**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**
**Bangor Division**

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

**PLAINTIFFS' CONSOLIDATED RESPONSE**
**IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

## INTRODUCTION

To avoid any scrutiny of their unconstitutional and unlawful termination of Plaintiffs for the mere exercise of their sincerely held religious beliefs, Defendants move to dismiss—in its entirety—Plaintiffs' well-pleaded complaint. (ECF No. 107, Mot. Dismiss of Defs. MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare, LLC, and MaineGeneral Health ("MaineHealth MTD"); ECF No. 108, Def. Northern Light Eastern Maine Medical Center's Mot. Dismiss ("NL MTD"); ECF No. 109, State Defs.' Mot. Dismiss ("State MTD").) In support of dismissal, however, Defendants rely heavily on the First Circuit's decision in *Does 1-6 v. Mills*, 16 F.4th 20, 29 (1st Cir. 2021), in which the court denied preliminary injunctive relief under the entirely different—and significantly more demanding—preliminary injunction standard. Determining whether Plaintiffs are likely to succeed on the merits does not answer whether Plaintiffs have plausibly alleged enough facts to support their claims. Additionally, State Defendants improperly resort to reliance on declarations and other evidentiary submissions that are outside the assumed true allegations of the complaint. Plaintiffs' well-pleaded allegations

easily cross the minimal pleading threshold for surviving a motion to dismiss and entitle Plaintiffs to their day in Court. Defendants' motions should be denied.

## LEGAL ARGUMENT

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," but a plaintiff must meet his "obligation to provide the grounds of his entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (cleaned up). The Supreme Court "do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face" and to "nudge[ plaintiffs'] claims across the line from conceivable to plausible." *Id.* at 570; *see also Ashcroft*, 556 U.S. at 679 ("a complaint that states a plausible claim for relief survives a motion to dismiss"). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl.*, 550 U.S. at 556 (cleaned up). The pleading standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Bell Atl.*, 550 U.S. at 556.

Thus, "the generally accepted rule concerning motions to dismiss for failure to state a claim [is] that they should be viewed with disfavor and rarely granted." *Padro v. Dep't of Navy*, 759 F. Supp. 958, 960 (D.P.R. 1991). A district court cannot dismiss a complaint under Rule 12(b)(6) unless, after accepting *all* well-pleaded allegations in the plaintiff's complaint as true and drawing *all* reasonable factual inferences from those facts in the plaintiff's favor, "the pleading shows *no*

set of facts which could entitle plaintiff to relief." *Gooley v. Mobile Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988) (emphasis added). Defendants cannot carry their extraordinarily high burden to prevail on their motions to dismiss because Plaintiffs' well-pleaded allegations unquestionably cross the minimum threshold.

## I. THE PRELIMINARY INJUNCTION DECISIONS OF THIS COURT AND THE FIRST CIRCUIT ARE INAPPOSITE BECAUSE THE STANDARD FOR OVERCOMING A MOTION TO DISMISS IS LESS STRINGENT THAN FOR OBTAINING A PRELIMINARY INJUNCTION.

Defendants place much reliance on the First Circuit's decision affirming the denial of a preliminary injunction on Plaintiffs' claims, arguing that the First Circuit's conclusions demonstrate Plaintiffs cannot state a claim. (*See* State MTD 11, 12, 16; NL MTD 10, 12, 14, 15; MaineHealth MTD 2, 7, 11.) Importantly, however, "the standard plaintiffs must surpass in order to succeed on their preliminary injunction claim, likelihood of success on the merits, is higher than the one they must surpass to defeat defendants' motion to dismiss." *Broadwell v. Municipality of San Juan*, 312 F. Supp. 2d 132, 137 (D.P.R. 2004); *see also Akebia Therapeutics, Inc. v. Azar*, No. 19-cv-12132-ADB, 2020 WL 5732331, at *3 (D. Mass. Sept. 24, 2020) ("the burden for [entitlement to a preliminary injunction] is higher than the burden for [survival of a motion to dismiss]"); *Benitez v. King*, 298 F. Supp. 3d 530, 536 (W.D.N.Y. 2018) ("The standard for demonstrating a 'likelihood of success on the merits' . . . is far more demanding than the plausibility standard applied to survive dismissal for the failure to state a claim at the pleading stage."); *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 164–170 (2d Cir. 2020) (reversing dismissal of Free Exercise claim under more lenient standard than applied to preliminary injunctions).

## II. STATE DEFENDANTS' RELIANCE ON MATERIALS OUTSIDE THE WELL-PLEADED ALLEGATIONS OF PLAINTIFFS' COMPLAINT CANNOT SERVE AS A BASIS FOR DISMISSAL.

State Defendants improperly rely on evidentiary submissions outside of Plaintiffs' complaint to bolster their dismissal arguments. (*See, e.g.*, State MTD 5, 8, 9 (relying on Declaration of Sara Gagne-Holmes (ECF No. 109-3) submitted in support of Motion to Dismiss); *id.* at 12, 14, 16, 17, 19 (relying on Declaration of Donald Wismer (ECF No. 109-1) submitted in support of Motion to Dismiss); *id.* at 15 (relying on Declaration of Defendant Nirav Shah (ECF No. 49-4) in opposition to Motion for Preliminary Injunction); *id.* at 18 (relying on State Defendants' reply papers in opposition to a requested extension of time (ECF No. 43).) As a matter of black letter law, however, a court reviewing a motion to dismiss for failure to state a claim is "limited to the allegations of the complaint." *Litton Indus., Inc. v. Colon*, 587 F.2d 70, 74 (1st Cir. 1978); *see also Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996) (same). "Under Rule 12(b)(6), the district court may properly consider only facts and documents that are part of or incorporated into the complaint." *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008). Thus, State Defendants' declarations and other matters outside of Plaintiffs' complaint are "out-of-bounds in reviewing a 12(b)6) dismissal." *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000).

## III. PLAINTIFFS HAVE PLAUSIBLY PLEADED A VIOLATION OF THE FREE EXERCISE CLAUSE.

To plead a violation of the Free Exercise Clause of the First Amendment, Plaintiffs need only allege that a law is either not neutral or not generally applicable, and that it is not the least restrictive means of advancing a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Plaintiffs have easily satisfied this pleading standard.

### A. Plaintiffs Have Sufficiently Pleaded That the Vaccine Mandate Is neither Neutral nor Generally Applicable.

State Defendants contend that Plaintiffs cannot state a claim under the Free Exercise Clause because the First Circuit already determined that the Vaccine Mandate[1] is neutral and generally applicable. (State MTD 12 (quoting *Does 1-6 v. Mills*, 16 F.4th 20, 29 (1st Cir. 2021).) First, as discussed *supra*, the First Circuit's decision was based solely on whether Plaintiffs had "met their burden of showing a likelihood of success on any aspect of their free exercise claims." *Id.* And the First Circuit's conclusion that Plaintiffs "have shown no probability of success on [the free exercise claims]," *id.*, is insufficient to warrant a dismissal under Rule 12(b)(6). Indeed, as the Supreme Court teaches, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl.*, 550 U.S. at 556 (cleaned up); *see also Fitzpatrick v. Teleflex, Inc.*, 630 F. Supp. 2d 91, 104 (D. Me. 2009) (same). Moreover, whether the First Circuit thought Plaintiffs had shown any probability of success on the merits is a consideration wholly inapposite to the standard governing Defendants' motions to dismiss. Indeed, "[a] court deciding a motion to dismiss must not make *any* judgment about the probability of the plaintiff's success . . . ." *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (1st Cir. 2008) (emphasis added). "In other words, a motion to dismiss does not measure the complaint's probability of success, but rather its legal adequacy." *Washtenaw Cnty. Emp. Retirement Sys. v. Avid Tech., Inc.*, 28 F. Supp. 3d 93, (D. Mass. 2014). Plaintiffs' free exercise claims easily satisfy the requirement of legal sufficiency, even if the First Circuit and State Defendants incorrectly think the probability of success is remote.

