No. 21A90

IN THE
Supreme Court of the United States

JANE DOES 1-6, JOHN DOES 1-3, JACK DOES 1-1000, and JOAN DOES 1-1000

Plaintiffs-Applicants

v.

JANET T. MILLS, Governor of the State of Maine, JEANNE M. LAMBREW, Commissioner of the Maine Department of Health and Human Services, DR. NIRAV D. SHAH, Director of the Maine Center for Disease Control and Prevention, MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, GENESIS HEALTHCARE, LLC, NORTHERN LIGHT FOUNDATION, and MAINEGENERAL HEALTH

Defendants-Respondents.

OPPOSITION OF STATE RESPONDENTS TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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PRELIMINARY STATEMENT

Requiring health care workers to be vaccinated against highly communicable diseases has a long history in Maine. Maine has mandated that hospitals and other healthcare facilities require their employees to be vaccinated against several highly communicable diseases since 1989. *See* 1989 Me. Laws 644 (requiring employees of hospitals to be vaccinated against measles and rubella). Since 2002, the required vaccinations for healthcare workers have been designated by rule in state regulations adopted by the Maine Department of Health and Human Services (Department) and the Maine Center for Disease Control and Prevention (Maine CDC). In contrast, the exemptions to the vaccination requirements are provided in statute: ME. REV. STAT. ANN. tit. 22, § 802(4-B) (Supp. 2021) [hereinafter, "the Statute"].

In 2019, the Maine Legislature eliminated all nonmedical vaccination exemptions (religious and philosophical) for healthcare workers, daycare employees, schoolchildren, and college students—more than a year before the COVID-19 pandemic began. (R.A. 22-23.)[1] This change was the direct result of falling vaccination rates within the State and the concomitant rising risk of communicable diseases spreading amongst the general population and particularly vulnerable populations, including those who are medically unable to be vaccinated. The only exemption currently provided in the Statute is a medical exemption: "A medical exemption is available to an employee who provides a written statement from a

[1] The Maine Legislature voted on this legislation in May of 2019, but the law did not become effective until April 19, 2020, 30 days after Governor Mills issued a proclamation announcing the law had been ratified by the Maine electorate in a statewide referendum. Me. Const. art. IV, pt. 3, § 17, cl. 1. (R.A. 24.)

licensed physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable."[2] ME. REV. STAT. ANN. tit. 22, § 802(4-B)(A)

Between 2019 and today, the worldwide COVID-19 pandemic has gripped the country and the State of Maine, and Maine state officials accordingly have responded to protect Maine citizens. *See, e.g.*, *Calvary Chapel of Bangor v. Mills*, 984 F.3d 21, 30 (1st Cir. 2020) (dismissing appeal of challenge to COVID-related gathering limits in houses of worship), *cert. denied*, -- S. Ct. ---, 2021 WL 4507640 (Oct. 4, 2021).

On August 12, 2021, the Department and Maine CDC promulgated an emergency amendment to its healthcare worker vaccination rule to require certain healthcare facilities to require their employees to be vaccinated fully against COVID-19. Immunization Requirements for Healthcare Workers, 10-144-264 ME. CODE R. § 2(A)(7) (2021) [hereinafter, the "Rule"]. (R.A. 74-81.) The Rule requires these healthcare facilities to comply by October 1, 2021, but the Department and Maine CDC will not enforce the Rule until October 29, 2021. (R.A. 59.)

The pseudonymous Applicants are nine healthcare workers whose "sincerely held religious beliefs compel them to abstain from obtaining or injecting any of [the available COVID-19 vaccines] into their bod[ies], regardless of perceived benefit or

[2] The language of the medical exemption for healthcare workers is nearly identical to the medical exemption for schoolchildren, which precludes a student's enrollment or attendance at Maine schools unless "[t]he parent or the child provides a written statement from a licensed physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more of the diseases may be medically inadvisable." ME. REV. STAT. ANN. tit. 20-A, § 6355(2) (Supp. 2021).

rationale." (A.A. Ex. 6 at 20-21.) Applicants brought suit against Janet T. Mills, Maine's Governor, Jeanne M. Lambrew, the Department Commissioner, and Dr. Nirav D. Shah, Maine CDC Director (collectively, "State Respondents"), and several healthcare systems ("Hospital Respondents"), on August 25, 2021, in the United States District Court for the District of Maine in order to require the State to provide them with a religious exemption against vaccination.

On October 13, 2021, the district court denied Applicants' preliminary injunction motion, concluding that none of the injunctive relief factors supported Applicants. (A.A. Ex. 5.) The United States Court of Appeals for the First Circuit denied injunctive relief pending appeal on October 15, 2021, and then affirmed the district court decision on October 19, 2021. (A.A. Exs. 1, 3.) On October 20, 2021, Applicants filed this Application (App.) seeking injunctive relief from this Court pending their petition for a writ of certiorari.

As explained more fully below, this Court should deny the application. Applicants have failed to satisfy the demanding requirements for obtaining injunctive relief from this Court in the first instance.

STATEMENT OF THE CASE

A. History of Mandatory Immunizations in Maine.

Since 1989, Maine has mandated that hospitals and other healthcare facilities require their employees to be vaccinated against several highly communicable diseases. 1989 Me. Laws 644 (requiring employees of hospitals to be vaccinated against measles and rubella and providing medical and religious exemptions). In

2001, the mandatory vaccination requirements were moved from statute to rules adopted by the Department.[3] 2001 Me. Laws 147. In 2002, the Department promulgated the Rule (R.A. 27-33), which required that designated healthcare facilities (DHCFs) mandate immunizations against several diseases for their employees.[4] (R.A. 28.)

From 2001 to 2019, Maine law provided three exemptions from vaccination requirements required for healthcare workers: when vaccination was medically inadvisable, contrary to a sincere religious belief, or contrary to a sincere philosophical belief. ME. REV. STAT. ANN. tit. 22, § 802(4-B)(B) (2019); *see also* ME. REV. STAT. ANN. tit. 20-A, § 6355 (2008) (providing same exemptions to vaccinations for schoolchildren). By 2018, vaccination rates for required vaccinations for healthcare workers and school children in Maine had fallen below the population-wide rates of vaccination necessary to prevent the spread of those communicable diseases. (R.A. 68-73, 10-20.)

Legislation thus was introduced in 2019 to eliminate nonmedical exemptions from the State's mandatory vaccination programs in order to protect public health. (R.A. 7-9 ("L.D. 798").) The rationale for requiring immunization against vaccine-preventable diseases is the same in healthcare settings and schools: high vaccination rates are necessary to prevent the spread of communicable diseases through the population and among vulnerable populations, i.e., children and patients. (R.A. 47.)

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[3] A statutory exemption for sincere philosophical beliefs was added in the same legislation. 2001 Me. Laws 147 (enacting ME. REV. STAT. tit. 22, § 802(4-B)(B)).

[4] Those diseases were rubeola (measles), mumps, rubella (German measles), Hepatitis B, and varicella (chickenpox). (R.A. 28.)

