No. 24-1283

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALICIA LOWE; DEBRA CHALMERS; JENNIFER BARBALIAS; GARTH BERENYI; NICOLE GIROUX; ADAM JONES; NATALIE SALAVARRIA,

Plaintiffs–Appellants,

v.

JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services, PUTHEIRY VA, in her official capacity as Director for the Maine Center for Disease Control and Prevention,

Defendants–Appellees.

On Appeal from the United States District Court for the District of Maine
In Case No. 1:21-cv-242-JDL before The Honorable John D. Levy

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Appellants respectfully request that oral argument be permitted because it would assist the Court in understanding and deciding the weighty constitutional issues presented by the State Defendants' COVID-19 vaccine mandate and their efforts to escape review of their unconstitutional actions.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because it is from the district court's order granting Defendants' Motions to Dismiss Surviving Claims as Moot (Addendum 001–021) and its Judgment of Dismissal (Addendum 022), both entered February 23, 2024. Plaintiffs timely noticed their appeal on March 2, 2024. (Appendix 179.) The district court had jurisdiction under 28 U.S.C. §1331 because Plaintiffs' Complaint asserted claims under the First and Fourteenth Amendments to the United States Constitution, Title VII of the Civil Rights Act, and 42 U.S.C. §1985.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the district court erred in finding that Plaintiffs' First Amended Verified Complaint mounted only an as-applied challenge to State Defendants' COVID-19 Vaccine Mandate, which consisted of the emergency rule and the statute, rather than the facial and as-applied challenges Plaintiffs plainly stated they were raising in their claims.

(2) Whether the district court erred in finding that State Defendants had satisfied their formidable burden to demonstrate that Plaintiffs' claims were moot.

(3) Whether the district court erred in finding that, despite the suspicious timing of their repeal, State Defendants had nevertheless satisfied their formidable

burden to demonstrate that the voluntary cessation exception to mootness did not apply.

(4) Whether the district court erred in finding that Plaintiffs' claims were not capable of repetition yet evading review.

(5) Whether the district court erred in denying Plaintiffs leave to further amend their complaint.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

A. State Defendants' Vaccine Mandate.

On August 12, 2021, Governor Mills announced that Maine would require health care workers to receive one of the three, then-available COVID-19 vaccines to remain employed in the healthcare profession. (App. 044, First Amend. V. Compl. ("FAVC") ¶31.) The Governor's announcement defined health care workers 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." (*Id.*, ¶32.) State Defendants threatened to enforce the vaccination mandate by revoking the licenses of all health care employers who failed to mandate that all employees receive the COVID-19 vaccine. (App. 045, FAVC ¶34.) As this

Court previously recognized, the Vaccine Mandate challenged by Plaintiffs "is the product of th[e] rule and the related state statutes." *Lowe v. Mills*, 68 F.4th 706, 711 (1st Cir. 2023). The district court, in its first dismissal of Plaintiffs' Complaint, likewise recognized that the emergency rule and the statute both operated "in tandem" to effectuate the injury Plaintiffs alleged. *Lowe v. Mills*, No. 1:21-cv-242-JDL, 2022 WL 3542187, *5 (D. Me. Aug. 18, 2022) ("DHHS's removal of the religious and philosophical exemptions in April 2021 served to conform the Rule to the requirements of the statute, 22 M.R.S.A. §802(4-B), *which operate in tandem*. (emphasis added).)

1. The Emergency-Turned-Permanent Rule.

In general, Maine law has long required certain licensed healthcare facilities to require certain forms of vaccination for healthcare workers. *Lowe*, 68 F.4th at 709-10. And, since 2001, the Maine Department of Health and Human Services ("MDHHS") has been delegated authority to designate the diseases against which a healthcare worker is required to be vaccinated. *Id.* at 710. In August 2021, the Maine Center for Disease Control and Prevention ("MCDC") issued an emergency rule that added COVID-19 to the list of diseases against which healthcare workers must be vaccinated. (App. 045, FAVC ¶36.) Effective on September 1, 2021, 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 vaccination mandate. (*Id.*, ¶36.) The only exemptions Maine now lists as available to healthcare workers are those outlined in 22 M.R.S. § 802.4-B, which exempts only those individuals for whom an immunization is medically inadvisable and who provide a written statement from a doctor. (*Id.*, ¶37.)

Under the prior version of the rule, 10-144 C.M.R. Ch. 264, § 3-B, a healthcare worker could be exempt from mandatory immunizations if the "employee states in writing an opposition to immunization because of a sincerely held religious belief." (*Id.*, ¶38.) As acknowledged by MCDC, Maine removed the religious exemption to mandatory immunizations effective September 1, 2021. (*Id.*, ¶39 ("The health care immunization law has removed the allowance for philosophical and religious exemptions and has included influenza as a required immunization."). MDHHS made the Emergency Rule *permanent* in November 2021. *Lowe*, 68 F.4th at 711. Permanent, that is, only until this Court reversed the earlier dismissal, the effect of which was to require State Defendants to submit to discovery concerning their Mandate, at which point State Defendants promptly and suspiciously repealed the "permanent" rule. (*See infra* Stmt. of the Case, Section III.)

2. The Statute.

Much like the emergency-turned-permanent rule requiring healthcare workers in Maine to receive COVID-19 vaccination as a condition of employment, Maine's legislature statutorily removed the availability of religious exemptions from

compulsory vaccination. (Addendum 006 (citing 22 M.R.S.A. §802).) Prior to 2019, Maine permitted healthcare workers to request and receive three potential accommodations from compulsory vaccination: (1) a medical exemption, (2) a religious exemption, and (3) a philosophical exemption. *See Lowe*, 2022 WL 3542187, *4 (citing the previous version of 22 M.R.S.A. s802(4-B)(A), (B) (2019)). (App. 045, FAVC ¶38.) The medical exemption was available for anyone "who provided a physician's written statement that immunization . . . *may be* medically inadvisable." *Lowe*, 2022 WL 3542187, *4. The religious and philosophical exemptions were available to those "who stated in writing a sincere religious or philosophical belief that is contrary to the immunization requirement." *Id*. The State revoked the religious and philosophical exemptions in 2019, but retained a slightly modified version of the medical exemption. *Lowe*, 68 F.4th at 710 (noting that the medical exemption was now available if a licensed physician, nurse practitioner or physician assistant stated that the immunization "may be medically inadvisable"). MDHHS made the removal of the religious and philosophical exemptions applicable to healthcare workers in September 2021. (App. 045, FAVC ¶39.)

