UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
Bangor Division

JANE DOES 1–6, et al., Plaintiffs, v. JANET T. MILLS, in her official capacity as Governor of the State of Maine, et al., Defendants.	)	Case No. 1:21-cv-00242-JDL

PLAINTIFFS' MOTION TO STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI IN UNITED STATES SUPREME COURT AND INCORPORATED MEMORANDUM IN SUPPORT

Plaintiffs, pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 7, move the Court for an order staying all proceedings in this Court pending disposition of Plaintiffs' petition to the United States Supreme Court for a writ of certiorari to the First Circuit Court of Appeals filed November 11, 2021 ("Cert. Petition," copy attached hereto as Exhibit A), reviewing the First Circuit's opinion (Doc. 72) and judgment (Doc. 73) affirming this Court's Order (Doc. 65) denying Plaintiffs' Motion for Preliminary Injunction (Doc. 3). The grounds for this motion and legal argument in support are as follows:

1. "A district court enjoys inherent power to 'control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *City of Bangor v. Citizens Communications Co.*, 532 F.3d 70, 99 (1st Cir. 2008) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("[T]he District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). The Court should exercise its discretion to stay the litigation because, as explained in Plaintiffs' Cert. Petition, the First Circuit "has decided an important question of

federal law that has not been, but should be, settled by [the Supreme] Court," S. Ct. R. 10(c), and the Supreme Court's disposition of Plaintiffs' Cert. Petition will likely affect all aspects of the case before this Court, including the scope of any discovery, the issues that can be addressed by dispositive motions, and this Court's ultimate resolution on the merits.[1]

2. The First Circuit's decision, involving important principles of federalism and First Amendment jurisprudence in the balancing of individual religious liberties and state COVID-19 restrictions, merits Supreme Court review. As Justice Gorsuch recognized in his dissent from the Supreme Court's denial of Plaintiffs' application for a writ of injunction following the First Circuit's decision,

> *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.*

Does 1–3 v. Mills, No. 21A90, 2021 WL 5027177, at *4 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting) (emphasis added). Justices Thomas and Alito joined in Justice Gorsuch's dissent, meaning at least three Justices are already likely to vote for review. Justice Barrett, joined by

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[1] There is no specific rule governing a stay of district court proceedings pending disposition of a petition for certiorari in the Supreme Court. The standard for seeking a stay of enforcement of a final judgment, which ordinarily requires balancing the same factors traditionally considered on application for a preliminary injunction, *see, e.g.*, *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010), does *not* apply here. The Federal Rules of Appellate Procedure provide a standard for litigants seeking to stay a circuit court's mandate pending the *filing* of a petition for a writ of certiorari in the Supreme Court," which is that the motion "must show that the petition would present a substantial question and that there is good cause for a stay," Fed. R. App. P. 41(d)(1) (emphasis added), but there is no corollary in the Federal Rules of Civil Procedure governing a motion for stay pending *disposition* of a certiorari petition already filed. In the absence of a specific governing rule, this Court should exercise its discretion in accordance with the principles embodied in the appellate rule—*i.e.*, substantial question and good cause.

Justice Kavanaugh, indicated their concurrence with the denial of immediate injunctive relief was due to the reluctance to evaluate the merits of Plaintiffs' claims in the first instance on an emergency application from one case, instead of on a certiorari petition following more development in the lower courts. *Id.* at *1 (Barrett, J., concurring). Given the rapid developments on the same issues in the Second Circuit (*see* ¶ 3, *infra*), the conditions for review have shifted considerably towards those preferred by Justices Barrett and Kavanaugh, and the vote of at least one more Justice to grant certiorari is likely.

3. In a similar case, the Northern District of New York issued a preliminary injunction against the New York Governor's COVID-19 vaccine mandate on healthcare workers. *See Dr. A v. Hochul*, No. 1:21-cv-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021) (converting temporary restraining order (TRO) to preliminary injunction). A panel of the Second Circuit Court of Appeals initially agreed with the *Dr. A* district court, but then reversed the preliminary injunction. On September 30, 2021, the panel gave its imprimatur to the *Dr. A.* TRO in *We The Patriots USA, Inc. v. Hochul*, No. 21-2179, dkt. 65 (2d Cir. Sept. 30, 2021), issuing an injunction pending appeal (IPA) enjoining state officials from enforcing the New York vaccine mandate. In a subsequent order, however, the panel vacated both its IPA and the *Dr. A* preliminary injunction, *We the Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 WL 5103443 (2d Cir. Nov. 1, 2021), explaining and then clarifying its reasoning in two subsequent, per curiam opinions, 2021 WL 5276624 (2d Cir. Nov. 12, 2021), *clarifying* 2021 WL 5121983 (2d Cir. Nov. 4, 2021) (consolidated for decision with *Dr. A*). In both *We the Patriots* and *Dr. A*, however, the respective plaintiffs have filed separate emergency applications to Justice Sotomayor, as the Circuit Justice for the Second Circuit, for writs of injunction pending disposition of their forthcoming petitions for writs of certiorari, to which Justice Sotomayor has requested and received responses. *See* S.

Ct. Nos. 21A125, 21A145. Decisions on those applications are imminent, but even if they were to be denied, they are different procedurally than the non-emergency, full merits review requested in Plaintiffs' Cert. Petition in this case, for which at least two justices have expressed a preference.

4. In addition, Plaintiffs here do not seek to unduly or unreasonably delay these proceedings, and they have also filed a motion in the Supreme Court to expedite consideration of their Cert. Petition (motion attached hereto as Exhibit B), seeking the soonest possible review of the First Circuit's decision affirming this Court's order. While their Cert. Petition is pending, hopefully on an expedited basis, Plaintiffs desire to avoid potentially unnecessary time and expense of litigating this case to disposition on the merits, given the potentially dispositive effects of the Supreme Court's decision.

5. Even if Plaintiffs' motion to expedite consideration of the Cert. Petition is denied, the stay requested herein is not of a lengthy duration. On the Supreme Court's regular calendar, the Cert. Petition would be considered on or around January 7, 2022, if not before. If the Cert. Petition were to be denied, proceedings in this Court could resume promptly. If the Cert. Petition were to be granted, then the need to stay these proceedings pending its ultimate disposition would be acute and undisputed. In either scenario, the stay requested is modest, finite, and reasonable.

6. The requested stay will cause no prejudice to any Defendant because there is no court order or any other restriction imposed on Defendants that could be lengthened by a stay. Defendants remain free to enforce their challenged policies, as they have been doing. A stay of this litigation will benefit Defendants for the same reasons it will benefit Plaintiffs and the Court, by avoiding potentially unnecessary expenditure of resources litigating issues that may very well be significantly shaped, if not outright determined, by further proceedings now pending at the Supreme Court.

7. Prior to filing this motion, Plaintiffs' counsel conferred with respective Defendants' counsel regarding the requested stay. The Government Defendants and Defendants MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare, LLC, and MaineGeneral Health oppose the requested stay. Defendant Northern Light Health Foundation takes no position on the requested stay at this time.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter an order staying all proceedings in this case pending the Supreme Court's disposition of Plaintiffs' pending Cert. Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this November 19, 2021, I caused a true and correct copy of the foregoing to be electronically filed with the Court. Service will be effectuated on all counsel of record by the Court's ECF/electronic notification system.

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiffs

No. _____

IN THE

Supreme Court of the United States

JANE DOES 1–6, *et al.*,

Petitioners,

V.

JANET T. MILLS, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MAINE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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EXHIBIT A

QUESTIONS PRESENTED

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). More to the point, "[e]ven in times of crisis—perhaps *especially* in times of crises—we have a duty to hold governments to the Constitution." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J.). Thus, as Justice Gorsuch wrote about this dispute,

> 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.

(App. 009.)

The questions presented for review are:

1. Whether a state governor's order mandating that private healthcare employers, on penalty of revocation of their business licenses, terminate their healthcare workers who are not fully vaccinated for COVID-19, and deny any worker's request for religious accommodation from the

mandate while allowing medical exemptions from the mandate, violates the employers' and employees' rights under the Free Exercise Clause of the First Amendment.

2. Whether, under the Supremacy Clause of the United States Constitution, a state governor's order mandating that private healthcare employers, on penalty of revocation of their business licenses, terminate their healthcare workers who are not fully vaccinated for COVID-19 with no opportunity for any worker to seek a religious accommodation from the mandate, is preempted by the religious accommodation provisions of Title VII of the Civil Rights Act of 1964.

3. Whether Article III courts have incidental equitable powers to grant preliminary injunctive relief to employees in aid of their Title VII remedies where the harm suffered by the employees in the absence of injunctive relief has a chilling effect on their religious free exercise and protection from religious discrimination.

PARTIES

Petitioners are Jane Does 1–6, John Does 1–3, Jack Does 1–1000, and Joan Does 1–1000. Respondents are Governor Janet T. Mills, in her official capacity as Governor of the State of Maine, Jeanne M. Lambrew, in her official capacity as Commissioner of the Maine Department of Health and Human Services, Nirav D. Shah, in his official capacity as Director of the Maine Center for Disease Control and Prevention, MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare, LLC, Northern Light Health Foundation, and MaineGeneral Health.

DIRECTLY RELATED PROCEEDINGS

JANE DOES 1–6, et al. v. MILLS, et al., No. 21A90, Order Denying Emergency Application for Writ of Injunction (U.S. Oct. 29, 2021), reprinted in the Appendix at 1a-11a.

JANE DOES 1–6, et al. v. MILLS, et al., No. 21-1826 (1st Cir. Oct. 19, 2021), Opinion and Order Affirming Denial of Motion for Preliminary Injunction, reprinted in the Appendix at 12a-43a.

JANE DOES 1–6, et al. v. MILLS, et al., No. 21-1826 (1st Cir. Oct. 15, 2021), Order denying Emergency Motion for Injunction Pending Appeal, reprinted in the Appendix at 46a-47a.

JANE DOES 1–6, et al. v. MILLS, et al.. No. 1:21-cv-242-JDL (D. Me. October 13, 2021), Order Denying

Motion for Injunction Pending Appeal, reprinted in the Appendix at 48a-49a.

JANE DOES 1–6, et al. v. MILLS, et al.. No. 1:21-cv-242-JDL (D. Me. October 13, 2021), Order Denying Motion for Preliminary Injunction, reprinted in the Appendix at 51a-98a

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The First Circuit's opinion affirming the denial of Petitioners' motion for preliminary injunction is not yet published in the Federal Reporter, but is reported at 2021 WL 4860328 and reprinted in the Appendix at 1a-11a. The First Circuit's order denying Petitioners' request for an emergency injunction pending appeal is unpublished, but is reported at 2021 WL 4845812 and reprinted in the Appendix at 46a. The district court's order denying Petitioners' motion for preliminary injunction is not yet published in the Federal Supplement, but is reported at 2021 WL 4783626.

JURISDICTION

The First Circuit entered its opinion and judgment on October 19, 2021. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Supremacy Clause of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made,

or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl.2.

Title VII of the Civil Rights Act of 1964 provides, in relevant part, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion," 42 U.S.C. § 2000e-2(a), and, "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioners are all healthcare workers in Maine who have sincerely held religious beliefs that preclude them from accepting any of the available COVID-19 vaccines because of the vaccines' connections to aborted fetal cell lines, and for other religious reasons that have been articulated to Respondents. Since COVID-19 first arrived in Maine, Petitioners have risen every morning,

donned their personal protective equipment, and fearlessly marched into hospitals, doctor's offices, emergency rooms, operating rooms, and examination rooms with one goal: to provide quality health care to those suffering from COVID-19 and every other illness or medical need. They did it bravely and with honor. They answered the call of duty to provide health care to the people who needed it the most and worked tirelessly to ensure that those ravaged by the pandemic were given appropriate care. All Petitioners seek the opportunity to continue providing the health care they have provided to patients throughout the pandemic and their entire careers, and to do so under the same protective measures that have sufficed for them to be considered *superheroes* for the last 18 months.

As Justice Gorsuch has already recognized:

> 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. 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.

Does v. Mills, No. 21A90, 2021 WL 5027177, at *1 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting) (citation omitted).

Regardless of whether Maine sees fit to extend protections to religious objectors under its own statutory framework, federal law demands that Petitioners and all employees in Maine receive protections for their sincerely held religious beliefs. This Court should hold Maine to the bargain it made with its citizens when it joined the union and ensure that Maine extends the required protections that federal law demands. A state that has demanded so much of its healthcare heroes owes them nothing less than the full measure of its commitment to constitutional principles. Anything less would be desecrating the sacrifices these medical heroes made for untold numbers of people—including Respondents—when the call of duty demanded it of them. The Petition should be granted.

The central issue before the Court can be boiled down to a simple question: Does federal law apply in Maine? Though the question borders on the absurd, so does Respondents' answer to it. Under Respondents' regulation, Petitioners were all told to get a COVID-19 vaccine by October 29, 2021 or be terminated, and that no protections or considerations are given to religious beliefs in Maine. Respondents have explicitly claimed that

federal law does not protect healthcare workers in Maine. Employer Respondents various responded to Petitioners' requests for religious accommodation as follows:

- "I can share MaineHealth's view that federal law does not supersede state law in this instance." (V. Compl. ¶ 87.)

- "**[W]e are no longer able to consider religious exemptions for those who work in the state of Maine**." (V. Compl. ¶ 84.)

- "All MaineGeneral employees will have to be vaccinated against COVID-19 by Oct. 1 unless they have a medical exemption. The mandate also states that only medical exemptions are allowed, no religious exemptions are allowed." (V. Compl. ¶ 93.)

- "Allowing for a religious exemption would be a violation of the state mandate issued by Governor Mills. So, unfortunately, that is not an option for us." (V. Compl. ¶ 94.)

The correct answer to the question before the Court is obvious: federal law and the United States Constitution are supreme over any conflicting Maine statute or edict, and Maine cannot override federal law. *See* U.S. Const. Art. VI, cl. 2. "This Court has

long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 556 U.S. 729, 734 (2009). Indeed, "it is a familiar and well-established principle that the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (cleaned up). Thus, "state law is nullified to the extent that it actually conflicts with federal law." *Id.* at 713.

Here, federal law is clear: Title VII of the Civil Rights Act of 1964 prohibits employer Respondents from discriminating against Petitioners on the basis of religion, and requires employer Respondents to "reasonably accommodate" Petitioners' "religious observance and practice." 42 U.S.C. §§ 2000e(j), 2000e-2(a). Thus, federal law requires employer Respondents to provide Petitioners a process for obtaining reasonable accommodation of their sincerely held religious objections to the available COVID-19 vaccines, and State Respondents cannot override employer Respondents' Title VII obligations.

This case is not about how employer Respondents can accommodate Petitioners' sincerely held religious beliefs or what conditions can be attached. Petitioners have already acknowledged they are willing to comply with reasonable health and safety requirements that were deemed sufficient for 18 months of COVID-19. The case is about whether federal law requires employer Respondents to consider Petitioners' requests for reasonable accommodation of their

sincerely held religious beliefs and prohibits State Respondents from interfering with that federal law. The answer is *yes*.

II. FACTUAL BACKGROUND

A. The Governor's COVID-19 Vaccine Mandate.

On August 12, 2021, Governor Mills announced that Maine will require healthcare workers to accept one of the three, currently available COVID-19 vaccines in order to remain employed in the healthcare profession (the "Vaccine Mandate"). (V. Compl. ¶ 41.) The Vaccine Mandate defines healthcare worker as "any individual employed by a hospital, multi-level health care facility, home health agency, nursing facility, residential care facility, and intermediate care facility for individuals with intellectual disabilities that is licensed by the State of Maine" as well as "those employed by emergency medical service organizations or dental practices." (V. Compl. ¶ 42.) The Vaccine Mandate also provides that "[t]he organizations to which this requirement applies must ensure that each employee is vaccinated, with this requirement being enforced as a condition of the facilities' licensure." (*Id.* ¶ 43.) Thus, the Governor has threatened to revoke the licenses of all covered healthcare employers who fail to mandate that their employees receive a COVID-19 vaccine. (*Id.* ¶ 44.)

