IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CATHERINE DARLING, *et. al.,*	)	**Case No: 3:21-cv-1787**
	)	
PLAINTIFFS,	)	
	)	
v.	)	
	)	
SACRED HEART HEALTH SYSTEM, INC. *et al.,*	)	
	)	
DEFENDANTS.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

I. INTRODUCTION

Defendants respectfully request that this Court deny Plaintiffs' Emergency Motion for Temporary Restraining Order ("TRO") and a Preliminary Injunction ("Motion"). Regardless of whether President Biden can mandate vaccines, it is beyond dispute that private hospitals can (and have for many years, long before COVID-19 or President Biden were involved). Indeed, most, including Defendants, already require their employees to have other vaccines, including those for measles, mumps, rubella, varicella (chicken pox) and influenza. *See George v. Kankakee County College*, No. 14-2160, 2014 U.S. Dist. LEXIS 161379, at **9, 17 (C.D. Ill.

Oct. 27, 2014) (recommending dismissal of challenge to hospital vaccine policy, noting that "this Court cannot conceive of a reason that a hospital, even when behaving as a state actor, could not impose a similar requirement [to receive vaccinations] on its employees"). (See also Ryan Decl. ¶ 4) (Ex 1)

Virtually every court that has taken up a challenge to require COVID-19 vaccinations – particularly in healthcare settings – has permitted private employers (and state employers) to require them. *See Harsman v. Cincinnati Children's Hospital Medical Center*, No. 1:21-cv-597, 2021 U.S. Dist. LEXIS 187841 (S.D. Ohio, Sept. 30, 2021) (denying TRO to plaintiffs who objected to hospital's vaccine mandate); *Beckerich v. St. Elizabeth Med. Ctr., Inc.*, No. 2:21-cv-105, 2021 U.S. Dist. LEXIS 183757 (E.D.K.Y. Sept. 24, 2021) (denying TRO to plaintiffs who objected to hospital's vaccine mandate); *Bridges v. Houston Methodist Hosp.*, No. H-21-01774, 2021 U.S. Dist. LEXIS 110382 (S.D. Tex. June 12, 2021) (denying TRO to plaintiffs who objected to hospital's vaccine mandate); *Buckley v. The New York and Presbyterian Hospital*, No. 21-CV-7864, 2021 U.S. Dist. LEXIS 181135 (S.D.N.Y. Sept. 21, 2021) (denying temporary restraining order for hospital vaccination mandate); *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592 (7th Cir. 2021) (denying TRO to plaintiffs who objected to university's vaccine mandate); *Wade v. University of Connecticut*, No. 3:21-cv-924, 2021 U.S. Dist. LEXIS 153565

(D. Conn. Aug. 16, 2021) (dismissing vaccine mandate challenge for lack of jurisdiction); *Harris v. University of Massachusetts*, No. 21-cv-11244, 2021 U.S. Dist. LEXIS 162444 (D. Mass. Aug. 27, 2021) (denying preliminary injunction to plaintiffs who objected to university's vaccine mandate); *Valdez v. Grisham*, No. 21-cv-783, 2021 U.S. Dist. LEXIS 173680 (D.N.M. Sept. 13, 2021); *America's Frontline Doctors v. Wilcox*, No. EDCV 21-1243, 2021 U.S. Dist. LEXIS 144477 (C.D. Ca. July 30, 2021).

Plaintiffs, recognizing that there is no basis for a TRO if their only claim is a Title VII claim, attempt to allege constitutional violations by transforming private employers into state actors. Their attempt fails as a matter of law. Requiring vaccination of employees is not a function reserved to the state and there is no federal compulsion at play here. Defendants instituted their vaccine policy before President Biden announced his Path Forward and before any suggestion that CMS would require it for receipt of Medicare funds (a requirement that is still not in place). (Ryan Decl. ¶ 3)

Plaintiffs have not demonstrated a substantial likelihood of success on the merits. Plaintiffs ask this Court to substitute its judgment for the judgment of the medical professionals leading Defendants, as well as the judgment of over 50 governing healthcare organizations that encourage healthcare employers to require

COVID-19 vaccination among their employees.[1] Plaintiffs cannot demonstrate irreparable harm or that the public and others will not be harmed by any injunction. The loss of employment (or income from employment) does not constitute irreparable harm. COVID-19 continues to claim lives every day. While any harm to employees who refuse a vaccine would be monetary and, in the unlikely event that they could state a recoverable claim, what is truly irreparable are the lives that may be lost if the virus continues to spread.

Plaintiffs have fallen far short of demonstrating their entitlement to a temporary restraining order or preliminary injunction.

II. STATEMENT OF FACTS

In light of the public health crisis caused by COVID-19, Defendants instituted a COVID-19 vaccine requirement for its employees on July 27, 2021. (Ryan Decl. ¶ 3) Although Defendants had to struggle through the pandemic without vaccination when the vaccines were not available, there is no doubt that vaccines offer protection to their employees and also the vulnerable patients that they must care for every day.

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[1] *Joint Statement in Support of COVID-19 Vaccine Mandates for All Workers in Health and Long-Term Care*, https://www.acponline.org/acp_policy/statements/joint_statement_covid_vaccine_mandate_2021.pdf (last visited Nov. 2, 2021). *See also* American Med. Ass'n, *AMA in support of COVID-19 vaccine mandates for health care workers*, July 26, 2021, https://www.ama-assn.org/press-center/press-releases/ama-support-covid-19-vaccine-mandates-health-care-workers (last visited Nov. 2, 2021).