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[1] Consistent with the allegations of the Verified Complaint (ECF No. 1) and for ease of reference, Plaintiffs refer collectively to the Final Rule 10-144-264 C.M.R. (2021), the statute removing religious exemptions for healthcare workers in Maine, 22 M.R.S. §802.4-B, and State Defendants' COVID-19 vaccine mandate (V. Compl. ¶¶ 41–44) as the "Vaccine Mandate."

**1. Plaintiffs have sufficiently pleaded that the Vaccine Mandate is not neutral and generally applicable because it treats comparable secular activity more favorably than religious exercise.**

State Defendants contend that the Vaccine Mandate is neutral and generally applicable because the legislature "removed both religious and philosophical exemptions from mandatory vaccine requirements." (State MTD 12 (quoting *Does 1-6*, 16 F.4th at 29).) According to this rationale, the mandate is neutral because it "did not single out religion alone," *Does 1-6*, 16 F.4th at 30, but this assertion is as incorrect as it is irrelevant for purposes of a motion to dismiss.

"[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); *see also Does 1-3 v. Mills*, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting) (same); *Resurrection Sch. v. Hertel*, No. 21-1699, 2022 WL 332400, at *1 (6th Cir. Jan. 11, 2022) (same). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs . . . ." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Moreover, "neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531.

Plaintiffs have plainly crossed the threshold pleading requirement for their Free Exercise claims. Regardless of whether the State removed protections for some nonreligious exemption motivations (*i.e.*, philosophical objections), it admittedly did not remove all nonreligious exemptions (*i.e.*, medical exemptions). (V. Compl. ¶¶ 47–49.) Thus, the Vaccine Mandate treats religious exemptions less favorably than *some* nonreligious exemptions. That is enough to remove the law from neutrality and general applicability requirement of the First Amendment. Indeed, "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as

or even less favorably than the religious exercise at issue." *Tandon*, 142 S. Ct. at 1296. Under the Supreme Court's clear dictates, "it does not suffice for a State to point out that, as compared to [religious activity], *some* secular [activities] are subject to similarly severe or even more severe restrictions." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring). "Rather, once a State creates a favored class of [exemptions], as [Maine] has done in this case, the State must justify why [religious exemptions] are excluded from that favored class." *Id.*

Plaintiffs' complaint plainly crosses this threshold by alleging that, as compared to the favored nonreligious, medical exemptions that Maine provides, Plaintiffs' requested religious exemptions and accommodations are treated less favorably—*i.e.*, denied. State Defendants' contention that it treats "all nonmedical exemptions" the same (State MTD 12) is irrelevant because it admittedly treats religious exemptions less favorably than *some* nonreligious exemptions. (V. Compl. ¶¶ 47–49, 84, 90, 93, 97, 99, 100.)

The First Circuit and State Defendants suggest that treating some nonreligious conduct more favorably than religious conduct is irrelevant where the law is purportedly facially neutral. *See Does 1-6*, 16 F.4th at 30; State MTD 11. But this misses the mark. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534. Treating nonreligious medical exemptions more favorably than religious exemptions transgresses the bright line the First Amendment draws, and Plaintiffs' complaint plainly states a claim.

**2. Plaintiffs have sufficiently pleaded that the Vaccine Mandate is not neutral and generally applicable because it prohibits religious conduct while permitting secular conduct that undermines Maine's asserted interests in a similar way.**

As the Supreme Court has explained, "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Lukumi*, 508 U.S. at 542–46 (same); *Tandon*, 141 S. Ct. at 1296 (same). "[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. . . . Comparability is concerned with risks various activities pose, not the reasons why people [undertake them]." *Tandon*, 141 S. Ct. at 1296. Thus,

> the only question is whether the challenged law contains an exemption for a secular objector that "undermines the government's asserted interests in a similar way" an exemption for a religious objector might. Laws operate on individuals; rights belong to individuals. And the relevant question here involves a one-to-one comparison between the individual seeking a religious exemption and one benefiting from a secular exemption.

*Dr. A. v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting) (citation omitted). Despite State Defendants' attempt to argue the contrary (State MTD 15–16), and the First Circuit's prior conclusions at the preliminary injunction stage, *see Does 1-6*, 16 F.4th at 30,[2] Plaintiffs have sufficiently pleaded that the Vaccine Mandate is not generally applicable based on comparable risks to Maine's asserted interests.

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[2] The the First Circuit's previous determination, that Plaintiffs are not likely to succeed on the merits because nonreligious medical exemptions are not comparable to religious exemptions for free exercise purposes, is not only inapposite at the motion to dismiss stage (*see* Pt. I, *supra*), but is also wrong under binding Supreme Court precedent.

Plaintiffs' complaint alleges—and logic dictates—that an unvaccinated medically exempt healthcare worker poses the same risk to the State's asserted interest as an unvaccinated religious objector. (V. Compl. ¶¶ 158–59.) Both a medically exempt healthcare worker and a religiously exempt healthcare worker pose the same purported risk—working in a healthcare setting while unvaccinated. Regardless of the reason for the exemption, each unvaccinated healthcare worker would enter the same facility, interact with the same patients and staff, perform the same functions, and otherwise operate identically in all respects. "[A]llowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones." *Dr. A.*, 142 S. Ct. at 556 (Gorsuch, J., dissenting). State Defendants treat nonreligious, medically exempt workers more favorably (by not firing them) than the religious objectors (who have all been fired). Plaintiffs' allegations establish that the Vaccine Mandate is not generally applicable. (V. Compl. ¶¶ 47-49, 84, 90, 93, 97, 99, 100, 130, 131.)

State Defendants' attempt to defeat the inalterable risk reality by claiming that "a law can be generally applicable when, as here, it applies to an entire *class* of people." (State MTD 13 (cleaned up) (quoting *Kane v. DeBlasio*, 19 F.4th 152, 166 (2d Cir. 2021)).) The fatal flaw in this logic is that the Vaccine Mandate *does not* apply to an entire class of people, it specifically removes favored individuals (*i.e.*, the medically exempt) from the class of healthcare workers. Indeed, Maine's "vaccine mandate is not absolute; individualized exemptions are available, but only if they invoke certain preferred (nonreligious) justifications." *Does 1-3*, 142 S. Ct. at 19 (Gorsuch, J., dissenting).