B. Plaintiffs' Sincerely Held Religious Beliefs.

Plaintiffs have sincerely held religious beliefs that precluded them from receiving any of 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. (App. 046, FAVC ¶40.) A fundamental component of Plaintiffs' sincerely held religious beliefs is that all life is sacred, from the moment of conception to natural death, and that abortion is the murder of an innocent life and a grave sin against God. (*Id.*, ¶41.) Plaintiffs' 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.*, ¶42. (quoting *2 Timothy* 3:16 (KJV).) Because of that sincerely held religious belief, Plaintiffs must conform their lives, including their decisions relating to medical care, to the commands and teaching of Scripture. (*Id.*, ¶43.)

Plaintiffs have sincerely held religious beliefs that God forms children in the womb and knows them prior to their birth, and that life is sacred from the moment of conception. (*Id.*, ¶44 (quoting, *inter alia*, *Psalm* 139:13–14 (ESV) ("For you formed my inward parts; you knitted me together in my mother's womb. I praise you, for I am fearfully and wonderfully made."); *Psalm* 139:16 (ESV) ("Your eyes saw my unformed substance; in your book were written, every one of them, the days that were formed for me, when as yet there was none of them."); *Isaiah* 44:2 (KJV) ("the LORD that made thee, and formed thee from the womb").)

Plaintiffs also have sincerely held religious beliefs that every child's life is sacred because every child is made in the image of God. (App. 047, FAVC ¶45

(quoting *Genesis* 1:26–27 (KJV) ("Let us make man in our image, after our likeness. . . . So God created man in his own image; in the image of God created he him; male and female created he them.").) Plaintiffs also have sincerely held religious beliefs that 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.*, ¶46 (quoting, *inter alia*, *Exodus* 20:13 (KJV) ("Though shalt not kill."); *Exodus* 21:22–23 (setting the penalty as death for even the accidental killing of an unborn child); *Exodus* 23:7 (KJV) ("the innocent and righteous slay thou not, for I will not justify the wicked").)

Plaintiffs 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, contrary to the Scripture, and must be denounced, condemned, and avoided altogether. (*Id.*, ¶48.) Plaintiffs believe that it is an affront to Scripture's teaching that all life is sacred for them to use a product derived from or connected in any way with abortion. (App. 048, FAVC ¶49.) Plaintiffs' sincerely held religious beliefs precluded them from accepting any one of the three available COVID-19 vaccines because of their undisputed connection to aborted fetal cell lines. (*Id.*, ¶50.)

In particular, the Johnson & Johnson (Janssen Pharmaceuticals) vaccine unquestionably used aborted fetal cells lines in its production and manufacture. (*Id.*,

¶51.) As reported by the North Dakota Department of Health, in its handout literature for those considering one of the COVID-19 vaccines, "[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.*, ¶52.) 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.*, ¶53.) Scientists at the American Association for the Advancement of Science have likewise published research showing that the Johnson & Johnson vaccine used aborted fetal cell lines in the development and production phases of the vaccine. (App. 049, FAVC ¶54.)

Similarly, the Moderna and Pfizer/BioNTech COVID-19 vaccines also have their origins in research using aborted fetal cell lines. (*Id.*, ¶55.) 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.*, ¶56.) The Louisiana Department of Health's publications confirm that aborted fetal cells lines were used in the "proof of concept" phase of the development of their COVID-19 mRNA vaccines. (*Id.*, ¶57.)

Because all three of the then-available COVID-19 vaccines were developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell lines HEK-293 and PER.C6, Plaintiffs' sincerely held religious beliefs compelled them to abstain from obtaining or injecting any of these products into their body, regardless of the perceived benefit or rationale.

C. Defendants' Refusal To Grant Religious Exemptions And Their Preference For Non-Religious Medical Exemptions.

As demonstrated *supra*, Maine's Mandate for Plaintiffs to accept and receive a COVID-19 vaccination contained only one potential exemption: a nonreligious medical exemption. (*Supra* Section I.A.) (*See also* App. 045, FAVC, ¶¶36-39.) The option to obtain an exemption and accommodation for Plaintiffs' sincerely held religious beliefs was revoked by Maine, and precluded Plaintiffs from obtaining that which the First Amendment and federal law required. And, it was not merely theoretical that Plaintiffs' religious beliefs were relegated to subservient status—they were explicitly told by their employers that Maine prohibited the employers from offering or providing any respect for their religious beliefs.

In its response to Plaintiff Lowe, MaineHealth indicated it was perfectly willing to accept and grant medical exemptions but not religious exemptions. (App. 057, FAVC ¶88). Specifically, MaineHealth stated to Plaintiff Lowe: "You submitted a religious exemption, 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." (*Id.*) To add clarity to Plaintiff Lowe's disfavored status, MaineHealth stated: "If you seek an accommodation other than a religious exemption from state mandated vaccine, please let us know." (App. 058, FAVC ¶90.)

Plaintiff Barbalias' employer, Northern Light Eastern Maine Medical Center, indicated her request for a religious accommodation was impermissible and that only medical exemptions would be considered or approved. (*Id.*, ¶ 91.) Specifically, Northern Light stated that "the only exemptions that may be made to this requirement are medical exemptions" and that all Northern Light employees must comply with the Governor's Vaccine Mandate "except in the case of an approved medical exemption." (*Id.*)

Plaintiff Giroux's employer, MaineGeneral, stated that all healthcare workers must comply with the Vaccine Mandate "unless they have a medical exemption," and that the "mandate states that only medical exemptions are allowed, no religious exemptions are allowed." (*Id.*, ¶92.)