Defendants' plan, which was developed based on their own internal medical insight and experience, was set in motion before President Biden's announcement of a Path Forward. Defendants announced that employees could request accommodations based on medical conditions and sincerely held religious beliefs and established a process for these to be reviewed. (Ryan Decl. ¶ 6)

III. ARGUMENT

A temporary restraining order or preliminary injunctive relief "is a powerful exercise of judicial authority" that is an "extraordinary and drastic remedy." *Global Lab Partners, LLC v. DirectMed DX, LLC*, No. 3:18cv246-MCR/CJK, 2018 U.S. Dist. LEXIS 24161, at **6-7 (N.D. Fl. Feb. 14, 2018). In the Eleventh Circuit a party seeking a temporary restraining order or preliminary injunction must establish: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest. *Schiavo ex rel. Schindler v. Chiavo*, 403 F.3d 1223, 1225-1226 (11th Cir. 2005). Additionally, a moving party must show that the injury it will suffer is "neither remote nor speculative, but actual and imminent. An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Saintlot v. Whitehead*, No. 3:18-cv-00441, 2020 U.S. Dist. LEXIS 247891, at *3 (N.D. Fla.

2020), citing *Northeastern Florida Chapter of Ass'n of General Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

A. Plaintiffs' Delay in Pursuing This Action Belies The Need For Emergency Relief

A temporary restraining order is an emergency measure. One factor the Court must consider in determining whether to grant a request for emergency relief is the imminence of the harm they face. *Saintlot*, 2020 U.S. Dist. LEXIS 247891 at *3 (*internal citations omitted*) ("The injury must be neither remote nor speculative, but actual and imminent"). Defendants announced its vaccine policy on July 27, 2021, requiring employees to be vaccinated by November 12, 2021. (Ryan Decl. ¶¶ 3, 5) This provided ample time for employees to receive the vaccination, request an exemption, or find employment elsewhere. Despite this, Plaintiffs did not file the current action until October 27, 2021 just two weeks before the November 12 deadline.

Plaintiffs' delay in filing this action demonstrates that there is no basis for an emergency temporary restraining order. Plaintiffs' lack of diligence in pursuing these claims precludes them from now seeking an emergency temporary restraining order. *Wreal, LLC v. Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months – though not necessarily fatal – militates against a finding of irreparable harm.").

B. Plaintiffs Will Not Suffer Irreparable Harm Because Any Alleged Damages May Be Quantified

Even if Plaintiffs' delay could be excused, their Motion fails because Plaintiffs cannot demonstrate irreparable harm. Any alleged harm can be remedied by a damages award, if Plaintiffs were ultimately successful on their claims. A showing of irreparable harm is "the *sine qua non* of injunctive relief." *Northeastern Florida Chapter of Ass'n of General Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Irreparable harm is characterized as "neither remote nor speculative, but actual and imminent." *Id.* The mere possibility of harm is not sufficient; and the movant must show that it is likely to suffer irreparable harm if equitable relief is denied. *See Brown v. Sec'y, United States HHS,* 4 F.4th 1220, 1225 (11th Cir. 2021). An injury is irreparable only if it cannot be undone through monetary remedies. *Northeastern Florida Chapter of Ass'n of General Contractors,* 896 F.2d at 1285; *see also SME Racks, Inc. v. Sistemas Mecanicos Para, Electronica, S.A.*, 243 Fed. Appx. 502, 504 (11th Cir.2007) ("[I]f an injury can be 'undone through monetary remedies,' it is not irreparable."). As the moving party, Plaintiffs bear the burden of proving that their alleged injury cannot be compensated with money damages. *See Berber v. Wells Fargo Bank, N.A.*, 760 Fed. Appx. 684, 687 (11th Cir. 2019).

Plaintiffs have failed to meet this burden. Pecuniary injuries and generalized fear of presumed termination of employment do not constitute irreparable injury. The United States Supreme Court has made it clear that injunctive relief is not appropriate in the vast majority of employment disputes, even those involving termination and loss of earnings or damage to reputation. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (the availability of damages prevents a plaintiff from claiming irreparable harm). Plaintiffs' alleged harm – the inability to work for Defendants – does not establish immediate and irreparable harm sufficient to entitle Plaintiffs to the extraordinary remedy of a preliminary injunction. *See Sampson*, 415 U.S. at 90; *Berber,* 760 Fed. Appx. at 686-87 (former employee's claims that her firing rendered her unemployable, pushed her into poverty, and exacerbated her depression were wholly compensable with a monetary remedy); *Del Canto v. Sheraton-Carlton Hotel*, No. 92-0509, 1992 U.S. Dist. LEXIS 3104, at *5 (D.C. Cir. March 13, 1992) (inability to work pending final resolution of the complaint was not an irreparable harm); *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1349 (7th Cir. 1982) (temporary loss of income and inability to obtain other employment is not considered irreparable harm because "this deprivation can be fully redressed by an award of monetary damages"); *Datto v. Univ. of Miami*, No. 18-CV-21053, 2019 U.S. Dist. LEXIS 200513, at *27 (S.D. Fl. Nov. 18, 2019) (the

plaintiff's termination did not amount an injury that establishes irreparable harm); *Rao v. New York City Health & Hosp. Corp.*, No. 89 Civ. 2700, 1991 U.S. Dist. LEXIS 4865, at *6 (S.D.N.Y. April 12, 1991) ("Financial distress or inability to find other employment does not establish the requisite irreparable harm, unless truly extraordinary circumstances are shown.").