The purpose of L.D. 798 was to reverse the trajectory of Maine's falling vaccination rates; prevent communicable, preventable diseases from spreading in schools, healthcare facilities, and daycare facilities; and protect persons who are unable to be vaccinated for medical reasons.[5] (R.A. 10-12.) Ultimately, in May of 2019, the Maine Legislature voted to eliminate nonmedical exemptions to vaccination requirements for healthcare workers and schoolchildren and likewise mandated the removal of nonmedical exemptions from all Department vaccination requirements. (R.A. 21-23.) The law was the subject of a statewide people's veto referendum on March 3, 3020 (R.A. 24); 72.8% of Maine voters approved the 2019 amendment to the Statute.[6] In order to comply with the statutory change, the Department removed nonmedical exemptions from the Rule in April 2021. (R.A. 64.)

B. The COVID-19 Pandemic, COVID-19 Vaccinations, and the Rule.

For the last 20 months, the world has contended with the worldwide COVID-19 pandemic. COVID-19 is a respiratory illness caused by a virus (SARS-CoV-2) that spreads when an infected person exhales droplets and very small aerosol particles that contain the virus. (R.A. 35, 36.) All variants of the COVID-19 virus exhibit asymptomatic transmission, meaning an infected person can spread the virus without noticing any symptoms. (R.A. 37, 38.)

[5] In the course of the Maine Legislature's consideration of L.D. 798, the Joint Standing Committee on Education and Cultural Affairs heard testimony from hundreds of Mainers, in support of, in opposition to, and neither for nor against the bill. (R.A. 1.). The bill, as amended, was also the topic of significant debate and discussion on the floors of both the Maine House and Senate. (R.A. 4-5.)

[6] Full results of the March 3, 2020, election are available on the website of the Maine Secretary of State: https://www.maine.gov/sos/cec/elec/results/index.html.

As of October 22, 2021, there have been approximately 242 million confirmed cases of COVID-19 and 4.92 million deaths from COVID-19 worldwide.[7] As of October 23, 2021, there have been approximately 45 million confirmed cases of COVID-19 and 733,000 deaths from COVID-19 in the United States.[8] As of October 23, 2021, there have been 100,937 total confirmed cases of COVID-19 in Maine, including 1,122 deaths from COVID-19.[9]

Fortunately, three COVID-19 vaccines have been authorized for use by the Food and Drug Administration (FDA), and they are highly effective at preventing infection with COVID-19.[10] (R.A. 40-41.) The first COVID-19 vaccine doses in Maine were administered on December 14, 2020. (R.A. 41.) In the interest of preserving Maine's health system capacity, Maine CDC prioritized eligibility for those first doses to frontline healthcare professionals and patient-facing staff in, among other places, hospitals, long-term care facilities, emergency medical services, physician practices, and dental practices. (R.A. 52-53.)

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[7] WHO Coronavirus (COVID-19) Dashboard, World Health Organization (updated Oct. 22, 2021), https://covid19.who.int/.

[8] CDC Covid Data Tracker: United States at a Glance, United States Centers for Disease Control and Prevention (updated Oct. 23, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

[9] *See* COVID-19: Maine Data, Maine CDC (updated Oct. 23, 2021), https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/data.shtml. In a mere seven weeks, there have been 19,760 more cases of and 153 more deaths from COVID-19 in Maine. (*See* R.A. 36.)

[10] Months before the COVID-19 vaccines were available, the Department and Maine CDC worked with hospitals, healthcare providers, health centers, and many others to develop a plan to facilitate distribution and administration of any COVID-19 vaccine that received authorization or approval from the FDA. (R.A. 50.) The Department and Maine CDC also hosted weekly COVID-19 vaccine information sessions on, among other topics, the science of vaccines; methods for addressing vaccine hesitancy; and patient conversations. (R.A. 51, 52.)

Given the length of the pandemic, several variants of SARS-CoV-2 have emerged over time, including the highly contagious Delta variant. (R.A. 37.) The Delta variant is more than twice as contagious as previous variants and may cause more severe illness than previous variants in unvaccinated people. (R.A. 37.) Individuals infected with the Delta variant carry a much higher viral load, making the virus far more contagious and allowing it to spread and multiply in a shorter time period; an individual infected with the Delta variant can begin spreading it to others within 24 to 36 hours of exposure.[11] (R.A. 37-38.)

The gold standard to prevent and stop the spread of communicable diseases, including COVID-19, is vaccination. (R.A. 39.) Population-level immunity, or "herd immunity," is an epidemiological phenomenon whereby unvaccinated individuals are protected against a communicable disease by virtue of being in a community with sufficiently high rate of vaccination. (R.A. 38.) When immunization rates fall below the necessary population-level rate of vaccination for a particular disease, both vaccinated and unvaccinated individuals are at risk of infection, especially the most vulnerable. (R.A. 40.) The level of vaccination required to achieve population immunity varies with the contagiousness of the disease. (R.A. 38.)

In light of the Delta variant, epidemiological models suggest that at least 90% of the population would need to be vaccinated against COVID-19 in order to achieve population-level immunity. (R.A. 38.) Under prior models formulated on earlier

[11] The Delta variant was first identified in Maine via genomic sequencing on May 11, 2021. (R.A. 42.) As of August 27, 2021, the Delta variant accounted for 96.7% of all positive COVID-19 samples sequenced in Maine. (R.A. 42.)

variants of SARS-CoV-2, only around 70% of the population would have needed to be vaccinated to achieve population-level immunity. (R.A. 38.)

Throughout the pandemic, Maine CDC has tracked statewide confirmed cases of COVID-19, including cases amongst healthcare workers, and investigated outbreaks of COVID-19, including in healthcare settings. Most healthcare facility outbreaks in Maine are the result of healthcare workers bringing COVID-19 into the facility. (R.A. 42.) On August 11, 2021, 4 of the 14 outbreaks then under investigation by Maine CDC were occurring in healthcare facilities. (R.A. 42.) By September 3, 2021, 19 of the 33 COVID-19 outbreaks under investigation by Maine CDC were occurring in healthcare facilities. (R.A. 42.)

After vaccines became available, Maine CDC started tracking the rate of COVID-19 vaccination among the general population and among employees of DHCFs. (R.A. 56-58.) For the monthly reporting period ending July 31, 2021, the rate of COVID-19 vaccination among healthcare workers in certain DHCFs was as follows:

- Ambulatory Surgical Centers: 85.9%
- Assisted Housing Facilities: 74.7%
- Hospitals: 80.3%
- Intermediate Care Facilities for Individuals with Intellectual Disabilities: 68.2%
- Nursing Homes: 73.0%[12]

[12] For the monthly period that ended September 30, 2021, about 7 weeks after the emergency amendment of the Rule went into effect, COVID-19 vaccination rates among healthcare workers in certain DHCFs were as follows, indicating the effectiveness of the amendment:

- Ambulatory Surgical Centers: 92.0%;
- Assisted Housing Facilities: 88.0%;
- Hospitals: 91.6%;
- Intermediate Care Facilities for Individuals with Intellectual Disabilities: 84.3%; and
- Nursing Homes: 85.8%.