In addition to the Governor's mandate, Petitioners and all healthcare workers in Maine were also stripped of their pre-existing rights to

request a religious accommodation from the COVID-19 Vaccine Mandate. Effective on September 1, 2021, Dr. Shah and the Maine Center for Disease Control and Prevention ("MCDC") amended 10-144 C.M.R. Ch. 264 to eliminate the ability of healthcare workers in Maine to request and obtain a religious accommodation from the COVID-19 Vaccine Mandate. (*Id.* ¶ 46.) The only source of mandatory immunization exemption Maine now recognizes for healthcare workers is 22 M.R.S. § 802.4-B, which purports to exempt only those individuals for whom an immunization is medically inadvisable and who provide a written statement from a doctor documenting the need for an exemption. (*Id.* ¶ 47.) Under the prior version of Maine's regulation, 10-144 C.M.R. Ch. 264, § 3-B, a healthcare worker could be exempted from mandatory immunizations if the "employee states in writing an opposition to immunization because of a sincerely held religious belief." (*Id.* ¶ 48.) In fact, as acknowledged by MCDC, Maine removed the religious exemption to mandatory immunizations effective September 1, 2021. (*Id.* ¶ 49 ("The health care immunization law has removed the allowance for philosophical and religious exemptions and has included influenza as a required immunization.").)

B. Petitioners' Sincerely Held Religious Beliefs Against the COVID-19 Vaccines.

Petitioners have sincerely held religious beliefs that preclude them from accepting or receiving any of the three available COVID-19 vaccines because of their connection to cell lines of aborted fetuses,

whether in the vaccines' origination, production, development, or testing. (V. Compl. ¶ 50.) A fundamental component of Petitioners' sincerely held religious beliefs is that all life is sacred, from the moment of conception to natural death, and that abortion is a grave sin against God and the murder of an innocent life. (*Id.* ¶ 51.) Petitioners' sincerely held religious beliefs are rooted in Scripture's teachings that "[a]ll Scripture is given by inspiration of God, and is profitable for doctrine, for reproof, for correction, [and] for instruction in righteousness." (*Id.* ¶ 52. (quoting *2 Timothy* 3:16 (KJV).) Because of that sincerely held religious belief, Petitioners must conform their lives, including their decisions relating to medical care, to the commands and teaching of Scripture. (*Id.* ¶ 53.)

Petitioners have sincerely held religious beliefs that God forms children in the womb and knows them prior to their births, and that life is sacred from the moment of conception. (*Id.* ¶ 54 (quoting, *inter alia*, *Psalm* 139:13–14 (ESV); *Psalm* 139:16 (ESV); *Isaiah* 44:2 (KJV)).)

Petitioners also have sincerely held religious beliefs that every child's life is sacred because made in the image of God. (*Id.* ¶ 55 (quoting *Genesis* 1:26–27 (KJV))), and because life is sacred from the moment of conception, the killing of that innocent life is the murder of an innocent human in violation of Scripture. (*Id.* ¶ 56 (quoting, *inter alia*, *Exodus* 20:13 (KJV); *Exodus* 21:22–23 (KJV); *Exodus* 23:7 (KJV)).)

Petitioners also have the sincerely held religious belief that it would be better to tie millstones around their necks and be drowned in the sea than bring harm to an innocent child. (*Id.* ¶ 57 (quoting *Matthew* 18:6; *Luke* 17:2).) Petitioners have sincerely held religious beliefs, rooted in the Scriptures listed above, that anything that condones, supports, justifies, or benefits from the taking of innocent human life via abortion is sinful, and contrary to the Scriptures. (*Id.* ¶ 58.) Petitioners believe that it is an affront to Scripture's teaching for them to use a product derived from or connected in any way with abortion. (*Id.* ¶ 59.) Petitioners' sincerely held religious beliefs preclude them from accepting any one of the three currently available COVID-19 vaccines because of their connections to aborted fetal cell lines. (*Id.* ¶ 60.)

Petitioners have sincerely held religious objections to the Johnson & Johnson (Janssen Pharmaceuticals) vaccine because it unquestionably used aborted fetal cells lines to produce and manufacture the vaccine. (*Id.* ¶ 60.) As reported by the North Dakota Department of Health, "[t]he non-replicating viral vector vaccine produced by Johnson & Johnson **did require the use of fetal cell cultures, specifically PER.C6, in order to produce and manufacture the vaccine**." (*Id.* ¶ 62 (quoting N.D. Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf).) The Louisiana Department of Health likewise confirms that the Johnson & Johnson COVID-19 vaccine, which used

the PER.C6 fetal cell line, "is a retinal cell line that was isolated from a terminated fetus in 1985." (*Id.* ¶ 63 (quoting La. Dept. of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 12, 2020), https://ldh.la.gov/assets/oph/CenterPHCH/CenterPH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf).)

Petitioners have sincerely held religious objections to the Moderna and Pfizer/BioNTech COVID-19 vaccines because both of these vaccines, too, have their origins in research using aborted fetal cell lines. (*Id.* ¶ 65.) In fact, "[e]arly in the development of mRNA vaccine technology, **fetal cells were used for 'proof of concept' (to demonstrate how a cell could take up mRNA and produce the SARS-CoV-2 spike protein) or to characterize the SARS-CoV-2 spike protein**." (*Id.* ¶ 66 (quoting N.D. Health, *supra*).) The Louisiana Department of Health's publications also confirm that aborted fetal cells lines were used in the "proof of concept" phase of the development of their COVID-19 mRNA vaccines. (*Id.* ¶ 67 (quoting La. Dept. of Public Health, *supra*).)

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

C. Petitioners' Willingness to Comply With Alternative Measures.

Petitioners have offered, and are ready, willing, and able to comply with all reasonable health and safety requirements to facilitate their religious exemption and accommodation from the COVID-19 Vaccine Mandate. (V. Compl. ¶ 75.) Petitioners have all informed their respective employers that they are willing to wear facial coverings, submit to reasonable testing and reporting requirements, monitor symptoms, and otherwise comply with reasonable conditions that were good enough to permit them to do their jobs for the last 18 months. (*Id.* ¶ 76.) Masking and testing protocols remain sufficient to prevent the spread of COVID-19 among healthcare workers, and constitute a reasonable alternative to vaccination as an accommodation of sincerely held religious beliefs. (*Id.* ¶ 80.)

D. Respondents' Denials That Federal Law Applies In Maine.

Consistent with her sincerely held religious beliefs, Petitioner Jane Doe 1 submitted to her employer, Respondent MaineHealth, a request for a religious exemption from the Vaccine Mandate. (V. Compl. ¶ 82.) On August 17, 2021, MaineHealth denied Jane Doe 1's request for a religious exemption and accommodation. (*Id.* ¶ 83 and dkt. 1-2.) MaineHealth stated:

> Please be advised that due to the addition of the COVID-19 vaccine to Maine's Healthcare Worker Immunization law

> announced by the governor in a press conference on 8/12/21, **we are no longer able to consider religious exemptions for those who work in the state of Maine. This also includes those of you who submitting [sic] influenza exemptions as well**. . . .
>
> You submitted a religious exemption, [sic] your request is unable to be evaluated due to a change in the law. Your options are to receive vaccination or provide documentation for a medical exemption to meet current requirements for continued employment.

(V. Compl. ¶ 84 and dkt. 1-2 at 2.)

On August 20, 2021, after receiving her first denial from MaineHealth, Jane Doe 1 responded to MaineHealth, stating:

> My request for an exemption was made under federal law, including Title VII of the Civil Rights [Act] of 1964. The Constitution provides that federal law is supreme over state law, and Maine cannot abolish the protections of federal law. You may be interested in this press release from Liberty Counsel, and the demand letter they have sent to Governor Mills on this issue (which is linked in the press release):https://lc.org/newsroom/details/081821-maine-governor-must-honor-religious-exemptions-for-shot-mandate.

> Regardless of what the Governor chooses to do, Franklin Memorial has a legal obligation under federal law to consider and grant my proper request for a religious exemption. Please let me know promptly if you will do so.

(V. Compl. ¶85 and dkt .1-2 at 1.) That same day, MaineHealth responded to Jane Doe 1 stating that federal law does not supersede state law or the Vaccine Mandate. (V. Compl. 86.) Specifically, MaineHealth stated:

> Although I cannot give legal guidance to employees, I can share MaineHealth's view that federal law does not supersede state law in this instance. The EEOC is clear in its guidance that employers need only provide religious accommodations when doing so does not impose an undue hardship on operations. Requiring MaineHealth to violate state law by granting unrecognized exemptions would impose such a hardship. As such, we are not able to grant a request for a religious exemption from the state mandated vaccine.

(V. Compl. ¶ 87 and dkt. 1-2 at 1.)

Petitioner Jane Doe 2 submitted to her employer, Genesis Healthcare, a request for a religious exemption and accommodation from the Vaccine Mandate. (V. Compl. ¶ 88.) After reviewing Jane Doe 2's submission, which articulated her

sincerely held religious beliefs, Genesis Healthcare sent Jane Doe 2 a cursory response stating that her religious beliefs did not qualify for an exemption from the vaccine mandate. (*Id.*) Petitioner Jane Doe 2 was given until August 23 to become vaccinated, and when her request for a religious objection and accommodation was denied, Jane Doe 2 was terminated from her employment. (*Id.*)

Petitioner Jane Doe 3 submitted a request to her employer, Respondent Northern Light Health, seeking an exemption and accommodation from the Vaccine Mandate. (*Id.* ¶ 89.) Northern Light responded to Jane Doe 3, denying her request and stating that the Vaccine Mandate does not permit exemptions or accommodations for sincerely held religious beliefs. (*Id.*) Specifically, Northern Light informed Jane Doe 3 that her request for a religious exemption could not be granted because Maine law and the Governor do not permit "non-medical exemptions," and stated, "the only exemptions that may be made to this requirement are medical exemptions supported by a licensed physician, nurse practitioner, or physician assistant." (*Id.* ¶ 90 and dkt. 1-3 at 1.)

On August 19, 2021, Jane Doe 5 submitted a request to her employer, Defendant MaineGeneral Health, stating that she has sincerely held religious objections to the COVID-19 vaccines and requesting an exemption and accommodation from the Vaccine Mandate. MaineGeneral told Jane Doe 5 that no religious exemptions were permitted under the Governor's mandate and that her request for a religious exemption and accommodation was denied.

(*Id.* ¶92 and dkt. 1-4.) Specifically, MaineGeneral stated:

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

(V. Compl. ¶ 93 and dkt. 1-4 at 1.) Maine General further stated, "Allowing for a religious exemption would be a violation of the state mandate issued by Governor Mills. So unfortunately, it is not an option for us." (V. Compl. ¶ 94 and dkt. 1-4 at 2.)

E. Respondents Allow Nonreligious, Medical Exemptions.

Employer Respondents' responses to Petitioners' requests for exemption and accommodation for their sincerely held religious beliefs confirm that the Vaccine Mandate allows for nonreligious exemptions while specifically prohibiting religious exemptions. (V. Compl. ¶¶ 84, 90, 93, 96–102.) In denying Jane Doe 1's religious exemption request, Respondent MaineHealth gave her the options "to receive vaccination or provide documentation for a medical exemption to meet current requirements for continued employment" (V. Compl. ¶ 84 and dkt. 1-2 at 2), and requested Jane

doe 1 to notify MaineHealth "[i]f you seek an accommodation other than a religious exemption" (V. Compl. ¶ 99 and dkt. 1-2 at 1).

Defendant Northern Light gave a similar response to Jane Doe 3, stating, "the only exemptions that may be made to this requirement are medical exemptions" and that all Northern Light employees must comply with the Vaccine Mandate "except in the case of an approved medical exemption." (V. Compl. ¶ 100 and dkt. 1-3 at 1.)

And Defendant MaineGeneral gave a similar response to Jane Doe 5, stating that all healthcare workers must comply with the Vaccine Mandate "unless they have a medical exemption" and that the Governor's "mandate states that only medical exemptions are allowed, no religious exemptions are allowed." (V. Compl. ¶ 101 and dkt. 1-4 at 1.)

III. PROCEDURAL HISTORY

Petitioners initiated this instant action on August 25, 2021 with the filing of a Verified Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction. On August 26, the district court held a temporary restraining order (TRO) hearing and denied the TRO the same day. (*See* App. 52a.) The district court initially scheduled a preliminary injunction hearing for September 10 but granted Respondents' request to continue the hearing to September 20, over Petitioners' objection. (*See id.*) After the preliminary injunction hearing on September 20, the court took the matter under advisement and informed the parties that a decision

would issue expeditiously. Twenty-three days later (two days before Petitioners' deadline to become vaccinated), the district court denied the preliminary injunction. (App. 51a.)

Within an hour of the district court's order denying a preliminary injunction, Petitioners appealed the denial to the First Circuit and moved for an emergency injunction pending appeal. The First Circuit denied that emergency motion (App. 46a), and Petitioners applied to this Court for an emergency writ of injunction pending disposition of Petitioners' forthcoming certiorari petition. Justice Breyer denied that motion without prejudice to refiling the application should the First Circuit not grant the necessary relief. (App. 44a.) On October 19, 2021, the First Circuit issued its opinion affirming the denial of a preliminary injunction, and Petitioners immediately reapplied to this Court for a writ of injunction. On October 29 the Court denied the application. (App. 1a.)

REASONS FOR GRANTING THE PETITION

I. THE PETITION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Rule 10 of the Court's rules states that certiorari is appropriate where—as here—"a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). The First Circuit's decision below, involving

unquestionably important principles of First Amendment jurisprudence in an era of escalating government hostility towards religious beliefs, merits the Court's review. As Justice Gorsuch recognized in his dissent from the Court's denial of Petitioners' reapplication for a writ of injunction,

> *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*.

(App. 11a (emphasis added).)

Moreover, while "stemming the spread of COVID-19 qualifies as a compelling interest," at least for a period of time, "this interest cannot qualify as such forever." (App. 8a (cleaned up).) "If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency." (App. 9a.) And, it is through the seemingly unending "emergency" of COVID-19 that Petitioners have faced the onslaught of seemingly unending assaults on their cherished First Amendment freedoms. As Justice Gorsuch pointed out, "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*." (App. 10a (emphasis added).)

The reason for this is simple: Maine's categorical denial of religious exemptions for healthcare workers who have bravely served as heroes for the last 18 months is an extreme outlier among the States. Forty-seven other states have rejected this approach for private healthcare facilities, and just days ago, the EEOC issued detailed guidance confirming that it directly violates federal law.[1] Maine is also selective about which healthcare workers it will force to get vaccinated. At the same time it axed its decades-old religious exemption, it kept an extremely broad medical exemption; at the same time that it foreclosed *any* accommodation to religious healthcare workers in hospitals, it chose not to impose *any* mandate on healthcare workers in urgent care centers or private

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[1] *See* EEOC, *EEOC Issues Updated COVID-19 Technical Assistance* (Oct. 25, 2021), https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance-0 ("Title VII *requires* employers to accommodate employees' sincerely held religious beliefs . . . ." (emphasis added)); EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at K.12, L.3, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (updated Oct. 25, 2021) (reaffirming guidance that Title VII requires an employer to "thoroughly consider all possible reasonable accommodations" for religious objectors to COVID-19 vaccinations, and that "[i]n many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs.").

physician's offices. Maine's selective mandate is therefore the antithesis of a neutral, generally applicable law that imposes only "incidental" burdens on religious objectors. Almost every other state has found a way to protect against the same virus without trampling religious liberty—including states that have smaller populations and much greater territory than Maine. If Vermont, New Hampshire, Alaska, the Dakotas, Montana, Wyoming, California, and the District of Columbia can all find ways to both protect against COVID and respect individual liberty, Maine can too. And, the Court should require Maine to comport its behavior to the demands of the Constitution.

"Government is not free to disregard the First Amendment in times of crisis. . . . Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). While COVID-19 has presented many challenges to all Americans alike, "judicial deference in an emergency or crisis does not mean wholesale judicial abdication, *especially when important questions of religious discrimination . . . are raised*." *Id.* at 74 (Kavanaugh, J., concurring) (emphasis added). Indeed, the Court "may not shelter in place when the Constitution is under attack. Things never go well when we do." *Id.* at 71 (Gorsuch, J., concurring). This Petition raises serious questions of religious discrimination under the First Amendment that have not been, but should be, settled by the Court.

II. THE FIRST CIRCUIT'S DECISION BELOW CONFLICTS WITH DECISIONS FROM THE THIRD, SIXTH, AND SEVENTH CIRCUITS, AND CONFLICTS WITH THE DECISIONS OF NUMEROUS FEDERAL COURTS ON THE SAME QUESTION.

A. The Third, Sixth, and Seventh Circuits Have All Held That Granting a Nonreligious Medical Exemption While Prohibiting Religious Exemptions Violates the First Amendment.

