being harassed or discriminated against. Plaintiff Monica Granfield's experience we noted in our Complaint confirmed for us that we would indeed be subject to such harassment and discrimination. Undersigned Plaintiff Michael Bush has not been in the public library in about two years now because of this policy that unlawfully discriminates against people like him for whom face masks are med-

ically contraindicated. As the facts we stated in our Complaint and its exhibits regarding the public library's policy establish claims eligible for relief that are at the very least plausible, our claims against the Town of Carlisle, Defendant Martha Feeney-Patten (the Director of the Gleason Public Library), and Timothy Goddard (the Town Administrator and Americans with Disabilities Act Coordinator) must survive the Defendants' Motion to dismiss.

Our Complaint *does* state a claim for relief under the ADA

The Defendants state, " . . . in denying plaintiffs access to indoor public spaces unless they wear face masks, the BOH is not discriminating against plaintiffs because of their disability. All mask-less visitors are treated alike; no visitors can enter indoor public spaces unless they don a mask." Yet in a subsequent paragraph the Defendants contradict themselves by claiming, " . . . the Carlisle BOH mask mandate contains a carveout – by its express terms, the mandate does not apply to those individuals who are 'unable to wear a face mask due to a medical condition or disability. . . . '"And then the Defendants proceed to inexplicably assert that, "The failure to wear face masks in indoor public places during the COVID-19 pandemic poses a significant risk to the health or safety of other visitors." If that were true, why then would the Board of Health provide an exemption for those unable to wear a face mask due to a medical condition or disability?? . . . The Defendants' section regarding the Americans with Disabilities Act (ADA) is self-contradictory and stunningly disconnected from relevant facts.

In their Memorandum of Law the Defendants fail to distinguish between a dejure disability and a de facto disability under the ADA. A de facto disability is created by policies that discriminate against persons who would not ordinarily be disabled but are rendered so in the legal sense by a policy whose requirements that for medical reasons those persons cannot meet. Apparently, some of the Defendants (or someone advising them) understood this when writing the Board of Health face mask mandate, as it does indeed contain a carveout so as to avoid creating de facto disabilities. We agree with the Defendants that this Court should therefore dismiss our claims as they relate solely to the ADA and the Board of Health's face mask mandate. But since the Gleason Public Library's face mask mandate predated the Board of Health's mandate and has never included such a carveout to avoid discriminating on the basis of de facto disability, our claims against the Town of Carlisle for the ADA violations as they relate to the Gleason Public Library's face mask mandate under Count I must by upheld.

Our Complaint *does* state a claim for relief under the 14th Amendment

Upon reviewing this since filing our Complaint, we realize that the 14th Amendment to the U.S. Constitution is not merely called the "Equal Protection Clause". We intend to apply the entire 14th Amendment to our case, not merely the Equal Protection Clause within. As Pro Se Plaintiffs we humbly request this Court's understanding. " . . . a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)

It is our understanding that the Fourteenth Amendment creates numerous rights enforceable under § 1983, including due process, the equal protection of the laws, and those rights in the Bill of Rights incorporated by the Due Process Clause of the Fourteenth Amendment.

We contend that it is commonly known in our society that some religions require certain or all adherents to wear head and/or face coverings. Some Muslim sects require women to wear hijabs, niqabs, and/or burkas; some Jewish sects require men to wear yarmulkes/kippahs, etc. Other religions proscribe wearing face coverings or using certain medical interventions for various reasons. These religious beliefs and practices are constitutionally-protected rights in this country. Thus, it was reasonable for the Defendants to anticipate that mandating face masks to participate fully in society might infringe on some people's constitutionally-protected religious beliefs and practices. The Defendants either have not taken that into consideration (even after being informed of that in our Notice and Demand letter which was later incorporated as an Exhibit to our Complaint) or have taken that into consideration yet still refuse to provide a religious carveout in their face mask policies—despite the Board of Health including a medical carveout in their face mask mandate as required by state and federal civil rights laws.

Some of us Plaintiffs have sincerely held religious beliefs that proscribe our wearing face masks and/or submitting to coerced medical devices/products such as face masks. We could have presented our individual beliefs and practices with our Complaint but detailed factual allegations are not required in a Complaint.

By mandating that people wear face masks to enter and remain in indoor spaces open to the public without a religious carveout, the Defendants have not merely infringed some Plaintiffs' right to free exercise of religion, the Defendants have also infringed on those Plaintiffs' 1st Amendment right to peaceably assemble and their 1st Amendment right to petition the Government for a redress of grievances.

The Defendants have argued that the face mask mandates in question should be subject to merely a rational basis standard of review. This is incorrect. As the Defendants' mandates have infringed the Plaintiffs' fundamental rights, the applicable standard of review is strict scrutiny. " . . . even a neutral, generally applicable law is subject to strict scrutiny under this Clause if it restricts the free exercise of religion and another constitutionally protected liberty, such as the freedom of speech or association, or the right to control the upbringing of one's children", *See Smith*, 494 U.S. at 881-82; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004).

The Ninth Circuit has reaffirmed the Court's recognition of "fundamental rights to determine one's own medical treatment," "to refuse unwanted medical treatment," and "a fundamental liberty interest in medical autonomy." *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014), as amended (Sept. 2, 2014) (citing *Cruzan ex rel. Cruzan*, 497 U.S. at 278, *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). Given that competent persons have a constitutionally protected liberty interest in medical autonomy, the Fourteenth Amendment protects individuals from its deprivation without due process of law. *See Cruzan ex*

rel. Cruzan, 497 U.S. at 279. *Magney v. Cnty. of Humboldt*, Case No. 17-cv-02389-HSG, 6 (N.D. Cal. Dec. 10, 2018)

Although the State's concern for mitigating a public health crisis is undeniably weighty, "[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020); *see also Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) ("[T]he injunction serves the interests of the general public by ensuring that the government's . . . procedures comply with the Constitution."). "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese*, 141 S. Ct. at 68. Thus, as both the Supreme Court and our court have agreed: Even in a case with such vital interests on each side, the balance of harms and the public interest require us to enjoin the State's unconstitutional practices. Indeed, neither court appears to have had much difficulty reaching such a conclusion. *See id.* at 67-68; *Calvary Chapel*, 982 F.3d at 1234. *Harvest Rock Church, Inc. v. Newsom*, 985 F.3d 771, 774 (9th Cir. 2021)

Count II under the 14th Amendment must be upheld.

The individual defendants are clearly *not* entitled to qualified immunity

The Defendants quoted a good deal of case law regarding qualified immunity but: 1) failed to distinguish between qualified immunity in the Defendants' official capacities and their individual capacities, 2) failed to connect the case law to the facts of this case, and 3) failed to recognize that municipal officials and

personnel are simply *not* entitled to qualified immunity in their official capacities. *See Eng. v. Cooley*, 552 F.3d 1062, 1064 n.1 (9th Circuit 2009); *Hallstrom v. City of Garden* City, 991 F.2d 1473, 1482 (9th Circuit 1992).

By quoting the particular case law they chose, the Defendants have impliedly asserted that, 1) they had no reason to know they lacked the legal authority to issue the mandates they issued, 2) they had no reason to know their mandates violated people's legal rights, and 3) those rights were not clearly established. As we established in our earlier sections about the Board of Health and the public library personnel lacking the authority to issue face mask mandates, we contend they certainly did have reason to know they lacked that legal authority. That is a significant factual dispute regarding point #1 above. As for points 2 and 3, our Complaint established that the Defendants persisted with their unlawful mandates even after we informed them in writing what legal rights they were violating. As they apparently dispute this, we clearly have yet another significant factual dispute that requires the Defendants' Motion be denied.

As for the Defendants' potential qualified immunity in their individual capacities, as the Director of the Gleason Public Library communicating an unlawfully discriminatory policy which she and the Board of Trustees had no legal authority to create in the first place, Defendant Martha Feeney-Patten obviously has no qualified immunity in any capacity. As for the other individual Defendants, our Complaint established that they forfeited their qualified immunity in their individual capacities by their unlawful enforcement of an otherwise valid statute. Unlawful enforcement of an otherwise valid statute demonstrates unrea-

sonable behavior depriving a government official of qualified immunity. *See Pierce v. Multnomah Cty., Or.*, 76 F.3d 1032, 1037 (9th Cir. 1996); *Chew v. Gates*, 27 F.3d 1432, 1450 (9th Cir. 1994)

Moreover, according to the case law the Defendants provided, by persisting with their unlawful mandates even after we notified the Defendants of the applicable laws and their violations of them, these Defendants forfeited their qualified immunity in their individual capacities. "They had more than "fair warning" that their conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014) (citation omitted). In fact, they knew it was. *See* Maj. Op. 985." *Christ v. Univ. of Iowa*, 991 F.3d 969, 990 (8th Cir. 2021)

"The individual defendants may pick their poison: they are either plainly incompetent or they knowingly violated the Constitution. Either way, they should not get qualified immunity." *Christ v. Univ. of Iowa*, 991 F.3d 969, 990 (8th Cir. 2021)

Thus, our claims against the Defendants in both their official and individual capacities must be upheld.