(R.A. 43.) All facilities fell significantly below the minimum 90% threshold believed to be needed to reduce the likelihood of facility-based outbreaks of the Delta variant of COVID-19. (R.A. 43, 38.)

Based on these and other facts, Maine CDC determined that requiring COVID-19 vaccinations for healthcare workers in certain high-risk settings was necessary to protect public health, healthcare workers, patients, and Maine's healthcare system from the further spread of COVID-19. (R.A. 43-44.) Accordingly, the Department and Maine CDC amended the Rule on an emergency basis to require DHCFs, Dental Health Practices, and Emergency Medical Services (EMS) Organizations to require their employees to be vaccinated against COVID-19. (R.A. 43.) Maine CDC determined that these types of facilities and settings posed a higher risk for the transmission of the virus that causes COVID-19 because of the patient populations served and the types of care provided. (R.A. 43-45.)

In reaching the decision to amend the Rule, Maine CDC considered whether there were other measures that might be appropriate. As discussed *infra*, those options were considered, but would not have been as effective, or had been proven ineffective, at stopping the spread of COVID-19 in facilities covered by the Rule. (R.A. 45-47.)

Because the Rule was amended on an emergency basis, the amended rule became effective on August 12, 2021. ME. REV. STAT. ANN. tit. 5, § 8054 (2013). The

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Maine CDC, Maine Health Care Worker COVID-19 Vaccination Dashboard, *available at* https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/publications/health-care-worker-covid-vaccination-rates.shtml

Rule requires compliance by October 1, 2021, but the Department and Maine CDC will not enforce the Rule against covered facilities until October 29, 2021. (R.A. 59.)

C. Litigation underlying this Application.

1. Proceedings in the District Court

Applicants filed a five-count complaint on August 25, 2021, against State Respondents and Hospital Respondents, along with a motion for temporary and preliminary injunctive relief. (A.A. Exs. 6-7.) Seven Applicants are employed by healthcare facilities subject to the Rule; one of the Applicants (John Doe 1) owns his own practice subject to the Rule and employs the ninth Applicant (Jane Doe 6). (A.A. Ex. 6 at 7-10.) None of the Applicants are State employees.

As to State Respondents, Applicants claim that the Rule violates their First Amendment rights to free religious exercise and the Supremacy Clause and denies them Equal Protection of the law under the Fourteenth Amendment and that State Respondents conspired with the Hospital Respondents to abridge these rights by adopting the Rule. (A.A. Ex. 6.) Applicants seek only injunctive relief against State Respondents. (A.A. Ex. 6 at 1.)

The district court denied Appellants' ex parte motion for a temporary restraining order on August 26, 2021, and denied Applicants' preliminary injunction motion on October 13, 2021. (A.A. Ex. 5 at n.3 & 3.) With respect to Applicants' Free Exercise claim, the district court concluded that both the Rule and Statute were neutral laws of general applicability that were subject to and passed rational basis review. (A.A. Ex. 5 at 16-29.)

The court reasoned that both the Rule and the Statute were facially neutral and that there was no evidence of animus towards religion in their adoption or enactment. (A.A. Ex. 5 at 16-18.) The court also determined that the Statute and Rule were generally applicable because the medical exemption "is rightly viewed as an essential facet of the vaccine's core purpose of protecting the health of patients and healthcare workers, including those who, for bona fide medical reasons, cannot be safely vaccinated." (A.A. Ex. 5 at 27.) Having concluded the laws were neutral and generally applicable, the court found that both the Rule and the Statute were rationally related to the State's legitimate interest in "[s]topping the spread of COVID-19 in Maine, and specifically stemming outbreaks in designated healthcare facilities to protect patients and healthcare workers." (A.A. Ex. 5 at 28-29.)

The district court also analyzed the Rule and the Statute for constitutionality using strict scrutiny review. (A.A. Ex. 5 at 29-34.) The court concluded not only that the State's interests were compelling, but also that the Rule and the Statute were narrowly tailored to achieve those goals. (A.A. Ex. 5 at 32-34.) The court agreed with State Respondents that these alternative measures were either not as effective, or shown to be ineffective, to achieve the State's interests. (A.A. Ex. 5 at 32-34.) The court thus concluded that the Statute and the Rule passed muster under both standards of constitutional review. (A.A. Ex. 5 at 34.)

Finally, the court concluded Applicants were unlikely to succeed on the merits of their remaining claims and held that the remaining preliminary injunction factors

weighed against injunctive relief. (A.A. Ex. 5 at 37-40.) The district court denied the motion and a motion for injunction pending appeal. (A.A. Ex. 5 at 40; A.A. Ex. 4.)

2. Proceedings in the Court of Appeals.

Applicants appealed to the United States Court of Appeals for the First Circuit and filed a motion in the First Circuit for an injunction pending appeal. The First Circuit panel denied the motion without argument on October 15, 2021 (A.A. Ex. 3), and ordered expedited briefing on the merits.

On October 19, 2021, the First Circuit affirmed the decision of the district court. The First Circuit examined the Rule, the Statute, and the measures State Respondents had taken to achieve its stated interests and concluded that Applicants were unlikely to succeed on the merits of their complaint. (A.A. Ex. 1 at 17, 30-31.)

On Applicants' Free Exercise claim, the First Circuit concluded that the Rule and Statute are neutral laws of general applicability, subject to rational basis review. The court determined the medical exemption in the Statute was a generalized, objective exception, thereby distinguishing it from the systems of individualized exemptions at issue in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). (A.A. Ex. 1 at 18-19.) The court also concluded that the medical exemption did not undermine Maine's stated interests:

> (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.

(A.A. Ex. 1 at 18.)

The court determined that the medical exemption in the Statute was "meaningfully different" from other non-religious exceptions to other COVID-19 restrictions this Court has examined. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). (A.A. Ex. 1 at 20-21.) Unlike the gathering limit exceptions addressed in those cases, Maine's medical exemption furthers its interests in protecting public health and vulnerable populations, whereas a religious exemption does not. (A.A. Ex. 1 at 21.) The court thus concluded that as neutral and generally appliable laws, they "easily satisfy[] rational basis review." (A.A. Ex. 1 at 22.)

The court also determined that the Rule and the Statute passed muster under strict scrutiny. The court examined the alternative measures the State had taken or considered in order to achieve its goals and concluded they were inadequate. (A.A. Ex. 1 at 6-9, 11-12, 22-25.) The court concluded: "In confronting the various risks to its own population and its own healthcare delivery system, Maine's rule does not violate the Constitution." (A.A. Ex. 1 at 30.)

Last, the court summarily rejected Applicants' remaining arguments and affirmed the district court's findings on the remaining injunctive relief factors. (A.A. Ex. 1 at 30-35.)

3. Proceedings in this Court.

On October 15, 2021, while the First Circuit appeal was pending, Applicants filed an emergency application for writ of injunction pending appeal. (A.A. Ex. 2.)

Applicants' first application was denied without prejudice. (A.A. Ex. 2.) In both applications, Applicants seek injunctive relief only as to themselves and primarily seek employment-related relief from the Hospital Respondents. (App. at 5-6.)