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Justice (then-Judge) Alito wrote unequivocally for the court that "[b]ecause the Department makes exemptions from its [no beards] policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment." 170 F.3d 359, 360 (3d Cir. 1999). There, like Maine here, the city argued that it was required to provide medical accommodations under federal law but that religious exemptions were not required. *Id.* at 365. The court squarely rejected that rationale: "It is true that the ADA requires employers to make reasonable accommodations for individuals with disabilities. However, Title VII of the Civil Rights Act of 1964 imposes an identical obligation on employers with respect to accommodating religion." *Id.* (cleaned up). Thus, the

court held, "we cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not." *Id.*

Here, the First Circuit held that the continued availability of medical exemptions, while religious exemptions were specifically targeted and excluded, does not violate the First Amendment because the two are not comparable. (App. 27a-28a.) Justice Alito squarely rejected that contention:

> We also reject the argument that, because the medical exemption is not an "individualized exemption," the *Smith /Lukumi* rule does not apply. While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi,* it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

Fraternal Order of Police, 170 F.3d at 365 (cleaned up). The same is true here. Maine maintained a policy that permitted religious exemptions and

medical exemptions to mandatory vaccinations. (V. Compl. ¶ 48.) Then, Maine specifically removed religious exemptions while maintaining medical exemptions. (V. Compl. ¶¶ 46–47.) That discriminatory removal of religious exemptions while maintaining medical exemptions violates the First Amendment. 170 F.3d at 365 ("Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.").

The Third Circuit held that the government is prohibited from making value judgments to legitimize a discriminatory policy:

> [T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

170 F.3d at 366. Essentially, as here, "the Department's policy cannot survive any degree of heightened scrutiny and thus cannot be sustained." *Id.* at 367.

In *Dahl v. Board of Trustees of Western Michigan University*, No. 21-2945, 2021 WL 4618519 (6th Cir. Oct. 7, 2021), the Sixth Circuit Court of Appeals likewise held that refusing to provide religious exemptions and accommodations where nonreligious exemptions were available violates the First Amendment. There, the University imposed a COVID-19 vaccine mandate on all student athletes and required them to receive the vaccine regardless of their sincerely held religious beliefs against it. 2021 WL 4618519, at *1. In some cases, the University simply denied the student-athletes' requests for a religious exemption, and in other cases, the University granted them but refused to allow them to participate in intercollegiate athletics. *Id.* However, the University retained the discretion to allow for medical exemptions and otherwise exempted all other students at the University from the vaccine requirement. *Id.* at *5–6.

The Sixth Circuit held that the allowance for such individualized exemptions removed the law from neutrality and general applicability. *Id.* at *4. Simply put,

> the University's failure to grant religious exemptions to Petitioners burdened their free exercise rights. The University put Petitioners to the choice: get vaccinated or stop fully participating in intercollegiate sports. The University did not dispute that taking the vaccine would violate Petitioners' "sincerely held Christian beliefs." Yet refusing the vaccine prevents Petitioners from participating in college

> sports, as they are otherwise qualified (and likely were recruited) to do. By conditioning the privilege of playing sports on Petitioners' willingness to abandon their sincere religious beliefs, the University burdened their free exercise rights.

Id. at *3.

Because the University's mandate was neither neutral nor generally applicable, the Sixth Circuit held that it was required to survive strict scrutiny. *Id.* at *5. And, like the Third Circuit in *Fraternal Order of Police*, the Sixth Circuit held that the discriminatory treatment of religious exemptions and accommodations failed that test. "[T]he University falters on the narrow tailoring prong." *Id.* Relying on this Court's decision in *Roman Catholic Diocese*, the Sixth Circuit reasoned that "public health measures are not narrowly tailored if they allow similar conduct that 'creates a more serious health risk'," *id.* (quoting *Roman Catholic Diocese*, 141 S. Ct. at 67), and concluded:

> That is the case at the University, which allows non-athletes—the vast majority of its students—to remain unvaccinated. One need not be a public health expert to recognize that the likelihood that a student-athlete contracts COVID-19 from an unvaccinated non-athlete with whom she lives, studies, works, exercises, socializes, or dines may well meet or exceed that of the athlete contracting the

> virus from a Petitioner who obtains a religious exemption to participate in team activities.

2021 WL 4618519, at *5.

Moreover, the Sixth Circuit reasoned that the University's failure to follow the less restrictive alternatives found sufficient at other institutions also compelled a finding that the University failed strict scrutiny. *Id.* Indeed, "narrow tailoring is unlikely if the University's conduct is 'more severe' than that of other institutions." *Id.* (quoting *Brach v. Newsom*, 6 F.4th 904, 931 (9th Cir. 2021)). And, because "several other universities grant exemptions from their COVID-19 mandates," the court held that the University's failure to provide religious accommodations and exemptions to its student-athletes violated the First Amendment. *Id.*

The Seventh Circuit, too, has held that the government must grant religious exemptions from a COVID-19 vaccine mandate. In *Klaassen v. Trustees of Indiana University*, the Seventh Circuit was faced with a broad challenge to Indiana University's COVID-19 vaccine mandate requiring all students to be vaccinated. 7 F.4th 592, 592 (7th Cir. 2021). Unlike the Maine Vaccine Mandate for healthcare workers, however, Indiana University's mandate permitted students to obtain religious **and** medical exemptions, and the University granted religious exemptions to those students who were eligible. *Id.* In fact, most of the petitioners in *Klaassen* had sought and received religious exemptions from the mandate. *Id.* at 593. The Seventh Circuit held that

because the University allowed for religious exemptions, and treated them equally to nonreligious exemptions, the mandate did not violate the First Amendment. *Id.* "These Petitioners just need to wear masks and be tested, requirements that are not constitutionally problematic." *Id.*

The Northern District of New York likewise issued a preliminary injunction outlining why the discriminatory treatment of religious exemptions violated the First Amendment. *See Dr. A v. Hochul*, No. 1:21-cv-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021) (converting temporary restraining order (TRO) to preliminary injunction). There, as here, New York imposed a COVID-19 vaccine mandate on healthcare workers. *Id.* at *8. Initially, New York law permitted both religious and medical exemptions from the mandate, but on August 18, New York revoked the option of a religious exemption and accommodation. *Id.* The district court concluded that "[t]his intentional change in language is the kind of religious gerrymander that triggers heightened scrutiny." *Id.* And, the court held that it failed strict scrutiny because it was not narrowly tailored. "[T]here is no adequate explanation from defendants about why the reasonable accommodation that must be extended to a medically exempt healthcare worker could not be similarly extended to a healthcare worker with a sincere religious objection." *Id.* at *9. Moreover, the court held that the state's departure "from similar healthcare vaccination mandates issued in other jurisdictions that include the kind of religious exemption that was originally present" in New York

demonstrates that the mandate was not narrowly tailored or the least restrictive means. *Id.*[2]

Other federal courts have also held that COVID-19 vaccine mandates must include accommodation for sincerely held religious beliefs to satisfy the Constitution. *See, e.g.*, *Magliulo v. Edward Via Coll. of Osteopathic Medicine*, No. 3:21-cv-2304, 2021 WL 3679227 (W.D. La. Aug. 17, 2021).

B. The First Circuit Held That States May Offer Nonreligious Medical Exemptions While Prohibiting Religious Exemptions Without Violating the First Amendment.

Contrary to the precedent of the Third, Sixth, and Seventh Circuits, as well as that of numerous district courts, the First Circuit's decision below held that Respondents did not violate the First Amendment by treating nonreligious exemptions

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[2] A panel of the Second Circuit Court of Appeals initially agreed with the *Dr. A* district court, but then reversed the preliminary injunction. On September 30, 2021, the panel gave its imprimatur to the *Dr. A.* TRO in *We The Patriots USA, Inc. v. Hochul*, No. 21-2179, dkt. 65 (2d Cir. Sept. 30, 2021), issuing an injunction pending appeal (IPA) enjoining state officials from enforcing the New York vaccine mandate. In a subsequent order, however, the panel vacated both its IPA and the *Dr. A* preliminary injunction. *See We the Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 WL 5103443 (2d Cir. Nov. 1, 2021). In a separate per curiam opinion, the Second Circuit concluded the respective plaintiffs had not established a likelihood of success on the merits on the preliminary records before the district courts. *See* 2021 WL 5121983 (2d Cir. Nov. 4, 2021).

more favorably than religious exemptions. (App. 28a.) Specifically, the First Circuit held that inclusion of a broad, medical exemption did not remove the law from general applicability because—in the First Circuit's view—"[n]o case in this circuit and no case of the Supreme Court holds that a single objective exemption renders a rule not generally applicable." (App. 28a.) More directly in contradiction to the other circuits, the First Circuit's decision stated that "[p]roviding a medical exemption does not undermine any of Maine's three goals, let alone in a manner similar to the way permitting an exemption for religious objectors would." (App. 28a.) Because of that erroneous contention, the First Circuit held that Maine's revocation of religious exemptions from the COVID-19 vaccine mandate was neutral and generally applicable.

Importantly, the First Circuit's decision below even highlights that it is in direct conflict with the Third and Sixth Circuit decisions. As to the Third Circuit's decision in *Fraternal Order of Police*, the First Circuit said that case was "not persuasive" even though it involved a virtually identical issue. (App. 34a.) The First Circuit said that the Third Circuit's decision, which "prohibited a police department from offering medical but no religious exemptions to its facial hair policy," did not apply here because "the medical exemptions support Maine's public health interests," and that "Maine's providing medical but not religious or philosophical exemptions does not suggest an improper motive." (App. 35a.)

As to the Sixth Circuit's decision in *Dahl*, the First Circuit stated that it was of no import because "Maine's rule is not underinclusive even under Dahl because it encompasses every employee working in a setting posing serious risks of COVID-19 exposure and transmission." (App. 36a-37a.) But this is plainly incorrect, as Maine's COVID-19 vaccine mandate does not apply to "every employee." Indeed, Petitioners here brought their challenges because Maine's Vaccine Mandate expressly excludes those employees with medical exemptions, while precluding religious exemptions for similarly situated employees.

The First Circuit's decision below cannot be reconciled with *Fraternal Order of Police*, *Dahl*, or *Klaassen*. Certiorari is appropriate to bring the circuits into harmony on a critical issue of First Amendment law.

III. THE FIRST CIRCUIT'S DECISION APPROVING MAINE'S ESPECIALLY HARSH AND DISCRIMINATORY TREATMENT OF PETITIONERS' FIRST AMENDMENT LIBERTIES DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS.

Throughout the COVID-19 pandemic, the Court has issued numerous decisions stating that singling out religious exercise for discriminatory treatment is a violation of the First Amendment. "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever

they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In fact, "the regulations cannot be viewed as neutral because they single out [religion] for especially harsh treatment." *Roman Catholic Diocese*, 141 S. Ct. at 66. "When a state so obviously targets religion for differential treatment, our job becomes much clearer." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Gorsuch, J.) As the Court said in *Tandon*,

> Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.

141 S. Ct. at 1296–97.

Thus, in deciding whether Maine's discriminatory decision to permit nonreligious, medical exemptions to its Vaccine Mandate while prohibiting religious exemptions to the same mandate, the critical issue is the comparison of risk, and "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* at 1296. Ultimately, "[c]omparability is concerned with the risks various activities pose" to the asserted interest,

not the reasons for which the activities are undertaken—i.e., religious or nonreligious. *Id.*

Contra this Court's holdings, the First Circuit held irrelevant the comparative risks to public health between the religiously unvaccinated and the medically unvaccinated in approving Maine's refusal to recognize religious exemptions while explicitly permitting medical exemptions. (App. 31a.) Flouting this Court's risk assessment mandate, the First Circuit concluded, "Maine's rule does not rest on assumptions about the public health impacts of various secular or religious activities," but rather "requires all healthcare workers to be vaccinated as long as the vaccination is not medically contraindicated." (App. 31a.) The First Circuit reasoned, "By analogy, if Maine's emergency rule were an occupancy limit, it would apply to all indoor activities equally based on facility size, but it would exempt healthcare facilities." (App. 031a.) But the First Circuit's analogy endorses precisely what *Tandon*, *South Bay*, and *Roman Catholic Diocese* condemned—"treat[ing] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. The First Circuit's decision allows Maine to prioritize the liberty of those to whom a vaccine might cause *physical* harm over the liberty of those to whom a vaccine would cause *spiritual* harm without requiring Maine to justify the disparate treatment in terms of supposed risks to Maine's asserted public health interests.

The First Circuit's decision cannot be reconciled with this Court's precedents. As Justice Gorsuch already admonished, "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." (App. 7a.) Moreover, "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." (App. 11a.) The First Circuit's decision plainly and directly conflicts with this Court's precedents. Certiorari is appropriate and should be granted.

IV. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE IMPORTANT FEDERAL QUESTION OF WHETHER THE SUPREMACY CLAUSE MANDATES THAT EMPLOYERS PROVIDE RELIGIOUS ACCOMMODATIONS TO EMPLOYEES REGARDLESS OF CONTRARY STATE LAWS.

As a matter of black letter law, federal law and the United States Constitution are supreme over any conflicting Maine statute, edict, or executive decree from the Governor, and Maine cannot override federal law. *See* U.S. Const. Art. VI, cl. 2. Contrary to the plain text of the Constitution, the First Circuit below held (erroneously) that the parties did not dispute whether Title VII was the supreme law of the land. (App. 39a.) This conclusion was plainly erroneous, factually and legally, and it directly conflicts with this Court's precedents on the issue.

First, as demonstrated in the Verified Complaint, Respondents have indeed stated that federal law does not apply in Maine. (V. Compl. ¶ 87 (""I can share MaineHealth's view that **federal law does not supersede state law in this instance**."); *Id.* ¶ 84 (""**[W]e are no longer able to consider religious exemptions for those who work in the state of Maine**.").) Thus, the First Circuit's decision was incorrect as a factual matter.

But, more importantly, the First Circuit's decision rested on a conclusion that Maine is permitted to ignore the requirements of Title VII by imposing a mandate that revokes the protections afforded to Mainers under its explicit provisions. "This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 556 U.S. 729, 734 (2009). The Supremacy Clause "provides a rule of decision for determining whether federal or state law applies in a particular situation," *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020), and where—as here—federal law "imposes restrictions [and] confers rights on private actors," and Maine law "imposes restrictions that conflict with the federal law," "the federal law takes precedence and the state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018). Indeed, "it is a familiar and well-established principle that the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (cleaned up). "[S]tate law is nullified to the extent that it actually conflicts with federal law." *Id.* at 713.

The First Circuit's decision below completely ignores this Court's precedents in *Haywood*, *Murphy*, and *Hillsborough County*, and its decision cannot be reconciled with the Supremacy Clause. Certiorari is warranted to align the First Circuit's decision withy this Court's precedent.

V. THE FIRST CIRCUIT'S HOLDING THAT PRELIMINARY INJUNCTIVE RELIEF IS INAPPROPRIATE IN TITLE VII CASES DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS AND THE PRECEDENTS OF THE SECOND AND FIFTH CIRCUITS.

A. The Second and Fifth Circuits Have Held That Preliminary Injunctive Relief Is Appropriate in Title VII Cases to Preserve the Status Quo.

In the Title VII context, the Second and Fifth Circuits have concluded that Article III courts retain equitable jurisdiction to grant preliminary injunctive relief to preserve the status quo. *See Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981); *Drew v. Liberty Mut. Ins. Co.*, 480 F.2d 69, 74 (5th Cir. 1973); *cf. Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944-45 (1st Cir. 1983) ("We are not prepared to adopt a rule categorically barring all suits for preliminary relief pending administrative disposition. In our view, there is considerable force to the argument that the statute does not require so much.").

In *Sheehan*, the Second Circuit held that "if the court eventually will have jurisdiction of the substantive claim and an administrative tribunal has preliminary jurisdiction, the court has incidental equity jurisdiction to grant temporary relief to preserve the status quo pending ripening of the claim for judicial action on the merits." 676 F.2d at 884. It continued, "within the framework of Title VII, we are persuaded that Congress intended the federal courts to have resort to all of their traditional equity powers, direct and incidental, in aid of the enforcement of the Title." *Id.* at 885. Indeed, as the Second Circuit reasoned,

> in many cases the effect on the complainant of several months without work or working in humiliating or otherwise intolerable circumstances will constitute harm that cannot adequately be remedied by a later award of damages. Given the singular role in 1964 of the individual private action as the only method of enforcing Title VII, and the continued view in 1972 of that right of action as "paramount," we cannot conclude that Congress intended to preclude the courts' use of their incidental equity power in these circumstances to prevent frustration of Congress's goals.