Our Complaint *does* state a claim for relief under the Civil Rights Act of 1964

As the Defendants state, this law prohibits discrimination in places of public accommodation on the basis of religion. As we explained above in the 14th Amendment section, some of us do have religious beliefs and practices that proscribe our complying with a face mask mandate.

The Constitution's protection against government regulation of religious belief is absolute; it is not sub-

ject to limitation or balancing against the interests of the government. *Smith*, 494 U.S. at 877; *Sherbert*, 374 U.S. at 402; *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)

The Free Exercise Clause protects beliefs rooted in religion, even if such beliefs are not mandated by a particular religious organization or shared among adherents of a particular religious tradition. *Frazee v. Illinois Dept. of Emp't Sec.*,489 U.S. 829, 833-34 (1989). As the Supreme Court has repeatedly counseled, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993) (internal quotation marks omitted). They must merely be "sincerely held." *Frazee*, 489 U.S. at 834.

A law "substantially burden[s] a person's exercise of religion," 42 U.S.C. § 2000bb-1, if it bans an aspect of the adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, *see Sherbert*, 374 U.S. at 405-06.

Further, the Chief Justice in his unanimous opinion details that, assuming a plaintiff presents prima facie evidence of a substantial burden on a sincerely held religious exercise, the government bears the burden to prove that the law in question furthers a compelling governmental interest by the least restrictive means available. *Navy Seal 1 v. Biden*, 8:21-cv-2429-SDM-TGW, 18 (M.D. Fla. Nov. 22, 2021)

The Navy servicemembers in this case seek to vindicate the very freedoms they have sacrificed so

much to protect. The COVID-19 pandemic provides the government no license to abrogate those freedoms. There is no COVID-19 exception to the First Amendment. *U.S. NAVY SEALs 1-26, et al., v. JOSEPH R. BIDEN, JR., et al.*, 4:21-cv-01236-O (N.D. Tex. Jan. 3, 2022)

As our Complaint and its accompanying exhibits plausibly asserted that the Defendants violated our rights under the Title II of the Civil Rights Act of 1964, Count IV must be upheld.

Defendants' assertions about counts III and V-X are inaccurate

The Defendants' sole and unsupported argument for dismissal of Counts III and V-X is that those provisions do not contain a private right of action for civil relief. That argument is faulty in a few respects.

First, Count IX is pursuant to M.G.L. Ch. 272 § 98 (enclosed as Exhibit 8), which states that it is a civil right, those aggrieved by its violation are entitled to sue, and such civil forfeiture shall be of an amount not less than three hundred dollars.

Second, whether a particular provision contains a private right of action for civil relief is not the criteria the Courts have established for whether a claim pursuant to § 1983 should be dismissed.

Dismissal is proper if Congress specifically foreclosed a § 1983 remedy, *Smith v. Robinson*, 468 U.S. 992, 1005, n. 9, 1003, either expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual § 1983 enforcement, *Livadas v. Bradshaw*, 512 U.S. 107, 133. Pp. 340-341.

Blessing v. Freestone, 520 U.S. 329, 330 (1997). Our claims in Counts III and V-X easily clear these criteria for dismissal, for none of these provisions expressly forbid recourse to § 1983 and none of them have a comprehensive enforcement scheme that is incompatible with § 1983 enforcement. Additionally, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367.

Thus, Counts III and V-X survive Court-established and statutory criteria for dismissal and this Court may exercise jurisdiction over them.

Our Complaint *does* state claims for relief against Fantasia and Goddard

Defendants Linda Fantasia and Timothy Goddard assert that because they "carried out" rather than voted on these unlawful face mask mandates, we have no claim to relief against them. They present no support for that incorrect argument.

Defendants Fantasia and Goddard were full-time paid employees of the Town of Carlisle. The Board of Health member Defendants were merely part-time volunteers. Thus, it would be reasonable to expect that upon having received our Notice and Demand letters in September 2021 addressed to them personally, Defendants Goddard and Fantasia would swiftly act to correct any constitutional or civil rights violations our letters informed them of. But as our Complaint established, Goddard has never responded or acted. And

Fantasia merely sent Plaintiff Michael Bush a one-sentence email message acknowledging receipt but communicating nothing else. And the Defendants' unlawful mandates have continued on with no corrective action taken by any of the Defendants.

See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) regarding defendants' supervisory liability in § 1983 suits. (direct participation in wrongdoing, failure to remedy wrong after being informed of it, creation of policy or custom, grossly negligent supervision, or deliberately indifferent failure to act on information about constitutional violations). *See also Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir. 2003); *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002). *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 254 (5th Cir. 2005) (deliberate indifference standard; adopting *Farmer v. Brennan*, 511 U.S. 825 (1994), definition of deliberate indifference); *Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005) (deliberately indifferent training or supervision causally linked to violation of plaintiff's rights). Clearly, Defendants Goddard's and Fantasia's failure to remedy these wrongs after being notified of them and deliberate indifference demand our claims against them be upheld.

Pro Se Plaintiffs are entitled to amend to cure deficiencies

"Unless it is absolutely clear that no amendment can cure the defect . . . a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam); *see also Lopez v. Smith*, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc); *Walker v. Beard*, 789

F.3d 1125, 1139 (9th Cir. 2015); *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) ("[B]efore dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." (citation and internal quotation marks omitted)); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1196 (9th Cir. 1998); *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623-24 (9th Cir. 1988); *Eldridge v. Block*, 832 F.2d 1132, 1135-36 (9th Cir. 1987).

"While [the] statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs, district courts must at least draft a few sentences explaining the [complaint's] deficiencies." *Eldridge*, 832 F.2d at 1136; *see also Karim-Panahi*, 839 F.2d at 625.

SUMMARY & CONCLUSION

The Defendants' counsel did not meet Local Rule 7.1(a)(2)'s requirement to serve and file this Motion, therefore it is defective and should be summarily denied. As we are being harmed by these ongoing constitutional, human, and civil rights violations by the Defendants, we respectfully request that this Court deny the Defendants' Motion swiftly.

If, however, this Court concludes that Rule's requirements were fulfilled, then:

There were two separate face mask mandates with distinct requirements issued by different town personnel. Neither the Board of Health nor any of the other Defendants had the statutory authority to mandate the usage of face masks (which are classified

as medical devices by the FDA; and the FDA has not approved face masks to stop the spread of COVID-19 and expressly prohibits such claims about face masks). Face masks also have a range of documented harms to the user which we notified the Defendants of and they have failed to provide that informed consent to the public with their mandates.

We concur with the Defendants that this Court should dismiss our claims as they relate solely to the ADA and the Board of Health's face mask mandate. But the Gleason Public Library's different face mask mandate has been in violation of the ADA, thus our claim for ADA violations against the Town of Carlisle under Count I must be upheld.

A number of our constitutional and fundamental rights have been infringed by the Defendants' face mask mandates, thus Count II under the 14th Amendment must be upheld.

Municipal personnel are not entitled to qualified immunity in their official capacities. And by persisting with their violations of our rights after we notified them in writing of those laws and violations with specificity, the Defendants forfeited their qualified immunity in their individual capacities. They also forfeited their qualified immunity in all capacities by their unlawful enforcement of an otherwise valid statute. Thus, our claims against the Defendants in both their official and individual capacities must be upheld.

With their face mask mandates, the Defendants have subjected some of us to religious discrimination and segregation in violation of Title II of the Civil Rights Act of 1964. Thus, Count IV must be upheld.

The Defendants have presented no legally valid argument why Counts III and V-X should be dismissed. Those claims and provisions successfully clear Court-established and statutory criteria for dismissal. Thus, those Counts must be upheld and this Court may exercise original and supplementary jurisdiction over them.

With their failures to remedy wrongs and deliberate indifference, Defendants Goddard and Fantasia created supervisory liability for themselves. Thus, the claims against them must be upheld.

There are a number of significant factual disputes between the Plaintiffs and the Defendants which require denial of the Defendants' Motion as well.

Wherefore, the undersigned Pro Se Plaintiffs request the Court grant in part the Defendants' Motion to dismiss our claims as they relate solely to the ADA and the Board of Health's face mask mandate while otherwise denying the Defendants' Motion to Dismiss. Should this Court deem it proper to dismiss more than our claims as they relate solely to the ADA and the Board of Health' face mask mandate, then as Pro Se Plaintiffs we respectfully request guidance from this Court as to what our Complaint's deficiencies are so that we may amend it to cure those specified deficiencies.