It was by force of State Defendants' COVID-19 vaccination mandate that private employers prohibited Plaintiffs from receiving accommodations for their sincere religious convictions, and terminated them. State Defendants created a two-tiered system of exemptions, and placed religious beliefs and those who hold them in a class less favorable than other exemptions that Defendants were perfectly

willing to accept. Under the State's scheme of creating a disfavored class of religious exemptions, employers were not even permitted to *consider* religious exemptions, much less grant them to those who have sincerely held religious objections to the COVID-19 vaccines.

II. PROCEDURAL HISTORY.

Plaintiffs commenced this action on August 25, 2021, with the filing of a Verified Complaint (District Court Docket Entry ("dkt.") No. 1) and a Motion for Temporary Restraining Order and Preliminary Injunction (dkt. 3). On August 26, the district court held a hearing on Plaintiffs' Motion for Temporary Restraining Order and issued an order denying Plaintiffs' motion the same day. (Dkt. 11.) The district court initially scheduled a hearing on Plaintiffs' Motion for Preliminary Injunction for September 10, 2021, but granted Defendants' request, over Plaintiffs' objection, to continue that hearing to September 20. (*See* dkt. 44.) The court held a hearing on Plaintiffs' Motion for Preliminary Injunction on September 20, took the matter under advisement, and informed the parties that a decision would issue expeditiously. Twenty-three days later, and two days before Plaintiffs' deadline to become vaccinated or face termination, the district court issued its decision denying Plaintiffs' Motion for Preliminary Injunction. (Dkt. 65.)

Plaintiffs timely noticed their appeal to this Court within an hour of the district court's decision. (Dkt. 66.) Immediately upon noticing their appeal to this Court,

Plaintiffs moved for an injunction pending appeal in the district court (dkt. 67), which the district court denied on October 13, 2021. (Dkt. 68.) Plaintiffs promptly moved for an emergency injunction pending appeal under Fed. R. App. P. 8 in this Court on October 14, 2021. This Court denied the injunction pending appeal without comment the next day, October 15, 2021. *See Does 1-3 v. Mills*, No. 21-1826, 2021 WL 4845812 (1st Cir. Oct. 15, 2021).

Immediately after this Court's denial of Plaintiffs' motion for injunction pending appeal on October 15, 2021, Plaintiffs filed an emergency application for injunctive relief to the United States Supreme Court. On October 19, 2021, Justice Breyer denied Plaintiffs' emergency application for injunctive relief. *Does 1-3 v. Mills*, No. 21A83, 2021 WL 1170854 (U.S. Oct. 19, 2021). Nevertheless, the Supreme Court denied Plaintiffs' emergency application "without prejudice to [Plaintiffs] 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." *Id.* at *1.

That same day, October 19, 2021, this Court issued its decision in Plaintiffs' preliminary injunction appeal affirming the district court's denial of preliminary injunction. *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021). In accordance with the Supreme Court's October 19 Order, Plaintiffs again sought emergency injunctive relief against Defendants' discriminatory treatment in the Supreme Court on October

21, 2021. That application was referred by Justice Breyer to the full Court, which denied the application on October 29, 2021. *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021).

Three Justices dissented from the denial of injunctive relief. *See id.* at 18. As Justice Gorsuch wrote: "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." *Id.* (Gorsuch, J., dissenting). But, as he noted, "[t]he 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." *Id.* at 19 (cleaned up). "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." *Id.* (italics original). Justice Gorsuch noted that "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*." *Id.* at 22 (emphasis added). He concluded: "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," and "[a]ll for adhering to their constitutionally protected religious beliefs." *Id.*

On January 27, 2022, news media organizations intervened for the sole purpose of challenging Plaintiffs' previously granted pseudonymity (dkt. 105)—to which no party had objected—and on February 14, Defendants filed motions to dismiss Plaintiffs' claims (dkts. 107, 108, 109). On May 31, 2022, the district court granted the intervenors' motion, and ordered Plaintiffs to file an amended complaint disclosing their identities by July 11, 2022. (Dkt. 131.) Plaintiffs appealed the pseudonymity order to this Court on June 1, 2022 (dkt. 132) and sought an emergency stay preventing the disclosure of their identities. On June 24, 2022, the district court held a hearing on Defendants' motions to dismiss. (Dkt. 146.)

On July 7, 2022, four days before Plaintiffs were required to reveal their identities in an amended complaint, this Court denied Plaintiffs' requested stay of the pseudonymity order, *Does 1-3 v. Mills*, 39 F.4th 20 (1st Cir. 2022), effectively foreclosing any relief that could be obtained through full briefing and argument. Plaintiffs voluntarily dismissed the appeal. *See Does 1-3 v. Mills*, No. 22-1435, 2022 WL 1736742 (1st Cir. July 14, 2022).

Plaintiffs filed their First Amended Verified Complaint on July 11, 2022. (App. 033-085.) Prior to Plaintiffs' filing of the amended complaint, Defendants had

moved to dismiss the Complaint for failure to state a claim and lack of jurisdiction on February 14, 2022. (Dkt. 107, 108, 109.) The district court originally set a hearing on those motions for June 2, 2022 (dkt. 123), which was cancelled pending Plaintiffs' appeal of the order to disclose their identities. (Dkt. 135.) After returning to the district court on the First Amended Verified Complaint, the district court set another hearing on the motions to dismiss for June 24, 2022. (Dkt. 137.) On August 18, 2022, the district court entered an order dismissing Plaintiffs' amended complaint for failure to state a claim and lack of jurisdiction (dkt. 156) and entered judgment of dismissal the same day. (Dkt. 157.) Plaintiffs timely noticed their appeal to this Court on September 15, 2022. (Dkt. 158.) This Court heard oral arguments on that appeal on May 4, 2023, and entered its Opinion reversing in part the district court's dismissal on May 25, 2023. *Lowe*, 68 F.4th 706.