As other district courts have concluded in similar cases challenging employer vaccine requirements, Plaintiffs have an adequate legal remedy that precludes injunctive relief:

> Assuming that there is a substantial likelihood of success on the merits, the plaintiffs have an adequate remedy at law. If they are wrongfully terminated, the plaintiffs can sue the hospital on those grounds to recover monetary damages.

Bridges v. Houston Methodist Hosp., No. H-21-1774, Order Denying Temporary Restraint (Doc. 10) (S.D. Tex. June 4, 2021) (Ex 2). *See also Norris v. Stanley*, No. 1:21-cv-756, 2021 U.S. Dist. LEXIS 168444 at *8 (W.D. Mich. Aug. 31, 2021) (no irreparable harm where vaccinate or terminate policy could be compensated with lost wages and benefits); *Harsman*, 2021 U.S. Dist. LEXIS 187841 at *13 ("Threats to Plaintiffs' "careers," "reputations," and the risk of "bankruptcy" or "foreclosure" are quintessentially compensable injuries."); *Beckerich*, 2021 U.S. Dist. LEXIS 183757 at *19 ("Even if they believe the condition or the consequences are wrong,

the law affords them an avenue of recourse—and that avenue is not injunctive relief on this record.").[2] Because the threatened harm can be adequately compensated by monetary damages if Plaintiffs prevail at trial, their Motion should be denied.

C. Plaintiffs Are Not Substantially Likely To Succeed On The Merits Of Their Claims

Although the lack of irreparable harm is alone sufficient to deny Plaintiffs' Motion, the Court can also deny Plaintiffs' Motion because they have not established (and cannot establish) a substantial likelihood of success on the merits of their claims. Plaintiffs allege that Defendants: (1) are state actors (which is both false and not an independent cause of action), (2) who violated Plaintiffs' constitutional right to privacy,[3] and (3) violated Title VII/the Florida Civil Rights Act.

1. Plaintiffs Cannot Assert Constitutional Violations Against Defendants, Which Are Private Entities

Defendants are private hospitals. Plaintiffs, in a failed attempt to state a claim, seek a declaration that Defendants are a state actor simply because the federal

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[2] The United States Supreme Court recently denied emergency relief to a constitutional challenge brought by healthcare workers in Maine against the state's COVID-19 vaccination policy which requires all healthcare workers to be vaccinated. *John Does 1-3 v. Mills*, 595 U.S. ____ (2021) (Ex. 3).

[3] Counts I and II of Plaintiffs' Complaint are interwoven. Plaintiffs seek a declaration that Defendants are a state actor in Count I in order to be able to assert a constitutional violation with respect to an asserted right to privacy in Count II. Neither "claim" has merit.

government agreed with the approach that Defendants took in July 2021. There is simply no merit or support for Plaintiffs' attempt to create state action here.[4]

Private employers like Defendants are not state actors and, thus, there can be no constitutional claim against Defendants. *See Scott v. Findlay*, No. 3:19-cv-03753, 2019 U.S. Dist. LEXIS 215571, at *6 (N.D. Fl. Nov. 5, 2019) ("[s]tate action is not established merely because a private entity receives government funding or is subject to extensive government regulation"). *See also Beckerich*, 2021 U.S. Dist. LEXIS 183757 at *7 ("Put simply, without establishing that Defendants are state actors, Plaintiffs' constitutional claims cannot stand, and thus have zero likelihood of success on the merits."); *Harsman,* 2021 U.S. Dist. LEXIS 187841, at *10 ("Because Plaintiffs cannot establish that Defendants are state actors, Plaintiffs' likelihood of successfully proving "constitutional violations" is zero. But even if Defendants were state actors, the overwhelming majority of courts to consider vaccine mandates have found them constitutionally sound."); *Martin Memorial Hospital Asso. v. Noble*, 496 So. 2d 222, 224 (4th Dist. 1986) (no state action in

[4] Under Plaintiffs' theory, every employer that follows federal law or guidance would become a state actor. For example, the federal government encouraged individuals to socially distance. Does that make every employer who installed barriers or required employees to maintain distance a state actor? Or is every employer that follows OSHA's recommendations for safety, or the Department of Labor's guidance for wages, or the EEOC's guidance for religious accommodation suddenly a state actor? Plaintiffs' claim makes no sense.

private hospital that was directed by the state to implement certain governing and care procedures).

"Only in rare circumstances can a private party be viewed as a state actor." *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). "[A] private hospital is subject to 42 U.S.C. § 1983 and the Fourteenth Amendment only if its activities are significantly affected with state involvement." *Willis v. University Health Servs*., 993 F.2d 837, 840 (11th Cir. 1993). The three tests to determine whether state action exists are: (1) the public function test, (2) the state compulsion test, and (3) the nexus/joint action test. *Id*. Plaintiffs cannot show that Defendants satisfy any of these tests.[5] *Id*.