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle, MA 01741
Bmoc54@verizon.net
Phone: (978) 734-3323

January 17, 2022

/s/ Ann Linsey Hurley
pro se
10 Half Moon Hill
Acton, MA 01720
Phone: 978-793-7291

January 17, 2022

/s/ Joseph Provenzano
pro se
80 Mill Pond Lane
Carlisle, MA 01741

January 17, 2022

/s/ Linda Taylor
Pro Se
879 Concord Street
Carlisle, MA 01741

January 17, 2022

/s/ Lisa Tiernan
Pro Se
116 Lowell Street
Westford, MA 01886

January 17, 2022

/s/ Monica Granfield
Pro Se
110 Carlisle Pines Drive
Carlisle, MA 01741

January 17, 2022

/s/ Robert Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

January 18, 2022

/s/ Katalin Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

January 18, 2022

/s/ Susan Provenzano
Pro Se
80 Mill Pond Lane
Carlisle, MA 01741

January 17, 2022

EXHIBIT 1
PHONE.COM VOIP RECORD

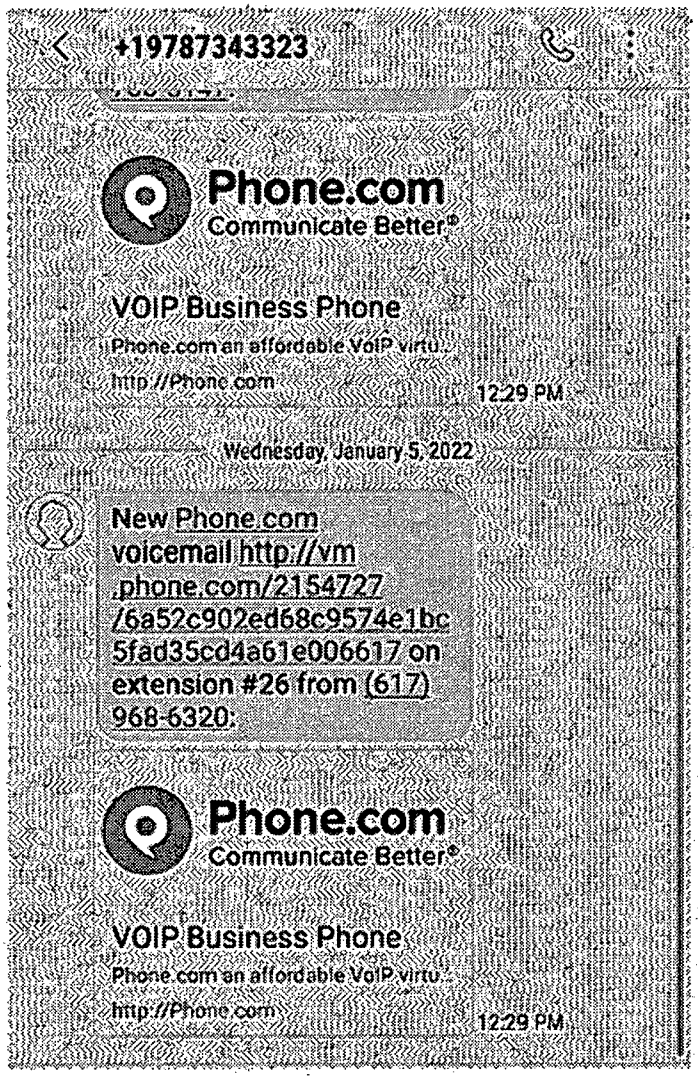


EXHIBIT 2
MEMORANDUM, TOWN OF CARLISLE
OFFICE OF BOARD OF HEALTH
(AUGUST 26, 2021)

TOWN OF CARLISLE
OFFICE OF BOARD OF HEALTH
66 Westford Street
Carlisle, MA 01741
Tel.: (978) 369-0283
Fax: (978) 369-4521

MEMORANDUM

To: Carlisle Select Board
Town Administrator
Town Counsel

From: Carlisle Board of Health
Tony Mariano, Chairman

Date: August 26, 2021

In Re: Town of Carlisle Face Mask Mandate

Acting under its authority stated in Mass. General Laws, Chapter III, Section 31, the Carlisle Board of Health at a duly posted public meeting held on August 25, 2021, unanimously voted as follows:

> In response to the recent increase in positive COVID-19 cases in Carlisle and throughout Middlesex County, including break-through cases among those who have been fully vaccinated, the Carlisle Board of Health hereby

> adopts an indoor face mask mandate for all indoor public spaces, or private spaces open to the public within the Town of Carlisle except where an individual is unable to wear a face mask due to a medical condition or disability and in employee's private work space where face masks are encouraged. This mandate will be revisited by the Board of Health in early October, 2021.

Massachusetts General Laws Chapter 111, Section 104 permits "the selectmen and the board of health [to] use all possible care to prevent the spread of [an] infection" that is dangerous to public health. The Board of Health therefor requests that the Carlisle Select Board also issue an emergency declaration for the implementation of a local face mask mandate within the Town of Carlisle.[1]

---

[1] *See* Massachusetts General Laws Chapter 111, Sections 31 and 104

EXHIBIT 3
MINUTES FROM BOARD OF HEALTH
(DECEMBER 15, 2021)

BOARD OF HEALTH
Remote Participation

Minutes for Tuesday, December 15, 2021, 7:00 PM

7:00 Minutes: 10/6/21; 11/16/21

7:15 COVID-19 – discussion

- Community Status
- Mask Mandate
- Booster Clinic

8:00 Benfield Farms Septic Upgrade

- FAST Permit Conditions (tabled)
- Installation Summary Report (Frado)

8:20 646 South Street – Request for Garbage Grinder Deed Restriction (tentative)

8:40 19 Bellows Hill Road – Request for Emergency Septic Upgrade (Chesleigh)

Discussion Items

- PFA's status report
- Fern's Country Store – Well update

New Business

The meeting agenda lists all topics reasonably anticipated by the Board of Health at the time of posting. Additional topics not anticipated may be

discussed at the meeting under the agenda item New Business.

Attendance members: Tony Mariano Chairman, Jean J Barry, Patrick Collins, David Erickson, Catherine Galligan

Attendance nonmembers: Fantasia Health Agent, Wanda Avril, Michael and Amoreena Chesleigh, Rob Frado, Michael Joseph, David Model, Ginny Turner, K. Zinke,

1. Minutes

It is a violation of the open meeting laws for more than a quorum of board members to have a private discussion, meaning that no board member can speak to more than 2 other board members at a time, consequently, in the future the minutes will be sent the Linda Fantasia who will then distribute them for comments. Moving on to the minutes themselves, Barry moved to approve the 11/6/21 minutes as amended, Erickson seconded the motion, which was then approved unanimously. Galligan moved to approve the 10/06/21 minutes as amended which was seconded and approved.

2. Covid-19

Mariano said there has been an increase in cases in town. Fantasia said Concord had 19 in the last 7 days (315 since 7/1) and Carlisle had 69 since 7/1, 10 in the last 7 days, Lincoln had 71 cases since 7/1. We are definitely seeing an uptick, according to Maven most cases are the Delta variant. The school is also seeing some cases. They are doing pool testing, out of 300 pool testing candidates they had 1 positive.

There have been 4 clinics in Concord/Carlisle with 700 doses in the first and 800 doses in the second (about 200 of the total were Carlisle students). Fantasia has submitted an application to hold a booster clinic but has not heard anything, the State has been overwhelmed. McGean has submitted an application for a TriTown booster clinic and even though it would be nice to have local Carlisle clinic the state might be more favorable to a TriTown clinic than to a local Carlisle clinic. Both applications are in, and we hope they move forward. The contact tracing collaborative has been totally disbanded so the public health nurse is now responsible for contract tracing. The state has removed a lot of the follow up requirements, the school nurse will do students, McGean, Fantasia, and Gines will do initial notifications. An individual on the swim team tested positive and the entire team had to be quarantined. Fantasia has asked McGean to let us know if she is overwhelmed. Fantasia sent the call notes from DPH call Tuesday, 12/15. There was little information on omicron. The State will be providing home test kits starting with socially disadvantaged towns.

Barry noted that now positive antigen tests don't need to be followed up with PCR tests and Fantasia noted that even probable cases are now treated as confirmed. With the new Massachusetts Notify, if you are exposed there is no real way to follow up. Barry said that most of the cases in Carlisle are mild because of our vaccination rats. Fantasia said Carlisle did have 1 death related to covid, but the patient did have other health issues.

Galligan read that people are doing their own tests without PCR follow up, so they won't get counted in

Maven, making Maven's numbers less accurate, but hospitalizations are way up. On the antigen test 2 of 5 people who are positive have no symptoms. Fantasia said the BOH should really support continuing the PCR testing at the Fire Station. Barry asked if the PCR testing is under threat, people have been very happy with it. Fantasia said that right now the town is carrying the cost, assuming that we will eventually be reimbursed but it is expensive. Mariano asked whether we have a tally on youth vaccinations and how does that affect our vaccination rate. Fantasia it was on the State web site, 220 aged 12-15years would have had at least one shot, grade school has had close to 450 and 7th and 8th graders got vaccinated earlier. Fantasia said people were having a hard time getting appointments at pharmacies. In terms of reviewing the mask mandate, we decided to wait until January, in line with the vote taken on 11/16.