Upon returning to the district court, State Defendants yet again moved to dismiss Plaintiffs' First Amended Verified Complaint on the basis that their claims were moot after the State revoked the COVID-19 vaccination mandate for healthcare workers. (App. 106-121.) The district court held oral arguments on that motion on December 4, 2023. (Dkt. 199; 206.) The district court entered its Opinion and Order dismissing Plaintiffs' claims as moot on February 23, 2024 (Addendum 001-021) and its Judgement (Addendum 022) the same day. Plaintiffs timely appealed. (App. 179.)

III. THIS COURT'S DECISION REVIVING PLAINTIFFS' CONSTITUTIONAL CLAIMS AND THE STATE DEFENDANTS' IMMEDIATE LITIGATION-BASED REVOCATION OF THE RULE.

In Plaintiffs' appeal of the original dismissal of their claims, this Court concluded:

> Applying the Rule 12(b)(6) standard and drawing all reasonable inferences in the plaintiffs' favor, we conclude that it is plausible, in the absence of any factual development, that the Mandate falls in this category, based on the complaint's allegations that the Mandate allows some number of unvaccinated individuals to continue working in healthcare facilities based on medical exemptions while refusing to allow individuals to continue working while unvaccinated for religious reasons.

Lowe, 68 F.4th at 714. This Court further held that "it is plausible based on the plaintiffs' allegations that the medical exemption undermines these interests in a similar way to a hypothetical religious exemption." *Id.* at 715. Simply put, this Court concluded that it had "reason to be skeptical that dismissal is appropriate absent further factual development." *Id.* This Court held that "applying the plausibility standard applicable to Rule 12(b)(6) motions and drawing all reasonable inferences from the complaint's factual allegations in the plaintiffs' favor, the complaint states a claim under the Free Exercise Clause." *Id.* at 718. It concluded the same as to Plaintiffs' Equal Protection claims. *Id.* This Court remanded the matter back to the district court for Plaintiffs to probe their claims in discovery and have a trial on the merits. *Id.* at 725.

Upon returning to the district court, Plaintiffs attempted to begin probing their claims in discovery only to be met with State Defendants' new strategy—this time to evade review. On July 11, 2023, MDHHS announced that it was proposing to revoke the COVID-19 vaccination requirement for healthcare workers in Maine. (App. 167.) MDHHS announced that "[a]round the end of May 2023 and beginning of June 2023," corresponding perfectly with the timing of this Court's remand of Plaintiffs' claims against the State for discovery and trial on the merits, the Department began reviewing available science on the continued need for its COVID-19 vaccination mandate for healthcare workers. (App. 126, Declaration of Nancy Beardsley, ("Beardsley Decl.") ¶16.) State Defendants claimed that some of their decision was based upon the Center for Medicare and Medicaid Services' removal of its healthcare worker mandates, but *under its own admissions*, it was aware of that revocation *prior to this Court even holding oral arguments on the previous appeal*. (*See* App. 123, Beardsley Decl. ¶9 (noting that the CMS had announced its intent to revoke the rule on May 1, 2023—*three days before this Court held oral argument* and a full three weeks before this Court entered its opinion sending Plaintiffs' claims back to the district court).)

In addition to the suspicious timing that perfectly coincided with this Court's revival of Plaintiffs' Complaint, State Defendants' timing for the revocation of the COVID-19 vaccination requirement for healthcare workers is also suspiciously

coincidental for another independent reason. Though State Defendants contend that their decision to revoke the COVID-19 vaccination requirement for healthcare workers was purportedly triggered—in part—by the CMS revocation of its rule, they also claimed that they were revoking the requirement based on the "science and research," "changed circumstances regarding COVID-19 variants, vaccination rates, and disease prevalence," and the "evidence base for the rule requiring COVID-19 vaccination for healthcare workers." (App. 126, Beardsley Decl. ¶¶16-18.) As Beardsley's sworn testimony demonstrates beyond cavil—the number of hospitalizations and deaths were *increasing dramatically at the exact time of the repeal*. (App. 134, Beardsley Decl. ¶¶45, 47.) From July 2023—when the State proposed repealing the Rule—to August 2023—when the repeal became effective, Maine saw an over *40 percent increase in COVID-19 hospitalizations* (*id.*, ¶45), and a *167 percent increase in deaths* over the same period. (*Id.*, ¶47.) Yet, Beardsley still testified that the State's decision to revoke the Rule was based on the science and "declining hospitalization and death rates." (App. 135, Beardsley Decl. ¶51.)

SUMMARY OF THE ARGUMENT

The district court erred by finding (1) that Plaintiffs had brought only an as-applied challenge, despite their Complaint plainly stating numerous times that they were asserting both facial and as-applied challenges; (2) that Plaintiffs' claims were moot because of State Defendants' litigation-based recission of the rule-based

challenged mandate, particularly since the challenged statute remains operative to this day; (3) that none of the exceptions to mootness apply; and (4) by refusing to permit Plaintiffs leave to further amend their complaint. The district court's decision should be reversed.

STANDARD OF REVIEW

This Court reviews appeals from a district court's dismissal of a complaint *de novo*. *See, e.g.*, *Squeri v. Mount Ida Coll.*, 954 F.3d 56, 65 (1st Cir. 2020) ("We review the grant of a motion to dismiss de novo."). "The incidence of mootness presents a purely legal question and, therefore, engenders de novo review." *Ford v. Bender*, 768 F.3d 15, 29 (1st Cir. 2014). This Court reviews the district court's refusal to permit Plaintiffs leave to amend their complaint for an abuse of discretion. *Maine State Bldg. & Const. Trades Council, AFL CIO v. U.S. Dep't of Lab.*, 359 F.3d 14, 18 (1st Cir. 2004).

ARGUMENT

I. THE DISTRICT COURT ERRED BY FINDING THAT PLAINTIFFS ONLY BROUGHT AN AS-APPLIED CHALLENGE TO THE OPERATION OF THE RULE.