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.* (emphasis added).

Here, State Defendants also contend that the Vaccine Mandate is generally applicable because the availability of medical exemptions is "not a 'mechanism for individualized exemptions.'" (State MTD 12.) But Justice Alito squarely rejected that contention as well:

> 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. State Defendants maintained a policy that permitted religious exemptions and medical exemptions to mandatory vaccinations. (V. Compl. ¶ 48.) Then, State Defendants specifically removed religious exemptions while maintaining medical exemptions. (V. Compl. ¶¶ 46–47.) That discriminatory removal of a

religious exemption while maintaining a medical exemption violates the First Amendment. *See id.* 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*.").

State Defendants further claim that secular, medical reasons for declining vaccination are important enough to overcome its ostensible interest in universal vaccination but that religious reasons for declining are not. But such a value judgment does not 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.

*Id.* at 366. Thus, the 'policy cannot survive any degree of heightened scrutiny and thus cannot be sustained." *Id.* at 367.

Justice Alito's opinion for the court in *Fraternal Order of Police* hardly represents a novel proposition. As the Sixth Circuit explained, "a double standard is not a neutral standard." *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). And as many courts have recognized, allowing medical exemptions while prohibiting religious exemptions is unconstitutional. *See, e.g.*, *Litzman v. N.Y. City Police Dep't*, No. 12 Civ. 4681(HB), 2013 WL 6049066, at *3 (S.D.N.Y. Nov. 15, 2013) (holding that a policy that permits medical exemptions but not religious exemptions is neither neutral nor generally applicable and must be subject to strict scrutiny); *Singh v. McHugh*, 185 F. Supp. 3d 201, 225 (D.D.C. 2016) ("In sum, it is difficult to see how accommodating plaintiff's religious exercise would do greater damage to the Army's compelling interests in uniformity,

discipline, credibility, unit cohesion, and training than the tens of thousands of medical shaving profiles the Army has already granted."); *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 607 (W.D. La. 2019) (allowing medical exemptions while precluding religious exemptions removes law from neutrality and general applicability). State Defendants' discriminatory retention of medical exemptions while excluding religious exemptions must be subjected to, and cannot withstand, strict scrutiny. Put simply, "restrictions inexplicably applied to one group and exempted from another do little to further [the government's] goals and do much to burden religious freedom." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020). Plaintiffs' complaint contains sufficient allegations to demonstrate that the Vaccine Mandate is not generally applicable.

### B. Plaintiffs Have Sufficiently Pleaded That the Vaccine Mandate Is Subject to and Cannot Withstand Strict Scrutiny.

Because Plaintiffs have adequately alleged that the Vaccine Mandate is neither neutral nor generally applicable, it is subject to strict scrutiny. *Fulton*, 141 S. Ct. at 1876–77. This is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992). Indeed, "[t]hat standard is not watered down; it really means what it says," *Tandon*, 141 S. Ct. at 1298. Plaintiffs have adequately alleged that this is not the rare case surviving strict scrutiny.

#### 1. Plaintiffs have sufficiently pleaded that the Vaccine Mandate is not supported by a compelling interest.

State Defendants contend that stemming the spread of COVID-19 is a compelling interest, and thus thee Vaccine Mandate satisfies even strict scrutiny. (State MTD 16–17.) But where, as here, First Amendment rights are at issue, "the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Janus v. Am. Fed'n of State, Cnty.*

*& Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018). Here, Plaintiffs have adequately alleged that the Vaccine Mandate and its exclusion of religious exemptions implicate Plaintiffs' First Amendment rights. (V. Compl. ¶¶ 122–139). State Defendants, therefore, "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993). This is so because "[d]eference to [the government] cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Maine*, 435 U.S. 829, 843 (1978).

To be sure, efforts to contain the spread of a deadly disease are "compelling interests of the highest order." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 910 (W.D. Ky. 2020). But, as Justice Gorsuch recognized, "this interest cannot qualify as such forever." *Does* 103, 142 S. Ct. at 21 (Gorsuch, J., dissenting). State Defendants' permitting unvaccinated employees with medical exemptions to continue in their same healthcare positions while claiming unvaccinated employees with religious exemptions would put the entire healthcare system at risk undermines any claim that State Defendants' interest is compelling. If *any* unvaccinated employees pose a risk to Maine's healthcare system *because they are unvaccinated*, then *all* unvaccinated employees pose the same risk. Put simply, the Vaccine Mandate "cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (cleaned up). As Plaintiffs' complaint plainly alleges (V. Compl. ¶¶ 46–49, 84, 90, 93, 97, 99, 100), State Defendants permit exceptions to the Vaccine Mandate, and the Supreme Court has recognized that such exceptions "can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker." *Williams-Yulee v. Florida Bar*, 575 U.S.

433, 448 (2015) (cleaned up). Indeed, "[w]here a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law . . . furthers a compelling interest." *McAllen Grave Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014). Plaintiffs' complaint sufficiently alleges that the Vaccine Mandate is not supported by a compelling interest.

Put simply, State Defendants are required to show a compelling interest in precluding specific religious objectors from requesting and receiving accommodations for their sincerely held religious beliefs, not whether they have an overly broad interest in compulsory vaccination in general. "The question, then, is not whether [Maine] has a compelling interest in enforcing its [vaccination] policies generally, but whether it has such an interest in denying an exception to [Plaintiffs]." *Fulton*, 141 S. Ct. at 1881; *see also U.S. Navy Seals 1-26 v. Biden*, No. 22-10077, 2022 WL 594375, at *11 (5th Cir. Feb. 28, 2022) (same). Plaintiffs have adequately alleged that State Defendants fail that test. (V. Compl. ¶ 137; *see also* ¶¶ 75–81 (noting other less restrictive alternatives and accommodations that Plaintiffs are perfectly willing to accept and were abiding by for nearly two years prior to the institution of the Vaccine Mandate).)

And, as here, State Defendants' "compelling interest is further undermined by other salient facts. It has granted temporary medical exemptions . . . yet no reason is given for differentiating those [workers] from Plaintiffs." *Navy Seals 1-26*, 2022 WL 594375, at *12. Such disparate treatment "renders the vaccine requirements underinclusive," *id.* (cleaned up), and "underinclusiveness is often a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact compelling." *Id.* (cleaned up). Plaintiffs' have adequately pleaded that the Vaccine Mandate is not supported by a compelling interest because its differential

treatment of medical exemptions undermines State Defendants' purported interest. (V. Compl. ¶¶ 46–49, 84, 90, 93, 97, 99, 100.)

**2. Plaintiffs have sufficiently pleaded that the Vaccine Mandate is not the least restrictive means.**

State Defendants baldly assert that there are no less restrictive alternatives to compulsory vaccination for every healthcare worker in Maine, regardless of religious convictions. (State MTD 17–18.) This assertion is belied by the alternatives that are available to State Defendants. As the Supreme Court said in *Tandon*,

> narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. 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.