Id. at 885–86. Thus, "where a person has filed a Title VII charge with the EEOC, the court has jurisdiction to entertain a motion for temporary injunctive relief against employer retaliation while the charge is

pending before the EEOC and before the EEOC has issued a right to sue letter." *Id.* at 887.

In *Drew*, the Fifth Circuit likewise held that a plaintiff may seek equitable relief during the pendency of a Title VII claim to prevent irreparable harm. 480 F.2d at 72–73. The court reasoned, "We should not lightly assume that Congress sought to do away with the chance that private litigants might in this manner alleviate the burdens on EEOC members and staff in the rare situation when the likelihood of success and the need for immediate assistance could attract competent counsel to act." *Id.* at 74. Thus, the court concluded, "it is clear that a victim of such forbidden conduct as was here alleged had a clear right to seek equitable relief without having to await the convenience of the EEOC." *Id.* at 72–73.

And it should be noted that the holdings of the Second and Fifth Circuits are entirely aligned with this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 72 (2006) ("Many reasonable employees would find a month without a paycheck to be a serious hardship. . . . A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former.").

B. The First Circuit's Decision Conflicts With the Decisions of the Second and Fifth Circuits.

Contrary to the precedents of the Second and Fifth Circuits, the First Circuit held below that Petitioners failed to show a need for injunctive relief because the loss of employment generally does not constitute irreparable harm. (App. 41a.) Specifically, the First Circuit held that Petitioners were not entitled to even seek injunctive relief because monetary damages were sufficient. (*Id.*)

But here, a Petitioner cannot simply walk across the street to a different healthcare provider to obtain alternative employment in the field of the Petitioner's often considerable education, training, and experience. Respondents have created a situation where no religious objectors to the COVID-19 vaccine can obtain employment in any comparable healthcare occupation. Petitioners have become constitutional orphans in their own state. Such extraordinary circumstances suffice for injunctive relief under the Second and Fifth Circuits' decisions, but the First Circuit left Petitioners out in the cold for the extreme Maine winter with no options for reasonably comparable alternative employment, solely as a result of the Governor's Vaccine Mandate. Certiorari is appropriate to harmonize the circuit courts on an important question of federal law.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated this November 11, 2021.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF DENIAL OF THE SUPREME COURT OF THE UNITED STATES, DATED OCTOBER 29, 2021

SUPREME COURT OF THE UNITED STATES

No. 21A90

JOHN DOES 1–3, *et al.*,

Applicants,

v.

JANET T. MILLS, GOVERNOR OF MAINE, *et al.*

Concur by: BARRETT

ON APPLICATION FOR INJUNCTIVE RELIEF

October 29, 2021, Decided

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

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

When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant "'is likely to succeed on the merits.'" *Nken* v. *Holder*, 556 U. S. 418, 434, 129 S. Ct. 1749, 173 L. Ed.

2d 550 (2009). I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. See, *e.g.*, *Hollingsworth* v. *Perry*, 558 U. S. 183, 190, 130 S. Ct. 705, 175 L. Ed. 2d 657 (2010) (*per curiam*); cf. Supreme Court Rule 10. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.

Dissent by: GORSUCH

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

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. *City of Philadelphia*, 593 U. S. ___, ___-___, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021) (slip op., at 5–6).

That description applies to Maine's regulation. The State's vaccine mandate is not absolute; individualized exemptions are available, but only if they invoke certain preferred (nonreligious) justifications. Under Maine law, employees can avoid the vaccine mandate if they produce a "written statement" from a doctor or other care provider indicating that immunization "may be" medically inadvisable. Me. Rev. Stat. Ann., Tit. 22, §802(4–B) (2021). Nothing in Maine's law requires this note to contain an explanation why vaccination may be medically inadvisable, nor does the law limit what may qualify as a valid "medical" reason to avoid inoculation. So while COVID-19 vaccines

have Food and Drug Administration labels describing certain contraindications for their use, individuals in Maine may refuse a vaccine for other reasons too. From all this, it seems Maine will respect even mere *trepidation* over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms. That kind of double standard is enough to trigger at least a more searching (strict scrutiny) review.

Strict scrutiny applies to Maine's vaccine mandate for another related reason. This Court has explained that a law is not neutral and generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U. S. ___, ___, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) (*per curiam*); see also *Fulton*, 593 U. S., at ___, 141 S. Ct. 1868, 210 L. Ed. 2d 137; *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." *Doe* v. *Mills*, ___ F. 4th ___, ___, 2021 U.S. App. LEXIS 31375, 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); 141 S. Ct. 1868, 210 L. Ed. 2d 137; *Tandon*,

593 U. S., at ___ (slip op., at 2) 141 S. Ct. 1294, 209 L. Ed. 2d 355; *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* v. *Cuomo*, 592 U. S. ___, ___, 141 S. Ct. 63, 208 L. Ed. 2d 206 (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

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.

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

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

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

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

given, Maine does not explain how denying exemptions to religious objectors is essential to its achieving that threshold statewide, let alone in the applicants' actual workplaces. Had the State consulted its own website recently, it would have discovered that, as of last month, hospitals were already reporting a vaccination rate of more than 91%, ambulatory surgical centers 92%, and all other entities roughly 85% or greater.[4] Current numbers may be even higher. What's more, healthcare providers that employ four of the nine applicants in this case already told the media more than a week ago that they have reached 95% and 94% vaccination rates among their employees.[5] Many other States have made do with a religious exemption in comparable vaccine mandates. See Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 13 (observing that the overwhelming majority of States 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.

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4. Maine Center for Disease Control and Prevention, Maine Health Care Worker COVID-19 Vaccination Dashboard (Oct. 27, 2021), https://www. maine.gov/dhhs/mecdc/infectious-disease/immunization/publications/healthcare-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-4day-period (Northern Light Health reporting 95.5% vaccination rate, MaineHealth reporting a 94% rate).

Looking to the other traditional factors also suggests relief is warranted. Before granting a stay or injunctive relief, we ask not only whether a litigant is likely to prevail on the merits but also whether denying relief would lead to irreparable injury and whether granting relief would harm the public interest. *Roman Catholic Diocese*, 592 U. S., at ___-___, 141 S. Ct. 63, 208 L. Ed. 2d 206 (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, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion). And as we have seen, Maine has so far failed to present any evidence that granting religious exemptions to the applicants would threaten its stated public health interests any more than its medical exemption already does.

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

APPENDIX B — OPINION AND ORDER AFFIRMING DENIAL OF MOTION FOR PRELIMINARY INJUNCTION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED OCTOBER 19, 2021

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1826

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

Plaintiffs-Appellants,

v.

JANET T. MILLS, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MAINE; JEANNE M. LAMBREW, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES; NIRAV D. SHAH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MAINE CENTER FOR DISEASE CONTROL AND PREVENTION; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE, LLC; NORTHERN LIGHT HEALTH FOUNDATION; MAINEGENERAL HEALTH,

Defendants-Appellees.

October 19, 2021, Decided

Appendix B

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE.
Hon. Jon D. Levy, *U.S. District Judge*

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

LYNCH, *Circuit Judge.* Faced with COVID-19's virulent delta variant and vaccination rates among healthcare workers too low to prevent community transmission, Maine's Center for Disease Control ("Maine CDC") promulgated a regulation effective August 12, 2021, requiring all workers in licensed healthcare facilities to be vaccinated against the virus. Under state law, a healthcare worker may claim an exemption from the requirement only if a medical practitioner certifies that vaccination "may be medically inadvisable." Me. Rev. Stat. tit. 22, § 802 (4-B) (West 2021). Maine has mandated that its healthcare workers be vaccinated against certain contagious diseases since 1989. It has not allowed religious or philosophical exemptions to any of its vaccination requirements since an amendment to state law in May 2019 (which took effect in April 2020), and the COVID-19 mandate complies with that state law.

Several Maine healthcare workers (and a healthcare provider who runs his own practice) sued, arguing that the vaccination requirement violates their rights including those under the Free Exercise Clause of the U.S. Constitution. They sued the Governor, the commissioner of the Maine Department of Health and Human Services ("Maine HHS"), and the director of Maine CDC alleging

violations of the Free Exercise Clause, Supremacy Clause, Equal Protection Clause, and 42 U.S.C. § 1985. They also sued several Maine hospitals, which employ seven of the nine appellants, alleging violations of the Supremacy Clause, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1985.

The appellants sought a preliminary injunction to prevent enforcement of the regulation against them. The district court denied their motion. *Doe v. Mills,* No. 1:21-cv-242-JDL, 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626 (D. Me. Oct. 13, 2021).

We affirm.

I.

Maine has long required that healthcare workers be vaccinated against infectious diseases. *See* 1989 Me. Laws ch. 487, § 11. Prior to 2019, state law exempted workers from vaccination in three circumstances: when vaccination was medically inadvisable, contrary to a sincere religious belief, or contrary to a sincere philosophical belief. *Id.* In 2019, the state responded to declining vaccination rates by amending its law to allow for only the medical exemption.[1] 2019 Me. Laws ch. 154, § 9 (codified at Me. Rev. Stat. Ann. tit. 22, § 802 (2021)); *see Hearing on LD 798, An Act to Protect Maine Children and Students from*

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

Appendix B

Preventable Diseases by Repealing Certain Exemptions from the Laws Governing Immunization Requirements Before the J. Standing Comm. on Educ. & Cultural Affs., 129th Legis., 1st Reg. Sess. (Me. 2019) (statements of Rep. Tipping, Rep. McDonald, and Maine CDC Acting Dir. Beardsley); House Rec. H-392, 393-94 (Me. Apr. 23, 2019) (statement of Rep. Tipping). The bill's sponsor explained that one key rationale for the change was to protect the immunocompromised "who will never achieve the immunities needed to protect them and [who] rely on their neighbors' vaccinations." *Hearing on LD 798, supra* (statement of Rep. Tipping). The law went into effect in 2020, after nearly three-quarters of voters rejected a referendum seeking to veto the law. In April 2021, Maine CDC updated its mandatory vaccination regulations to reflect the statutory changes. 364 Me. Gov't Reg. 26 (LexisNexis May 2021); Code Me. R. tit. 10-144, ch. 264, § 3 (West 2021). In adopting that new rule, Maine explained that it was acting to reduce the "risk for exposure to, and possible transmission of, vaccine-preventable diseases resulting from contact with patients, or infectious material from patients." At the time, the rule required vaccination (without religious or philosophical exemption) against measles, mumps, rubella, chickenpox, hepatitis B, and influenza. Code Me. R. tit. 10-144, ch. 264, § 2. Contrary to the appellants' claims, Maine changed its vaccination laws to eliminate the religious and philosophical exemptions well before the COVID-19 pandemic was rampant.

Maine has articulated a strong interest in protecting the health of its population and has taken numerous steps, both before and after the development of the COVID-19

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

- Starting in December 2020, Maine HHS and Maine CDC held regular information sessions with clinicians to educate them about the vaccines including plans for vaccine distribution and methods for addressing vaccine hesitancy.

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

- Given the limited vaccine availability in December 2020 and January 2021, Maine gave priority to frontline healthcare workers over other groups in the population during the first stage of vaccine

2. Before vaccines became available, state officials had taken many steps to curb the spread of COVID-19. *See Calvary Chapel of Bangor v. Mills,* No. 1:20-CV-156-NT, 2021 U.S. Dist. LEXIS 105400, 2021 WL 2292795, at *1-7 (D. Me. June 4, 2021) (describing efforts), *appeal filed,* No. 21-1453 (1st Cir. docketed June 14, 2021).

distribution. Hospitals offered on-site vaccination to their staff and other eligible recipients.

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

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

- Maine CDC also distributed vaccines to healthcare facilities, EMS organizations, and pharmacies across the state.

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

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

- For twenty days in May, Maine HHS offered incentives to any Mainer who got his or her first dose of a COVID-19 vaccine. Those eligible

could choose between a complimentary fishing license, a complimentary hunting license, a Maine Wildlife Park Pass, a $20 L.L. Bean gift card, a ticket to a Portland Sea Dogs game, or an Oxford Plains Speedway Pass.

- In June, Governor Mills announced a prize sweepstakes, allowing all vaccinated residents to enter and tying the prize to the number of residents vaccinated by Independence Day weekend. On July 4, a dialysis dietitian from Winslow won nearly $900,000. Press Release, Office of Gov. Mills, Governor Mills Announces Winner of Don't Miss Your Shot: Vaccinationland Sweepstakes (July 4, 2021), https://www.maine.gov/governor/mills/news/governor-mills-announces-winner-dont-miss-your-shot-vaccinationland-sweepstakes-2021-07-04 .[3]

By the end of July 2021, 65.0% of Maine residents had received at least one dose of a COVID-19 vaccine. However, the geographic distribution of vaccination was, and remains, uneven throughout the state. *See* Maine CDC, COVID-19 Vaccination Dashboard: COVID Vaccination by County Listing, (last visited Oct. 15, 2021)

3. "While our review is generally limited to the record below, *see* Fed. R. App. P. 10, we may take judicial notice of facts which are 'capable of being determined by an assuredly accurate source.'" *Pietrangelo v. Sununu,* No. 21-1366, 2021 U.S. App. LEXIS 29678, 2021 WL 4487850, at *1 n.1 (1st Cir. Oct. 1, 2021) (citations omitted) (quoting *United States v. Hoyts Cinemas Corp.,* 380 F.3d 558, 570 (1st Cir. 2004)).

https://www.maine.gov/covid19/vaccines/dashboard; *see also Pietrangelo*, 2021 U.S. App. LEXIS 29678, 2021 WL 4487850, at *1 n.1 ("The accuracy of state and federal vaccine distribution data cannot be reasonably questioned . . . ."). Many counties report much lower vaccination rates. Maine CDC, COVID-19 Vaccination Dashboard, *supra*. Efforts to reach the elderly population have also shown geographic differences. *See id.*

Despite these measures, Maine faced a severe crisis in its healthcare facilities when the delta variant hit the state.[4] According to Maine CDC, the delta variant is more than twice as contagious as previous variants and may cause more severe illness than previous variants. An individual infected with the delta variant may transmit it to others within twenty-four to thirty-six hours of exposure. Those conditions threaten the entire population of the state. But health care facilities are uniquely susceptible to outbreaks of infectious diseases like COVID-19 because medical diagnosis and treatment often require close contact between providers and patients (who often are medically vulnerable). And outbreaks at healthcare facilities hamper the state's ability to care for its residents suffering both from COVID-19 and from other conditions. That problem is particularly acute in Maine because, as Maine CDC's director stated, "the size of Maine's healthcare workforce is limited, such that the impact of any outbreaks among

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

personnel is far greater than it would be in a state with more extensive healthcare delivery systems." Maine CDC determined that at least 90% of a population must be vaccinated to prevent community transmission of the delta variant. No county in Maine, including those that have the highest vaccination rates, has achieved the 90% level. Maine CDC, COVID-19 Vaccination Dashboard, *supra.* Many counties are at much lower levels. *Id.* And while community has a broader meaning than workers at a particular healthcare facility, even at those facilities the 90% figure has not been reached. At the end of the last monthly reporting period before Maine CDC adopted the emergency rule, ambulatory surgical centers achieved 85.9% of workers vaccinated; hospitals hit only 80.3%, nursing homes reached 73.0%, and intermediate care facilities for individuals with intellectual disabilities only 68.2%. On August 11, four of fourteen known COVID-19 outbreaks in Maine were occurring at health care facilities with "strong infection control programs."[5] Those outbreaks were mostly caused by healthcare workers bringing COVID-19 into the facilities.

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

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

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

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

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

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

See Doe, 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *3. For these stated reasons, Maine CDC concluded that none of its available alternatives to mandatory vaccination

would allow it to protect its healthcare infrastructure and its residents.

On August 12, Maine HHS and Maine CDC issued an emergency rule adding COVID-19 to the list of diseases against which healthcare workers must be vaccinated.[6] Pointing to a 300% increase in COVID-19 cases between June 19 and July 23 and the danger of the delta variant, the agencies said the rule was necessary because "[t]he presence of the highly contagious [d]elta variant in Maine constitutes an imminent threat to public health, safety, and welfare." In announcing the rule, Governor Mills explained that "[healthcare] workers perform a critical role in protecting the health of Maine people, and it is imperative that they take every precaution against this dangerous virus, especially given the threat of the highly transmissible [d]elta variant." The rule requires healthcare facilities to "exclude[] from the worksite" for the rest of the public health emergency employees who have not been vaccinated. In interpretive guidance, Maine CDC clarified that the mandate does not extend to those healthcare workers who do not work on-site at a designated facility, for example those who work remotely. Thus, employers may accommodate some workers'

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

requests for religious exemptions provided that the accommodations do not allow unvaccinated workers to enter healthcare facilities. Maine HHS and Maine CDC later announced that they would not begin enforcing the rule until October 29.