No fewer than 23 times do Plaintiffs mention in their First Amended Verified Complaint that they are challenging the COVID-19 vaccination mandate "on its face and as applied." (App. 062-068, FAVC, ¶¶114-154, App. 076, Prayer for Relief.) Though it correctly noted that "[t]he Amended Complaint states expressly that the

Plaintiffs are mounting both facial and as-applied challenges" to the COVID-19 vaccination requirement under the First Amendment's Free Exercise Clause and the Fourteenth Amendment, the district court held that "those labels . . . are not what matters." (Addendum 006 n.4.) Instead, "whether a constitutional claim is facial depends on whether the 'plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs." (*Id.*) There can be no dispute that Plaintiffs challenged the vaccination requirement both facially and as-applied specifically to them. (*See, e.g.*, App. 063, FAVC, ¶117 (alleging that the mandate was facially unconstitutional because it "is neither neutral nor generally applicable"); *id.*, ¶120 (alleging that the mandate facially creates "a system of individualized exemptions for preferred exemption request while discriminating against requests for exemption and accommodation based on sincerely held religious beliefs"); *id.*, ¶121 (alleging that the mandate is facially unconstitutional because it permits healthcare workers in Maine to request and receive a nonreligious medical exemption, but not a religious exemption).)

All of these allegations—and many more throughout Plaintiffs Complaint—demonstrate that a part of Plaintiffs' challenge was to the face—*i.e.*, the text—of the mandate, which requires examination of the tandem operation of the rule and the statute. Despite what Plaintiffs labeled their claims, alleged in their complaint, and requested in their relief, the district court held that Plaintiffs only "mount an as-

applied challenge to the tandem operation of the pre-repeal regulation and statute, but no more." (Addendum 006.) This is plainly reversible error.

First, the district court's characterization of a facial challenge is flawed. Facial challenges require only an examination of the text of the challenged law—not its application to any particular plaintiff or person. *See, e.g.*, *Kane v. De Blasio*, 19 F.4th 152, 164 (2d Cir. 2021) (noting that plaintiffs' challenge to the constitutionality of the New York City's vaccine mandate for teachers involved both a facial challenge, which required only "examining the Mandate's text," and an as-applied challenge concerning its particular application to plaintiffs there). Moreover, in the COVID-19 mandate context, a facial challenge under the Free Exercise Clause does not require examination of the application to a plaintiff but whether the face of it is neutral and generally applicable. *See Roth v. Austin*, 619 F. Supp. 3d 928, 954 (D. Neb. 2022) ("A facial challenge under the Free Exercise Clause does not require examination of the application of the policy to any particular Plaintiff, so there is no reason to look beyond the COVID-19 vaccination mandate's requirement of discharge for non-compliance or to look at the administrative proceedings used to accomplish the discharge after the Air Force Surgeon General's denial of an RAR appeal."); *Navy Seal 1 v. Biden*, 574 F. Supp. 3d 1124, 1140-41 (M.D. Fla. 2021) ("the service-member plaintiffs argue that a service member's request for a religious exemption from the COVID-19 vaccine requirement is futile because, despite

regulations in each branch purporting to require case-by-case consideration, the regulations are subject to an undisclosed policy of 'deny them all,' an allegation to which the available interim data lends tentative credence. Although the vaccination requirement contains a religious exemption, the contention that the vaccine requirement is 'effectively without exception' constitutes a 'form of a facial challenge.'").

And, in fact, challenges such as the ones brought by Plaintiffs are necessarily facial because the First Amendment analysis adopted by the Supreme Court in every Free Exercise Clause challenge *requires* an examination of the *text* of the challenge statute or rule. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that "the minimum requirement of neutrality is that a law not discriminate on its face"). It is worth noting, too, that the district court's own prior analysis of the same operative provisions in Plaintiffs' pseudonymous Complaint followed this precise facial challenge protocol. In its first erroneous dismissal, the district court analyzed the COVID-19 vaccine mandate "on its face" to determine whether it was *facially* neutral. *Lowe*, 2022 WL 3542187, at *11.

Second, the district court's treatment of Plaintiffs' complaint is factually erroneous. Under the district court's own formulation, a facial challenge involves relief that "reach[es] beyond the particular circumstances of these plaintiffs." (Addendum 006 n.4.) Plaintiffs' claims clearly satisfy even that standard. In their

Prayer for Relief, Plaintiffs requested *inter alia* a declaration that the COVID-19 vaccination requirement for healthcare workers and its concomitant revocation of any religious accommodations in the State of Maine were unconstitutional, not just as to Plaintiffs (which it was) but as to "a class system in which religious objectors in Maine are disparately and discriminatorily denied the option of receiving an exemption or accommodation while simultaneously allowing and granting exemptions for other nonreligious reasons." (App. 077, FAVC at 45.) Using the district court's own precedent, Plaintiffs' "claim is facial in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to [the removal of all religious accommodations.]" *John Doe 1 v. Reed*, 561 U.S. 186, 194 (2010). *See also Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 70 (1st Cir. 2014) (where complaint requested invalidation of the challenged government regulation as a whole, and "not merely a change in their application to [plaintiff]," "it is clear that this is a request that reaches beyond the precise circumstances of [plaintiffs'] particular application").

Finally, regardless of how the district court ultimately characterized Plaintiffs' claims, the substantive analysis does not change—only the burden of proof to demonstrate the need for the requested relief. *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019). "A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications." *Id.* Thus, "classifying a lawsuit as facial

or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy, but *it does not speak at all to the substantive rule of law necessary to establish a constitutional violation*." *Id.* (emphasis added). The district court's decision was in error.

Plaintiffs' facial challenge to the requirement that they receive COVID-19 vaccination as a condition of employment involved both the rule and the statute. The district court's failure to recognize the clear import of Plaintiffs' claims against both permitted it to find all of Plaintiffs' claims moot based upon the repeal of only one aspect of the mandate they were challenging on its face. (*See infra* Section II.) That decision was erroneous and should be reversed.

II. PLAINTIFFS' CLAIMS ARE NOT MOOT BECAUSE DEFENDANTS' STATUTORY PROHIBITION ON RELIGIOUS ACCOMMODATIONS TO COMPULSORY VACCINATION PRESENTS LIVE AND JUSTICIABLE CLAIMS.