"It seems that nearly every other State has found that it can satisfy its COVID-19 public health goals without coercing religious objectors to accept a vaccine." *Dr. A.*, 142 S. Ct. at 557 (Gorsuch, J., dissenting). State Defendants' mere assertions that Maine "almost uniquely" must coerce vaccination "alone is sufficient to show that New York's law is not narrowly tailored." *Id.* But more specifically,

> Maine has not shown that its rule represents the least restrictive means available to achieve it[s interest]. The State says that, to meet its [goals], 90% of employees at covered health facilities must be vaccinated. The State doesn't offer evidence explaining the selection of its 90% figure. But even taking it as given, Maine does not explain how denying exemptions to religious objectors is essential to its achieving that threshold statewide, let alone in the [Plaintiffs'] 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. Current numbers may be even higher. What's more, healthcare providers that employ four of the nine [Plaintiffs] in this case already told the media more than a week ago that they have reached 95% and 94% vaccination rates among their employees. Many other States have made do with a religious exemption in comparable vaccine mandates. 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.

*Does 1-3*, 142 S. Ct. at 21–22 (Gorsuch, J., dissenting) (cleaned up).

Plaintiffs have adequately alleged all of this, have alleged that other less restrictive alternatives are available to State Defendants, and that the current "take the jab, or take a hike" policy is not the least restrictive means. (V. Compl. ¶ 137.; *see also* ¶¶ 75–81 (noting other less restrictive alternatives and accommodations that Plaintiffs are perfectly willing to accept and were abiding by for nearly two years prior to the institution of the Vaccine Mandate). "[D]efendants cannot rely on 'magic words'" to discharge their burden under strict scrutiny. *Navy Seal 1 v. Austin*, No. 8:21-cv-2429-SDM-TGW, 2022 WL 534459, at *18 (M.D. Fla. Feb. 18, 2022). Plaintiffs' well-pleaded allegations demonstrate that other, less-restrictive alternatives are available. Thus, Defendants have not and cannot "articulate why [Plaintiffs'] sincerely held religious practice must yield to the requirement to accept COVID-19 vaccination." *Id.*

## IV. PLAINTIFFS HAVE SUFFICIENTLY PLEADED A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment makes it unconstitutional for any state to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. "[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To plausibly plead a violation

of the Equal Protection Clause of the Fourteenth Amendment, Plaintiffs need only allege two elements: "(1) whether the [plaintiff] was treated differently than others similarly situated, and (2) whether such a difference was based on an impermissible consideration, such as [religion]." *Macone v. Town of Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002); *Rubinovitz v. Rogato*, 60 F.3d 906, 909–910 (1st Cir. 1995). Plaintiffs' complaint alleges the requisite elements, and therefore states a claim upon which relief may be granted.

**A. Plaintiffs Have Sufficiently Pleaded That the Vaccine Mandate Treats Similarly Situated Individuals Differently, Based on Religion, in Violation of Equal Protection.**

To demonstrate that Plaintiffs were treated differently than other similarly situated individuals, their complaint's task "was to identify and relate specific instances where persons situated similarly 'in all relevant aspects' were treated differently." *Dartmouth Rev. v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989), *overruled on other grounds by Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004). Specifically,

> The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated the relevant aspects are those factual elements which determine whether reasoned analogy supports, or demands a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.

*Bruns v. Mayhew*, 931 F. Supp. 2d 260, 267 (D. Me. 2013) (cleaned up) (quoting *Dartmouth Rev.*, 889 F.2d at 19)).

Here, Plaintiffs have alleged that the Vaccine Mandate purports to apply to all healthcare workers at designated facilities in Maine. (V. Compl. ¶¶ 41-43.) Yet, at the same time, the Vaccine Mandate provides allowance for exemption of some, but not all, such healthcare workers. (V. Compl. ¶¶ 46–49, 84, 90, 93, 97, 99, 100.) Specifically, Maine permits healthcare workers with nonreligious, medical objections to COVID-19 vaccination to be granted accommodation and

continue working. (*Id.*) Maine does not, however, allow healthcare workers with religious objections to COVID-19 vaccination to be granted accommodation on the same basis as those nonreligious, medical objections. (*Id.*) "Slice it how you will, medical exemptions and religious exemptions are on comparable footing when it comes to the State's asserted interests." *Does 1-3 v. Mills*, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting). Thus, Plaintiffs' Complaint has plainly alleged that healthcare workers with religious objections to the Vaccine Mandate are not treated equally to the similarly situated healthcare workers with nonreligious, medical objections. Unvaccinated healthcare workers are identically situated to other unvaccinated healthcare workers in the same facility, yet State Defendants' treat religious objectors to vaccination dissimilarly to nonreligious objectors. Plaintiffs' complaint plausibly alleges that the Vaccine Mandate treats similarly situated individuals differently.

### B. Plaintiffs Have Sufficiently Pleaded That the Removal of Previous Protections for Religious Beliefs Represents Animus in Violation of the Fourteenth Amendment Under *Romer*.

The Governor's Vaccine Mandate and the MCDC's removal of religious exemptions for healthcare workers in Maine, on their face and as applied, are each a "status-based enactment divorced from any factual context" and "a classification of persons undertaken for its own sake," which "the Equal Protection Clause does not permit." *Romer v. Evans*, 517 U.S. 620, 635 (1996). The Governor's COVID-19 Vaccine Mandate, on its face and as applied, "identifies persons by a single trait [religious beliefs] and then denies them protections across the board." *Id.* at 633. Under such a scenario, *Romer* demands a finding that the removal of protections that previously existed represents per se animus in violation of the Fourteenth Amendment. *See also Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (noting that denying one group of individuals protections of the law they previously enjoyed is "'inexplicable by anything but animus'"); *id.* at 2423 (Kennedy, J., concurring) (noting that "animosity to a religion" can be "subject to judicial review to determine

whether or not it is 'inexplicable by anything but animus'"). State Defendants' removal of access to religious exemptions from immunizations while retaining nonreligious exemptions results in a "disqualification of a class of persons from the right to seek specific protection [for their religious beliefs]." *Romer*, 517 U.S. at 633. Indeed, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek [an exemption from the COVID-19 Vaccine Mandate] is itself a denial of equal protection of the laws in the most literal sense." *Id.* Plaintiffs have sufficiently pleaded that there is no rational basis or sufficient justification for permitting one group of identically situated healthcare workers to continue to have access to an exemption while prohibiting those with religious beliefs from seeking and obtaining the same exemption.

### C. State Defendants Mistakenly Place All Their Defense Against Plaintiffs' Equal Protection Claim on a Purported Insufficiency of the Free Exercise Claim.

State Defendants claim that Plaintiffs' equal protection claims fail because their Free Exercise claims purportedly fail. (State MTD 19.) State Defendants thus hang their entire equal protection defense on the notion that the discriminatory removal of religious protections for healthcare workers survives First Amendment scrutiny. (*Id.*). For the reasons stated *supra*, however, Defendants' defenses to Plaintiffs' Free Exercise claims have no merit, and thus they cannot provide a basis for dismissal of Plaintiffs' equal protection claims.