Seeking to enjoin the emergency rule, the appellants filed suit in the District of Maine. The appellants are unvaccinated Maine healthcare workers (and a healthcare provider) who object to vaccination with any of the three available COVID-19 vaccines. They claim that their religious beliefs prohibit them from using any product "connected in any way with abortion." The appellants allege that Johnson & Johnson/Janssen used cells ultimately derived from an aborted fetus to produce its vaccine and that Moderna and Pfizer/BioNTech used the same type of cells in researching their vaccines. So, the appellants say, their religion prohibits them from being vaccinated. At least one appellant has lost her job with appellee Genesis Healthcare because she refused to get vaccinated. All the appellants allege causes of action under the Free Exercise Clause, the Equal Protection Clause, the Supremacy Clause, Title VII, and 42 U.S.C. § 1985.

The appellants sought an ex parte temporary restraining order and a preliminary injunction. The district court denied the motion for a temporary restraining order, concluding that the appellants failed to satisfy the requirements of Federal Rule of Civil Procedure 65(b)(1). It then received briefing and heard argument on the motion for a preliminary injunction. Following the hearing, the district court denied the motion

in a forty-one-page decision. *Doe,* 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *2.

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

II.

We review the district court's factual findings for clear error, its legal conclusions de novo, and its ultimate decision to deny the preliminary injunction for abuse of discretion.[7] *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.,* 969 F.3d 12, 21 (1st Cir. 2020).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of

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

preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

A.

1.

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

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

Appendix B

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

To be generally applicable, a law may not selectively burden religiously motivated conduct while exempting comparable secularly motivated conduct. *See Lukumi,* 508 U.S. at 543. "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton,* 141 S. Ct. at 1877 (quoting *Smith,* 494 U.S. at 884) (alteration in original). Under that rule, if a state reserves the authority to "grant exemptions based on the circumstances underlying each application," it must provide a compelling reason to exclude "religious hardship" from its scheme. *Id.* (quoting *Smith,* 494 U.S. at 884). Nor is a law generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (citing *Lukumi,* 508 U.S. at 542-46).

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

Appendix B

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

To start with, the rule is facially neutral, *see Trump v. Hawaii,* 138 S. Ct. 2392, 2418, 201 L. Ed. 2d 775 (2018), and no argument has been developed to us that the state singled out religious objections to the vaccine "*because of* their religious nature." *Fulton,* 141 S. Ct. at 1877 (emphasis added). The state legislature removed both religious and philosophical exemptions from mandatory vaccination requirements, and thus did not single out religion alone.

The rule is also generally applicable. It applies equally across the board. The emergency rule does not require the state government to exercise discretion in evaluating individual requests for exemptions. Unlike, for example, *Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), in which the government had discretion to decide whether "good cause" existed to excuse the requirement of an unemployment benefits scheme, *id.* at 399-401, 406, here there is no "mechanism for individualized exemptions" of the kind at issue in *Fulton,* 141 S. Ct. at 1877 (quotation marks and citation omitted). Instead, there is a generalized "medical exemption . . . available to an employee who provides a written statement from a licensed physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable." Me. Rev. Stat. tit. 22, § 802(4-B).

No case in this circuit and no case of the Supreme Court holds that a single objective exemption renders a rule not generally applicable. *See Maryville Baptist Church, Inc. v. Beshear,* 957 F.3d 610, 614 (6th Cir. 2020) (per curiam) ("As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law.").

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

whether they suffer from COVID-19 or any other medical condition. To accomplish its three articulated goals, Maine has decided to require all healthcare workers who can be vaccinated safely to be vaccinated.

Providing a medical exemption does not undermine any of Maine's three goals, let alone in a manner similar to the way permitting an exemption for religious objectors would. Rather, providing healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care. The medical exemption is meaningfully different from exemptions to other COVID-19-related restrictions that the Supreme Court has considered. In those cases, the Supreme Court addressed whether a state could prohibit religious gatherings while allowing secular activities involving everyday commerce and entertainment and it concluded that those activities posed a similar risk to physical health (by risking spread of the virus) as the prohibited religious activities. *See, e.g., Tandon,* 141 S. Ct. at 1297 (rejecting the California order that restricted worship but permitted larger groups to gather in "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants"); *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 66-68, 208 L. Ed. 2d 206 (2020) (per curiam) (rejecting the New York order that restricted worship but permitted larger groups to gather at "acupuncture facilities, camp grounds, garages, as well as many [businesses] whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals

and microelectronics and all transportation facilities"); *see also S. Bay United Pentecostal Church v. Newsom,* 141 S. Ct. 716, 717, 209 L. Ed. 2d 22 (2021) (statement of Gorsuch, J., joined in part by four justices) (criticizing the California order that restricted worship but permitted larger groups to gather in "most retail" establishments and "other businesses"). In contrast to those cases, Maine CDC's rule offers only one exemption, and that is because the rule itself poses a physical health risk to some who are subject to it.[8] Thus, carving out an exception for those people to whom that physical health risk applies furthers Maine's asserted interests in a way that carving out an exemption for religious objectors would not.

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

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

emergency rule were an occupancy limit, it would apply to all indoor activities equally based on facility size, but it would exempt healthcare facilities. That analogous policy would serve the state's goal of protecting public health, while maximizing the number of residents able to access healthcare and thus minimizing health risks. Such a rule would not fall afoul of the Supreme Court's decisions. *See Tandon*, 141 S. Ct. at 1296. The rule is generally applicable. And it easily satisfies rational basis review.

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

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

Appendix B

We begin by asking "not whether the [state] has a compelling interest in enforcing its [rule] generally, but whether it has such an interest in denying an exception" to plaintiffs. *Fulton,* 141 S. Ct. at 1881. If any healthcare workers providing such services, including the plaintiffs, were exempted from the policy for non-health-related reasons, the most vulnerable Mainers would be threatened. *Cf. id.* at 1881-82.

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

The first category itself contains two types of interventions. The COVID-19 vaccines protect against infection and lower the risk of adverse health consequences,

9. The appellants claim they were forced to bear the burden of showing that the regulation failed strict scrutiny. The district court's decision belies that claim. See *Doe,* 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *12 ("The government must also demonstrate that it 'seriously undertook to address the problem with less intrusive tools readily available to it' and 'that it considered different methods that other jurisdictions have found effective.'" (quoting *McCullen v. Coakley,* 573 U.S. 464, 494, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)). As we do here, the district court required Maine to show that its rule satisfied strict scrutiny. Maine met that burden by showing that it considered alternative means of achieving its goals and that those alternatives were inadequate.

including death, should a vaccinated person become infected. Vaccination also reduces a person's risk of transmitting COVID-19 to others. There are also treatments that can be administered to infected patients once they have contracted the disease. Because those treatments do not prevent infections, Maine established in the record that reliance on such treatment options would not meet its goals.

The second category is one in which Maine actively engaged before the mandate and included measures like testing, masking, and social distancing. Those measures proved to be ineffective in meeting Maine's goals. As to testing, Maine CDC concluded that regular testing cannot prevent transmission given how quickly an infected person can transmit the delta variant and how long accurate testing takes. And Maine experienced multiple COVID-19 outbreaks in healthcare facilities adhering to mandatory masking and distancing rules. Thus, Maine has shown that non-pharmaceutical interventions are inadequate to meet its goals. *See Doe,* 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *3, *12-14 (making factual findings about the inadequacy of non-pharmaceutical alternatives).

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

its goal other than mandating healthcare workers to be vaccinated. *See id.*

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

Out-of-circuit authorities to the contrary are distinguishable and not persuasive. The appellants stress *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359 (3d Cir. 1999) (Alito, J.), in which the Third Circuit prohibited a police department from offering medical but not religious exemptions to its facial hair policy. It applied strict scrutiny to the policy after determining that the police department's disparate allowance of exemptions suggested a discriminatory intent. *Id.* at 365. But critically, the police department sought to justify its policy by pointing to its interest in a uniform appearance among police officers. *Id.* at 366. Thus, the Third Circuit

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

Nor do the appellants find support in their citation of the Sixth Circuit's recent decision denying a stay pending appeal of a preliminary injunction in *Dahl v. Board of Trustees of Western Michigan University,* No. 21-2945, 2021 U.S. App. LEXIS 30153, 2021 WL 4618519 (6th Cir. Oct. 7, 2021) (per curiam). In *Dahl,* the District Court for the Western District of Michigan preliminarily enjoined a state university from requiring student-athletes to be vaccinated in order to participate in athletic activities. 2021 U.S. App. LEXIS 30153, [WL] at *1. The university's policy provided that "[m]edical or religious exemptions and accommodations will be considered on an individual basis." 2021 U.S. App. LEXIS 30153, [WL] at *4. The Sixth Circuit held that the policy provided a "mechanism for individualized exemptions," applied strict scrutiny, and held that the policy was not narrowly tailored to meet the university's goals. 2021 U.S. App. LEXIS 30153, [WL] at *4-5. The emergency rule here is materially different from the university's policy in *Dahl.* First, Maine's emergency rule does not allow any government official discretion to consider the merits of an individual's request for an exemption. Even so and even assuming that strict scrutiny applies, Maine has narrowly tailored its rule. That conclusion follows from the second key distinction between this case and *Dahl:* the vaccination requirement in *Dahl* required vaccination only of athletes, not of the thousands of other students with whom the athletes may live, study, eat, and socialize. *See* 2021 U.S. App. LEXIS 30153, [WL] at *5. In contrast, the Maine rule covers everyone who works with the medically vulnerable population in healthcare facilities. Unlike the university's athletes-only policy, Maine's emergency rule is not underinclusive

even under *Dahl* because it encompasses every employee working in a setting posing a serious risk of COVID-19 exposure and transmission.

Finally, the appellants' reliance on recent decisions in New York does not advance their cause. *See Dr. A. v. Hochul*, No. 1:21-cv-1009, 2021 U.S. Dist. LEXIS 199419, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021) (granting preliminary injunction); *see also We the Patriots USA, Inc. v. Hochul*, No. 21-2179 (2d Cir. Sept. 30, 2021) (unpublished order) (granting in part injunction pending appeal). In *Dr. A.*, a group of healthcare workers challenged under the Free Exercise Clause an emergency regulation issued by the New York State Public Health & Health Planning Council, which required most healthcare workers in that state to be vaccinated against COVID-19.[10] The Maine regulation here is distinguishable from the New York regulation at issue in *Dr. A.* Eight days after New York officials promulgated a version of the regulation containing a religious exemption, they amended the regulation to "eliminate the religious exemption." 2021 U.S. Dist. LEXIS 199419, 2021 WL 4734404, at *8. In light of that change, *Dr. A.* found that state officials had singled out religious believers through a "religious gerrymander." *Id.* In contrast, Maine's legislature eliminated religious and philosophical exemptions to mandatory vaccination in May 2019 and Maine voters approved the law in March 2020. That timeline does not support a claim of religious

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

gerrymandering. Nor have the appellants developed a religious animus argument on appeal. *Dr. A.* is also inapplicable because it found that New York had failed to explain why the testing and masking alternatives offered to medically exempt healthcare workers were inadequate. 2021 U.S. Dist. LEXIS 199419, 2021 WL 4734404, at *9-10. In contrast, Maine has explained, and the district court found, that testing and masking would not achieve Maine's vital goals to the extent that vaccination would. *See Doe,* 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *14. Further, unlike in *Dr. A.,* Maine has demonstrated that given the "limited" nature of its healthcare workforce and its significant elderly population -- the highest in the nation -- it has tried and failed to control "numerous COVID-19 outbreaks at health care facilities," even after multiple attempts to implement a variety of alternative measures. In confronting the various risks to its own population and its own healthcare delivery system, Maine's rule does not violate the Constitution. *See S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613, 1613-14, 207 L. Ed. 2d 154 (2020) (Roberts, C.J., concurring).

2.

The appellants also assert claims against the state appellees under the Equal Protection Clause, against the hospitals under Title VII, and against all appellees under the Supremacy Clause and 42 U.S.C. § 1985. We find no error in the district court's conclusion that they are unlikely to succeed on any of those claims. *See Doe,* 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *15-16.

Appendix B

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

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

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

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

preliminary injunction, the appellants must show that they have inadequate remedies at law. *See Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1019, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). When litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy. To obtain an injunction, therefore, the appellants must show a "genuinely extraordinary situation." *Sampson v. Murray,* 415 U.S. 61, 92 n.68, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974); *cf. Matrix Grp. Ltd. v. Rawlings Sporting Goods Co.,* 378 F.3d 29, 34 (1st Cir. 2004) (holding that an injunction is unavailable in ordinary breach of contract action). The district court determined that the appellants "have not shown that the injuries they have suffered or may suffer -- the loss of their employment and economic harm -- meet [that] high standard," noting that the appellants had not exhausted their administrative remedies. *Doe,* 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *16; *see Fort Bend Cnty. v. Davis,* 139 S. Ct. 1843, 1850-51, 204 L. Ed. 2d 116 (2019) (describing exhaustion requirements).

We find no error in that conclusion. Indeed, our court has expressly declined to provide such preliminary relief, and has declined to "reach the question of what circumstances would justify a district court in granting preliminary relief in such cases," finding only that "[a]t a minimum, an aggrieved person seeking preliminary relief outside the statutory scheme for alleged Title VII violations would have to make a showing of irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process." *Bailey v. Delta Air Lines, Inc.,* 722 F.2d 942, 944 (1st

Cir. 1983). The appellants have failed to demonstrate why they are entitled to pre-termination relief despite their failure to exhaust, given that the loss of employment "does not usually constitute irreparable injury" except in "the genuinely extraordinary situation" going beyond mere cases of "insufficiency of savings or difficulties in immediately obtaining other employment." *Sampson*, 415 U.S. at 90, 91 n.68. That is true regardless of whether the appellants have administratively exhausted their claims. The appellants' failure to exhaust does not put them in a better position to seek extraordinary relief. And even if the appellants were entitled to an injunction, they have not shown a likelihood of success on the ultimate merits questions. The hospitals need not provide the exemption the appellants request because doing so would cause them to suffer undue hardship. *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004); *see also Trahan v. Wayfair Maine, LLC*, 957 F.3d 54, 67 (1st Cir. 2020) (holding that "liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts").

Finally, the appellants are unlikely to succeed on their § 1985 conspiracy claims. To properly plead a § 1985 conspiracy, the appellants "must allege the existence of a conspiracy, allege that the purpose of the conspiracy is 'to deprive the plaintiff of the equal protection of the laws,' describe at least one overt act in furtherance of the conspiracy, and 'show either injury to person or property, or a deprivation of a constitutionally protected right.'" *Alston v. Spiegel*, 988 F.3d 564, 577 (1st Cir. 2021) (quoting

Pérez-Sánchez v. Pub. Bldg. Auth., 531 F.3d 104, 107 (1st Cir. 2008)). To allege that a civil rights conspiracy exists, they "must plausibly allege facts indicating an agreement among the conspirators to deprive [them] of [their] civil rights." *Id.* at 577-78 (*quoting Parker v. Landry*, 935 F.3d 9, 18 (1st Cir. 2019)). Here the appellants do not allege that the hospitals had any role in the amendment of the statute or issuance of the regulation, only that they supported the regulation after the fact. Thus, their conspiracy claims are unlikely to succeed.

B.

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

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

Finally, we review the district court's balancing of the equities and analysis of the public interest together, as they "merge when the [g]overnment is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). Maine's interest in safeguarding its residents is paramount. While we do not diminish the appellants' liberty of conscience, we cannot find, absent

any constitutional or statutory violation, any error in the district court's conclusion that the rule promotes strong public interests and that an injunction would not serve the public interest. *See Doe*, 2021 U.S. Dist. LEXIS 197251, 2021 WL 4783626, at *17.

III.

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

APPENDIX C — PROCEEDINGS AND ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, DOCKETED OCTOBER 15, 2021

No. 21A83

JOHN DOES 1-3, ET AL.,

Applicants

v.

JANET T. MILLS, GOVERNOR OF MAINE, ET AL.

Docketed:
October 15, 2021

Lower Ct:
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case Numbers:
(21-1826)

Appendix C

DATE	PROCEEDINGS AND ORDERS
Oct 15 2021	Application (21A83) for injunctive relief, submitted to Justice Breyer.
Oct 19 2021	Application (21A83) denied by Justice Breyer. The application is denied without prejudice to applicants filing a new application after the Court of Appeals issues a decision on the merits of the appeal, or if the Court of Appeals does not issue a decision by October 29, 2021.