In their most candid (and fatal) admission below, State Defendants conceded—as they must—that Plaintiffs' challenge to the Vaccine Mandate includes both a challenge to the Rule requiring COVID-19 vaccination for healthcare workers *and* the concomitant Statute, 22 M.R.S.A. §802(4-B). (App. 116.) And, as the district court previously (and correctly) stated, "the COVID-19 vaccine mandate refer[s] to *both* the current version of the Rule *and* the statute, 22 M.R.S.A. §802(4-B), which operate in tandem" to prohibit Plaintiffs from obtaining a religious exemption to compulsory vaccination. *Lowe v. Mills*, No. 1:21-cv-242-JDL, 2022 WL 3542187,

*5 (D. Me. Aug. 18, 2022). *See also Does 1-6 v. Mills*, 566 F. Supp. 3d 34, 43 (D. Me. 2021) ("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.").

A partial repeal of the Rule which caused Plaintiffs' constitutional injuries is not sufficient to warrant a finding of mootness. Indeed, for interim events to moot Plaintiffs' challenge, those events must "have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979). *See also City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (holding that the case was not moot because "[i]ntervening events have not 'irrevocably eradicated the effects of the alleged violation'" (quoting *Davis*, 440 U.S. at 631).) At best, what State Defendants have done is effectuate a partial repeal of the constitutional violations that Plaintiffs have alleged here. And, as a matter of law, a partial repeal of the challenged conduct is insufficient to moot the case. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982) (holding that defendant's partial repeal of a challenged ordinance did not moot the case).

Here, State Defendants have revoked the Rule only, but have not repealed the Statute, 22 M.R.S.A. §802(4-B). (Addendum 005.) And, because Plaintiffs' challenge in this action involves the complete prohibition on requesting or receiving religious accommodations for compulsory vaccination, it cannot be said that State

Defendants have "completely eradicated" the effects of the Statute on Plaintiffs' First and Fourteenth Amendment liberties. *Davis*, 440 U.S. at 631. In fact, the revocation of the Rule cannot have completely eradicated the effects of the Rule and Statute because Plaintiffs have already suffered concrete injury as a result of the tandem operation of both, and continue to suffer from that constitutional injury today. Plaintiffs' challenge to the Vaccine Mandate, which includes a challenge to the still-alive Statute that authorizes a deprivation of their constitutional rights, is not moot. The district court's decision to the contrary was in error.

III. STATE DEFENDANTS' RESCISSION OF THE VACCINE MANDATE RULE DID NOT MOOT PLAINTIFFS' CLAIMS FOR RELIEF.

A. Plaintiffs' Claims Are Not Moot Because Defendants' Admitted Timing For Rescission Of The Challenged Rule Evinces Litigation Tactics, Not A Genuine Change Of Heart.

Since the ongoing presence of the Statute alone eviscerates State Defendants' mootness challenge, this Court need not proceed any further and may reverse the district court's decision on that ground alone. However, even if the Statute were not sufficient to maintain a live case or controversy, and it certainly is, the Court must still reverse the district court because State Defendants' purported repeal of the Rule does not moot this case.

State Defendants explicitly admitted that it was not until "around the end of May 2023 and the beginning of June 2023," that they purportedly "reviewed the

available science and research on the then current risks of COVID-19 in healthcare settings." (App. 126, Beardsley Decl. ¶16.) On July 11, 2023, MDHHS announced that it was proposing to revoke the COVID-19 vaccination requirement for healthcare workers in Maine. (App. 086-089.) MDHHS announced that "[a]round the end of May 2023 and beginning of June 2023," corresponding perfectly with the timing of this Court's remand of Plaintiffs' claims against the State for discovery and trial on the merits, the Department began reviewing available science on the continued need for its COVID-19 vaccination mandate for healthcare workers. (App. 126, Beardsley Decl. ¶16.) State Defendants claimed that some of their decision was based upon the Center for Medicare and Medicaid Services' removal of its healthcare worker mandates, but *under their own admissions*, they were aware of that revocation *prior to this Court even holding oral arguments on the previous appeal*. (*See* App. 125, Beardsley Decl. ¶9 (noting that the CMS had announced its intent to revoke the rule on May 1, 2023—*three days before this Court held oral argument* and a full three weeks before this Court entered its opinion sending Plaintiffs' claims back to the district court).)

The district court attributed little weight to this unquestionably suspicious timing, calling the sequence of events "misleading." (Addendum 017.) But the timing is critical. After Plaintiffs fought for two years to have their day in Court, and despite State Defendants admitting that they were aware of changed circumstances

concerning the risk of COVID-19 beginning "*in January 2022*" (App. 111 (emphasis added)), State Defendants did nothing to alter the challenged Vaccine Mandate until the eve of discovery commencing in the district court, and *after this Court had required they submit to Plaintiffs' discovery*. That is a litigation tactic, not a genuine change of heart, and it precludes a finding of mootness. *See, e.g.*, *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such [post-litigation] maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."); *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 871 (2005) (rejecting counties' mere "litigating position" as evidence of actual intent of county policies).

Moreover, in addition to the suspicious timing that perfectly coincides with this Court's revival of Plaintiffs' Complaint, State Defendants' timing for the revocation of the COVID-19 vaccination requirement for healthcare workers is also suspicious for another independent reason. Though State Defendants contend that their decision to revoke the COVID-19 vaccination requirement for healthcare workers was purportedly triggered by the CMS revocation of its rule, they also claimed that they were revoking the requirement based on the "science and research," "changed circumstances regarding COVID-19 variants, vaccination rates, and disease prevalence," and the "evidence base for the rule requiring COVID-19 vaccination for healthcare workers." (App. 126, Beardsley Decl. ¶¶16-18.) As

Beardsley's sworn testimony demonstrates beyond cavil—the number of hospitalizations and deaths were *increasing dramatically at the exact time of Defendants' repeal*. (App. 134, Beardsley Decl. ¶¶45, 47.) From July 2023—when the State proposed repealing the Rule—to August 2023—when the repeal became effective, Maine saw an over *40 percent increase in COVID-19 hospitalizations* (*id.*, ¶45), and a *167 percent increase in deaths* over the same period. (*Id.*, ¶47.) Yet, Beardsley still testified that the State's decision to revoke the Rule was based on the science and "declining hospitalization and death rates." (App. 135, Beardsley Decl. ¶51.) The facts tell a different story.