Indeed, the failure of Plaintiffs' Free Exercise claims would not be enough to in any event. The First Circuit specifically said that "[i]t bears clarifying that we do not read this statement to be a blanket rule that where a Free Exercise Claim fails, all equal protection claims based on the same facts must also fail." *Wirzburger v. Glvin*, 412 F.3d 271, 282 n. 5 (1st Cir. 2005). State Defendants' disparate treatment of similarly situated healthcare workers must be evaluated on its

own under the Equal Protection Clause because Plaintiffs' claims "have independent force and must be evaluated accordingly." *Id.* As the Supreme Court has held,

> our analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws 'does not deny . . . the power to treat different classes of persons in different ways . . . (it denies) the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

*Johnson v. Robison*, 415 U.S. 361, 374 (1974) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Plaintiffs have plainly alleged that the classification differential between religious exemptions and nonreligious medical exemptions is arbitrary and bears no relation to the risk purportedly protected by the Vaccine Mandate. (V. Compl. ¶¶ 46–49, 84, 90, 93, 97, 99, 100; *see also* V. Compl. ¶¶ 155, 158, 160.)

Additionally, as discussed *supra*, State Defendants' inexplicable removal of religious exemptions while maintaining other exemptions bearing the same risk is not explainable by anything other than impermissible animus under *Romer*. And, such an impermissible denial of equal treatment fails rational basis, even if that is the appropriate standard, which it is not. *Smothers v. Benitez*, 806 F. Supp. 299, 304 (D.P.R. 1992) (noting that strict scrutiny is "triggered when suspect classifications such as race, religion, and national origin are involved").

## V. PLAINTIFFS' TITLE VII CLAIMS AGAINST PROVIDER DEFENDANTS ARE RIPE FOR ADJUDICATION BECAUSE PLAINTIFFS HAVE EXHAUSTED ADMINISTRATIVE REMEDIES AND OBTAINED NOTICES OF RIGHT TO SUE FROM THE EEOC.

### A. Plaintiffs Were Permitted to Bring Their Claims Seeking Emergency Relief Prior to Exhausting Administrative Remedies, and their Title VII Claims Ripen as Soon as the Administrative Process Is Exhausted.

Provider Defendants also contend that the action should be dismissed because Plaintiffs allegedly failed to satisfy Title VII's exhaustion requirement prior to filing suit. (NL MTD 15.) As the First Circuit has oft recognized, "'the exhaustion requirement is not a jurisdictional prerequisite' to filing a Title VII claim in federal court." *Verz v. McHugh*, 622 F.3d 17, 30 (1st Cir. 2010) (quoting *Frederique-Alexandre v. Dep't of Nat'l & Envtl. Res.*, 478 F.3d 433, 440 (1st Cir. 2007)). *See also Jorge v. Rumsfeld*, 404 F.3d 556, 565 (1st Cir. 2005) ("To be sure, an employee's failure to follow the administrative route to its due completion does not automatically doom a Title VII claim. The charge-filing requirement is mandatory but not jurisdictional."). And, because the requirement to obtain a right to sue letter is not jurisdictional, there is no basis to dismiss a claim where—as here—Defendants admit that Plaintiffs have obtained right to sue letters prior to the issue being addressed. (*See, e.g.*, NL MTD 15 n.18.) In fact, numerous courts have held that a Title VII plaintiff who obtains a right to sue letter shortly after the filing of the complaint should not suffer dismissal on that non-jurisdictional basis alone. *See, e.g., Portis v. State of Ohio*, 141 F.3d 632, 634 (6th Cir. 1998) ("We see no reason to bar Portis's claim solely on the grounds of a non-jurisdictional requirement whose brief absence causes Ohio no prejudice in this case."); *Perkins v. Silverstein*, 939 F.2d 463, 471 (7th Cir. 1991); *Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412, 1418 n.2 (D.C. Cir. 1983); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1525 (11th Cir. 1983); *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1095 n.13 (5th Cir. 1981); *Henderson v. Eastern Freight Ways, Inc.*, 460 F.2d 258, 260 (4th Cir. 1972)

As the Fifth Circuit has recognized,

> A Title VII action filed prior to the receipt of statutory notice of the right to sue does not preclude the EEOC from performing its administrative functions, and it is unlikely that permitting the subsequent receipt of a right-to-sue letter to cure the filing defect will encourage plaintiffs to attempt to bypass the administrative process because premature suits are subject to a motion to dismiss at any time before notice of the right to sue is received.

*Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1218 (5th Cir. 1982).

Moreover, this Court has, itself, recognized that a Plaintiff should not be barred from pursuing her Title VII claims is she obtains a right to sue letter shortly after the institution of the complaint. *See Tardif-Brann v. Kennebec Valley Cmty. Action Prog.*, No. Civ. 04-132-B-S, 2005 WL 1712421, *7 (D. Me. July 21, 2005) ("recognizing a narrow equitable exception to the requirement that a plaintiff wait to file suit until after a right to sue letter is in his or her possession . . . when the right-to-sue letter is received by the plaintiff shortly after filing his or her case and before the defendant raises the statutory bar by way of dispositive motion, assuming that the defendant fails to demonstrate any prejudice").

Put simply, "a failure to obtain a right-to-sue letter [prior to filing suit] is curably at any point during the pendency of the action." *Angelino v. New York Times Co.*, 200 F.3d 73, 96 (3d Cir. 1999). *See also Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412, 1418 n.12 (D.C. Cir. 1983) ("Receipt of a right-to-sue notice during the pendency of the Title VII action cures the defect caused by the failure to receive a right-to-sue notice before filing a Title VII claim in federal court."). The reason for this is simple, a Title VII plaintiff has the right to resort to an Article III court's incidental equity jurisdiction to preserve the status quo while he seeks to satisfy the exhaustion requirement. *See, e.g., Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 844 (2d Cir. 1981) ("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 the ripening of the claim for judicial action on its merits.") This is precisely what Plaintiffs sought in the instant action, and Plaintiffs' Title VII claims have ripened already in the form of Right to Sue letters from the EEOC.

### B. Even if Exhaustion Was Required Prior to Filing a Complaint Seeking Emergency Injunctive Relief, the Remedy Is the Filing of an Amended Complaint, Not Dismissal.

Even if Provider Defendants' claim is correct that Plaintiffs must exhaust administrative remedies before bringing claims in federal court, a dubious assertion given the emergency nature of the requested relief in the instant matter, the remedy is a dismissal without prejudice and allowing a plaintiff to cure the exhaustion requirement and file an amended complaint. *See, e.g.*, *Lebron-Rios v. U.S. Marshall Serv.*, 341 F.3d 7, 13-15 (1st Cir. 2003). *See also Weber v. Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000) (affirming dismissal for failure to exhaust administrative remedies but noting that it must be without prejudice as to the refiling of the complaint once exhaustion is cured); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 31-35 (1st Cir. 2000) (vacating a dismissal with prejudice and remanding for dismissal "without prejudice to refiling after exhaustion"). And, this is particularly true where—as here—Plaintiffs "have stated viable claims for relief under Title VII." *Lebron-Rios*, 341 F.3d at 12. This precedent is all the more instructive where—as here—Plaintiffs have already exhausted their administrative remedies and received final notices of right to sue. (*See* Doc. # (notice of filing EEOC right to sue letters).)