ARGUMENT

An injunction from this Court is "extraordinary relief" that "'demands a significantly higher justification [even] than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). To obtain such relief, the applicant must show that the "legal rights at issue" in the underlying dispute are "indisputably clear" in its favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), such that this Court is reasonably likely to grant certiorari and reverse any judgment adverse to the applicant entered upon the completion of lower-court proceedings. Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13(b) (10th ed. 2013). And, as with injunctive relief generally, the applicant must also satisfy all of the remaining factors relevant for such relief, namely "that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)—the latter two factors merging where, as here, the injunction would run against the government, *see Nken v. Holder*, 556 U.S. 418, 435 (2009).

Applicants have not met this demanding burden in connection with their application to enjoin the enforcement of the Rule and Statute against them. The application should therefore be denied.

I. APPLICANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR FREE EXERCISE CLAIM.

The First Amendment's Free Exercise Clause provides in pertinent part: "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (incorporating Free Exercise Clause against the States via the Fourteenth Amendment).

As described above, Applicants' claim involves two different legal authorities: the Rule and the Statute. Regardless of which standard of review is applied, neither the Rule nor the Statute violates Applicants' First Amendment rights to free religious exercise.

A. The Rule and the Statute are neutral laws of general applicability that are valid under rational basis review.

The Free Exercise Clause protects "the right to believe and profess whatever religious doctrine one desires," *Emp't Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990), but it "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his [or her] religion prescribes (or proscribes),'" *id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). A neutral law of general applicability is constitutional if it

is rationally related to a legitimate state interest, even if it incidentally burdens religious practices. *Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878-82).

1. Neutrality.

The neutrality inquiry begins with the text of the law in question. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* Neither the text of the Rule nor the text of the Statute refers to religious practice, conduct, belief, or motivation. The Rule and the Statute are public health measures designed to prevent the spread of communicable diseases. The Rule and Statute are facially neutral.

The laws are also neutral because their object or purpose is not to infringe or restrict any particular religious practice, and they are not "specifically directed at [Applicants'] religious practice." *Smith*, 494 U.S. at 878. The overarching object of the Rule is to control and prevent communicable diseases. (R.A. 75.) The object of the recent amendment to the Rule is to prevent the spread of COVID-19 among healthcare workers in high-risk settings, protect patients and individuals from disease and death, and protect Maine's healthcare system. (R.A. 42-44.) Similarly, the Legislature's elimination of all nonmedical exemptions was intended to increase the overall rate of vaccination and protect individuals who are unable to be vaccinated for medical reasons. (*See, e.g.* R.A. 10-20.) Neither the Rule nor the Statute can be said to be directed at religious practice.

Nevertheless, Applicants claim that they have been targeted for their religious beliefs because Maine allegedly eliminated "only the religious exemption from the [R]ule" on August 14, 2021. (App. at 2, 8-9, 19.) Applicants compare their case to the district court decision in *Dr. A. v. Hochul*, No. 1:21-cv-1009, 2021 WL 4734404, at *8 (N.D.NY. Oct. 12, 2021), wherein the New York Department of Health Commissioner established a COVID-19 vaccine mandate for employees of nursing homes and hospitals via a time-limited summary order that included both medical and religious exemptions. *Id.* at *1-2. That order was superseded 8 days later by an emergency mandatory COVID-19 vaccination rule issued by the New York Public Health and Health Planning Council that applied to a broader range of healthcare facilities and included only a medical exemption. *Id.*

Here, Applicants misstate when and what type of vaccination exemptions were eliminated in Maine. The record demonstrates conclusively that religious and philosophical exemptions were eliminated in Maine at the same time. (R.A. 23 (repealing ME. REV. STAT. tit. 22, § 802(4-B)(B).) The record also demonstrates that these nonmedical exemptions were eliminated by legislation enacted in 2019 that ultimately became effective in April 2020—not August 2021, when the emergency amendment to the Rule went into effect.[13] (R.A. 24, 74.)

[13] When the Department and Maine CDC eliminated all references to nonmedical exemptions from the Rule in April 2021, they simply updated the Rule to reflect the Statute's amendment effective April 2020 that removed these exemptions. (R.A. 64.) The nonmedical exemptions in the Rule became invalid 30 days after the Governor proclaimed that the statutory amendment was ratified by the electorate, notwithstanding that the Rule was not amended until April 2021. (R.A. 24.)

Viewing these record facts accurately, it is clear that the circumstances in *Dr. A.* are not present here.[14] 2021 WL 4734404, at *8. All nonmedical exemptions, religious and philosophical, were eliminated by the Maine Legislature in 2019, and after the statutory amendment was sustained in a statewide referendum in 2020, the amendment became effective in April 2020. (R.A. 24.) This sequence is not a "religious gerrymander." (A.A. Ex. 1 at 29; *see also* A.A. Ex. 1 at 5 ("Contrary to the [Applicants]' claims, Maine changed its vaccination laws to eliminate the religious and philosophical exemptions well before the COVID-19 pandemic was rampant.").)

Other than Applicants' inaccurate claim that the State of Maine eliminated only religious exemptions on August 14, 2021, Applicants point to no other evidence of animus or conduct targeted at religious practice by the State of Maine. Both the Rule and Statute are neutral. (A.A. Ex. 1 at 18.)

2. General applicability.

The general applicability requirement prohibits the government from "in a selective manner impos[ing] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. It "protect[s] religious observers against unequal treatment[] and inequality [occurring] when a legislature decides that the

[14] Applicants have also relied on the Second Circuit interim order in *We the Patriots v. Hochul*, No. 21-2179 (2d Cir. Oct. 1, 2021). (App. at 13.) But that order did not contain any analysis and was time limited to coincide with the temporary restraining order entered in *Dr. A. v. Hochul*, No. 1:21-cv-1009 (N.D.NY. Sept. 14, 2021). The New York State officials have now appealed the *Dr. A* preliminary injunction decision. Notice of Appeal, *Dr. A. v. Hochul*, No. 1:21-cv-1009 (N.D.NY. Oct. 13, 2021), ECF No. 23. The Second Circuit has ordered that the two appeals will be heard in tandem, with oral argument to occur on both matters on October 27, 2021. Order, *Dr. A. v. Hochul*, Docket No. 21-2566 (2d Cir. Oct. 14, 2021).

governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542–43.

Here, the Rule applies equally to all covered entities. Those organizations must require their employees to show proof of vaccination against COVID-19, unless the employee is medically exempt. Rule §§ 2(A)(7), (B), (E). The Statute permits employees to assert only medical exemptions to mandatory vaccination requirements; exemptions based on any other reason, religious or otherwise, are not permitted. *Cf. Lukumi*, 508 U.S. at 535-36 (explaining how ban on ritual animal sacrifice without banning other animal slaughter targeted specific practice of Santeria faith). An individual's personal, philosophical, or religious beliefs simply do not come into play under the Statute.[15]

Further, and contrary to Applicants' contention (App. at 14, 17), the State does not have a discriminatory scheme of individualized exemptions to its vaccination requirements. Neither the Rule nor the Statute permits the State to "exercise discretion in evaluating individual requests for exemptions." (A.A. Ex. 1 at 18.)