Barry said that some of the data that came out today indicates for Omicron, Moderna with the booster is comparable to Delta without the booster. For Moderna the booster is a 1/2 dose, and the nature of the immune response is somewhat different, getting longer lasting T cell immunity.

3. PFAS

Fantasia said the retesting of a resident's well came out much higher and the State is installing a filtration system. Barry spoke to the homeowner, who didn't remove the aerator, although Mariano didn't think the aerator would increase the result, unless it was contaminated. Fantasia mentioned other houses were slightly elevated, but the library was over 100 both times and Concord Rd was 90. The Chelmsford

public water supply was tested at 21ppt. Fantasia is getting a lot of inquiries from residents and doesn't feel she has good information to give them. Mariano said we need to follow up with the State.

4. Fern's Country Store

There is no real update, they still have a boil water order and have not filed for a new well location yet.

5. Benfield Farms Septic Upgrade

Frado said the septic field is completed. He had a look today and the entire field has been hydroseeded and covered with hay. Rob Sarmanian of Oakson came out and checked the filter and put pool shock into the pump chamber and let it sit overnight, it seemed to clean up the lines pretty well, the pump water began a little dirty, but it gradually got clearer and clearer, so he thinks it did a pretty good job. The electric boxes, manifold, and everything else is in. When preparing the bed, it was easy to identify the impermeable material was easy to identify. Frado basically watched every scoop and could say to dig a little deeper when necessary, going from 4' to 7' to get to good material. 2000 cubic yards were brought in and Frado is confident that they got most if not all of the impermeable material. We still need to get an as built grade from Mark Beaudry and Frado thinks there should be bird boxes to mark the corners of the new field and there should be monuments over the new monitoring wells and plastic manhole cover, and inspection port in the middle of the field—these all need to be noted in the As Built as well. Frado doesn't think that we have a decommissioning report on the old wells. Beaudry needs to supply all of that.

Fantasia has told Beaudry that he still has a few things to provide. Mariano would like information on how the monitoring wells are constructed: their depth, do they have filter packing, and did they hit bedrock. Frado thinks Beaudry needs to be reminded.

Galligan said that Linda will send him an approval for the field, but they are not ready to send waste until we get the necessary material (O&M plan, startup plan, etc.). The material just came in today and work group needs to review it before bringing it before the board, also we need to ensure that finances have been resolved. Fantasia sees 2 steps: 1-allow them to turn it on and then 2-certificate of compliance after 1 yr. of monitoring. Galligan said they have not produced the O&M—Mariano asked Fantasia to remind mark that we need the O&M. Mariano was surprised at how easy it was to identify bad material. Frado was surprised at how much there was, but it has been removed and Mariano was happy to see clean Title 5 sand. Frado said the cut showed how variable the soil was, last time poor fill material was used, this time entire field was excavated. The work group meeting will be next week. Galligan is concerned that the system sits unused, and Frado said that he did operate the pumps and checked the hydraulic system so the field if charged. There was a question of whether there could be a problem with freezing (normally effluent would warm the field) but there is about 6" of sand and 9-10" of topsoil over the field and while we could have 4' of frost Frado has never seen it that deep.

6. 19 Bellows Hill Rd.

The septic system has failed. Wind River has confirmed the failure and has designed a new system,

but November 18th is too late for a winter installation. The system is a pumped system with a 1500-gallon septic tank and a 1000-gallon pump tank. The home-owners (Michael and Amoreena Chesleigh) need to go to a tight tank and pump until the system can be replaced after March 1 when we allow installation to begin.

7. Title 5 training

Fantasia will try to set up a title 5 training session.

8. New Business

In other new business, Mariano noted that Galligan has been working behind the scenes to get funding for air systems in the town hall. Fortunately, we have a couple of motivated individuals helping with this. Galligan and Fantasia met with Bill Rizzo who installed a system at 51 Walden. Allen is on the standards committee for these types of system, and both have worked with companies that supply such systems. Galligan had reached out to Goddard about what it would take for buildings to be safe, current options for have not been identified. Fantasia met with Bill and Allen; they are willing to complete a proposal. Fantasia thanked Galligan for taking it on herself to get a small air purifier for the BOH office, so they don't need to wear mask 100% of the time.

9. Adjourn

Next meetings are set for 01/05/21, and 01/19/21

Barry moved to adjourn, Galligan seconded, meeting adjourned at 20:55

Respectfully submitted,

David Erickson
Recorder

EXHIBIT 4
M.G.L. CH. 111 § 104

Part I	Administration of the Government
Title XVI	Public Health
Chapter 111	Public Health
Section 104	Prevention of Spread of Infection; Public Notice; Removal

Section 104. If a disease dangerous to the public health exists in a town, the selectmen and board of health shall use all possible care to prevent the spread of the infection and may give public notice of infected places by such means as in their judgment may be most effectual for the common safety. Whoever obstructs the selectmen, board of health or its agent in using such means, or whoever wilfully and without authority removes, obliterates, defaces or handles such public notices which have been posted, shall forfeit not less than ten nor more than one hundred dollars.

EXHIBIT 5
M.G.L. CH. 111 § 31

Part I	Administration of the Government
Title XVI	Public Health
Chapter 111	Public Health
Section 31	Health Regulations; Summary Publication; Hearings; Impact on Farming or Agriculture; Filing Sanitary Codes and Related Rules, etc

Section 31. Boards of health may make reasonable health regulations. A summary which shall describe the substance of any regulation made by a board of health under this chapter shall be published once in a newspaper of general circulation in the city or town, and such publication shall be notice to all persons. No regulation or amendment thereto which relates to the minimum requirements for subsurface disposal of sanitary sewage as provided by the state environmental code shall be adopted until such time as the board of health shall hold a public hearing thereon, notice of the time, place and subject matter of which, sufficient for identification, shall be given by publishing in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days prior to the date set for such hearing, or if there is no such newspaper in such city or town, then by posting notice in a conspicuous place in the city or town hall for a period of not less than fourteen days prior to the date set for such hearing. Prior to the adoption of any such regulation or amendment which exceeds the mini-

mum requirements for subsurface disposal of sanitary sewage as provided by the state environmental code, a board of health shall state at said public hearing the local conditions which exist or reasons for exceeding such minimum requirements. Whoever, himself or by his servant or agent, or as the servant or agent of any other person or any firm or corporation, violates any reasonable health regulation, made under authority of this section, for which no penalty by way of fine or imprisonment, or both, is provided by law, shall be punished by a fine of not more than one thousand dollars.

[*Second paragraph effective until April 11, 2021. For text effective April 11, 2021, see below.*]

In a municipality with a municipal agricultural commission established pursuant to section 8L of chapter 40, the board of health in that municipality shall, during the publication period, solicit and consider comments submitted by the commission on regulations that have an impact on farming or agriculture as defined in section 1A of chapter 128.

[*Second paragraph as amended by 2020, 321 effective April 11, 2021. For text effective until April 11, 2021, see above.*]

In a municipality with a municipal agricultural commission established pursuant to section 8L of chapter 40, the board of health shall, prior to enacting any regulation that impacts: (i) farmers markets as defined in department regulations; (ii) farms as defined in section 1A of chapter 128; (iii) the non-commercial keeping of poultry, livestock or bees; or (iv) the non-commercial production of fruit, vegetables or horticultural plants, provide the municipal agricultural com-

mission with a copy of the proposed regulation. The municipal agricultural commission shall have a 45-day review period during which the commission may hold a public meeting and may provide written comments and recommendations to the board of health relative to the proposed regulation. Upon a majority vote of the members, the agricultural commission may waive the 45-day review period,

[*Paragraph inserted following second paragraph added by 2020, 321 effective April 11, 2021.*]

If the board of health determines that an emergency exists, the board or its authorized agent, acting in accordance with section 30 of chapter 111, may, without notice of hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to address the emergency. The board of health shall comply with the local enforcement emergency procedures set forth in department regulations, as amended from time to time.

Boards of health shall file with the department of environmental protection, attested copies of sanitary codes, and all rules, regulations and standards which have been adopted, and any amendments and additions thereto, for the maintenance of a central register pursuant to section eight of chapter twenty-one A.

EXHIBIT 6
M.G.L. CH. 111 § 95

Part I	Administration of the Government
Title XVI	Public Health
Chapter 111	Public Health
Section 95	Powers and Duties of Boards in Cases of Infectious Diseases

Section 95. If a disease dangerous to the public health breaks out in a town, or if a person is infected or lately has been infected therewith, the board of health shall immediately provide such hospital or place of reception and such nurses and other assistance and necessaries as is judged best for his accommodation and for the safety of the inhabitants, and the same shall be subject to the regulations of the board. The board may cause any sick or infected person to be removed to such hospital or place, if it can be done without danger to his health; otherwise the house or place in which he remains shall be considered as a hospital, and all persons residing in or in any way connected therewith shall be subject to the regulations of the board, and, if necessary, persons in the neighborhood may be removed. When the board of health of a town shall deem it necessary, in the interest of the public health, to require a resident wage earner to remain within such house or place or otherwise to interfere with the following of his employment, he shall receive from such town during the period of his restraint compensation to the extent of three fourths of his regular wages; provided, that the amount so received shall not exceed two dollars for each working day.