The district court—despite being required to draw all reasonable inferences in Plaintiffs' favor—said this was merely a "selective subset" of relevant statistics that does not undermine the State Defendants' suspicious claims. (Addendum 016 n.10.) That is incorrect. The relevant "subset" was selected because it perfectly coincides with when State Defendants said they were looking "at the science" and effectuating the rescission, and the statistics and science do not support their decision.

The Ninth Circuit recently confronted a similar scenario in *Health Freedom Defense Fund, Inc. v. Carvalho*, where a government defendant similarly engaged in litigation-based revocation of a challenged COVID-19 vaccine mandate. 104 F.4th 715, 719 (9th Cir. 2024). There, the Ninth Circuit noted: "For over two years—until twelve days after argument—Los Angeles Unified School District (LAUSD)

required employees to get the COVID-19 vaccination or lose their jobs. LAUSD has not carried its "formidable burden" to show that it did not abandon this policy because of litigation." *Id.* The Ninth Circuit "held oral argument . . . where LAUSD's counsel was vigorously questioned. The same day LAUSD submitted a report recommending rescission of the Policy. Twelve days later, LAUSD withdrew the policy." *Id.* at 723. State Defendants here likewise faced vigorous questioning at this Court's oral argument in the previous appeal and ultimately faced a reversal of their previously-obtained dismissal. *Lowe*, 68 F.4th 706. And, just like here, "LAUSD's about-face occurred only after vigorous questioning at argument in this court, which suggests that it was motivated, at least in part, by litigation tactics." *Health Freedom*, 104 F.4th at 723. Simply put, the Ninth Circuit held, "LAUSD's timing is suspect," and that alone precludes a finding of mootness. *Id.* The same is true of State Defendants' suspicious and scientifically unsupported timing.

State Defendants' litigation-induced timing is too suspect to support a finding of mootness on motion to dismiss, and evinces a desire to avoid a determination of the lawfulness of their mandate. While the district court concluded that Plaintiffs' contentions were "misleading," the reality is that State Defendants' timing is suspicious and can be interpreted as "act[ing] at least partially in bad faith to avoid litigation risk." *Health Freedom*, 104 F.4th at 724. Plaintiffs' claims are not moot.

B. Plaintiffs' Claims Are Not Moot Because State Defendants Retained The Authority To Reinstate The Mandate At Any Time.

State Defendants contended below that their continued authority to reinstate a compulsory COVID-19 vaccination requirement for Plaintiffs does not prevent a finding of mootness. (App. 119.) Supreme Court precedent compels a contrary conclusion. As the Supreme Court unequivocally declared in *Tandon v. Newsom*, "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 593 U.S. 61, 63 (2021). "And, so long as a case is not moot, litigants otherwise entitled to [relief] remain entitled to such relief where applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 20 (2020)). The reason for this is simple: "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2020) (Gorsuch, J., statement). Indeed, "officials with a track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time." *Tandon*, 592 U.S. at 20. In such a case, "the rescission of the policy does not render this case moot." *United States v. Sanchez-Gomez*, 584 U.S. 381, 386 n.* (2018).

Here, not only have State Defendants not "irrevocably eradicated the effects of the alleged violation" inherent in their COVID-19 Vaccine Mandate, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983), but they unquestionably retain authority to deploy their constitutionally flawed but still alive Statute, 22 M.R.S.A. §804(4-A), to impose the same constitutional injury on Plaintiffs yet again. And, to make matters worse, State Defendants conceded below—as they must—that the Statute remains in effect (App. 116), have continued to argue that there is no constitutional flaw in the Statute or Rule (App. 119), and that a retention of authority does not otherwise negate mootness. (*Id.*) None of those contentions is true under *Tandon*. 592 U.S. at 20. The absence of any concession by the State Defendants that they acted unconstitutionally is troubling on its own, but coupled with their retention of authority to do it again is fatal to any contention of mootness. *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) (holding that the "power to reassess [the challenged conduct] at any time" precludes a finding of mootness); *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018) ("[W]e have held that a defendant does not meet its burden of demonstrating mootness when it retains the authority to reassess the challenged policy at any time.").

Put simply, "there is no reason why [plaintiffs] should bear the risk of suffering further irreparable harm in the event of another [mandate]." *Catholic Diocese*, 592 U.S. at 20-21. As State Defendants' "reasoning goes, [the Court]

should send the plaintiffs home with an invitation to return later if need be." *Id.* at 26 (Gorsuch, J., concurring).

> [I]f we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, [she] could just change them again. The Governor has fought this case at every step of the way. To turn away religious [claimants] bringing meritorious claims just because the Governor decided to hit the "off" switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.

Id.

Thus, rather than disclaiming the constitutional error of their ways, State Defendants' mootness contentions seem to be "more like don't let the door hit you on your way out." *N'Diom v. Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring). Plaintiffs' claims are not moot, and the district court's conclusions to the contrary are in error.

C. Plaintiffs' Claims Are Not Moot Because State Defendants Failed To Satisfy Their Formidable Burden To Demonstrate That It Is Absolutely Clear That The Challenged Conduct Could Not Be Reinstated.

1. State Defendants' burden under the voluntary cessation doctrine is formidable.

The Court should also reverse the district court's conclusion that the voluntary cessation exception is inapplicable. (Addendum 018.) State Defendants' sudden, "voluntary" shift from the discriminatory and unconstitutional requirement that healthcare workers in Maine accept a vaccination directly contrary to their sincerely

held religious beliefs—which State Defendants have vigorously defended below and in multiple appeals at this Court and the Supreme Court—is not enough to shield the discriminatory mandate from review. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.").

> [A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (internal quotation marks and citation omitted).

2. The district court erred by placing the burden entirely upon Plaintiffs to demonstrate that the case was not moot, rather than on State Defendants where it belongs as a matter of law.