The public function test "limits state action to instances where private actors are performing functions traditionally the *exclusive* prerogative of the state." *Id*. at 840 (*emphasis added*). "Few activities are exclusively reserved to states." *Harvey*, 949 F.2d at 1131, citing *White v. Scrivner Corp*., 594 F.2d 140, 142 (5th Cir.1979) (public function "embraces very few activities"; even arrest, detention, and search are not exclusively reserved to states). Plaintiffs' attempt to argue that Defendants' vaccination policy is a public function is without any basis in fact or law. Private

[5] Plaintiffs do not assert that the nexus/joint action test applies here. Nor could they, as there is no assertion that the state has insinuated itself into a position of interdependence with Defendants or is a joint participant in any actions.

hospitals have, for decades, instituted vaccine requirements. (Ryan Decl. ¶ 4) In fact, Plaintiffs fail to point to any case law suggesting that Defendants have taken any action that is an "exclusive prerogative of the state." Defendants implemented its vaccination policy to protect its employees and patients. These activities hardly amount to exclusive state functions. Private hospitals are obligated to take action to protect the health and safety of its employees and patients. Plaintiffs cannot establish even a plausible basis for this claim, let alone a substantial likelihood of success.

Similarly, the state compulsion test "limits state action to instances where the government has coerced or at least significantly encouraged the action alleged to violate the Constitution." *Willis*, 993 F.2d at 840. The Supreme Court has long held that just because a private entity accepts government funding does not make it a state actor. *See Blum v. Yaretsky*, 457 U.S. 991 (1982) (a private nursing home is not a state actor despite extensive state regulation and 90% of fees being subsidized by the state); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school that treats students with drug/alcohol problems not state actor despite operating under contract with the state and receiving 90% state funding); *Fields v. Unnamed Emples*, No. 5:11-cv-657, 2012 U.S. Dist. LEXIS 129844, at *6 (M.D. Fl. Sept. 12, 2012) ("it is well settled that a private institution does not become a state actor because virtually all of [its] income was derived from government funding"); *Moles v. White*, 336 So.

2d 427 (2d Dist. 1976) (mere acceptance of state funds does not impose due process requirements upon a private hospital unless it is shown there is state action).

Plaintiffs attempt to allege that President Biden and the federal government's encouragement of vaccination is government coercion. (Plaintiffs' Memorandum of Law in Support of Plaintiffs' Emergency Order for a Restraining Order and a Preliminary Injunction ("MOL"), p. 17) In particular, they cite to a September 9, 2021 press release suggesting CMS will require vaccination programs for hospitals in order to receive Medicare and Medicaid reimbursement, which has yet to occur. (MOL, pp. 18-19) Plaintiffs' conspiracy theory falls apart for the simple reason that the alleged federal coercion occurred ***after*** Defendants had already independently determined its own course of action for the safety of its employees and patients. (Ryan Decl. ¶ 3) Plaintiffs' arguments are based on conspiracy theories and conjecture – they cite to no evidence supporting their claims and no reason to believe that any federal action played any role in Defendants' decision in July to initiate its policy. Plaintiffs cannot establish a likelihood of success on their constitutional claims because Defendants are not state actors and Plaintiffs cannot show otherwise.

Because Defendants are not state actors, Plaintiffs' constitutional privacy claim has no likelihood of success on the merits. *See Beckerich*, 2021 U.S. Dist. LEXIS 183757 at *7 ("Put simply, without establishing that Defendants are state

actors, Plaintiffs' constitutional claims cannot stand, and thus have zero likelihood of success on the merits."); *Harsman,* 2021 U.S. Dist. LEXIS 187841 at *10 ("Because Plaintiffs cannot establish that Defendants are state actors, Plaintiffs' likelihood of successfully proving "constitutional violations" is zero. But even if Defendants were state actors, the overwhelming majority of courts to consider vaccine mandates have found them constitutionally sound.").

Moreover, there is no fundamental right to refuse vaccines. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174, 176 (1922) (it is "settled that it is within the police power of a state to provide for compulsory vaccination"); *Klaassen*, 7 F.4th at 593 ("Given *Jacobson*…which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2."); *Valdez*, 2021 U.S. Dist. LEXIS 173680 at *23 ("it is within the police power of a state to provide for compulsory vaccination"); *Johnson v. Brown*, No. 3:21-cv-1494-SI, 2021 U.S. Dist. LEXIS 200159, at *38 (D. Oregon Oct. 18, 2021) (recognizing that it is within the police power of a state to provide form compulsory vaccination). Courts have repeatedly rejected similar challenges to vaccines mandated by state employers, even in non-hospital settings. *See e.g. Dr. T v. Alexander-Scott*, No. 1:21-cv-00387, 2021 U.S. Dist. LEXIS 188096, at *4 (D. R.I. Sept. 30, 2021) ("[C]ourts have held

for over a century that mandating vaccination laws are a valid exercise of a state's police powers, and such laws have withstood constitutional challenges."); *Klaassen*, 7 F.4th at 592 (upholding Indiana University's vaccine mandate under rational basis review); *Norris,*, 2021 U.S. Dist. LEXIS 168444 (denying TRO finding that employee of university was unable to show she had a constitutionally protected interest in her employment and was unable to show that the vaccine policy was not rationally related to a legitimate government interest); *Kheriaty v. Regents of the Univ. of Cal*., No. SACV 21-1367 JVS, 2021 U.S. Dist. LEXIS 196639, at *23 (C.D. Ca. Sept. 29, 2021) (Denying preliminary injunction on university vaccine mandate and finding: "[b]ut merely drawing different conclusions based on consideration of scientific evidence does not render the Vaccine Policy arbitrary and irrational. The Regents have met their burden under rational basis review. They considered the evidence and developed a policy that rationally furthers a legitimate state purpose."); *Messina v. Coll. of N.J.*, No. 21-17576, 2021 U.S. Dist. LEXIS 198104, at *33 (D. N.J. Oct. 14, 2021) (denying preliminary injunction on challenge to university COVID-19 vaccination mandate and stating that this requirement is rationally based); *Harris*, 2021 U.S. Dist. LEXIS 162444 at *19 (university has a rational basis for vaccine mandate for students); *Bauer v. Summey*, No. 2:21-cv-02952, 2021 U.S. Dist. LEXIS 203204, *37 (D. S.C. Oct. 21, 2021) (executive order imposing