NAME	ADDRESS	PHONE
Attorneys for Petitioners Mathew D. Staver *Counsel of Record* Party name: Jane Doe, et al.	PO Box 540774 Orlando, FL 32854 court@lc.org	407-875-1776

APPENDIX D — ORDER DENYING EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED OCTOBER 15, 2021

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1826

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

Plaintiffs-Appellants,

v.

JANET T. MILLS, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MAINE; JEANNE M. LAMBREW, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES; NIRAV D. SHAH, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MAINE CENTER FOR DISEASE CONTROL AND PREVENTION; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE, LLC; NORTHERN LIGHT HEALTH FOUNDATION; MAINEGENERAL HEALTH,

Defendants-Appellees.

October 15, 2021, Entered

Appendix D

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

ORDER OF COURT

The appellants' emergency motion for an injunction pending appeal is *denied.*

By the Court:

Maria R. Hamilton, Clerk

APPENDIX E — ORDER DENYING MOTION FOR INJUNCTION PENDING

From: cmecf@med.uscourts.gov
To: cmecfnef@med.uscourts.gov
Subject: Activity in Case 1:21-cv-00242-JDL JANE DOES 1-6 et al v. MILLS et al Order on Motion for Order
Date: Wednesday, October 13, 2021 4:50:00 PM

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U.S. District Court

District of Maine

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Appendix E

Case Name: JANE DOES 1-6 et al v. MILLS et al
Case Number: 1:21-cv-00242-JDL
Filer:
Document Number: 68(No document attached)

Docket Text:

ORDER re [67] Motion for Order - Plaintiffs have filed an Emergency Request for Ruling on Pending Motion for Injunction Pending Appeal. ECF No. 67. The Plaintiffs have not filed a separate Motion for an Injunction Pending Appeal. However, I will treat the Emergency Request as a motion seeking a stay or other relief authorized by Fed. R. App. P. 8(a)(1)(C). For the reasons stated in the Order Denying Motion for Preliminary Injunction (ECF No. 65), Plaintiffs Motion for an Injunction Pending Appeal (ECF No. 67) is ORDERED denied. By JUDGE JON D. LEVY. (aks)

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APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, FILED OCTOBER 13, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

1:21-cv-00242-JDL

JANE DOES 1-6 *et al.*,

Plaintiffs,

v.

JANET T. MILLS, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MAINE, *et al.*,

Defendants.

October 13, 2021, Decided;
October 13, 2021, Filed

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs, eight individual healthcare workers and one individual healthcare provider, seek a preliminary injunction (ECF No. 3) prohibiting Janet T. Mills, Maine's Governor, and other named defendants from requiring all employees of designated healthcare facilities to be

vaccinated against the SARS-CoV-2 coronavirus—the cause of COVID-19 infections—through the enforcement of the rule, Immunization Requirements for Healthcare Workers, 10-144-264 Me. Code R. § 1-7 (2021)[1] (the "Rule"), as amended August 12, 2021. The Plaintiffs contend that the vaccination requirement violates their First Amendment and other federal constitutional and statutory rights because it does not exempt from its requirements individuals whose sincerely held religious beliefs cause them to object to being vaccinated against COVID-19. Seven of the nine plaintiffs also contend that their employers violated federal employment law by refusing to grant them a religious exemption from the vaccination requirement.

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

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

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The Rule requires all employees of designated healthcare facilities[2] to receive their final dose of the vaccination against the SARS-CoV-2 coronavirus by September 17, 2021. 10-144-264 Me. Code R. § 5(A)(7) (effective Aug. 12, 2021). On September 2, 2021, the DHHS and Maine CDC announced that they would not begin enforcing the Rule's provisions until October 29, 2021, to allow additional time for employees of designated healthcare facilities to comply with the Rule by receiving their final vaccine dose by October 15. ECF No. 49-5 at ¶ 37. If granted, the preliminary injunction would prohibit the Defendants from enforcing the Rule or terminating the Plaintiffs' employment based on their refusal to be vaccinated against COVID-19.

A hearing on the Motion for Preliminary Injunction was held on September 20, 2021.[3] After careful consideration

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

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

and for the reasons that follow, I deny the Plaintiffs' motion. (ECF No 3).

II. BACKGROUND

The parties have filed declarations and various exhibits in support of their positions. Except where otherwise noted, I have based my findings on these documents.[4] Additionally, I take judicial notice of certain additional facts pertinent to the Motion. *See In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003) (noting that although a district court is generally limited to examining the record, it may also consider "the documents incorporated by reference in it, matters of public record, and other matters susceptible to judicial notice"); *see also Loucka v. Lincoln Nat'l Life Ins. Co.*, 334 F. Supp. 3d 1, 8-9 (D.D.C. 2018) ("[T]he CDC's Lyme-testing criteria and procedures are a matter of public record, and it cannot be reasonably questioned that the agency's website is an accurate source for those standards.").

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

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

the emergency rulemaking that required that healthcare workers be vaccinated against COVID-19.

A. The COVID-19 Global Pandemic

COVID-19 is a highly contagious disease that can cause serious illness and death. ECF No. 49-4 at ¶¶ 11, 13, 15. In March 2020, the World Health Organization declared COVID-19 to be a global pandemic. ECF No. 49-4 at ¶ 12. As of September 12, 2021, there were approximately 219 million cases of COVID-19 worldwide. ECF No. 49-4 at ¶ 13. Globally, over 4,550,000 people have died from COVID-19, including approximately 660,000 deaths in the United States. ECF No. 49-4 at ¶ 13. As of September 14, 2021, Maine had 81,177 total cases of COVID-19, with 969 deaths. ECF No. 49-4 at ¶ 14.

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

5. Herd immunity refers to the population-level phenomenon whereby the community is sufficiently populated with vaccinated individuals that unvaccinated individuals can enjoy a substantially lessened risk of exposure and, therefore, of infection, as the

the Delta variant, epidemiological models have increased the projected vaccination rate needed to achieve herd immunity from 70% to 90%. ECF No. 49-4 at ¶ 29.

Three COVID-19 vaccines are generally available: Pfizer-BioNTech (the "Pfizer vaccine"), Moderna, and Janssen (the "J&J vaccine"). ECF No. 49-4 at ¶ 40. All three are effective against the Delta variant. ECF No. 49-4 at ¶ 43. Prior to their availability, the United States Centers for Disease Control and Prevention ("CDC") and Maine CDC recommended that people wear face coverings and practice physical distancing to limit the spread of the virus. ECF No. 49-5 at ¶ 5. Once the first vaccine doses became available in December 2020, Maine CDC prioritized the vaccination of frontline healthcare professionals and patient-facing staff through its eligibility guidelines. ECF No. 49-5 at ¶¶ 15-18. The vaccines are now widely available, and the State has worked in parallel with hospital systems to encourage and facilitate the widespread vaccination of Maine residents. ECF No. 49-5 at ¶¶ 19(f), 23-29.

The Rule was amended in August 2021 to add COVID-19 to the list of infectious diseases for which vaccinations are mandated for employees of designated healthcare facilities. It represented the latest in a series of measures employed by the State to combat the COVID-19 pandemic in healthcare settings. When formulating the amendment, Maine CDC reviewed and considered

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vaccinated individuals block the virus from spreading from person to person. ECF No. 49-4 at ¶¶ 27-28.

alternatives to mandating vaccinations, including the measures then being employed by Maine healthcare facilities, such as twice-weekly or daily testing, symptom monitoring, and the use of personal protective equipment ("PPE"). ECF No. 49-4 at ¶¶ 59-64. Maine CDC rejected twice-weekly testing as inadequate given the speed at which the Delta variant is transmitted—a person infected with the Delta variant can transmit the infection to others within just 24 to 36 hours of exposure. ECF No. 49-4 at ¶¶ 25, 61. Similarly, Maine CDC rejected daily antigen testing as insufficient because the most effective tests (polymerase-chain-reaction tests ("PCR")) require 24 to 72 hours to produce results and the faster rapid-antigen tests are too inaccurate and in short supply. ECF No. 49-4 at ¶ 62. Symptom monitoring as a standalone measure was rejected because the virus can be transmitted by persons who are asymptomatic. ECF No. 49-4 at ¶ 60. Similarly, sole reliance on the use of PPE was rejected because, even if worn correctly, PPE will not stop the spread of COVID-19 in healthcare settings. ECF No. 49-4 at ¶ 64.

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

healthcare workers bringing COVID-19 into the facility. ECF No. 49-4 at ¶ 48.

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

The Plaintiffs are nine individuals who are identified in the Complaint by pseudonyms. The Complaint alleges that Jane Does 1 through 5 and John Does 2 and 3 are healthcare workers employed by the Hospital Defendants. John Doe 1 is a licensed healthcare provider who operates his own practice. Jane Doe 6 is a healthcare worker employed by John Doe 1.[6, 7]

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6. The Complaint alleges the following facts regarding the Plaintiffs:

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

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

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

Plaintiffs Jane Doe 2 and John Doe 2 are both Maine residents and healthcare workers employed by healthcare facilities operated

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

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

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

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

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

In their responses to the Plaintiffs' motion seeking preliminary injunctive relief, the Defendants have not challenged the sincerity of the Plaintiffs' asserted religious beliefs or that those beliefs are the reason for the Plaintiffs' refusal to be vaccinated. I therefore treat these facts as established for purposes of deciding the Preliminary Injunction Motion.[8]

C. The COVID-19 Vaccine Mandate

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

The ensuing years witnessed the development of new vaccines and vaccine recommendations, resulting in frequent revisions to the statute. In response, the

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

statute was again amended in 2001 to delegate to DHHS the authority, by rulemaking, to designate mandatory vaccines for healthcare workers at designated healthcare facilities and for school children. 2001 Me. Legis. Serv. 147 (West). Accordingly, in 2002 DHHS promulgated and first adopted the rule entitled "Immunization Requirements for Healthcare Workers," which is the Rule at issue here. 10-144-264 Me. Code R. §§ 1-7 (Apr. 16, 2002). At its adoption, the Rule required vaccinations for measles, rubella, hepatitis B, mumps, and chickenpox. *Id.* at § 5(A).

From 2001 until 2019, the statute contained three exemptions from the vaccination requirements for both Maine healthcare workers and school children: a "medical exemption" for those who provided "a physician's written statement that immunization against one or more diseases may be medically inadvisable," and both "religious [and] philosophical exemption[s]" for those "who state[d] in writing a sincere religious or philosophical belief that is contrary to the immunization requirement." 22 M.R.S.A. § 802(4-B)(A), (B) (2019). In 2019, the Maine Legislature enacted legislation repealing the exemptions for religious and philosophical beliefs, 2019 Me. Legis. Serv. 386 (West), thus leaving the medical exemption as the sole exemption permitted under law. In response to this legislative change, a statewide veto referendum regarding the new law eliminating the religious and philosophical exemptions was held in March 2020 pursuant to the People's Veto provision of the Maine Constitution, Me. Const. art. IV, pt. III, § 17. The law was upheld, with over 72% of voters voting in favor of it.[9] In April 2021, DHHS

9. Full results are available on the Maine Secretary of State website. Dep't of Sec'y of State, State of Maine, Tabulations for

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

The preceding history demonstrates that although Plaintiffs' arguments are directed at the amendment of the Rule in August 2021 and the Rule's failure to include a religious exemption from the COVID-19 vaccination requirement, it was the Legislature's revision of the statute in 2019 which eliminated the religious exemption for all mandatory vaccines. Therefore, when I refer in this decision to the COVID-19 vaccine mandate, I am referring to the Rule as it operates in conjunction with the statute, 22 M.R.S.A. § 802(4-B), which authorizes it.

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

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

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

III. PRELIMINARY INJUNCTION LEGAL STANDARD

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

A trial court must consider four factors when assessing a request for a preliminary injunction: (1) likelihood of success on the merits, (2) whether, absent preliminary relief, the plaintiff will suffer irreparable harm, (3) whether "the balance of equities tips in [the plaintiff's] favor," and (4) whether granting the injunction serves the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Of these factors, "[t]he movant's likelihood of success on the merits weighs most heavily in the preliminary injunction calculus." *Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 18 (1st Cir. 2020). This first factor is so consequential that "[i]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Me. Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) (quoting *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)).

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

IV. LEGAL ANALYSIS

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

A. The Free Exercise of Religion

The Free Exercise Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law prohibiting the free exercise" of religion. U.S. Const. amend. I, *see Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (incorporating the Free Exercise Clause of the First Amendment against the states). The clause "embraces two concepts[:] freedom to believe and freedom to act." *Cantwell*, 310 U.S. at 303. Although the freedom to believe is absolute, the freedom to

act on one's religious beliefs "remains subject to regulation for the protection of society." *Id.* at 304.

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

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11. Writing for the Court's majority in *Smith*, Justice Scalia reasoned that the question of whether a religious exemption or accommodation should be adopted as part of a neutral, generally applicable regulatory law is not within the purview of the courts' role in enforcing the Free Exercise Clause but is instead for the other branches of government to determine:

> But to say that a nondiscriminatory religious-practice exemption is permitted [by the Free Exercise Clause], or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the

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

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

Under rational basis review, "a neutral, generally applicable regulatory law that compel[s] activity forbidden by an individual's religion" withstands a Free Exercise challenge if there is a rational basis for the regulation.

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political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Smith, 494 U.S. at 880. Applying rational basis review to the COVID-19 vaccine mandate at issue here would be in keeping with the Supreme Court's foundational decision in the area of mandatory vaccines—*Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905)—in which the Court upheld the constitutionality of a state mandated smallpox vaccine. In so doing, the Court applied a deferential standard of review and rejected a Fourteenth Amendment substantive due process challenge to the law, concluding that the mandatory vaccination law was constitutional because it had a "real [and] substantial relation to the protection of the public health and the public safety."[12] *Id.* at 31. However, *Jacobson* did not specifically

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

In the years since the Supreme Court recognized that the First Amendment's Free Exercise Clause applies to the states, *Jacobson* has been treated as informative authority both regarding the scope of government power to enact mandatory vaccination requirements to protect public health and for the proposition that the Constitution does not require religious exemptions from state-mandated vaccinations. *See, e.g., Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922) (affirming that *Jacobson* "settled that it is within the police power of a state to provide for compulsory vaccination"); *Prince v. Massachusetts*, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) ("[M]andatory vaccination as a condition for admission to

address the scope of an individual's constitutional rights under the First Amendment's Free Exercise Clause in relation to mandatory vaccines, and that inquiry is the crux of the dispute here.

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school does not violate the Free Exercise Clause"); *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) ("[Plaintiff] has not been denied any legal right on the basis of her religion. Constitutionally, [plaintiff] has no right to a [vaccine] exemption."); *Workman v. Mingo Cnty. Bd. Of Educ.*, 419 Fed. App'x 348, 352-54 (4th Cir. 2011) (relying on the *Jacobson, Zucht*, and *Prince* line of cases to hold that a state mandatory vaccination law that allowed medical but not religious exemptions was constitutional); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1084, 1086 (S.D. Cal. 2016) ("[I]t is clear that the Constitution does not require the provision of a religious exemption to vaccination requirements" because, "[a]s stated in *Prince*, the right to free exercise does not outweigh the State's interest in public health and safety."); *Klaassen v. Trs. Of Ind. Univ.*, No. 1:21-CV-238, 2021 U.S. Dist. LEXIS 133300, 2021 WL 3073926, at *17-22, *39 (N.D. Ind. July 18, 2021) (providing a detailed analysis of *Jacobson's* continued viability and noting that "courts have consistently held that schools that provided a religious exemption from mandatory vaccination requirements did so *above and beyond* that mandated by the Constitution"), *aff'd*, 7 F.4th 592 (7th Cir. 2021) (relying on *Jacobson* to hold that "there can't be a constitutional problem with vaccination against SARS-CoV-2" because, although *Jacobson* has been criticized, "a court of appeals must apply the law established by the Supreme Court"); *Boone v. Boozman*, 217 F. Supp. 2d 938, 954 Ark. 2002) ("The constitutionally-protected free exercise of religion does not excuse an individual from compulsory immunization; in this instance, the right to free exercise of religion . . . [is] subordinated to society's interest in protecting against the spread of disease."); *Harris v. Univ. of Mass., Lowell*, No. 21-cv-11244, 2021 U.S. Dist. LEXIS 162444, 2021 WL 3848012, at *7 (D. Mass. Aug. 27, 2021) (following the *Jacobson* line to hold that "UMass is under no constitutional obligation to offer a religious exemption to its Vaccine Requirement.").