On the contrary, the Statute vests authority regarding medical exemptions with healthcare providers, not State officials. "[A] licensed physician, nurse practitioner or physician assistant" is to utilize her professional judgment in deciding whether to sign a written statement in support of a medical exemption for an employee. ME. REV. STAT. ANN. tit. 22, § 802(4-B)(A). The medical exemption is not a "mechanism for individualized exemptions" that renders the Statute not generally

[15] Any individual who may have nonmedical reasons to object to vaccinations could still qualify for a medical exemption: Maine law distinguishes not by belief, but by medical condition.

applicable. *Fulton*, 141 S. Ct. at 1877 (2021); *Sherbert*, 374 U.S. at 399-401 (exception which vested discretion in state officials to determine whether "good cause" existed to excuse requirement of state unemployment scheme violated Free Exercise rights of petitioner); *Dahl v. Bd. of Trs. of W. Mich. Univ.*, -- F.4th ---, No. 21-2945, 2021 WL 4618519, at *4 (6th Cir. Oct. 7, 2021) (reasoning college's vaccine mandate was not neutral or generally applicable because university retained full discretion to grant or deny religious and medical exemptions to its vaccine mandate for student athletes). "[A] single objective exemption [does not render a rule] not generally applicable." (A.A. Ex. 1 at 18-19.) *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) ("As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.").

3. Comparability.

In *Tandon v. Newsom*, the Court stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. [W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." 141 S. Ct. 1294, 1296 (2021) (per curiam) (second emphasis added). Applicants assume that a medical exemption is comparable to a religious exemption, but they fail to address the State's actual interests in the Statute and the Rule. Contrary to Applicants' contention, a medical exemption is not comparable to a religious exemption and does not undermine the State's interests.

Maine includes a medical exemption to its vaccination requirements because there are certain circumstances when vaccination may cause adverse health consequences, thereby actually harming that individual. (R.A. 40.) When the Maine Legislature eliminated nonmedical exemptions (i.e., religious and philosophical exemptions) from the Statute in 2019, its goals were to reverse the trend of falling vaccination rates and protect persons who cannot be vaccinated for medical reasons, including children, the elderly, and pregnant women. (R.A. 10-12, 19-20, 68.) As explained by the then-Maine CDC Director: "When someone chooses not to vaccinate, that decision can jeopardize the health and safety of entire communities, especially the weakest and most vulnerable among us. Those who are unable to be vaccinated, such as young infants, pregnant mothers or children with cancer, face the most risk from disease complications." (R.A. 20.) Persons who are unable to be vaccinated for medical reasons rely on the immunity of those around them as their protection from those communicable diseases. (R.A. 11-12, 38.) The medical exemption in the Statute serves to protect these individuals.

Maine's interests in the Rule likewise are similarly focused on protecting the health of Maine's citizenry by ensuring healthcare workers remain healthy and able to provide care to patients, protecting vulnerable populations, including persons who are unable to be vaccinated, and protecting the health of Mainers, including patients and healthcare workers. (R.A. 43-45.) "Maine's three interests are mutually reinforcing. It must keep its healthcare facilities staffed in order to treat patients, whether they suffer from COVID-19 or any other medical condition. To accomplish

its three articulated goals, Maine has decided to require all healthcare workers who can be vaccinated safely to be vaccinated." (A.A. Ex. 1 at 18.)

Requiring vaccination of healthcare workers whose health may be harmed by vaccination would not serve any of the State's goals. It would not protect the individual healthcare worker, Maine's healthcare system, or the health of patients and other healthcare workers. The medical exemption to vaccination in the Statute is therefore unlike the COVID-19 gathering measures the Court has addressed in the past year. *See Tandon*, 141 S. Ct. at 1296-97; *South Bay United*, 141 S. Ct. at 717; *Roman Catholic Diocese*, 141 S. Ct. at 66-67.

In each of these cases, the State prohibited or limited religious gatherings while placing no restrictions (or less restrictions) on numerous, secular settings based on the State's assessment of the risks posed by the different activities and settings. For example, in *Roman Catholic Diocese*, the regulation at issue allowed houses of worship in a designated area to admit only 10 persons, but "essential" businesses, such as "acupuncture facilities, camp grounds, garages, [and] plants manufacturing chemicals" could admit as many people as they wished. 141 S. Ct. at 66; *see also Tandon*, 141 S. Ct. at 1297 (noting regulation permitted persons at "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events" "to bring together more than three households at a time" but did not allow the same for "at-home religious exercise"); *South Bay United*, 141 S. Ct. at 717 (statement of Gorsuch, J.) (criticizing the California order that restricted worship but permitted larger groups to gather in "most retail" establishments and "other businesses"). In

each case, the Court rejected the States' comparative assessments of risks because comparability for gathering restrictions "is concerned with the risks various activities pose, not the reasons why people gather." *Tandon*, 141 S. Ct. at 1296.

In contrast, Maine's Statute and Rule do not rely on comparative assessments of risk between secular and religious activities. The Statute and Rule simply require that all healthcare workers be vaccinated unless the vaccination would harm that worker's health. The comparability concerns in *Tandon* are not present here. Framed in the gathering limit context, Maine's vaccination requirement is like a COVID-19 indoor occupancy limit that applied equally to all indoor activities based on the size of the facility (regardless of whether they were secular or religious), but exempts hospitals and other healthcare facilities from its purview. Such a gathering limit would further the State's goal of protecting public health by stemming the spread of COVID-19. The exception would also protect public health by ensuring all persons can receive medical care. Such a gathering limit would not contravene *Tandon*, *South Bay United*, or *Roman Catholic Diocese*.

Similarly, the constitutional defect in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), was not that the medical exemption from the no-facial hair policy was secular per se—the problem was that it undermined the City's stated goal in maintaining a uniform, easily identifiable appearance for its officers. *Id.* at 365-66. In the same decision, the court explained that a different exception to the facial hair rule for undercover officers was not problematic. *Id.* at 366. Undercover officers were not held out as members of the

force, so exempting them from the no facial hair policy did not undermine the City's interest in a uniform appearance for its officers. *Id.* In other words, the undercover officer exception was acceptable because it was consistent with the City's goal; the medical exemption was not. Here, like the undercover officer exception in *Fraternal Order*, providing a medical exemption is consistent with (and certainly does not undermine) the State's interests. *Fraternal Order*, 170 F.3d at 366 ("the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing"). In sum, medical exemptions are not "comparable" to religious exemptions under *Tandon*, *South Bay United*, *Roman Catholic Diocese*, or *Fraternal Order*. *See also Resurrection Sch. v. Hertel*, 11 F.4th 437, 458-59 (6th Cir. 2021) (concluding COVID-related mask mandate for secular and religious schools with exception for those medically unable to mask was neutral and generally applicable);

4. Value judgment.

Applicants also argue that the Department and Maine CDC have made a value judgment in favor of a secular, medical exemption and prioritized it over a religious exemption. (App. at 22-24.) Applicants contend that the "risk" from unvaccinated healthcare workers because of medical or religious reasons is the same, and so Maine is discriminating against religious motivation. Applicants contend this alleged value judgment means the Statute is not generally applicable, citing *Fraternal Order* and a series of similar cases.