vaccine mandate on city employees satisfies rational basis based on "health concerns to government employees and citizens posed by COVID-19"); *Mass. Corr. Officers Federated Union v. Baker*, No. 21-11599, 2021 U.S. Dist. LEXIS 198905, at *20 (D. Mass. Oct. 15, 2021) (vaccine requirements for employees was a rational way to curb the spread of COVID-19 under rational basis test); *Williams v. Brown*, No. 6:21-cv-01332-AA, 2021 U.S. Dist. LEXIS 201423, *27 (D. Oregon Oct. 19, 2021) ("[T]he Court has no trouble discerning a legitimate state interest in slowing the spread of COVID-19 and the Court concludes that the vaccine mandates are rationally related to furthering that interest. The Court concludes that the vaccine mandates would survive rational basis review and that Plaintiffs have not shown a likelihood of success on the merits of their equal protection claim or even serious questions going to the merits of that claim.").

Moreover, Plaintiffs are not forced to receive a vaccination. *See Bridges*, 2021 U.S. Dist. LEXIS 110382 at *7 (Policy requiring employee to receive COVID-19 vaccination was not coercive because employee "can freely choose to accept or refuse a COVID-19 vaccine…if she refuses, she will simply need to work somewhere else."). *See also Doe v. Zucker*, No. 1:20-cv-840, 2021 U.S. Dist. LEXIS 28937, at *250-251 (N.D.N.Y. Feb. 17, 2021) (mandatory vaccination requirement does "not force…consent to vaccination"); *Klaassen*, 7 F. 4th at 593 (Upholding

denial of injunction against university's COVID-19 vaccination requirement: "People who do not want to be vaccinated may go elsewhere").

2. Plaintiffs Have Not Asserted A Likelihood Of Success On Their Title VII (Or Florida Civil Rights Act Claim, To The Extent One Has Been Asserted), Nor Could They

Plaintiffs also cannot establish a likelihood of success on the merits of their Title VII claim (or Florida Civil Rights Act claim, to the extent one has been asserted). First, Plaintiffs' claims under Title VII must be dismissed because they failed to exhaust their administrative remedies through the EEOC, as required before commencing suit. "Before commencing a lawsuit under Title VII, a plaintiff must first exhaust administrative remedies" including filing "a timely charge of discrimination." *Liu v. Univ. of Miami Sch. Of Med.*, 693 Fed. Appx. 793, 796 (11th Cir. 2017).

The purpose of the exhaustion requirement is "to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer." *Id*. at 796.

Thus, in order to "commenc[e] a Title VII action in federal district court, a private plaintiff must file an EEOC complaint against the discriminating party and receive statutory notice from the EEOC of his right…. to sue the respondent named in the charge." *Royster v. YMCA*, No. 3:06cv238/RV/MD, 2006 U.S. Dist. LEXIS

99762, at *6 (N.D. Fl. July 6, 2006). Plaintiffs have not even argued, let alone shown, that they are entitled to equitable relief from the exhaustion requirement. *See Twitty v. Potter,* 2008 U.S. Dist. LEXIS 42932, at **8-9 (N.D. Fla. 2008). Contrary to their assertions, Plaintiffs cannot forgo exhausting their administrative remedies under Title VII simply because they may face pecuniary or monetary injury (i.e., the loss of employment or pay). The loss of employment or a monetary injury is invariably what every single plaintiff asserting a Title VII claim has faced or faces. Plaintiffs cannot be permitted to bypass the fundamental requirement under Title VII of exhausting their administrative remedies simply because their employment might be terminated.

Because Plaintiffs admittedly have not exhausted their administrative remedies, their Title VII claims cannot be asserted here. *See Liu,* 693 Fed. Appx. at 796. For this reason alone, Plaintiffs cannot establish a likelihood of success on the merits of any Title VII claim asserted in the Complaint.

Moreover, employers do not have to accommodate religious beliefs where doing so would create an undue hardship. *Dalberiste v. GLE Assocs., Inc.*, 814 Fed. Appx. 495, 497 (11th Cir. 2020).[6] "[U]ndue hardship [is] any act requiring an employer to bear more than a *de minimis* cost in accommodating an employee's

[6] "The Florida Civil Rights Act is patterned after Title VII, and therefore federal case law regarding Title VII is applicable." *See Maldonado v. Publix Supermarkets*, 939 So. 2d 290, fn 2 (4th Dist. 2006).