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

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

1. Neutrality

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

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

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

The Plaintiffs contend that the COVID-19 vaccine mandate is not neutral because the removal of the religious exemption from the Rule "specifically target[ed] Plaintiffs' religious beliefs for disparate and discriminatory treatment." ECF No. 1 ¶ 131. They assert that "Maine has plainly singled out religious employees who decline vaccination for especially harsh treatment (i.e., depriving them from earning a living anywhere in the State), while favoring employees declining vaccination for secular, medical reasons." ECF No. 57 at 4. This argument mirrors claims made recently by healthcare providers challenging

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New York's COVID-19 vaccine mandate, which also did not provide for religious exemptions. *Dr. A. v. Hochul*, No. 1:21-cv-1009, at **4-6, 2021 U.S. Dist. LEXIS 199419 (N.D.N.Y. Oct. 12, 2021). However, the challenged New York regulation is distinguishable from Maine's COVID-19 vaccine mandate, because the New York regulation originally provided for a religious exemption which was then removed only a few days before the requirement became effective; additionally, New York provides religious exemptions to other mandated vaccinations for healthcare workers. *Id.* at *4, *5, *16 n.9, 2021 U.S. Dist. LEXIS 199419. For these reasons, the court determined that the intentional, last-minute change to the language in the New York regulation was a "religious gerrymander" that required strict scrutiny. 2021 U.S. Dist. LEXIS 199419 at *18. In contrast, the Maine Legislature removed the religious exemption as to all mandated vaccines by amending 22 M.R.S.A. § 802(4-B) in 2019. Following the unsuccessful People's Veto held in 2020, DHHS removed the religious exemption from the Rule in April 2021 to conform the Rule to the 2019 statutory change. This revision pre-dated the COVID-19 vaccine requirement and served to ensure that the Rule was consistent with Maine law. The history associated with the revision of the Rule does not demonstrate animus toward religion.

In support of their argument, the Plaintiffs cite to a trio of recent per curiam or memorandum decisions issued by the U.S. Supreme Court: *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (per curiam); *South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716, 209 L. Ed. 2d 22 (2021) (mem.); and *Tandon*

v. Newsom, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) (per curiam). Each involved a challenge to a state law aimed at quelling the spread of COVID-19. Each was issued in response to a motion for emergency injunctive relief to preserve the status quo pending resolution of appellate review. Of the three, the Plaintiffs rest primarily on *Tandon v. Newsom*.

In *Tandon*, the Supreme Court granted injunctive relief against enforcement of a California regulation that prohibited indoor private gatherings of more than three households during the COVID-19 pandemic. 141 S. Ct. at 1297. The prohibition had the effect of restricting at-home religious gatherings while allowing groups of more than three households to gather in public settings, such as hair salons, retail stores, and restaurants. *Id.* In enjoining the regulation's enforcement, the Court explained that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* "Comparability is concerned with the risks various activities pose, not the reasons" motivating the activities. *Id.* The Court's majority concluded that private indoor gatherings of three or more households were comparable to groups of the same or a greater number of households in public businesses, which were not prohibited by the regulation, and granted an injunction against the policy's enforcement pending appellate review. *Id.* at 1297.

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

In the unique context of a vaccine mandate intended to protect public health, there is a fundamental difference between a medical exemption—which is integral to achieving the public health aims of the mandate—and exemptions based on religious or philosophical objections—which are unrelated to the mandate's public health goals. The risks associated with the two are not comparable. Reducing the risk of adverse medical consequences for a high-risk segment of the population is essential to achieving the public health objective of the vaccine mandate. A religious exemption would not address a risk associated with the vaccine mandate's central objectives. Under *Tandon*'s reasoning, rational basis review applies.

Tandon is distinguishable from this case in another respect. The vaccination requirement challenged here does not prevent the Plaintiffs from exercising their religious beliefs by refusing to receive the COVID-19 vaccination. In contrast, in *Tandon* interference with the free exercise of religion was direct because the statute prevented like-minded persons from gathering together to perform religious rituals. Here, the Rule does not

compel the Plaintiffs to be vaccinated against their will, and the Plaintiffs have, in fact, freely exercised their religious beliefs by declining to be vaccinated. This is not to minimize the seriousness of the indirect consequences of the Plaintiffs' refusal to be vaccinated, as it affects their employment. Nonetheless, the Rule has not prevented the Plaintiffs from staying true to their professed religious beliefs.

The two remaining decisions in the trio relied upon by the Plaintiffs are also readily distinguished. In *South Bay United Pentecostal Church v. Newsom*,[13] the Court partially granted an application for injunctive relief from California Governor Gavin Newsom's executive order limiting attendance at indoor religious gatherings to prevent further spread of COVID-19. 141 S. Ct. at 716, 718. Writing separately, Justice Gorsuch concluded that the restrictions on religious institutions imposed by California followed a pattern of that state "openly impos[ing] more stringent regulations on religious institutions than on many businesses" throughout the pandemic, and that this represented religious discrimination and required strict scrutiny. *Id.* at 717 (statement of Gorsuch, J.).

13. The California Order challenged in *South Bay* came before the Court twice on application for injunctive relief: in May 2020, the Court issued a memorandum opinion denying the application, 140 S. Ct. 1613, 1613, 207 L. Ed. 2d 154 (2020) (Mem.); in February 2021 the Court denied relief with respect to the percentage capacity limitations imposed on houses of worship and limitations on singing and chanting during indoor services, and granted the injunction with respect to the other capacity limits, 141 S. Ct. 716, 716, 209 L. Ed. 2d 22 (2021) (Mem.).

The restrictions considered in *South Bay* are unlike the vaccine mandate at issue here. *Id.* In *South Bay*, California had explicitly imposed stricter attendance limits on in-person worship services, while not imposing similar limits in secular settings. There is no similar targeted imposition of restrictions on religious practices presented by the COVID-19 vaccine mandate.

Finally, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court granted injunctive relief from a State of New York order that imposed severe restrictions on religious gatherings in certain high-risk zones of New York City during the first wave of the Covid-19 pandemic. 141 S. Ct. at 66. Specifically, the order limited attendance at religious gatherings in "red" zones to no more than ten persons and in "orange" zones to no more than 25 persons, while allowing myriad essential businesses in those same locations to admit an unlimited number of persons. *Id.* at 66-67. Invoking *Smith*, the Court determined that the challenged order was neither neutral nor generally applicable due to these categorizations. *Id.* at 67. Applying strict scrutiny, the Court held that although "[s]temming the spread of COVID-19 is unquestionably a compelling interest," the regulation was likely unconstitutional for lack of narrow tailoring. *Id.* There were multiple less restrictive rules that could have achieved the State's goal without burdening the exercise of religion so severely, such as tying the maximum attendance at a house of worship to the size of that facility. *Id.* The Court was not persuaded that the State demonstrated that houses of worship, which had "admirable safety records," "contributed to the spread of COVID-19" such that the targeted and restrictive prohibition could be constitutionally sound. *Id.* at 67-68.

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

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

Specifically, the Legislature considered data establishing that it was the religious and philosophical exemptions to mandatory vaccines that had prevented Maine from achieving herd immunity as to several infectious diseases, which is a prerequisite to eliminating those diseases.[14] Measles, for example, requires a 95% population-level vaccination rate, ECF No. 49-4 ¶ 35, and this was undermined in the years prior to 2019 by the large percentage of unvaccinated persons resulting from the religious and philosophical exemptions, ECF No. 48-3 at 3-6. As Representative McDonald, cosponsor of the legislation, testified:

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

ECF No. 48-3 at 1.

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

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

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

ECF No. 48-4 at 2.

The Plaintiffs have not specifically disputed that the reasons put forward by the State Defendants for the Legislature's removal of the religious and philosophical exemptions in 2019 were, in fact, the actual reasons. Accordingly, there is no factual support for the proposition that the August 2021 amendment of the Rule, adding the COVID-19 vaccine to the list of mandatory vaccinations for Maine's healthcare workers, "specifically target[ed] Plaintiffs' religious beliefs for disparate and discriminatory treatment," as the Plaintiffs argue. ECF No. 1 ¶ 131. Moreover, there is no basis to find that the August 2021 amendment of the Rule, including the

removal of the religious and philosophical exemptions so that the Rule would conform to the 2019 amendment to the statute, was intended to discriminate against religious beliefs, practices, or motivations. *See Lukumi*, 508 U.S. at 534. For these reasons, the COVID-19 vaccine mandate is neutral because it is facially neutral and it was not intended to discriminate against individuals' religious beliefs, practices, or motivations.

2. General Applicability

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

Individualized exemptions undermine a regulation's general applicability if they display an unconstitutional value judgment that gives preference to secular concerns over religious concerns. In *Fulton*, the Supreme Court explained that "[a] law is not generally applicable if it

invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877; *see also Cent. Rabbinical Cong. Of U.S. & Can. V. N.Y.C. Dep't. of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (citing *Lukumi*, 508 U.S. at 535-38). ("A law is . . . not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.)" "[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

The Plaintiffs contend that the medical exemption at issue here should be treated as an individualized exception which is "sufficiently suggestive of discriminatory intent so as to trigger heightened [strict] scrutiny." *Id.* They point to various judicial decisions applying strict scrutiny and invalidating regulations that permitted medical exemptions but not religious exemptions. However, the decisions cited by the Plaintiffs all relate to government regulations that were primarily intended to achieve governmental objectives other than protecting public health. Thus, in *Fraternal Order of Police, id*, the court applied strict scrutiny and invalidated a regulation that prohibited beards for male police officers that was adopted for the stated purpose of promoting uniformity of the officers' appearance, and which granted a medical exemption from the requirement while not exempting

officers who maintained beards as a matter of religious faith. The other decisions cited by the Plaintiffs addressed similar circumstances. *See Litzman v. New York City Police Department*, No. 12 Civ. 4681, 2013 U.S. Dist. LEXIS 162968, 2013 WL 6049066, at *2-3 (S.D.N.Y. Nov. 15, 2013) (requiring religious exemptions to a policy mandating once-yearly facial shaving for male police officers to ensure compliance with respirator fit-testing requirements); *Singh v. McHugh*, 109 F. Supp. 3d 72, 75 (D.D.C. 2015) (determining that religious accommodation was required under a policy that would not permit a Sikh student seeking to enroll in the Army's Reserve Officers' Training Corps program to wear a turban, unshorn hair, and beard due to a grooming policy to promote uniformity); and *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 599 (W.D. La. 2019) (determining a policy requiring beards for male officers "for officer safety reasons and to promote a uniform appearance of all officers" required religious accommodations).

Here, the purpose of requiring COVID-19 vaccinations for healthcare workers is to protect public health and not any other policy objective, such as promoting the uniformity of the appearance of police officers or firefighters. Exempting individuals whose health will be threatened if they receive a COVID-19 vaccine is an essential, constituent part of a reasoned public health response to the COVID-19 pandemic. It does not suggest a discriminatory bias against religion. *See W.D. v. Rockland County*, 521 F. Supp. 3d 358, 403 (S.D.N.Y. 2021) (concluding that New York's emergency declaration mandating vaccinations against measles, which provided

a medical exemption but not a religious exemption, met the requirement of general applicability by "encouraging vaccination of all those for whom it was medically possible, while protecting those who could not be inoculated for medical reasons.").

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

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

3. Conclusion Regarding the Standard of Constitutional Review

For the reasons I have explained, the COVID-19 vaccine mandate is both neutral and generally applicable; therefore, rational basis review applies. The trio of recent Supreme Court *per curiam* and memorandum decisions relied on by the Plaintiffs do not suggest otherwise. I therefore turn to consider whether the mandate satisfies rational basis review.

4. Rational Basis Review

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

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

First, data collected by Maine CDC throughout the COVID-19 pandemic demonstrates that unvaccinated individuals are substantially more likely both to contract COVID-19 and to suffer serious medical consequences as a

result. ECF No. 49-4 ¶¶ 16, 23, 52. Second, the percentage of COVID-19 outbreaks occurring in healthcare facilities is increasing rapidly and most of these outbreaks are caused by healthcare workers bringing the virus into the facilities. ECF No. 49-4 ¶¶ 46-48. Third, despite widespread availability of COVID-19 vaccinations, the rate of COVID-19 vaccinations for healthcare workers in designated healthcare facilities remains below the 90% threshold needed to stem facility-based outbreaks. ECF No. 49-4 ¶¶ 53-54. Mandating COVID-19 vaccinations for healthcare workers at designated healthcare facilities will increase the vaccination rate for a critically important segment of Maine's workforce while lowering the risk of facility-based outbreaks.

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

5. Strict Scrutiny Review

Although I conclude that rational basis, and not strict scrutiny, is the correct level of constitutional review, even if strict scrutiny were the required standard, the COVID-19 vaccine mandate for healthcare workers still withstands the Plaintiffs' Free Exercise challenge. As previously discussed, a challenged government action subject to strict scrutiny may be upheld only if "it is justified by a compelling interest and is narrowly tailored

to advance that interest." *Lukumi*, 508 U.S. at 533. The government must also demonstrate that it "seriously undertook to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 573 U.S. 464, 494, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

a. Compelling Interest

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

b. Narrow Tailoring

The record establishes that "[t]he gold standard to prevent and stop the spread of communicable diseases, including COVID-19, is vaccination." ECF No. 49-4 at ¶ 34. High vaccination rates minimize the number of unvaccinated individuals in group settings—such as healthcare environments—which ultimately facilitates population-level immunity and prevents outbreaks of these diseases both within these settings and in the general population. ECF No. 49-4 at ¶¶ 35-37. Achieving the high levels of vaccination needed to establish population-level immunity is crucial to protect the health of the most vulnerable individuals, including

"individuals with weakened immune systems, infants too young to be vaccinated, and persons unable to be vaccinated." ECF No. 49-4 at ¶¶ 38-39. For "individuals undergoing treatment for serious diseases, and individuals who have a demonstrated allergy to one of the vaccine components," certain vaccinations are inadvisable for medical reasons. ECF No. 49-4 at ¶ 39. For these people, receiving a particular vaccine could have adverse health consequences. ECF No. 49-4 at ¶ 39.

The Plaintiffs' sole challenge to the scientific rationale put forward by the State Defendants for the vaccine mandate is based on the Plaintiffs' citation to an article published in National Geographic Magazine that reports on a preliminary study that found that vaccinated persons with breakthrough COVID-19 infections can transmit the virus. This preliminary finding, however, does not address the broader question of whether COVID-19 vaccinations reduce the risk of people spreading the virus that causes COVID-19. According to the CDC, they do. CDC, *Key Things to Know About COVID-19 Vaccines*, (Oct. 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html ("COVID-19 vaccines can reduce the risk of people spreading the virus that causes COVID-19."). Nor does the National Geographic article address the related question of whether vaccinated persons become infected at a lesser rate than unvaccinated persons and whether vaccinations provide substantial protection against COVID-19 hospitalizations. On these points as well, the CDC indicates that they do. *Id.* ("People can sometimes get COVID-19 after being fully vaccinated. However, this only happens in a

small proportion of people, even with the Delta variant. When these infections occur among vaccinated people, they tend to be mild."); *see also* Ashley Fowlkes et al., *Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance—Eight U.S. Locations, December 2020—August 2021*, CDC (Aug. 27, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7034e4.htm?s_cid=mm7034e4_w; Wesley H. Self, et al., *Comparative Effectiveness of Moderna, Pfizer-BioNTech, and Janssen (Johnson & Johnson) Vaccines in Preventing COVID-19 Hospitalizations Among Adults Without Immunocompromising Conditions—United States, March—August 2021*, CDC (Sept. 24, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7038e1.htm?s_cid=mm7038e1_w. The study cited by the Plaintiffs does not establish a lack of narrow tailoring for purposes of strict scrutiny analysis. If vaccinated individuals are less likely to become infected, they are less likely to transmit the disease. The preliminary study cited by the Plaintiffs does not call this crucial point into question.

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

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

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

measures have not been sufficient to prevent these outbreaks. In the face of the Delta variant and rising percentage of healthcare facility-based outbreaks, they are not alternative equivalent measures that would achieve the compelling interest of curbing the spread of COVID-19.