EXHIBIT 7
M.G.L. CH. 272 § 98

Part IV	Crimes, Punishments and Proceedings in Criminal Cases
Title I	Crimes and Punishments
Chapter 272	Crimes Against Chastity, Morality, Decency and Good Order
Section 98	Discrimination in Admission to, or Treatment in, Place of Public Accommodation; Punishment; Forfeiture; Civil Right

Section 98. Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, deafness, blindness or any physical or mental disability or ancestry relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement, as defined in section ninety-two A, or whoever aids or incites such distinction, discrimination or restriction, shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both, and shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B; provided, however, that such civil forfeiture shall be of an amount not less than three hundred dollars; but such person so aggrieved shall not recover against more than one person by reason of any one act

of distinction, discrimination or restriction. All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.

PLAINTIFFS' REQUEST FOR RULING OR HEARING (FEBRUARY 25, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; KATE HENDERSON; ROBERT EGRI; KATALIN EGRI; ANITA OPTIZ; MONICA GRANFIELD; ANN LINSEY HURLEY; IAN SAMPSON; SUSAN PROVENZANO; JOSEPH PROVENZANO,

Pro Se Plaintiffs,

v. Case No. 1:21-cv-11794-ADB

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants.

REQUEST FOR RULING OR HEARING

On February 2, 2022 the Defendants' Reply Brief in support of their Motion to Dismiss was filed with this Court. That Motion remains pending. As the Motion itself is defective, I request the Court summarily deny the Defendants' Motion. Alternatively, I request the

Court schedule a hearing on the Motion so that discovery may commence promptly.

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
Bmoc54@verizon.net
Phone: (978) 734-3323

February 25, 2022

TOWN OF CARLISLE LETTER NOTIFYING DISTRICT COURT THAT BOARD OF HEALTH LIFTED ITS MASK MANDATE (MARCH 11, 2022)

PIERCE DAVIS & PERRITANO LLP
10 Post Office Square, Suite 1100N, Boston, MA 02109
Phone: 617.350.0950 | Fax: 617.350.7760
John J. Davis Ext. 102
jdavis@piercedavis.com

March 11, 2022

Hon. Allison D. Burroughs
U.S.D.C. (D. Mass.)
John Joseph Moakley U.S. Courthouse
1 Courthouse Way – Suite 2300
Boston, MA 02210

Re: *Michael Bush, pro se, et al. vs. Linda Fantasia, et al.* U.S.D.C. (D. Mass) Docket No. C.A. No. 1:21-cv-11794-ADB

Dear Judge Burroughs:

Defendants wish to bring to the Court's attention that the mask mandate challenged by plaintiffs in the above-captioned matter was rescinded by the Carlisle Board of Health on February 23, 2022, and replaced with a mask advisory. The following day, the Board of Health posted the following notice on its website:

> Based on current COVID-19 data and trends, the Carlisle Board of Health, at their meeting on February 23, 2022, voted unanimously to lift the Indoor Mask Mandate for all public buildings and facilities open to the public in

Carlisle and to replace the Mask Mandate with a Mask Advisory in accordance with the recommendations established by the Center for Disease Control (CDC) and adopted by the Mass. Dept. of Public Health on February 15, 2022. Further information is available at www.mass.gov/maskrules.

On March 8, 2022, the Carlisle Select Board voted to support the Board of Health's decision.

Thank you for your attention to this matter.

Very truly yours,

PIERCE DAVIS & PERRITANO LLP

/s/ John J. Davis
John J. Davis

JJD /bf

EMERGENCY MOTION TO STRIKE DEFENDANTS' EX PARTE LETTER TO THE COURT FROM THE DOCKET (MARCH 12, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; KATE HENDERSON; ROBERT EGRI; KATALIN EGRI; ANITA OPTIZ; MONICA GRANFIELD; ANN LINSEY HURLEY; IAN SAMPSON; SUSAN PROVENZANO; JOSEPH PROVENZANO,

Pro Se Plaintiffs,

v. Case No. 1:21-cv-11794-ADB

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants.

EMERGENCY MOTION TO STRIKE DEFENDANTS' EX PARTE LETTER TO THE COURT FROM THE DOCKET

On March 11, 2022 the Defendants' counsel electronically filed an ex parte letter of the same date with this Court regarding this case. As that letter bears no

relation to the Federal or Local Rules of Civil Procedure nor cites any law or legal argument supporting its submission to the Court, we undersigned Pro Se Plaintiffs would like to briefly bring some relevant points to the Court's attention.

Just as the Defendants' counsel neglected to and/or avoided conferring with any of us before filing the Defendants' defective Motion To Dismiss, the Defendants' counsel has in this instance also made no attempt to confer with any of us before filing his latest letter with this Court. Thus, we are filing this emergency motion without conferring with the Defendants' counsel.

In his ex parte letter, the Defendants' counsel provides no explanation as to why he is submitting it to the Court or its relevance to this case. It seems the Defendants' counsel is hoping to mislead the Court into concluding this case is moot. It is anything but moot, a mere few of many reasons being that:

1. The Defendants' counsel contradicts his own assertions in his letter by claiming the Board of Health Defendants "rescinded" their face mask mandate. As is clear to see in those Defendants' own statement their counsel quotes in his letter, they merely "lifted" their mandate—they failed to acknowledge it was unlawful to begin with.

2. Whether intentionally or negligently, the Defendants' counsel incorrectly asserts in his letter that there is only one face mask mandate at issue in this case. That is false, as both our Complaint and Opposition to the Defendants' Motion to Dismiss make abundantly clear.

3. In our Complaint we seek declaratory and injunctive relief as well as compensatory, nominal, presumed, and/or punitive damages to be awarded. Thus, the Defendants' counsel's letter and the status of any face mask mandates are utterly immaterial and impertinent.

4. Were cases to be dismissed because defendants cease or temporarily refrain from improper conduct, such reasoning would render 42 U.S.C. § 1983 meaningless and useless and would likely render many if not most lawsuits pointless merely because the events in question occurred in the past.

Wherefore, the undersigned Pro Se Plaintiffs request the Court strike the Defendants' counsel's ex parte letter to the Court from the docket.

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
bmoc54@verizon.net
Phone: 978-734-3323

Date: March 12, 2022

/s/ Ann Linsey Hurley
Pro Se
10 Half Moon Hill
Acton, MA 01720

March 11, 2022

/s/ Robert Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

March 11, 2022

/s/ Katalin Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

March 11, 2022

/s/ Linda Taylor
Pro Se
879 Concord Street
Carlisle, MA 01741

March 11, 2022

/s/ Susan Provenzano
Pro Se
80 Mill Pond Lane
Carlisle, MA 01741

March 11, 2022

/s/ Lisa Tiernan
Pro Se
116 Lowell Street
Westford, MA 01886

March 12, 2022

PLAINTIFFS' LETTER ADDRESSING MOOTNESS DOCTRINE (MARCH 30, 2022)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

MICHAEL BUSH; LINDA TAYLOR; LISA TIERNAN; KATE HENDERSON; ROBERT EGRI; KATALIN EGRI; ANITA OPTIZ; MONICA GRANFIELD; ANN LINSEY HURLEY; IAN SAMPSON; SUSAN PROVENZANO; JOSEPH PROVENZANO,

Pro Se Plaintiffs,

v. Case No. 1:21-cv-11794-ADB

LINDA FANTASIA; MARTHA FEENEY-PATTEN; ANTHONY MARIANO; CATHERINE GALLIGAN; JEAN JASAITIS BARRY; PATRICK COLLINS; DAVID ERICKSON; TIMOTHY GODDARD; TOWN OF CARLISLE; JOHN DOE; JANE DOE,

Defendants.

LETTER ADDRESSING MOOTNESS DOCTRINE

The undersigned Pro Se Plaintiffs were unaware that motions to strike are generally disfavored. We thank this Court for its citation of pertinent case law

when it denied our emergency motion to strike on March 14th, 2022.

Accordingly, the Defendants' counsel's ex parte letter filed March 11th, 2022 informing this Court that some of the Defendants lifted one of the two face mask mandates at the heart of this case remains on the docket. We have since researched and reviewed the mootness doctrine, exceptions to that doctrine pertinent to this case, relevant facts in this case, and applicable case law. We present those facts and our arguments herein for the court's information and consideration.

First, the Defendants' counsel's letter informed the Court only that the Board of Health member Defendants had lifted their face mask mandate. The other face mask mandate in this case (issued by other Defendants and addressed in both our complaint and our opposition to the Defendants' motion to dismiss) has not been rescinded. Thus, this case cannot be deemed moot. And if that separate mandate were rescinded subsequent to our serving and filing this letter, it would be a conspicuous instance of voluntary cessation to evade judicial review.