religious beliefs." *Id*. at 498. "Where, as here, the proposed accommodation threatens to compromise safety in the workplace, the employer's burden of establishing an undue burden is light indeed." *Kalsi v. New York City Transit Authority*, 62 F. Supp.2d 745, 758 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999); *E.E.O.C. v. Oak-Rite Mfg. Corp.*, 2001 U.S. Dist. LEXIS 15621, at *43 (S.D. Ind. Aug. 27, 2001) (risk of state OSHA fines or workers compensation claim created undue hardship). Given the threat that COVID-19 poses to the health and safety of Defendants' patients, employees, patients' families, etc., it is almost certain that Defendants can establish an undue hardship. *See, e.g., Robinson v. Children's Hosp. Bos.*, Civil Action No. 14-10263-DJC, 2016 U.S. Dist. LEXIS 46024, at *28 (D. Mass. Apr. 5, 2016) (Denying the plaintiff's failure to accommodate claim under Title VII where granting the plaintiff's religious exemption request "would have been an undue hardship because it would have increased the risk of transmitting influenza to its already vulnerable patient population."); *EEOC v. Mission Hosp., Inc.*, 2017 U.S. Dist. LEXIS 124183, at *8 (W.D. N.C. 2017) ("With regard to the second prong, it must be noted that this defendant operates a large hospital and that these employees were interacting with vulnerable populations. A jury could reasonably find that strictly enforced exemption procedures to vaccination requirements protected the hospital patients. If the hospital's other health care staff

or patients suffered hospital-borne infectious disease, such an infection would increase costs to the hospital."); *Barrington v. United Airlines, Inc*., 2021 U.S. Dist. LEXIS 201633, at *10 (D. Colo. Oct. 14, 2021) (denying injunctive relief in COVID-19 vaccine case outside of healthcare setting because of likelihood of undue hardship where there was a possibility that the unvaccinated employees could expose co-workers to heightened risk of COVID-19).

Thus, even if Plaintiffs were denied a religious accommodation under Defendants' COVID-19 Vaccine Policy, it is unlikely that a failure to accommodate claim under Title VII (or the Florida Civil Rights Act) could survive an undue hardship defense.[7]

D. Restraining Defendants Will Harm Others And Isn't In The Public Interest

Finally, Plaintiffs hardly address the balancing of harm and public interest factors. The reason why is clear—enjoining Defendants from taking appropriate action to address the COVID-19 pandemic has the potential to visit substantial harm on the public, including Defendants' patients, employees, and visitors. Courts across the nation have stressed the deadliness of the virus and the obvious interest in stopping its spread. *See, e.g.*, *Zinman v. Nova Southeastern Univ.*, No. 21-CIV-

[7] In any event, as noted above, any evaluation of such a claim must be made in the first instance by the EEOC after the filing of an administrative charge.

60723, 2021 U.S. Dist. LEXIS 92180, at **10-11 (S.D. Fl. May 14, 2021) (denying TRO for event and masking requirements, noting that measures to slow the spread of COVID-19 "serve the public interest of protecting human life and health in the face of a global and unpredictable pandemic"); *Barrington*, 2021 U.S. Dist. LEXIS 201633 at **22-24 (the public interest would be harmed by the issuance of injunctive relief because ending the COVID-19 is in the collective best interest and vaccines can reduce the risk of spreading COVID-19); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 Fed. Appx. 125, 129-30 (6th Cir. 2020) (staying injunction granted by district court; the interest in combatting COVID-19 and potential for additional infection trump any alleged harm suffered by plaintiffs); *Beckerich*, 2021 U.S. Dist. LEXIS 183757 at *20 ("No matter any individual stance on COVID-19, every person, including the parties in this case, can agree that ending the COVID-19 pandemic is in our collective best interest—and in the public's best interest, as well, for purposes of balancing equities.").

The same is true here. The potential harm to third parties and the public's interest outweigh any interest asserted by Plaintiffs and compel denial of injunctive relief. *See, e.g.*, *Altman v. Santa Clara*, 464 F. Supp. 3d 1106, 1134 (N.D. Cal. 2020) ("[T]he public's interest in controlling the spread of COVID-19 outweighs its interest in preventing the constitutional violations alleged here, especially given that

Plaintiffs have failed to establish a likelihood of success on the merits."); *Bridges v. Houston Methodist Hospital*, No. H-21-1774, Order Denying Temporary Restraint (Doc. 10) (S.D. Tex. June 4, 2021) ("The public's interest in having a hospital capable of caring for patients during a pandemic far outweighs protecting the vaccination preferences of 116 employees. The plaintiffs are not just jeopardizing their own health, they are jeopardizing the health of doctors, nurses, support staff, patients and their families."); *Klaassen*, 7 F.4th 592 (denying TRO finding that students' refusal to get vaccinated, while also not complying with heightened safety precautions, "certainly impacts the public interest" by putting others at risk); *Harris*, 2021 U.S. Dist. LEXIS 162444 at *22-23 ("[T]he balance of equities tips in Defendants' favor given the strong public interest here that they are promoting – preventing further spread of COVID-19 on campus, a virus which has infected and taken the lives of thousands of Massachusetts residents. Plaintiffs' requested relief here would weaken the efforts of UMass to carry out those goals. Similarly, given the public health efforts promoted by the Vaccine Policy, enjoining the continuation of same is not in the public interest."); *Harsman*, 2021 U.S. Dist. LEXIS 187841, at *14 (In COVID-19 vaccine mandate case: "there is no question that balancing the equities requires the Court to deny Plaintiffs' motion. Denying injunctive relief serves the public's interest in combating COVID-19, at an infinitesimally small risk

to Plaintiffs' health or liberty"); *Beckerich*, 2021 U.S. Dist. LEXIS 183757 at **24-25, citing *Jacobson* 197 U.S. at 35 ("if legislative action to prevent the spread of contagious disease must be upheld, even in spite of doubt – and in spite of individual liberties – then private action must be upheld too...."). Because the requested injunction would impair the interests of third parties and the public at large, Plaintiffs' request for a TRO must be denied.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs' Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction must be denied.

Respectfully submitted,

/s/ Richard N. Margulies
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, a true and accurate copy of the foregoing was electronically filed with the Court's CM/ECF system, and such system will send electronic notice to all counsel of record.