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

15. At least two other states have adopted COVID-19 vaccine mandates which do not provide religious exemptions. In August 2021, the State of New York mandated COVID-19 vaccinations for healthcare workers in the state and did not include a religious exemption within the mandate. *Dr. A. v. Hochul*, No. 1:21-cv-1009, 2021 U.S. Dist. LEXIS 177761, 2021 WL 4189533 (N.D.N.Y. Sept. 14, 2021). A preliminary injunction against the requirement was granted on October 12, 2021, *Dr. A. v. Hochul*, No. 1:21-cv-1009, 2021 U.S. Dist. LEXIS 199419 (N.D.N.Y. Oct. 12, 2021); as previously discussed, this case is distinguishable from Maine's vaccine mandate. Rhode Island has also mandated COVID-19 vaccinations for healthcare workers and did not provide for religious exemptions to that requirement; a temporary injunction was denied on September 30, 2021. *Dr. T v. McKee*, No. 1:21-cv-00387, 2021 U.S. Dist. LEXIS 188096 (D.R.I. Sept. 30, 2021).

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

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

B. Title VII

Seven plaintiffs[16] assert that the Hospital Defendants refused to consider or grant religious accommodations by

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

failing to grant exemptions from the vaccine mandate and that this refusal violates Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e to e-17 (West 2021).

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

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

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The Supreme Court has "set a high standard for obtaining preliminary injunctions restraining termination of employment." *Bedrossian v. Nw. Mem'l Hosp.*, 409 F.3d 840, 845 (7th Cir. 2005) (citing *Sampson v. Murray*, 415 U.S. 61, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)). The case must present a "genuinely extraordinary situation" to support granting an injunction, *Sampson*, 415 U.S. at 92 n.68; allegations of "humiliation, damage to reputation, and loss of income" are insufficient to meet that standard, *Bedrossian*, 409 F.3d at 845, as are "deterioration in skills" and "inability to find another job," *id.* at 846. Courts generally do not grant preliminary injunctions to prevent termination of employment, because "the termination . . . of employment typically [is] not found to result in irreparable injury." 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2021). Injuries incurred in employment discrimination claims may be addressed through remedies at law, such as reinstatement, back pay, and damages. 42 U.S.C.A. § 2000e-5(g). In addition, in the ordinary course, Title VII violations must be addressed first through the administrative processes available under federal law. *See* 42 U.S.C.A. § 2000e-5(f)(1)), *see also Rodriguez v. United States*, 852 F.3d 67, 78 (1st Cir. 2017) ("It is settled that a federal court will not entertain employment discrimination claims brought under Title VII unless administrative remedies have first been exhausted.").

The Plaintiffs have not shown that the injuries they have suffered or may suffer—the loss of their employment and economic harm—meet the high standard

for preliminary injunctive relief required to restrain an employer from terminating an employee's employment. Administrative remedies are available to the Plaintiffs that have not been exhausted. For these reasons, Plaintiffs have not demonstrated a likelihood of success on their Title VII claims to the degree needed to support preliminary injunctive relief.

C. Equal Protection Clause

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

As described above, because the Plaintiffs have not demonstrated a likelihood of success on their Free Exercise Clause claim and I have found, at this stage, that the vaccine mandate is rationally based, the Plaintiffs have not demonstrated a likelihood of success that their

Equal Protection claim is warranted, and no additional analysis is required.

D. Conspiracy

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

E. Supremacy Clause

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

The Supremacy Clause "is not the 'source of any federal rights,' and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015) (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989)). Rather, the Supremacy Clause "creates a rule of decision" that "instructs courts what to do when state and federal law clash." *Id.* Additionally, the Plaintiffs' assertion that "Defendants have explicitly claimed to healthcare workers

in Maine, including Plaintiffs, that federal law does not apply" in Maine is wholly unsupported by the record. ECF No. 1 at ¶ 1.

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

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

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

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

Second, the balance of equities favors the Defendants because of the strong public interest promoted by the vaccine mandate, which includes preventing facility-based COVID-19 outbreaks that risk the health of vulnerable

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

Finally, the vaccine mandate is directly aimed at promoting the public interest. This factor weighs heavily against granting preliminary injunctive relief in this case. Many courts that have examined requests for preliminary injunctions against COVID-19 restrictions have come to this same conclusion, as it is clear that "[w]eakening the State's response to a public-health crisis by enjoining it from enforcing measures employed specifically to stop the spread of COVID-19 is not in the public interest." *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 789 (W.D.N.Y. Oct. 21, 2020); *see also Harris*, 2021 U.S. Dist. LEXIS 162444, 2021 WL 3848012, at *8 ("[G]iven the public health efforts promoted by the [COVID-19] Vaccine Policy, enjoining the continuation of same is not in the public interest."); *Klaassen*, 2021 U.S. Dist. LEXIS 133300, 2021 WL 3073926, at *43 (noting that when individuals refuse vaccination, "the evidence reasonably shows that they aren't the only ones harmed by refusing to get vaccinated: refusing while also not complying with heightened safety precautions could 'sicken and even kill

many others who did not consent to that trade-off,'" which "certainly impacts the public interest" (quoting *Cassell v. Snyders*, 990 F.3d 539, 550 (7th Cir. 2021)). So too, here. Enjoining the Rule is not in the public interest.

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

V. CONCLUSION

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

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

mandate for healthcare workers, the Motion for Preliminary Injunction (ECF No. 3) is **DENIED**.

SO ORDERED.

Dated this 13th day of October, 2021.

/s/ JON D. LEVY
CHIEF U.S. DISTRICT JUDGE

No. 21-717

IN THE

Supreme Court of the United States

JOHN DOES 1–3, ET AL.,

Petitioners,

V.

JANET T. MILLS, GOVERNOR OF MAINE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR EXPEDITED CONSIDERATION OF THIS MOTION

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November 17, 2021

EXHIBIT B

Pursuant to Supreme Court Rule 21, Petitioners move for expedited consideration of their Petition for Writ of Certiorari filed November 11, 2021 and, if the Petition is granted, expedited merits briefing and oral argument. Petitioners show the Court their pressing need for swift resolution of the questions presented as follows:

STATEMENT OF FACTS

On August 12, 2021, Governor Mills announced that Maine would require healthcare workers to accept or receive one of the three, currently available COVID-19 vaccines as a condition to continued employment in the healthcare profession. (Pet. 7 (citing Office of Governor Janet T. Mills, *Mills Administration Requires Health Care Workers To Be Fully Vaccinated Against COVID-19 By October 1* (Aug. 12, 2021), https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october (hereinafter "COVID-19 Vaccine Mandate")).) Pursuant to the Mandate, Dr. Shah and the Maine Center for Disease Control and Prevention ("MCDC") amended 10-144 C.M.R. Ch. 264 to strip healthcare workers in Maine of their pre-existing right to request and obtain a religious exemption and accommodation from the Mandate. (Pet. 8 (citing V. Compl. ¶ 46).) In fact, as acknowledged by MCDC, Maine specifically and intentionally removed the religious exemption from mandatory immunizations effective September 1, 2021. (*Id.* (citing V. Compl. ¶ 49 ("The health care immunization law has removed the allowance for philosophical and religious exemptions and has included influenza as a required immunization.")).) The only exemptions Maine now allows for healthcare workers are for those individuals for

whom an immunization is medically inadvisable and who provide a written statement from a doctor documenting the need for an exemption. (*Id.* (citing V. Compl. ¶ 47).)

As detailed in the Petition, Petitioners have sincerely held religious beliefs that preclude them from accepting or receiving any of the three available COVID-19 vaccines because of their connection to cell lines of aborted fetuses, whether in the vaccines' origination, production, development, testing, or other inputs. (Pet. 8–9 (citing V. Compl. ¶ 50).) Maine does not dispute that its new rule burdens the exercise of sincerely held religious beliefs. *Does 1-3 v. Mills*, No. 21A90, 2021 WL 5027177 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting). Rather, Respondents maintain they have no obligation to provide accommodations for sincerely held religious beliefs despite granting individualized medical exemptions. As a result, some Petitioners have already been fired for refusing to violate their religious beliefs, and others are facing imminent termination.

PROCEDURAL BACKGROUND

Petitioners filed this action in the district court on August 25, 2021, and immediately moved for preliminary injunctive relief. (Pet. 17.) Over Petitioners' objections, the district court delayed a hearing until September 20. (*Id.*) The court then kept Petitioners' emergency motion under advisement for more than three weeks, waiting to rule until two days before Petitioners' vaccine compliance deadline. (Pet. 18.) On October 13, the district court finally denied Petitioners' preliminary injunction motion, holding that Petitioners were unlikely to succeed on the merits of their challenge to the Governor's COVID-19 Vaccine Mandate. (Pet. 18; App. 51a.)

Petitioners noticed their appeal to the First Circuit on the same day, within one hour of the district court's denial. (Pet. 1.)

In Petitioners' preliminary injunction motion to the district court, pursuant to Fed. R. App. P. 8(a)(1)(C), Petitioners also requested the alternative relief of an injunction pending appeal (IPA) if the court denied the preliminary injunction, which the district court also denied. (Pet. 18; App. 49a.) Within one hour of the First Circuit's docketing Petitioners' appeal on October 14, Petitioners filed an emergency IPA motion to the court. (Pet. 18.) The First Circuit Court denied the IPA motion without explanation on October 15. (App. 47a.) Petitioners applied to this Court for an emergency writ of injunction on the same day, October 15, and Justice Breyer denied that application without prejudice on October 19. (App. 45a.) Also on October 19 the First Circuit issued its decision affirming the district court's denial of a preliminary injunction. (Pet. 18; App. 12a.) The next day, October 20, Petitioners submitted to this Court a new emergency application for a writ of injunction, pending disposition of their forthcoming petition for writ of certiorari. (Pet. 18.) The Court denied the application on October 29. (App. 1a.) Petitioners filed their certiorari petition on November 11, 2021.

ARGUMENT

"If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency." *Does 1-3 v. Mills,* No. 21A90, 2021 WL 5027177, at *8 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting). In this case, every day that the Court allows Maine to flagrantly disregard the First Amendment, Title VII, and Supremacy Clause is another day that Maine's citizens

are stripped of their right to free exercise of religion and the Title VII guarantees against religious discrimination. As a result of the First Circuit's decision to uphold Maine's COVID-19 Vaccine Mandate, hundreds of healthcare workers in Maine are losing their jobs and the financial means to provide for themselves and their families—they are jobless because Maine showed preferential treatment to those with secular reasons for refusing the vaccine over those with sincerely-held religious reasons.

The First Circuit decision sets dangerous precedent that states can nullify federal constitutional rights, Title VII, and the Supremacy Clause. Indeed, Maine is not alone in its frontal attack on the Supremacy Clause: New York's COVID-19 vaccine mandate also removed any right of healthcare workers to seek a religious exemption. Justice Sotomayor currently has before her two emergency applications for writs of injunction against the New York mandate pending disposition of forthcoming petitions for writs of certiorari, *see We The Patriots USA, Inc. v. Hochul*, No. 21A125, *and Dr. A v. Hochul*, No. 21A145, seeking review of the Second Circuit's decision in *We The Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 WL 5276624 (2d Cir. Nov. 12, 2021), *clarifying* 2021 WL 5121983 (2d Cir. Nov. 4, 2021) (consolidated for decision with *Dr. A*). Justice Sotomayor has requested and received responses to both applications. Furthermore, private employers around the nation are similarly denying religious exemptions, resulting in lawsuits. *See, e.g.*, *Jane Does 1-14 v. NorthShore University Health System,* No. 1:21-cv-05683 (N.D. Ill. Oct. 29, 2021) (granting emergency injunctive relief against health system's vaccine mandate,

to fourteen plaintiffs and putative class representatives who faced termination after health system refused to consider exemption requests based on sincerely held religious beliefs). This Court should swiftly and clearly assert federal law's supremacy under these circumstances and preserve the cherished First Amendment liberties and critical Title VII rights being eroded each day.

Any argument that Maine should be permitted wide deference as it addresses COVID-19 must be tempered by the principle that "[g]overnment is not free to disregard the First Amendment in times of crisis." *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). Nor should judicial deference to states in a time of emergency or crisis "mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised." *Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh, J., concurring). Nearly a year ago, the Court taught that no temporary restriction of constitutional rights purportedly based on emergency COVID-19 measures could ever be justified as long-term restrictions on constitutionally guaranteed rights. As Justice Gorsuch explained in his concurring opinion in *Roman Catholic Diocese*, "[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. . . . [C]ourts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain." *Id.* at 70 (Gorsuch, J., concurring). Only the Court's immediate intervention will ensure that Mainers' federal rights are protected from Maine's blatant effort to subvert federal law.

The Court has previously expedited review when faced with watershed constitutional matters that call for urgent intervention. For example, in reviewing the military's power to try foreign saboteurs captured on U.S. soil, the Court held that expedited review was required—

> In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, *to preserve unimpaired the constitutional safeguards of civil liberty*, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay . . . .

Ex parte Quirin, 317 U.S. 1, 19 (1942) (emphasis added); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006) ("Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review."). The Court also granted expedited review of a challenge to the constitutionality of an executive agency. *See, e.g.*, *Hannah v. Larche*, 361 U.S. 910 (1959) & 363 U.S. 420 (1960) (expediting briefing and oral argument to review authorization and constitutionality of Civil Rights Commission).

Questions concerning the scope of executive branch power have also triggered expedited review. *See, e.g., Dames & Moore v. Regan,* 452 U.S. 932, 933 (1981) (challenging President's authority to extinguish property rights of private individuals to comply with Iranian Hostage settlement); *United States v. Nixon*, 417 U.S. 927 (1974) (granting certiorari before judgment and scheduling oral argument five-and-a-half weeks later); *New York Times Co. v. United States*, 403 U.S. 713, 753 (1971) (reviewing Executive Branch's effort to prevent the publication of classified information); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (granting

certiorari before judgment to review President Truman's nationalization of steel mills).

Maine's refusal to follow federal law and the United State Constitution is a similarly unprecedented action that merits expedited review. The Governor, through her COVID-19 Vaccine Mandate, is violating the First Amendment's Free Exercise Clause by expressly prohibiting religious exemptions to mandatory vaccination for healthcare workers while endorsing broad medical exemptions for the same healthcare workers. The Mandate's prohibition of religious exemptions also requires private employers to disregard Title VII's religious accommodation requirements by denying employees a process for seeking and obtaining reasonable accommodation of their sincerely held religious beliefs against COVID-19 vaccination, even where such accommodation is possible without imposing an undue hardship on employers. Thus, Maine's actions violate the First Amendment, essentially mandate religious discrimination under Title VII, and are preempted by the Supremacy Clause.

All Petitioners seek in this lawsuit the ability to continue providing the healthcare they have provided to patients throughout the pandemic—throughout their careers—and to do so under the same protective measures that have sufficed for them to be considered superheroes for the last 18 months. As Petitioners have advised their employers, Petitioners remain ready, willing, and able to comply with all reasonable health and safety protocols necessary to accommodating their religious objections to COVID-19 vaccination. (V. Compl. ¶¶ 75, 76.) Essentially, Petitioners

seek to have their religious objections accommodated on the same terms as workers whose medical exemptions from vaccination have been accommodated.

Because the deadline imposed by Respondents' unconstitutional mandate demands that Petitioners choose between violating their sincerely held religious beliefs or losing their livelihoods, relief cannot wait. Petitioners and other healthcare workers in Maine are already being told not to report to work, are being terminated, and are facing the irreparable loss of cherished free exercise rights each day. No American should be faced with this unconscionable choice, especially the healthcare heroes who have served us admirably for the entire duration of COVID-19. As Justice Gorsuch noted,

> 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 the pandemic for the last 18 months are bow being fired and their practice shuttered. All for adhering to their constitutionally protected religious beliefs. *Their plight is worthy of our attention*.

(App. 11a (emphasis added).)

Only the Court can provide the necessary relief to stop this latest incursion of religious discrimination throughout the Nation. As Justice Gorsuch stated earlier this year, "[e]ven in times of crisis—perhaps *especially* in times of crises—we have a duty to hold governments to the Constitution." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., statement). Here, the Court is faced with a new "variant" of religious discrimination—a refusal to recognize the religious objections to COVID-19 vaccines sincerely held by countless individuals across the Nation. In a land born on the will to be free, "take the jab or take a hike"

has no place under our laws, and this Court should step in to aid the faithful from becoming constitutional orphans. Expedited relief to halt the grave constitutional crisis occurring in Maine (and elsewhere) is their only hope.

CONCLUSION

For the reasons set forth in this motion and the Petition, Petitioners respectfully request the Court's expedited consideration of this motion, and that the Court expedite its consideration of the Petition and, if granted, briefing and oral argument on the merits.

Respectfully submitted:

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