Regardless of whether the Defendants have issued face mask mandates that are in effect at the time of this lawsuit's judgment, this Court may grant some or all of the declaratory, injunctive, and monetary relief we seek in our complaint. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quoting *City of Erie*, 529 U.S. at 287) (internal quotation marks omitted). *See also, e.g., Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652,

1660 (2019) (same); *Campbell-Ewald*, 577 U.S. at 161 (same); *Decker*, 568 U.S. at 609 (same); *Chafin*, 568 U.S. at 172 (same). Additionally, since there is the chance the damages we seek in this case may be awarded, it is important to note that the U.S. Supreme Court has held that, "[i]f there is any chance of money changing hands' as a result of the lawsuit, then the "suit remains live." *Mission Prod. Holdings*, 139 S. Ct. at 1660.

As long as the court retains the ability to "fashion some form of meaningful relief, "then that' is sufficient to prevent th[e] case from being moot." *Church of Scientology*, 506 U.S. at 12-13. *See also, e.g., Chafin*, 568 U.S. at 177 ("[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot.") (quoting *Calderon*, 518 U.S. at 150) (brackets and internal quotation marks omitted).

The Defendants' counsel effectively informed this Court in his letter that the Board of Health member Defendants had voluntarily ceased their conduct challenged as unlawful in this case. But the U.S. Supreme Court has held that a party's voluntary cessation of a practice will usually not moot its opponent's challenge to that practice. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287-89 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993); *Chi. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 n.14 (1986); *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283,

289 (1982); *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Allee v. Medrano*, 416 U.S. 802, 810 (1974). This "voluntary cessation" exception to the mootness doctrine exists because if a litigant could defeat a lawsuit simply by temporarily ceasing its unlawful activities, there would be nothing to stop that litigant from engaging in that unlawful behavior again after the court dismissed the case—the litigant would effectively "be free to return to [its] old ways." *Allee*, 416 U.S. at 811 (quoting *Gray v. Sanders*, 372 U.S. 368, 376 (1963)). *See also, e.g., Friends of the Earth*, 528 U.S. at 189 (same).

By merely lifting one of their challenged mandates, the Defendants in this case have not assured us or this Court that their challenged conduct will not recur. As the U.S. Supreme Court has held, "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (explaining that a party's burden to avoid the voluntary cessation doctrine is "formidable"). *Friends of the Earth*, 528 U.S. at 189 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203). *See also, e.g., Trinity Lutheran Church*, 137 S. Ct. at 2019 n.1; *Adarand Constructors*, 528 U.S. at 222. *See also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

Though of arguably limited applicability to our case as it involved a different type of mandate issued by a different category of government official (state rather than municipal), the United States Court of Appeals For the First Circuit's August 26th, 2021 ruling upholding a District Court's dismissal of the *Boston Bit Labs, Inc. v. Charles D. Baker* case ("Bit Labs ruling") as moot warrants some discussion here. As

that Appeals Court cited in its ruling, "'[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation,' our judicial superiors tell us, "that does not necessarily moot the case.' *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam)."

Importantly, as the Appeals Court noted in its Bit Labs ruling, the Plaintiff in that case did not seek "money damages". In contrast, we do seek money damages in this case, which precludes our case being ruled moot.

As the Appeals Court also noted in its Bit Labs ruling, Governor Charles D. Baker terminated his COVID-19 emergency declaration and all related orders before the ruling in August 2021. With a letter to the Appeals Court, Baker assured the court that his order challenged by the Plaintiff would not recur. The Appeals Court deemed the Defendant's assurance of non-recurrence of his challenged conduct "critical". In contrast, the Board of Health Defendants in our case only requested the town Select Board issue a declaration of emergency due to COVID-19 in August 2021 after Governor Baker terminated his declaration of such emergency. Thus, the arbitrary and capricious nature of the Board of Health Defendants' challenged conduct in our case becomes all the more obvious, on top of the relevant facts we noted in our opposition to their motion to dismiss.

Our email messages as well as notice and demand letters delivered by Certified Mail over the past year failed to persuade the heedless Defendants to rescind their unlawful mandates. Yet apparently a short statement by a single member of the public at the February 23rd, 2022 Board of Health meeting about how she

"[felt] like it is appropriate at this time for Carlisle's mask mandate to be lifted" persuaded the Board of Health Defendants to lift their particular mandate we challenge. Also at the meeting, the Defendants acknowledged that COVID-19 was still present in town, infecting and sickening people. Yet they voted to lift their challenged mandate nonetheless. Those and more details are in the official minutes from that Board of Health meeting enclosed as Exhibit 1.

In its Bit Labs ruling in August 2021, the Appeals Court also seemed to be under the impression that the COVID vaccines/shots were or would bring COVID-19 under control. It was only around that time that it was starting to become evident that the shots could not achieve that objective.[1] Since then, large studies domestically and abroad[2][3] as well as the Massachusetts Department of Public Health's own published data have shown with alarming clarity that the shots fail to prevent illness, hospitalization (*see* Exhibits 2 and

---

[1] https://www.cnbc.com/2021/07/30/cdc-study-shows-74percent-of-people-infected-in-massachusetts-covid-outbreak-were-fully-vaccinated.html last visited March 20, 2022.

[2] *Shedding of Infectious SARS-CoV-2 Despite Vaccination*, Kasen K. Riemersma, Brittany E. Grogan, Amanda Kita-Yarbro, Peter J. Halfmann, Hannah E. Segaloff, Anna Kocharian, Kelsey R. Florek, Ryan Westergaard, Allen Bateman, Gunnar E. Jeppson, Yoshihiro Kawaoka, David H. O'Connor, Thomas C. Friedrich, Katarina M. Grande medRxiv 2021.07.31.21261387; doi: https://doi.org/10.1101/2021.07.31.21261387, last visited March 29, 2022.

[3] Subramanian, S.V., Kumar, A. Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States, Eur J Evidemiol 36, 1237-1240 (2021). https://doi.org/10.1007/s10654-021-00808-7 last visited March 29, 2022.

3 enclosed), and death from COVID-19, much less prevent infection or transmission of its associated virus SARS-CoV-2 (*see* Exhibit 4 enclosed). Thus, it is much more evident now that those tyrannically-inclined in government may reissue challenged COVID/medical mandates in the future than it was back in August 2021 when the Appeals Court issued its Bit Labs ruling. This is not merely according to us Plaintiffs, for unlike Governor Baker who assured the Appeals Court his challenged conduct would not recur, when lifting their face mask mandate on February 23rd, 2022 the Board of Health Defendants in this case publicly stated that their conduct we challenge may very well recur and they reserve the right to engage in it. In her notes on this very issue on the last page of Exhibit 1, Defendant Jean Barry states that a mask mandate "should be a temporary measure . . . We need to be able to pivot quickly and reverse course when the time is right." Barry went on to state that a future variant of the virus could be dangerous.

In its Bit Labs ruling, the Appeals Court also noted that Bit Labs did not raise the "capable of repetition yet evading review" exception to the mootness doctrine. Thus, the Appeals Court did not consider that issue. We, however, do assert that the Defendants' two distinct face mask mandates (only one of which has been "lifted") are both capable of repetition yet evading review. The Defendants have demonstrated with their own conduct evidenced in our complaint and their conduct described by their own legal counsel's ex parte letter to this Court that they may issue such mandates we challenge and lift or rescind them in the blink of an eye, for any reason or criteria. The Supreme Court has generally declined to deem cases moot that

present issues or disputes that are "capable of repetition, yet evading review." 1; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *Honig v. Doe*, 484 U.S. 305, 317-23 (1988); *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 436 n.4 (1987); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 257-58 (1987); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 577-78 (1987); *Press-Enter. Co. v. Super. Ct. of Cal. for Cty. of Riverside*, 478 U.S. 1, 6 (1986); *Globe Newspaper Co. v. Super. Ct. for Cty. of Norfolk*, 457 U.S. 596, 603 (1982); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 115 n.13 (1981); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979); *Bell v. Wolfish*, 441 U.S. 520, 526 n.5 (1979); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 165 n.6 (1977); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125-27 (1974); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-16 (1911). According to the U.S. Supreme Court, if this exception to mootness did not exist, then certain types of time-sensitive controversies would become effectively unreviewable by the courts. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 400 (1975).

SUMMARY AND CONCLUSION

Only one of the two face mask mandates our lawsuit challenges has been lifted or rescinded. Thus, our lawsuit cannot be deemed moot.

Even if both face mask mandates were lifted or rescinded, the U.S. Supreme Court and the Appeals Court for the First Circuit have made repeatedly clear that voluntary cessation of challenged conduct (whether COVID-related or otherwise) does not render a lawsuit moot.

Even if the Defendants voluntarily ceased both of their challenged mandates, our case could not be moot, as the Defendants themselves have made clear that their challenged mandates are capable of repetition while evading judicial review.