## VI. PLAINTIFFS HAVE SUFFICIENTLY PLEADED A VIOLATION OF TITLE VII BY THE PROVIDER DEFENDANTS.

### A. Plaintiffs Have Sufficiently Pleaded a *Prima Facie* Case of Religious Discrimination.

To state a claim under Title VII and a *prima facie* case of religious discrimination, Plaintiffs need only allege "(1) a bona finde religious practice conflicts with an employment requirement,

(2) that he or she brought the practice to the employer's attention; and (3) that the religious practice was the basis for an adverse employment action." *Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, inc.*, 673 F.3d 1, (1st Cir. 2012). Once Plaintiffs have satisfied the requisite pleading elements, "the employer must show that it offered a reasonable accommodation *or* that a reasonable accommodation would be an undue burden." *Id.* Plaintiffs have easily satisfied the pleading requirements for a Title VII violation and that Defendants have failed to demonstrate the requisite burden under Title VII. Provider Defendants' Motions should be denied.

**1. Plaintiffs have sufficiently pleaded that they have bona fide religious objections that interfere with Provider Defendants' employment requirements.**

Plaintiffs have plainly alleged that they have sincerely held religious objections that preclude them from complying with the Provider Defendants' COVID-19 Vaccine Mandate. (V. Compl. ¶ 1 ("Plaintiffs . . . have sincerely held religious objections to the Governor's mandate that all healthcare workers in Maine must receive a COVID-19 vaccine by October 1, 2021"); *id.* ¶8 ("Plaintiffs are all healthcare workers in Maine who have sincerely held religious beliefs that preclude them from accepting any of the COVID-19 vaccines because of the vaccines' connections to aborted fetal cell lines and for other religious reasons that have been articulated to Defendants."); *id.* ¶¶10-18 (noting that Plaintiffs are healthcare workers in the State of Maine subject to State Defendants' COVID-19 Vaccine Mandate but who have sincerely held religious objections to accepting or receiving the COVID-19 vaccine); *id.* ¶¶50-74 (alleging the sincerely held religious beliefs of Plaintiffs that preclude them from complying with the State Defendants' mandate or the Provider Defendants' employment requirements to obtain a COVID-19 vaccine).)

**2. Plaintiffs have sufficiently pleaded that they raised their religious objections to the Provider Defendants while seeking an accommodation under Title VII.**

Plaintiffs have plainly alleged that they raised their objections with their Provider Defendant employers. (V. Compl. ¶¶ 10–14, 17–18 (noting that Plaintiffs submitted written requests for exemption from the vaccine mandate to their employers and outlined their religious objections to accepting or receiving the vaccine), ¶¶ 82–95 (same).)

**3. Plaintiffs have sufficiently pleaded that their religious objections and practices were the basis for Provider Defendants' adverse employment actions.**

Plaintiffs have plainly alleged that their religious objections and inability to comply with Provider Defendants' Vaccine Mandate was the basis for Defendants' adverse employment action against them. (V. Compl. ¶¶ 10-19 (alleging that Provider Defendants denied Plaintiffs' requested religious exemptions.) Provider Defendants do not and cannot contest that Plaintiffs' religious objection was the basis for their termination, as Provider Defendants contend that they were forced to terminate Plaintiffs for refusal to comply with a vaccine mandate. (MH MTD 6-8; NL MTD 11 n.6.)

**B. Plaintiffs Have Sufficiently Pleaded That Granting Them Religious Accommodations Under Title VII Is Not an Undue Hardship.**

**1. Compliance with Title VII is not and cannot be an undue hardship.**

Provider Defendants' primary contention concerning their utter refusal to comply with the demands of Title VII is that State Defendants' revocation of religious exemptions from the COVID-19 Vaccine Mandate are not inconsistent with Title VII, and thus they need not comply. (MaineHealth MTD 7-8; NL MTD 12-13). Provider Defendants are wrong, and the allegations of Plaintiffs' Complaint preclude dismissal on these grounds, as does Title VII itself. Title VII plainly requires that every employer with over 15 employees (which includes all Employer Defendants

(V. Compl. ¶ 171)) must provide religious accommodations "unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship." 42 U.S.C. § 2000e(j). *See also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) ("the employer's statutory obligation to make reasonable accommodation for the religious observance of its employees, short of incurring an undue hardship, **is clear**" (emphasis added)). Despite that mandate of federal law, State Defendants have issued a wholesale revocation of religious exemptions and accommodations for healthcare workers and abolished the entire exemption and accommodation process under Title VII for religious objectors. (V. Compl. ¶ 46 (noting that Maine "eliminate[d] the ability of health care workers in Maine to request and obtain a religious exemption and accommodation from the COVID-19 Vaccine Mandate").) Additionally, State Defendants made it abundantly clear that "[t]he health care immunization law **has removed the allowance for philosophical and religious exemptions**." (V. Compl. ¶ 49 (quoting Division of Disease Surveillance, *Maine Vaccine Exemption Law Change 2021*, https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/maine-vaccine-exemption-law-changes.shtml (emphasis added)).)

Thus, Title VII's requirement that employers provide at least a process for seeking an accommodation for an employee's sincerely held religious beliefs, and State Defendants' refusal to provide such a process, are in direct conflict. Under such a scheme, the Supremacy Clause demands that all Defendants comply with Title VII. 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) (emphasis added). Provider Defendants take great pains to suggest that Maine's refusal to extend religious protections is not preempted by Title VII's

demand that employers provide a reasonable accommodation for religious beliefs. This is incorrect. Title VII supersedes state laws where—as here—"compliance with both federal and state regulations is a physical impossibility." *California Fed. Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 281 (1987) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

Moreover, regardless of whether Provider Defendants believe that an accommodation is possible under Title VII, the question of whether application of State Defendants' Vaccine Mandate and Provider Defendants' refusal to accommodate Plaintiffs' religious objections constitutes an undue burden under Title VII is a question of fact not suitable for determination on a motion to dismiss. Indeed, "[w]hether an accommodation is reasonable is a question of fact." *Antione v. First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013). *See also McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992) ("As for the balance between reasonable accommodation and undue hardship, **these matters are questions of fact and thus generally inappropriate for resolution on the pleadings**" (emphasis added)); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 877 (9th Cir. 1989) ("whether a particular accommodation would have imposed an undue hardship on the employer is a question of fact"); *Walsh v. Coleman*, No. 3:19-cv-980 (JAM), 2020 WL 7024927, *6 (D. Conn. Nov. 30, 2020) ("Undue hardship is a question of fact" inappropriate for determination at the motion to dismiss stage); *Menuel v. Hertz Corp.*, No. 1:07-CV-3031-JTC-RGV, 2008 WL 11322934, *4 (M.D. Ga. Nov. 10, 2008) (noting that the questions surrounding an undue burden "is a question of fact that will depend on a variety of factors . . . thus precluding dismissal of the Title VII claim."); *Doe 1 v. NorthSHore Univ. Healthsystem*, No. 21-cv-05683, 2021 WL 5578790, * (N.D. Ill. Nov. 30, 2021) ("whether an employer can 'reasonably accommodate a person's religious beliefs without undue hardship is basically a question of fact.'"