/s/ Richard N. Margulies
Richard N. Margulies

4885-0546-5601, v. 4

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CATHERINE DARLING, *et. al.*,	)	Case No: 3:21-cv-1787
	)	
PLAINTIFFS,	)	
	)	
v.	)	
	)	
SACRED HEART HEALTH SYSTEM, INC. *et al.*,	)	
	)	
DEFENDANTS.	)	

DECLARATION OF STEPHANIE RYAN

Stephanie Ryan states that she is competent to testify about the matters contained herein and hereby declares and states that the following information is true based on her own personal knowledge and information:

1. I am the Senior Director of Human Resources for Florida for The Florida Health Ministries that are a part of Ascension Health. In that role I have personal knowledge of the matters set forth herein and/or have access to records maintained in the ordinary course of business reflecting the information set forth herein.
2. A number of the individuals listed as Plaintiffs in case number 3:21-cv-1787 are not employed by any of the named Defendants.
3. On July 27, 2021, St. Vincent's (including St. Vincent's Health System, Inc., St. Vincent's Medical Center-Clay County, Inc., St. Vincent's Ambulatory Care, Inc., St. Vincent's Medical Center, Inc., and St. Luke's-St. Vincent's Healthcare, Inc.) and Sacred Heart Health System instituted a COVID-19 Vaccine Policy. This policy, like our other vaccine policies, was developed based on the independent medical insight

EXHIBIT 1

and experience of medical leaders within Ascension. The policy is intended to safeguard and protect the patients, associates, and visitors of the Hospitals from the potentially deadly effects of COVID-19. This policy was created separate and apart from any federal advice or requirement. At the time our policy was developed, we were not aware of President Biden's plan with respect to vaccine requirements or that CMS would later consider requiring vaccines of certain providers. I was involved in the implementation and administration of the policy.

4. The hospitals have, for decades, maintained vaccine policies and requirements with respect to various vaccines. For example, we also require associates, depending upon their role, to be vaccinated for measles, mumps, rubella, varicella (chicken pox) and influenza.

5. Associates were on notice since July that they were required to be vaccinated by November 12, 2021 or request and receive an approved accommodation.

6. The policies allowed employees to request accommodations for sincerely held religious beliefs or medical reasons. Each of these requests was individually considered. At least seven of the Plaintiffs in case number 3:21-cv-1787 received requested accommodations. We do not have record of receiving accommodation requests from many of the Plaintiffs.

7. To our knowledge, none of the Plaintiffs have filed a charge with the EEOC related to the Vaccine Policy.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3rd day of November 2021.

Stephanie Ryan

4859-6601-9073, v. 1

EXHIBIT 2

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Jennifer Bridges, *et al.*,

Plaintiffs,

versus

Houston Methodist Hospital, *et al.*,

Defendants.

Civil Action H-21-1774

Order Denying Temporary Restraint

1. Houston Methodist Hospital announced a policy requiring employees be vaccinated against COVID-19 by June 7, 2021. Jennifer Bridges and 115 other employees sued, arguing that the hospital is forcing its employees to be injected with one of the currently-available vaccines or be fired.

2. On June 4, 2021, the plaintiffs moved to enjoin the hospital from enforcing the vaccination deadline. To obtain a temporary restraining order, the plaintiffs must show: (a) substantial likelihood of success on the merits; (b) a substantial threat of immediate and irreparable harm for which it has no adequate remedy at law; (c) that greater injury will result in denying the temporary restraining order than from granting it; and (d) that a temporary restraining order will not disserve the public interest. None of these are met in this case.

3. Assuming that there is a substantial likelihood of success on the merits, the plaintiffs have an adequate remedy at law. If they are wrongfully terminated, the plaintiffs can sue the hospital on those grounds to recover monetary damages.

4. Greater injury will result from denying the temporary restraining order than from granting it, and a temporary restraining order will disserve the public interest. The public's interest in having a hospital capable of caring for patients during a pandemic far outweighs protecting the vaccination preferences of 116 employees. The plaintiffs are not just jeopardizing their own health; they are jeopardizing the health of doctors, nurses, support staff, patients, and their families.

5. The motion for temporary restraining order is denied. (6, 7)

Signed on June 4, 2021, at Houston, Texas.

Lynn N. Hughes
United States District Judge

EXHIBIT 3

SUPREME COURT OF THE UNITED STATES

No. 21A90

JOHN DOES 1–3, ET AL. *v.* JANET T. MILLS, GOVERNOR OF MAINE, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[October 29, 2021]

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

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

When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant "'is likely to succeed on the merits.'" *Nken* v. *Holder*, 556 U. S. 418, 434 (2009). I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. See, *e.g.*, *Hollingsworth* v. *Perry*, 558 U. S. 183, 190 (2010) (*per curiam*); cf. Supreme Court Rule 10. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.

EXHIBIT 3

SUPREME COURT OF THE UNITED STATES

No. 21A90

JOHN DOES 1–3, ET AL. *v.* JANET T. MILLS, GOVERNOR OF MAINE, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[October 29, 2021]

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

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

Start with the first question confronting any injunction or stay request—whether the applicants are likely to succeed on the merits. The First Amendment protects the exercise of sincerely held religious beliefs. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S.