Even if the Defendants voluntarily ceased both of their challenged mandates; and somehow persuaded this Court that they did not really mean it when they insisted in their motion to dismiss that the Board of Health does have the legal authority to issue face mask mandates; and somehow persuaded this Court that they did not mean it when they publicly stated at the February 23rd, 2022 meeting that they may re-issue their challenged mandates at their whim and discretion; our case could not be deemed moot as there is a chance of money changing hands as a result of our lawsuit and thus according to the U.S. Supreme Court it "remains live."

Wherefore, though the Defendants' counsel's ex parte letter remains on the docket, the facts and events it conveyed fall far short of the 'formidable' threshold required to render our lawsuit moot.

Respectfully submitted,

/s/ Michael Bush
pro se
280 Lowell Street
Carlisle MA 01741
Bmoc54@verizon.net
Phone: (978) 734-3323

Date: March 30, 2022

/s/ Robert Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

March 30, 2022

/s/ Katalin Egri
Pro Se
80 Wildwood Drive
Carlisle, MA 01741

March 30, 2022

/s/ Susan Provenzano
Pro Se
80 Mill Pond Lane
Carlisle, MA 01741

March 30, 2022

MINUTES FROM BOARD OF HEALTH

BOARD OF HEALTH

Minutes for Wednesday, February 23, 2022, 7:00 PM
Remote Participation

7:00 Community Input

7:05 COVID-19 – discussion

- Community Status
- Mask Mandate Discussion

7:30 PH 147 Westford Street – septic system upgrade requiring Local Waiver

- 15.211 Distances – leaching area 91' from wetlands, 100' required

Discussion Items

- FY23 Budget Update
- PFA's status report
- Minutes: 2/9/22
- Administrative Reports

New Business

The meeting agenda lists all topics reasonably anticipated by the Board of Health at the time of posting. Additional topics not anticipated may be discussed at the meeting under the agenda item New Business.

Attendance members: Jean J Barry, David Erickson, Catherine Galligan

Attendance nonmembers: Fantasia Health Agent, Nathanial Cataldo, Rob Frado, Chris Johnson, Amy Livens, Tricia McGean

1. Community Input

At 19:04 Erickson opened the meeting.

Amy Livens made the following statement:

"I feel it is appropriate at this time for Carlisle's mask mandate to be lifted. We are in a different place then we were in 2020 and 2021. We now have therapies, data, high vaccination rates and natural immunity. My biggest concern is for our children's mental health. They have been greatly affected by the pandemic. Children, like us all, need to see faces and connect. Please set a date to give us hope! Please consider following Governor Baker's deadline of dropping mask mandate on February 28th."

2. Covid-19

Fantasia said that from Jan 1, 2020-Dec 31, 2021, there were 374 confirmed cases. There were 284 confirmed cases in Jan 2022 but from Feb 1,2022 to Feb 19 there were only 21 cases, and many were family members of infected people, although there are many family members who are doing rapid home testing and whose numbers are therefore unknown. When McGean talks to people they frequently say others in the family were infected. Fortunately, there have been no hospitalizations due to the Omicron variant and McGean confirms that most cases are mild with a moderate fever for a few days and sinus infection-like issues. Most cases start with a scratchy throat. Barry recommends changing from a mandate to an advisory effec-

tive no later than the end of February. See attached notes.

After some continuing discussion Barry moved to lift the mask mandate effective immediately and establish a mask advisory consistent with the CDC & Massachusetts Department of Public Health. Galligan seconded the motion which was then approved unanimously.

3. 147 Westford Street

Galligan moved to open the public hearing for 147 Westford Street, the motion was seconded and approved Cataldo was present for Stamski and McNary. There was a question that came up in the afternoon as to whether the system was in a 500-year flood plain. There was some discussion of this but it was eventually stated that the site chosen is probably the best site on the property and is in any case an improvement over the previous system and is in compliance with State requirements and so does not require a state waiver. Frado was comfortable with the assumptions being made. Cataldo agreed to keep the PH open to allow for the Conservation Commission scheduled meeting.

Galligan moved to approve plan entitled "Sewage Disposal Plan, 147 Westford Street, Map 15, Parcel 43-3, designed by Stamski & McNary, Inc. revised February 16, 2022 and grant a setback waiver from leach field to wetlands (91' provided; 100' required) under local upgrade approval, contingent on a floor plan verifying the house is a 4-bedroom house and an Order of Conditions from the Conservation Commission that would not affect the septic system design. Barry seconded the motion which was then approved unanimously.

4. FY23 Budged Update

Galligan attended the Select Board/FinComm meeting discussing the town operational budget. The BOH had asked for a total of 11 additional hours, going from 24 to 35 hours/week. Of those hours, 8.5 would come from the tax base and 2.5 from 53c account. The Select Board was amenable to more hours, but FinCom was not in support noting that the BOH had received a 15% increase in the operating budget for FY22 (this was for the Public Health Nurse position, which had previous y been funded by pilot grants for multiple years). FinCom eventually included a 9.1% increase (as opposed to the 12.3% requested). It is a step in the right direction but we will continue to try to communicate why we need the full amount requested.

5. PFA's status

Fantasia and Kris attended a DEP workshop this morning and have sent out a link. Fantasia noted that the state does not currently regulate private wells. There is a Model Private Well Guideline that many communities use. There is also a Bill before the Legislature for a uniform code for private wells similar to what Title 5 does for septic system. A uniform code would still allow for more stringent local regulations.

Administrative reports

Fantasia provided a document detailing the administrative reports. Fantasia summarized the report, but I am copying it here for the record:

Minutes

2/9/22 minutes: It was noted that Ginny Turner should be added to the list of attendees. Galligan

moved to accept the amended minutes, Barry seconded, and the motion was approved unanimously.

Adjourn

Next meeting is set for 3/09/22.

Barry moved to adjourn, Galligan seconded, meeting adjourned at 20:26

Respectfully submitted,

David Erickson
Recorder

Meeting Materials

ADMINISTRATIVE REPORTS
February 23, 2022

Public Health Excellence Grant – We have hired Kelly Cael as the Grant Coordinator. Kelly was the former health director in Hopkinton and managed a similar grant collaborative. We are in the process of preparing a mission statement and goals so we have a road map on future activities. Next step will be to hire a FT Inspector and FT PHN.

Assistant Health Agent – report from Select Board meeting 2/22/22. (Galligan)

Ongoing Projects

Large Development Compliance
Operations and Maintenance Template
Presentation on PFAs
Ferns PWS

Mask Mandate Notes (JBarry)

Carlisle Mask Mandate 2/23/22
Recommendation:
Change the mask mandate to a MASK ADVISORY–follow the metrics set out by the CDC and Mass DPH, effective no later than 2/28/22.

- Masks= "no real (physical) harm" but over a period of time it can have a significant negative impact on our psyche
- Ongoing mandate–could have negative consequences with regard to compliance if the DPH/BOH needs to recommend future

unpleasant restrictions in the event of a future surge (e.g. next Fall/Winter)

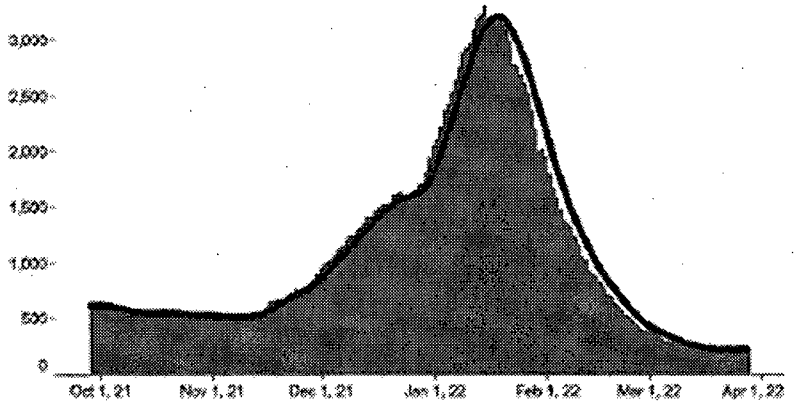
- Mask Mandate=should be a temporary measure, used during a time of extreme danger (e.g. during Delta + Omicron surge). We need to be able to pivot quickly and reverse course when the time is right.
- Masks will not disappear by recommending an advisory, just not mandated. We all continue to wear masks in high risk situations (e.g. indoor activities, medical facilities, etc.)
- IN SYNCH with current CDC + Mass DPH guidelines (masks are recommended for high risk individuals and anyone unvaccinated, indoors in areas where cases are high). There have never been any federal mask mandate and MA has not had a mask mandate since 2020.
- IN SYNCH with DESE + Carlisle School (who submitted a request with DESE to end their mask mandate).
- IN SYNCH with surrounding towns (e.g. Concord + Westford) who established a mask mandate during Omicron surge and recently lifted the mandate.
- COVID-19 Vaccine Boosters–recent studies show that boosters maintain a strong T cell response against many COVID-19 variants (even better than with natural infection)

- Omicron re-infections are rare, including with the BA.2 variant (according to a recently published Danish study)
- Background immunity–very high rate of vaccination/boosters in town, very high rate of exposure to various subtypes of COVID-19. We should not delay lifting the mandate for fear of the *possibility* of a future variant that *could* be dangerous.
- TAKE HOME POINT: mask mandates (or any other type of mandate) should be used judiciously during times of extreme danger. We need to take care when using such tools and not overuse or abuse them.