(quoting *Minkus v. Metro. Sanitary Dist. Of Greater Chicago*, 600 F.2d 80, 81 (7th Cir. 1979)). Thus, resolving Provider Defendants' contentions concerning any purported hardship is inappropriate at this juncture.

**2. State Defendants' own response states that Provider Defendants would not be prohibited from providing a religious accommodation under Title VII.**

Provider Defendants' assertions of an undue hardship for violating state law also fails for a separate and independent reason (at least under State Defendants' own response in this Court); the State claims it would not be a violation of state law for Provider Defendants to offer an accommodation under Title VII. Indeed, State Defendants claim, "**the Department published guidance explaining that the Rule does not prohibit employers from providing accommodations under Title VII**." (State MTD 18-19 (citing Health Care Workers Vaccination FAQs, https://www.maine.gov/covid19/vaccines/public-faq-health-care-worker-vaccniation (bold emphasis added).) State Defendants continue:

> A 2019 Maine law eliminated religious exemptions from Maine DHHS immunization rules, including the health care worker immunization rule. However, Federal civil rights laws, such as Title VII of the Civil Rights Act, continue to apply to some employers. **The [R]ule does not prohibit employers from providing accommodations for employees' sincerely held religious beliefs, observances, or practices that may otherwise be required by Title VII and other federal civil rights laws**. The [Rule does not] expand the scope of the federal civil rights laws or otherwise require employers to provide religious exemptions. However, . . . if such accommodations are provided by a [DHCF, those accommodations] must comply with the [R]ule.

(*Id.* (emphasis added).)

Defendants cannot have their cake and eat it too, relying on the Vaccine Mandate to say it would be an undue hardship to violate state law while at the same time espousing that the Vaccine Mandate does not prohibit employers from providing an accommodation under Title VII. It must

be one or the other but cannot be both. If the State Defendants prohibit such an accommodation, then compliance with such a rule would violate Title VII by prohibiting that which Title VII requires. If State Defendants do not prohibit such an accommodation under Title VII, then Provider Defendants cannot claim an undue hardship for violating a state law that does not prohibit providing Plaintiffs with accommodations.

At minimum, however, the inconsistency in the positions of the State Defendants and the Provider Defendants—coupled with the well-pleaded allegations of Plaintiffs' Complaint—demonstrates that Plaintiffs have at least stated plausible claim under Title VII. There are too many factual inquiries concerning an alleged undue hardship—which is itself a question of fact—to warrant a dismissal of Plaintiffs' Complaint.

**3. Title VII preempts Maine's Vaccine Mandate and thus Provider Defendants cannot claim the Vaccine Mandate shelters them from Title VII Claims.**

Provider Defendants also contend that Plaintiffs' Complaint should be dismissed because Title VII does not preclude application of State Defendants' mandate. (NL MTD 11-13; MaineHealth MTD 7-8.) Under the plain language of Title VII, Maine's refusal to recognize and accommodate Plaintiffs' sincerely held religious beliefs is preempted and overridden by Title VII. Indeed,

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, **other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter**.

42 U.S.C. § 2000e-7 (emphasis added). Thus, because Maine's rule revoking religious exemptions and accommodations "purports to require" discrimination on the basis of religion, and purports to abolish the exemption and accommodation procedure explicitly provided in Title VII, each of

which are "an unlawful employment practice" under Title VII, *see* 42 U.S.C. §2000e-2(a), Maine's rules are superseded and preempted by Title VII.

In addition to the explicit textual preemption of Title VII, abundant precedent demonstrates that Maine cannot require employers to engage in a practice that is unlawful under Title VII. *See, e.g., Coalition for Economic Equality v. Wilson*, 122 F.3d 692, 710 (9th Cir. 1997) (noting that Title VII preempts state laws that "purport to require the doing of any act which would be an unlawful employment practice under Title VII"); *Brown v. City of Chicago*, 8 F. Supp. 2d 1095, 1112 (N.D. Ill. 1998) (noting that Congress "'intended to supercede [*sic*] all provisions of State law which require or permit the performance of an act which can be determined to constitute an unlawful employment practice under the terms of Title VII of the Act or are inconsistent with any of its purposes'" (quoting *Rinehart v. Westinghouse Elec. Corp.*, No. C 70-537, 1971 WL 174, *2 (N.D. Ohio Aug. 20, 1971)); *LeBlanc v. S. Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 608 (E.D. La. 1971) (noting that Louisiana's employment law provisions that conflict with Title VII "are invalid under the Supremacy Clause"). Moreover, Provider Defendants are not permitted to rely upon Maine's revocation of protections for religious objectors as a defense to refusing to do what Title VII requires. *See, e.g., Guardians Ass'n v. Civil Serv. Comm.*, 630 F.2d 79, 104–105 (2d Cir. 1980) ("Nor can the City justify the use of rank-ordering by reliance on what it contends are requirements of state law. Title VII explicitly relieves employers from any duty to observe a state hiring provision "which purports to require or permit" any discriminatory employment practice." (citation omitted).

## VII. PLAINTIFFS HAVE STATED A CLAIM FOR CONSPIRACY TO VIOLATE CIVIL RIGHTS.

State Defendants contend that Plaintiffs have not stated a claim for violation of 42 U.S.C. § 1985(3) because their allegations of conspiracy are conclusory and unspecific. (State MTD 20.)

Provider Defendants contend that—in a rather conclusory manner themselves—that Plaintiffs cannot state a claim for relief under 42 U.S.C. §1985(3). (NL MTD 14-15; MaineHealth MTD 11.) Once again, however, Defendants base all their arguments on the fact that this Court and the First Circuit held that Plaintiffs are unlikely to succeed on the merits of their claims. (MaineHealth MTD 11; NL MTD 14.) As demonstrated in Part I, *supra*, however, the standards applicable to obtaining a preliminary injunction are for more stringent than those applicable to merely stating a claim under Rule 12(b)(6). Again, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl.*, 550 U.S. at 556 (cleaned up). Plaintiffs easily satisfy that threshold.

Here, Plaintiffs need only allege four elements:

> (1) a conspiracy; (2) for the purposes of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws . . . (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

*United Brotherhood of Carpenters & Joiners of Am. Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29 (1983); *Perez-Sanchez v. Public Hous. Auth.*, 531 F.3d 104, 107 (1st Cir. 2008) (same).

### A. Plaintiffs Have Sufficiently Pleaded That Defendants Entered Into an Agreement to Deprive Plaintiffs of Their Cherished Constitutional Rights.