___, ___–___ (2018) (slip op., at 12–14). Laws that single out sincerely held religious beliefs or conduct based on them for sanction are "doubtless . . . unconstitutional." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990). But what about other laws? Under this Court's current jurisprudence, a law may survive First Amendment scrutiny if it is generally applicable and neutral toward religion. If the law fails either of those tests, it may yet survive but the State must satisfy strict scrutiny. To do that, the State must prove its law serves a compelling interest and employs the least restrictive means available for doing so. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 531–532 (1993); *Smith*, 494 U. S., at 879.

Maine does not dispute that its rule burdens the exercise of sincerely held religious beliefs. The applicants explain that receiving the COVID–19 vaccines violates their faith because of what they view as an impermissible connection between the vaccines and the cell lines of aborted fetuses. More specifically, they allege that the Johnson & Johnson vaccine required the use of abortion-related materials in its production, and that Moderna and Pfizer relied on aborted fetal cell lines to develop their vaccines. Complaint ¶¶61–68. This much, the applicants say, violates foundational principles of their religious faith. For purposes of these proceedings, Maine has contested none of this.

That takes us to the question whether Maine's rule qualifies as neutral and generally applicable. Under this Court's precedents, a law fails to qualify as generally applicable, and thus triggers strict scrutiny, if it creates a mechanism for "individualized exemptions." *Lukumi*, 508 U. S., at 537; see also *Fulton* v. *Philadelphia*, 593 U. S. ___, ___–___ (2021) (slip op., at 5–6).

That description applies to Maine's regulation. The State's vaccine mandate is not absolute; individualized ex-

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

Strict scrutiny applies to Maine's vaccine mandate for another related reason. This Court has explained that a law is not neutral and generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U. S. ___, ___ (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. The State allows those invoking medical reasons to avoid the vaccine mandate on the apparent premise that these individuals can take alternative measures (such as the use of protective gear and regular testing) to safeguard their patients and co-workers. But the State refuses to allow those invoking religious reasons to do the very same thing.

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

> (1) Protecting individual patients from contracting COVID–19;

> (2) Protecting individual healthcare workers from contracting COVID–19;
>
> (3) Protecting the State's healthcare infrastructure, including the work force, by preventing COVID–caused absences that could cripple a facility's ability to provide care; and
>
> (4) Reducing the likelihood of outbreaks within healthcare facilities caused by an infected healthcare worker bringing the virus to work. App. to Brief for Respondents, Decl. of Nirav Shah, p. 43, ¶56 (Shah Decl.).

Now consider the first, second, and fourth of these. No one questions that protecting patients and healthcare workers from contracting COVID–19 is a laudable objective. But Maine does not suggest a worker who is unvaccinated for medical reasons is less likely to spread or contract the virus than someone who is unvaccinated for religious reasons. Nor may any government blithely assume those claiming a medical exemption will be more willing to wear protective gear, submit to testing, or take other precautions than someone seeking a religious exemption. A State may not assume "the best" of individuals engaged in their secular lives while assuming "the worst" about the habits of religious persons. *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020). In fact, the applicants before us have already demonstrated a serious commitment to public health during this pandemic and expressly stated that they, no less than those seeking a medical exemption, will abide by rules concerning protective gear, testing, or the like. Complaint ¶76.

That leaves Maine's third asserted interest: protecting the State's healthcare infrastructure. According to Maine, "[a]n outbreak among healthcare workers requiring them to quarantine, or to be absent . . . as a result of illness caused by COVID–19, could cripple the facility's ability to

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

The Court of Appeals found Maine's rule neutral and generally applicable due to an error this Court has long warned against—restating the State's interests on its behalf, and doing so at an artificially high level of generality. According to the court below, Maine's regulation sought to "protec[t] the health and safety of all Mainers, patients, and healthcare workers alike." *Does 1–6* v. *Mills*, ___ 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. "At some great height, after all, almost any state action might be said to touch on '. . . public health and safety' . . . and measuring a highly particularized and individual interest" in the exercise of a civil right "'directly against . . . these rarified values inevitably makes the individual interest appear the less significant.'" *Yellowbear* v. *Lampert*, 741 F. 3d 48, 57 (CA10 2014) (quoting J. Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev.

327, 330–331 (1969)). This Court's precedents "do not support such a lopsided inquiry." 741 F. 3d, at 57.

That takes us to the application of strict scrutiny. Strict scrutiny requires the State to show that its challenged law serves a compelling interest and represents the least restrictive means for doing so. *Lukumi*, 508 U. S., at 546. For purposes of resolving this application, I accept that what we said 11 months ago remains true today—that "[s]temming the spread of COVID–19" qualifies as "a compelling interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U. S. ___, ___ (2020) (*per curiam*) (slip op., at 4). At the same time, I would acknowledge that this interest cannot qualify as such forever. Back when we decided *Roman Catholic Diocese*, there were no widely distributed vaccines.[1] Today there are three.[2] At that time, the country had comparably few treatments for those suffering with the disease. Today we have additional treatments and more appear near.[3] If human nature and history teach anything,

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

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

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

it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.

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

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easy-to-take pill to treat covid-19 available in the nation's medicine cabinet").

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

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

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

Looking to the other traditional factors also suggests relief is warranted. Before granting a stay or injunctive relief, we ask not only whether a litigant is likely to prevail on the merits but also whether denying relief would lead to irreparable injury and whether granting relief would harm the public interest. *Roman Catholic Diocese*, 592 U. S., at ___–___ (slip op., at 5–7); see also 28 U. S. C. §1651(a). The answer to both questions is clear. This Court has long held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion). And as we have seen, Maine has so far failed to present any evidence that granting religious exemptions to the applicants would threaten its stated public health interests any more than its medical exemption already does.

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