But whether a medical exemption reflects a value judgment that discriminates against religious motivation must be evaluated based on the policy objective to be achieved. *Cf. Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014) (explaining a State may "identify[] a qualitative or quantitative difference between the particular religious exemption requested and other secular exceptions already tolerated, and then explain[] how such differential treatment furthers" the State's concern). For example, in *Blackhawk v. Pennsylvania*, the Third Circuit examined a state law that forbade religious exemptions from restrictions on keeping wildlife in captivity while categorically exempting zoos and circuses from such restrictions. 381 F.3d 202, 210 (3d Cir. 2004). Noting that the purpose of the underlying state law was to raise revenue (from charging permit fees) and to "discourage the keeping of wild animals in captivity," *id.* at 211, the Third Circuit found that the nonreligious exemptions for zoos and circuses "undermine[d] the purpose of the law to at least to the same degree as the covered conduct that is religiously motivated," *id.* at 209.

But here, as the First Circuit held, "[e]xempting individuals whose health will be threatened if they receive a COVID-19 vaccine is an essential, constituent part of a reasoned public health response to the COVID-19 pandemic." (A.A. Ex. 5 at 26.) The medical exemption advances the State's public health interests, and certainly does not undermine them or suggest discriminatory bias against religion.[16] Put

[16] In contrast, medical exemptions that do not further the stated governmental interest have been determined to be an unwarranted value judgment against religious belief. *See, e.g.*, *Fraternal Order*, 170 F.3d at 365-66; *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 607-08 (W.D. La. 2019); *Singh v. McHugh*, 185 F. Supp. 3d 201, 211-13 (D.D.C. 2015); *Litzman v. N.Y City Police Dep't*, No. 12 Civ. 4681, 2013 WL 6049066, *3 (S.D.N.Y. Nov. 15, 2013).

another way, Maine's vaccination requirement and the statutory medical exemption further the same goal and do not reflect a value judgment against religious motivation. *W.D. v. Rockland Cnty.*, 521 F. Supp. 3d 358, 406 (S.D.N.Y. 2021) ("the medical exemption furthered Defendants' public health purpose by encouraging community-wide vaccination on the one hand, and protecting the lives and safety of those who could not be vaccinated, on the other").

5. Rational basis review.

Because the Rule and the Statute are neutral and generally applicable, the applicable standard of constitutional review is rational basis. Because "[s]temming the spread of COVID–19 is unquestionably a compelling interest," *Roman Cath. Diocese*, 141 S. Ct. at 67, the State's goals of protecting patients, workers, the healthcare system, and those unable to be vaccinated in a worldwide pandemic are unquestionably legitimate state interests. And requiring vaccination, the most effective method of stopping the spread of communicable diseases (R.A. 39, 47), is rationally related to achieving these goals. *Accord Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905*)* (upholding municipality's mandatory vaccination law based on its "real and substantial relation" to protecting public health).

B. The Rule and the Statute are narrowly tailored to achieve the State's compelling interests.

As shown above, both Maine laws in question are neutral and generally applicable and "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."

Lukumi, 508 U.S. at 531. But if strict scrutiny were to apply, then both laws would still stand up against Applicants' Free Exercise challenge.

Applicants suggest that the State's interests are not compelling (App. at 24-25), but this Court has already held that protecting the public from a deadly disease "is unquestionably a compelling interest." *Roman Catholic Diocese*, 141 S. Ct. at 67; *see also Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011) (holding state vaccine mandate without religious exemption to "prevent the spread of communicable diseases clearly constitutes a compelling interest"); *Ware v. Valley Stream High Sch. Dist.*, 550 N.E.2d 420, 429 (N.Y. 1989) (controlling AIDS epidemic was compelling state interest). "Few interests are more compelling than protecting public health against a deadly virus." (A.A. Ex. 1 at 23.)

Applicants also attack the effectiveness of vaccination at controlling the COVID-19 pandemic. (App. 25-26.) Data from the United States Centers for Disease Control shows that COVID-19 vaccinations reduce the risk of people spreading the virus that causes COVID-19. (A.A. Ex. 5 at 31-32.) In Maine, as of September 1, 2021, the rate of infection in the population of individuals aged 12 and older is 8 times higher among the unvaccinated. (R.A. 42.) Maine added COVID-19 to the Rule in order to protect its healthcare infrastructure, workers and patients, and vulnerable populations. Requiring vaccination of all medically eligible healthcare workers protects public health by ensuring that all persons can receive necessary medical treatment, for COVID-19 or otherwise.[17]

[17] Applicants have not grappled with the Statute. More than two years ago, the Legislature determined that whatever vaccination requirements might be adopted through the Rule, the only

The Rule and Statute are narrowly tailored to achieve the State's interests. Narrow tailoring requires the government to show that its policy is the "least restrictive means" of achieving its objective, *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981), and that it "seriously undertook to address the problem with less intrusive tools readily available to it," *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). To evaluate the requirement of narrow tailoring, the inquiry is "whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

The record shows that the State "seriously undertook to address the problem with less intrusive tools readily available to it" and "considered different methods" employed by other jurisdictions. *McCullen*, 573 U.S. at 494. The record establishes that Maine considered and tried numerous methods of fighting COVID-19 before mandating vaccinations. Those measures had either proven ineffective or would not be effective at achieving the State's goals.

For example, Maine considered continuing to utilize just masks and other personal protective equipment (PPE), as Applicants suggest. (R.A. 47.) Adherence to these practices, while crucial to infection control efforts, did not stop outbreaks of COVID-19 from occurring in healthcare facilities. (R.A. 47.) The Applicant employees of Hospital Respondents have been required to comply with applicable

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exemption to those requirements would be a medical exemption. Applicants have not argued that the State's specified goals in 2019 in eliminating religious and philosophical exemptions – to increase vaccination rates and protect vulnerable populations, including people medically unable to be vaccinated – are not compelling interests. Nor do they explain what steps they contend the Maine Legislature should have taken two years ago to more narrowly tailor the Statute (instead of eliminating non-medical exemptions).

infection control practices, including those pertaining to COVID-19. (R.A. 92, 95, 98, 101.) As of August 11, 2021, 4 of the 14 outbreaks under investigation by Maine CDC were occurring at healthcare facilities that are now covered by the Rule. (R.A. 42.) By September 3, 2021, 19 of the 33 outbreaks that Maine CDC was investigating occurred at healthcare facilities that are now covered by the Rule. (R.A. 42.) Continuing to operate under conditions as they existed before the implementation of the amendment to the Rule would have been effective at achieving the State's goals.

Maine CDC also considered, but rejected, regular testing as an alternative to protect against the Delta variant. (R.A. 46.) Given the speed with which the Delta variant is transmitted, weekly or twice weekly testing would be wholly ineffective as a tool for preventing transmission. (R.A. 46.) An employee who tests negative on a Monday morning could be exposed that afternoon and, within 36 hours, could be spreading the virus to vulnerable patients and other employees over the course of the several days until the next test. (R.A. 46.)