"Generally, a conspiracy requires a meeting of the minds to achieve and unlawful end," *Rolon v. Rafael Rosario & Assoc., Inc.*, 450 F. Supp. 2d 153, (D.P.R. 2006), and adequately alleging a conspiracy requires only "minimum factual support of the existence of a conspiracy." *Francis-Sobel v. Univ. of Maine*, 597 F.2d 15, 17 (1st Cir. 1979). And, as conspirators often do not announce their intentions to conspire to violate civil rights, "[w]ithout direct evidence of such an agreement . . . the plaintiff must plead plausible factual allegations sufficient to support a

reasonable inference that such an agreement was made." *Parker v. Landry*, 935 F.3d 9, 17-18 (1st Cir. 2019)

Plaintiffs have more than sufficiently alleged minimum factual support for their claims. the Governor's own press release announcing her mandate that all healthcare workers in Maine receive the COVID-19 vaccine states that Defendants agree with her concerning its provisions. For example, Defendant MaineHealth has stated that it agreed with the Governor's decision to mandate the vaccine and prohibit religious exemptions from it. (V. Compl. ¶¶185-186.) Defendant Northern Light was even more explicit in its confirmation of agreement with the Governor's mandate when it stated that "*Governor Mills' decision to require vaccination of health care workers is another example of close alignment between the government and the health care community*." (V. Compl. ¶187 (italics original).)

And, if the statement of Defendants were somehow insufficient to demonstrate their express agreement with the Governor to enforce her COVID-19 Vaccine Mandate without providing any religious exemptions whatsoever, the actions and statements of Defendants demonstrate their agreement. MaineHealth's agreement with the Governor to deprive Plaintiffs of their constitutionally protected liberties is evidenced in its denial of Jane Doe 1's request for a religious exemption and accommodation. (V. Compl. ¶185.) Specifically, the statement that MaineHealth is "**no longer able to consider religious exemptions for those who work in the state of Maine**." (*Id.* and Ex. A t 2 (emphasis added)) demonstrates that MaineHealth has reached an agreement with the Governor to refuse requests for religious exemptions based on the State's mandate.

These statements and actions have more than demonstrated Defendants' agreement to deprive Plaintiffs of their constitutionally protected liberties. "In order to maintain an action under

Section 1985, a plaintiff 'must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express **or tacit**, to achieve an unlawful end.'" *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (quoting *Romer v. Morganthau*, 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000)) (emphasis added). Defendants' representations—in public—that they are in lockstep with the Governor that Plaintiffs must receive the COVID-19 vaccine and that no religious accommodations are available plainly demonstrates a tacit—if not express—agreement to preclude Plaintiffs from seeking and receiving a religious accommodation to the COVID-19 Vaccine mandate.

### B. Plaintiffs Have Sufficiently Pleaded That Defendants Acted With a Conspiratorial Purpose and Committed Overt Acts in Furtherance of the Conspiracy.

To satisfy the conspiratorial purpose allegation requirement, Plaintiffs need only "allege fact that would permit us plausibly to infer an agreement among the defendants, motivated by some discriminatory animus." *Parker,* 935 F.3d at 18. *See also Grendell v. Maine,* No. :19-cv-419-JDL, 2020 WL 3895765, *4 (D. Me. July 10, 2020) (As to the second element—'it has long been established that a claim under §1985(3) requires some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (quoting *Perez-Sanchez,* 531 F.3d at 107)). And, a conspiratorial purpose to deprive Plaintiffs of their First Amendment rights satisfies the discriminatory animus sufficient for a conspiratorial purpose. *Perez-Sanchez,* 531 F.3d at 109 (noting that Section 1985(3) claims extend to "members of recognized classifications such as race, sex, religion, or national origin" (citting *Brown v. Reardon,* 770 F.2d 896, 906 (10th Cir. 1985)); *Palm v. Sisters of Charity Health Sys.*, No. 07-120-B-W, 2008 WL 2229764, *2 (D. Me. May 28, 2008) (noting that conspiracies to deprive a plaintiff of his First Amendment rights is actionable if state action is involved).

Plaintiffs have sufficiently alleged a conspiratorial purpose of Defendants' agreement to deprive Plaintiffs of their constitutionally and statutorily protected rights to a religious accommodation that is manifested by Defendants' overt acts in furtherance of the conspiratorial agreement. Plaintiffs have plausibly alleged that State Defendants engaged in an overt act in furtherance of the conspiracy by removing all religious protections from mandatory vaccines via the agency rule change. (*See, e.g.*, V. Compl. ¶¶46-49.) Indeed, on August 14, 2021, Dr. Shah and the MCDC amended 10-144 C.M.R. Ch. 264 to eliminate the ability of health care workers in Maine to request and obtain a religious exemption and accommodation from the COVID-19 Vaccine Mandate. (V. Compl. ¶46.) The only exemptions Maine now lists as available to health care workers are those outlined in 22 M.R.S. § 802.4-B, which purports to exempt only those individuals for whom an immunization is medically inadvisable and who provide a written statement from a doctor documenting the need for an exemption, despite the fact that the prior version of the rule permitted religious exemptions. (V. Compl. ¶¶47-48.) Moreover, State Defendants engaged in an overt act of purporting to deny religious exemptions by publicly stating to the public that religious accommodations and exemptions were no longer permissible in Maine, regardless of federal law's requirement that such accommodations be made available to conscientious and religious objectors. (V. Compl. ¶49).

Plaintiffs have plausibly alleged that Provider Defendants engaged in an overt act in furtherance of their conspiratorial purpose by falsely stating to their employees that religious exemptions, **including those offered and mandated by federal law**, were inapplicable in Maine. (*See, e.g.*, V. Compl. ¶¶1, 82-95.)

Thus, Defendants have all engaged in overt acts in furtherance of their conspiracy and conspiratorial motives by publicly stating—falsely—that no protections or accommodations were

available to those individuals who might have sincerely held religious objections to the COVID-19 Vaccine Mandate. Plaintiffs' have plausibly alleged that those statements to the public and the explicit denials of religious exemptions to Plaintiffs on the false premise that federal protections do not apply in Maine are overt acts in furtherance of Defendants' conspiracy to dissuade Plaintiffs from seeking an accommodation for their sincerely held religious belief and to refuse to consider and deny Plaintiffs' request for a religious accommodation to which the law entitles them.

### C. Plaintiffs Have Sufficiently Pleaded That Defendants Deprived Them of Their Constitutionally Protected Civil Rights to Equal Protection and Religious Free Exercise.

Plaintiffs have adequately alleged that Defendants have actually deprived Plaintiffs of their protected civil liberties in violation of 42 U.S.C. §1985(3). Indeed, Plaintiffs' Complaint alleges that Jane Doe 2 was terminated from her position for her refusal to accept a vaccine that violates her sincerely held religious beliefs. (V. Compl. ¶11.) Defendants have also informed Plaintiffs—who still had jobs at the time of the filing of the Complaint—that as of October 1, they will be terminated if they refuse to accept the COVID-19 vaccine regardless of their sincerely held religious objections to it. (V. Compl. ¶¶82-95, 104-116.) Thus, Plaintiffs have adequately alleged an actual deprivation of constitutionally protected rights and an injury to their person. *See Diva's, Inc. v. City of Bangor*, 176 F. Supp. 2d 30, 37 (D. Me. 2001).

## CONCLUSION

Because this Court must accept, as true, the allegations of Plaintiffs' Verified Complaint and because those allegations make plausible claims under the First and Fourteenth Amendments, Title VII to the Civil Right Act, and 42 U.S.C §1985, Defendants Motions should be denied.

Respectfully submitted,

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