COVID-19 DASHBOARD

Massachusetts Department of Public Health
Hospitalizations from COVID-19

Number of COVID-19 patients in the hospital. 7-day average, and patients reported to be fully vaccinated. Last six months:



Released on: March 29, 2022
Data as of: March 28, 2022
Caution: recent data may be incomplete

Hospitalizations

On March 28, 2022 there were 215 patients hospitalized for COVID-19.

Of those 215 patients, 131 (61%) were reported to be fully vaccinated for COVID-19 when they contracted COVID-19.

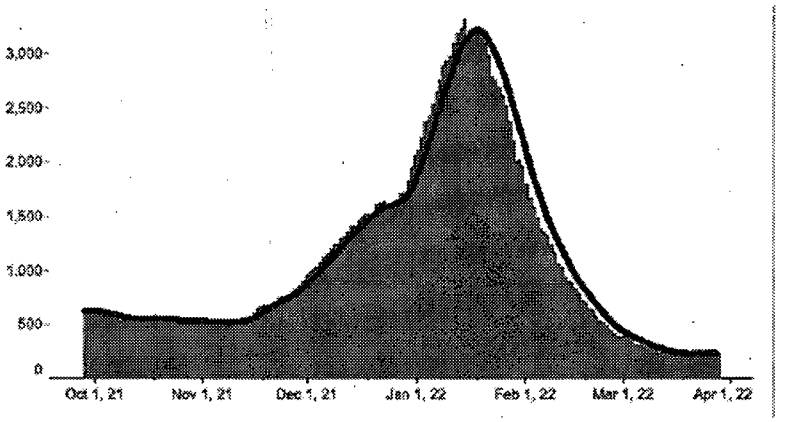
Of those 215 hospitalized patients, 81 (38%) were primarily hospitalized for COVID-19 related illness.**

Number of COVID-19 patients in the hospital, 7-day average, and Patients reported to be fully vaccinated: Last six months

Data on patients reported to be fulled vaccinated were first collected on 8/16/2021 and are not available for prior dates.

** Patients are reported as being hospitalized due to COVID-19 if they received dexamethasone treatment. Administration of dexamethasone, a type of steroid medication, is considered an indicator of moderate to severe COVID-19 and provides an estimate of primary COVID-19.

Hospitalization data provided by the MDPH hospital survey (survey data are self-reported by hospitals). NOTE: Self-reported hospital data are generally posted the next day. Friday's data are posted on Monday and Saturday-Monday data are posted Tuesday. Data are reported and shown broken-down by day, including Saturday and Sunday. All data included in this dashboard are preliminary and subject to change. Created by the Massachusetts Department of Public Health, Bureau of Infectious Disease and Laboratory Sciences, Division of Surveillance, Analytics and Informatics.



Graph selections

Time period: Last six months
Data fill (orange part of the graph)
Patients reported to be fully vaccinated

Massachusetts Department of Public Health Hospitalizations from COVID-19

Released on: March 29, 2022
Data as of: March 28, 2022
Caution: recent data may be incomplete

Hospitalizations

On March 28, 2022 there were 215 patients hospitalized for COVID-19.

Of those 215 patients, 131 (61%) were reported to be fully vaccinated for COVID-19 when they contracted COVID-19.

Of those 215 hospitalized patients, 81 (38%) were primarily hospitalized for COVID-19 related illness.**

Number of COVID-19 patients in the hospital, 7-day average, and Patients reported to be fully vaccinated: Last six months

---

** Patients are reported as being hospitalized due to COVID-19 if they received dexamethasone treatment. Administration of dexamethasone, a type of steroid medication, is considered an indicator of moderate to severe COVID-19 and provides an estimate of primary COVID-19.

Hospitalization data provided by the MDPH hospital survey (survey data are self-reported by hospitals). NOTE: Self-reported hospital data are generally posted the next day. Friday's data are posted on Monday and Saturday-Monday data are posted Tuesday. Data are reported and shown broken-down by day, including Saturday and Sunday. All data included in this dashboard are preliminary and subject to change. Created by the Massachusetts Department of Public Health, Bureau of Infectious Disease and Laboratory Sciences, Division of Surveillance, Analytics and Informatics.

*Data on patients reported to be fully vaccinated were first collected on 8/16/2021 and are not available for prior dates.

February 23, 2022

Total COVID-19 patients in a hospital: 512

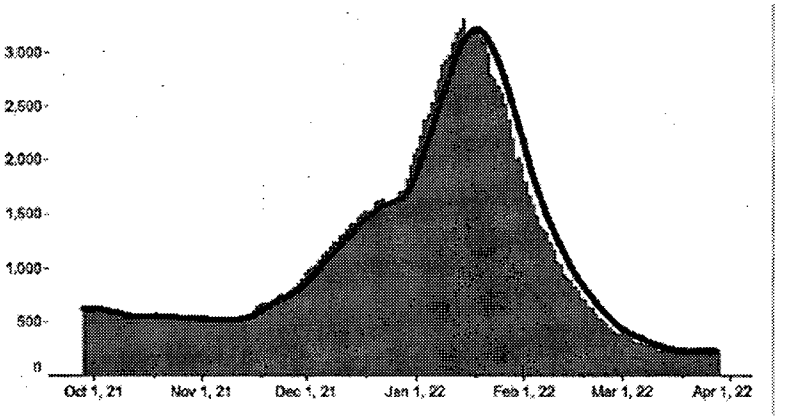
Patients reported to be fully vaccinated: 282

*Data on patients reported to be fully vaccinated were first collected on 8/16/2021 and are not available for prior dates.

Number of new COVID-19 admissions: 61
New admissions are updated once weekly.

Hospitalization data includes confirmed cases of COVID-19 in acute care hospitals and alternate care sites (added as of December 6, 2020). Hospitalization data are provided by the MDPH survey of hospitals (hospital survey data are self-reported).

NOTE: Self-reported hospital data are generally posted the next day. Friday's data are posted on Monday and Saturday-Monday data are posted Tuesday. Data are reported and shown broken-down by day, including Saturday and Sunday.



Graph selections

Time period: Last six months

Data fill (orange part of the graph)

Patients reported to be fully vaccinated

COVID-19 Cases in Fully Vaccinated Individuals

Massachusetts Department of Public Health COVID-19 Vaccine Data – Tuesday, March 29, 2021

The COVID-19 Cases in Fully Vaccinated Individuals Report is updated weekly and posted on Tuesday. Additional data on vaccines are published in the Daily Vaccine Report (posted Monday-Friday) and the Weekly Vaccination Dashboard (posted on Thursday).

Please note: Identification of cases in vaccinated people relies on matching data between the system of record for cases and vaccinations. The number of cases in vaccinated people may be undercounted due to discrepancies in the names and dates of birth of individuals, resulting in an inability to match records across systems. Hospitalization data is likely also undercounted as identification and reporting of hospitalized cases relies

on that information being obtainable by case investigators through patient interview.

- COVID-19 cases in vaccinated people are counted as those who test positive more than 14 days after the final dose of vaccine*
- As of March 26, 2022 there were 5,318,595 fully vaccinated people and there were 463,015 cases in vaccinated people
- 7,799 of those 463,015 cases resulted in hospitalization and 2,223 cases resulted in death based on information reported to date

Case	
Cumulative count through last week (reported 3/19/2022)	459,123
Cumulative count through this week (reported 3/26/2022)	463,015
% of All Fully Vaccinated Individuals*	8.7%
Hospitalizations among cases	
Cumulative count through last week (reported 3/19/2022)	7,716
Cumulative count through this week (reported 3/26/2022)	7,799
% of All Fully Vaccinated Individuals*	0.15%

* Vaccination began December 14, 2020; the earliest date at which individuals would be considered fully vaccinated is January 19, 2021

Deaths among cases	
Cumulative count through last week (reported 3/19/2022)	2,222**
Cumulative count through this week (reported 3/26/2022)	2,223**
% of All Fully Vaccinated Individuals*	0.04%

Note: Identification of cases in vaccinated people relies on matching data between the system of record for cases and vaccinations. The number of cases in vaccinated people may be undercounted due to discrepancies in the names and dates of birth of individuals, resulting in an inability to match records across systems. Hospitalization data is likely also undercounted as identification and reporting of hospitalized cases relies on that information being obtainable by case investigators through patient interview.

** Death counts updated in accordance with adoption of Council of State and Territorial Epidemiologists' surveillance definition for COVID-19-associated deaths. https://cdn.ymaws.com/www.cste.org/resource/resmgr/pdfs/pdfs2/20211222 interim-guidance.pdf