Daily testing was also considered, but rejected. The most effective test utilized for the detection of the virus that causes COVID-19 is a polymerase chain reaction (PCR) test; a PCR test requires a minimum of 24 hours before results are available, and sometimes results are not available for up to 72 hours. (R.A. 46.) Because of this delay, PCR testing on a daily basis would be insufficient for the same reasons that occasional testing is insufficient. (R.A. 46.) Daily testing likely would require the use of the less-effective rapid antigen test, which provides results in fifteen minutes, but which correctly identify only about 50% of positive COVID-19 cases. (R.A. 46.)

Moreover, the nation is experiencing a shortage of rapid antigen tests, which is not expected to end until November 2021. (R.A. 46.) Daily testing would not be effective at stopping the spread of COVID-19 in covered facilities, particularly in light of the Delta variant. (R.A. 46.)

Healthcare facilities in Maine, and across the country, have utilized these measures—PPE and testing—and others—such as symptom monitoring—throughout the pandemic to protect their workers and patients. But despite the use of these health and safety protocols, there have been numerous outbreaks of COVID-19 in healthcare facilities in the State. (R.A. 47.) Further, there is no equivalency between measures taken before and after vaccines became available;[18] when more effective measures to achieve the State's goals become available, the State should not be required to continue using less effective measures.

Applicants argue strenuously that because other jurisdictions allow for a religious exemption to their COVID-19 vaccination requirements, Maine must follow suit.[19] (App. at 27-29.) But Applicants fail to recognize that allowing medically

[18] Prior to requiring healthcare facilities to require their employees to be vaccinated against COVID-19, the Department and Maine CDC took numerous steps to encourage vaccination amongst the population and healthcare workers specifically. Maine CDC hosted informational sessions for clinicians on the COVID-19 vaccines and prioritized healthcare workers for the first COVID-19 vaccine doses. (R.A. 52-53.) The Department and Maine CDC partnered with some of the Hospital Respondents and others to host large public vaccination sites across the State. (R.A. 54-55.) All Hospital Respondents offered on-site vaccination to their staff and other eligible recipients. (R.A. 92, 95, 98, 101.) The State also offered various prizes and incentives in order to encourage vaccination. (R.A. 56.)

[19] Neither the Department nor Maine CDC could have included a religious exemption in the text of the Rule. The Maine Legislature removed religious and philosophical exemptions via legislation effective April 2020 and instructed the Department to remove all references to nonmedical exemptions from the Rule. (R.A. 27.) Executive agencies are creatures of statute and have only that authority provided to them by law. *See Valente v. Bd. of Env'tl Prot.*, 461 A.2d 716, 718 (Me. 1983). Neither the Department nr Maine CDC could have reinstated a religious exemption to vaccination once the Statute was amended in 2019.

eligible persons to remain unvaccinated would not address the State's interest in protecting persons who cannot be vaccinated for medical reasons. Those persons rely on the vaccination of their coworkers, neighbors, and family members in order to stay safe from communicable diseases, including COVID-19.

What other States may choose to do does not answer the question of what is constitutionally required. And contrary to Applicants' claims, the record shows that Maine is different. The size of Maine's workforce is limited as compared to other States,[20] such that the impact of any outbreaks among personnel is far greater than it would be in a state with more extensive healthcare delivery systems, like those cited by Applicants. (R.A. 47.) *Cf. Dr. A.*, 2021 WL 4734404, at *9 (reasoning that New York vaccine mandate was not narrowly tailored because the State had not "explained why they chose to depart from similar healthcare vaccination mandates issued in other jurisdictions" that include religious exemptions). Considering Maine's circumstances, it is necessary to take every available precaution to limit the spread of COVID-19 in healthcare facilities and among their workers. (R.A. 47.)

In sum, the record shows that there were no less restrictive alternatives that would have been effective at achieving the State's goals. *Ashcroft*, 542 U.S. at 666.

[20] Applicants state, without any support, that both Vermont and New Hampshire have similarly sized workforces, but "allow religious exemptions." (App. at 30.) But neither State has imposed a statewide COVID-19 vaccination requirement on healthcare workers, and COVID-19 vaccine mandates that may be imposed by private hospitals and private healthcare employers across the country are irrelevant in a First Amendment analysis.

C. Applicants' other arguments are meritless.

In support of his Free Exercise claim, Applicant John Doe 1 claims that his sincerely held religious beliefs are substantially burdened by the Rule and Statute. (App. at 16-17.) In support, he relies on *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). *Burwell* is inapplicable to this case because its analysis rested on the Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. §§ 2000bb to 2000bb-4 (Westlaw, through Publ. L. 103-141). Congress enacted RFRA in response to *Smith* in order to provide increased protection to religious exercise. *Burwell*, 573 U.S. at 693-95. But RFRA categorically does not apply to State and municipal actors. *See City of Boerne v. Flores*, 521 U.S. 507, 529-36 (1997).

II. APPLICANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR SUPREMACY CLAUSE CLAIM.

Applicants are unlikely to succeed on the merits of the Supremacy Clause claim because the Supremacy Clause is not "the source of any federal rights" or any private cause of action, but a "rule of decision" that courts should not give effect to state laws that conflict with federal law. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (cleaned up). The Supremacy Clause "certainly does not create a cause of action." *Id.* at 325.

With this claim, Applicants seek a religious accommodation in the form of an exemption from the vaccination requirements. But Applicants conflate a vaccination exemption under the Statute with a religious accommodation under Title VII. A valid exemption exempts a healthcare worker from the vaccination requirements of the Rule. But whether a person can claim a valid exemption does not answer the question

of whether an employer must provide that person with a religious accommodation under Title VII. The two are separate inquiries, governed by separate legal frameworks.

In any event, Maine CDC published guidance explaining that, in the State's view, the Rule does not prohibit employers from providing accommodations under Title VII:

> Does this rule prohibit Designated Health Care Facilities, Dental Health Practices, or Emergency Medical Services Organizations from making accommodations for unvaccinated employees who object to receiving the COVID-19 vaccine because of sincerely held religious beliefs, as may be required by the Maine Human Rights Act and/or Title VII of the Civil Rights Act?
>
> This rule does not prohibit employers from providing accommodations for employees' sincerely held religious beliefs or practices that may otherwise be required by law. For example, this rule does not prohibit employers from allowing employees to work remotely or reassigning employees to positions outside of a Designated Health Care Facility, Dental Health Practice, or Emergency Medical Services Organization. However, if accommodations provided by a Designated Health Care Facility, Dental Health Practice, or Emergency Medical Services Organization are not in compliance with this rule, then the Designated Health Care Facility, Dental Health Practice, or Emergency Medical Services Organization may be subject to enforcement action.

(R.A. 58-59.)[21] If compliance with both a state law and federal law is possible, the state law is not preempted. *See California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987). Finally, Applicants have provided no evidence of how State Respondents have denied the supremacy of federal law or the inapplicability of Title

[21] Moreover, Title VII does not require employers to make accommodations that compromise workplace safety. *See, e.g.*, *Robinson v. Children's Hospital Boston*, No. 14-10263-DJC, 2016 WL 1337255, at **9-10 (D. Mass. Apr. 5, 2016) (concluding hospital did not violate Title VII when it terminated an employee who refused the flu vaccine based on her religious beliefs pursuant to a hospital vaccination policy that only allowed for medical exemptions).

VII. (*Cf.* A.A. Ex. 7 at 36 (alleging State Respondents "tacitly stated" Title VII is inapplicable in Maine).)

III. THE REMAINING FACTORS SUPPORT DENYING THE APPLICATION.

A. Irreparable harm, balance of hardships, public interest.

Applicants have not established irreparable harm, that the balance of hardships tips in their favor, or that the public interest warrants an injunction.

As to irreparable harm, Applicants assert that their First Amendment Free Exercise rights are being irreparably harmed by the Rule and the Statute. (App. at 36-38.) According to Applicants, this Court must intervene promptly because they are faced with a difficult choice: get vaccinated and "violate their deeply held religious beliefs" or maintain their "ability to feed their families" and "work in their chosen profession." (App. at 2-3.)

Applicants have not fairly stated their choices. They remain free to decline vaccination in accordance with their religious beliefs; the Rule imposes no requirement on the individual Applicants. Further, unlike the gathering limits addressed in *Tandon*, *South Bay United*, and *Roman Catholic Diocese*, Applicants are not being restricted from engaging in any religious practice. Applicants may continue to adhere to their sincerely held religious beliefs and refuse vaccination against COVID-19 if they wish to do so. And Applicants have already attested, under oath, that their "sincerely held religious beliefs compel them to abstain from obtaining or

injecting any of [the available COVID-19 vaccines] into their bod[ies], regardless of perceived benefit or rationale." (A.A. Ex. 7 at 20-21.)

Applicants assert that they will suffer loss of current employment and all potential employment in the healthcare field in the State if the Rule is enforced. (App. 2, 3, 17, 37.) The Rule is not so broad as Applicants claim. The Rule covers only employees of certain healthcare facilities; it does not apply to private physician practices, urgent care clinics, or any other facility not identified in the Rule. Rule, §§ 2(A)-(B). The Rule also only applies to employees physically present in covered healthcare facilities or settings; employees working remotely are not affected. (R.A. 35.) Applicants can pursue employment elsewhere, or may be transitioned to employment off site, contrary to their claims. In any event, Applicants' "loss of their employment [is] serious and substantial, [but] is not irreparable. [Applicants] may pursue remedies at law for alleged discriminatory firings, including reinstatement, back pay, and damages." (A.A. Ex. 5 at 39.)

With respect to the balance of harms, State Respondents are seeking to protect the health and lives of healthcare workers and patients across the State, and that interest far outweighs the harm, if any, that Applicants may suffer. *See Cassell v. Snyders*, 990 F.3d 539, 550 (7th Cir. 2021) ("When balancing the public interest—meaning the interests of those not before the court—courts must also keep in mind that plaintiffs are not asking to be allowed to make a self-contained choice to risk only their own health").

Finally, the public interest weighs heavily in State Defendants' favor. *Castillo v. Whitmer*, 823 F. App'x 413, 417–18 (6th Cir. 2020) ("enjoining the testing scheme poses a substantial risk of harm to others given that identifying and isolating COVID-19-positive workers limits the spread of the virus"; "enforcing it serves the public interest"). Applicants should not be permitted to interfere with the careful, medically based approach taken by the Maine Legislature, as ratified and approved by the Maine electorate, and State Respondents.

B. The First Circuit's decision is not certworthy.

Applicants seek relief pending their petition for writ of certiorari, but it is not likely that this Court will grant the writ. The First Circuit's decision does not present a legal issue that has not been decided by this Court. First, this Court's precedent firmly establishes that mandatory vaccination laws without religious exemptions are constitutional. *See Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (upholding compulsory vaccination law for all inhabitants of the City of Cambridge against Fourteenth Amendment challenge); *Zucht v. King*, 260 U.S. 174, 176 (1922) (upholding compulsory vaccination law against Fourteenth Amendment challenge); *Prince v. Massachusetts*, 321 U.S. 158, 165–67 (1944) ("[A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *cf. Smith*, 494 U.S. at 888-89 ("The First Amendment's protection of religious liberty does not require" "religious exemptions [to] compulsory vaccination laws").

Second, the First Circuit's decision does not create a circuit split that requires this Court's resolution. Numerous Courts of Appeals have also explained and held that mandatory vaccination laws without religious exemptions do not violate the Free Exercise Clause. *See Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) ("[Nikolao] has not been denied any legal right on the basis of her religion. Constitutionally, Nikolao has no right to [a vaccine] exemption."), *cert. denied*, 138 S. Ct. 1999 (2018) (mem.); *Phillips v. City of New York*, 775 F.3d 538, 543-44 (2d Cir. 2015) ("mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"), *cert. denied*, 577 U.S. 822 (2015); *Workman*, 419 F. App'x at 352-54 (concluding West Virginia's mandatory vaccination law that allowed for only medical exemptions withstood strict scrutiny review), *cert. denied*, 565 U.S. 1036 (2011). There is no Court of Appeals decision to the contrary.

Third, the First Circuit's decision does not present a legal issue that has divided federal and state courts. The States' highest courts have agreed with the federal circuit courts and held that the Free Exercise Clause does not require mandatory vaccination laws to include religious exemptions. *See Davis v. Maryland*, 451 A.2d 107, 111-112 (Md. 1982) (explaining state need not "provide a religious exemption from its immunization program"); *Brown v. Stone*, 378 So. 2d 218, 222 (Miss. 1979) ("it is within the police power of the State to require that school children be vaccinated against smallpox"; "such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise"), *cert. denied*, 449 U.S. 887 (1980); *Wright v. DeWitt School Dist.*, 385 S.W.2d 644, 647-48 (Ark. 1965)

(rejecting challenge to mandatory vaccination law on ground it did not include religious exemption); *Mosier v. Barren Cnty. Bd. of Health*, 215 S.W.2d 967, 969 (Ky. 1948) (rejecting parents' religious objections to mandatory vaccination requirements for schoolchildren when there was no ongoing pandemic); *Sadlock v. Bd. of Ed.*, 58 A.2d 218, 220-22 (N.J. 1948) (upholding mandatory school vaccination ordinance with only a medical exemption to state and federal free exercise challenge); *City of New Braunfels v. Waldschmidt*, 207 S.W. 303, 308-09 (Tex. 1918) (concluding mandatory school vaccination law with only medical exemptions did not violate free exercise clause of state or federal constitution).

This case does not require or present any novel constitutional questions. Indeed, as shown above, the Statute and the Rule pass constitutional muster under the traditional Free Exercise rubric established in *Lukumi*, *Smith*, and the comparability analysis of *Tandon*. It is therefore not reasonably likely that this Court will grant a petition for certiorari and reverse any decision or judgment adverse to Applicants.

CONCLUSION

The Applicants' emergency application for a writ of injunction pending disposition of petition for writ of certiorari should be denied.

Respectfully submitted,

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