The district court erred by placing the burden on Plaintiffs to demonstrate that the case was not moot. Though it correctly noted that the "party claiming mootness has the burden to show that the voluntary cessation exception does not apply" (Addendum 015), it nevertheless placed the entirety of the burden on Plaintiffs' shoulders. The district court took Defendants solely at their word that "the

Department repealed the vaccination requirement based on changed circumstances of the COVID-19 pandemic, not this litigation." (*Id.*) For one, this is simply not supported by the evidence and reasonable inferences drawn therefrom. (*See supra* Section III.A.) It did not, however, require anything further from State Defendants; instead requiring Plaintiffs produce proof that State Defendants' suspicious timing was not designed to escape review. That flips the burden on its head.

Specifically, while the district court noted "Plaintiffs' suggestion that the Defendants engaged in a bad faith litigation tactic," it nevertheless said that suggestion was "based on a misleading narrative of relevant events." (Addendum 017.) It concluded that Defendants' mere statements to the contrary were sufficient to support a finding of mootness because "Plaintiffs have not supported their position with declarations under oath or exhibits, nor have they requested permission to engage in discovery on this issue." (*Id.*) But, it is not Plaintiffs' burden to come forward with evidence that the voluntary cessation exception applies. It applies by default, *see Already*, 568 U.S. at 91 ("a defendant cannot automatically moot a case simply by ending its unlawful conduct"), and Defendant bears the burden to demonstrate it does not apply. The district court's decision to place that burden on Plaintiffs was erroneous as a matter of law.

3. State Defendants have not made it absolutely clear that the challenged Mandate would not and could not be reinstated.

Applying this "formidable burden," the Supreme Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer* that a state governor's "voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 582 U.S. 449, 457 n.1 (2017) (cleaned up). Here, State Defendants "ha[ve] not carried the 'heavy burden' of making 'absolutely clear' that [they] could not revert to [their] policy," *id.*, because the change in policy is neither permanent nor irrevocable. *See City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983). State Defendants have not made it "absolutely clear" that they will not return to their former discriminatory and unconstitutional ways, but merely say it is "highly unlikely that the Department will seek to impose COVID-19 vaccination requirements." (App. 135, Beardsley Decl. ¶51.) State Defendants' own contention fails the applicable standard.

Importantly, State Defendants "neither asserted nor demonstrated that they will *never* resume the complained of conduct." *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998) (emphasis added). Rather, State Defendants' contentions are simply that it is "highly unlikely" that they would reinstitute such a mandate and that MDHHS "has no plans" to reinstate it. (App. 133, Beardsley Decl. ¶41.) This hedging precludes any mootness argument. *Cf. United*

States v. Sanchez-Gomez, 584 U.S. 381, 386 n.* (2018) (holding, where intent to reinstate is present, "the rescission of the policy does not render this case moot"); *Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate "), *id* at *5–6 ("The Court is not fooled."), *rev'd on other grounds*, 965 F.3d 1085 (9th Cir. 2020).

Though legislative action concerning a challenged law is typically entitled to greater weight in some circumstances, *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016), "the Supreme Court has not hesitated to invoke the voluntary cessation exception when considering the conduct of private, municipal, and *administrative* defendants." *Id.* (emphasis added). Thus, the more lenient approach to legislative repeal is inapposite here, and the administrative action taken to invoke and then revoke the Rule—while the legislature's Statute remains operative to this day—precludes a finding of mootness.

4. State Defendants' continued defense of the Vaccine Mandate throughout this litigation eliminates any possibility of mootness.

A case is not moot where, as here, State Defendants "did not voluntarily cease the challenged activity because [they] felt [it] was improper," and have "at all times continued to argue vigorously that [the] actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985). *Pierce*, 2019 WL 4750138, at *1.

"[W]hen the government ceases a challenged policy without renouncing it, the voluntary cessation is less likely to moot the case." *Id.*, at *5. In numerous instances, including even in their very submissions on mootness at issue below, State Defendants have maintained that the compulsory vaccination of healthcare workers comprised by the Rule and the Statute, without any religious exemptions, was lawful and constitutional. (*See* App. 108 (suggesting that the State "determined that requiring COVID-19 vaccination for healthcare workers in DHCFs was necessary to protect public health" and consistent with its duties); (App. 118 (contending that "circumstances wholly unrelated to this litigation led to the repeal").)

Indeed, State Defendants explicitly refused to concede that there is any constitutional flaw in their Vaccine Mandate and its complete prohibition on any religious accommodations. (*See* App. 119 ("State Defendants do not have to concede any unlawful conduct for a case to be moot."). "[A] defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." *Sheely v. MRI Radiology Net., P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007). In such a case, State Defendants' constant refrain that their refusal to follow the commands of the First and Fourteenth Amendments was never unlawful negates mootness. *See, e.g.*, *id.* (collecting cases showing that failure to admit unlawful conduct and provide assurances of not returning to prior practices does not suffice

to moot a claim); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 833-34 (11th Cir. 1989) (holding that a matter is not moot when defendant "never promised not to resume the prior practice" and constantly pressed "that the voluntarily ceased conduct should be declared constitutional"); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 127 (5th Cir. 1973) ("[I]n the face of appellant's own inability to recognize his transgressions of the Act, we decline to assume he will not violate the Act in the future."); *Pierce*, 2019 WL 4750138, at *6 ("[t]here is nothing in the parties' submissions or the record to demonstrate the [Secretary] changed his mind about the merits of Plaintiff's claim.").

As in *Health Freedom Defense Fund*, State Defendants' conduct and actions in this matter look like "strategic moves designed to keep us from reviewing challenged conduct," which must be viewed "with a critical eye." 104 F.4th at 723 (quoting *Knox v. Serv. Emps. Int'l Union Local 1000*, 567 U.S. 298, 307 (2012)). Certainly, "[i]t is not the purpose of the doctrine to require an admission from the defendant that the now ceased conduct was illegal," *ACLU of Mass. v. United States Conf. of Catholic Bishops*, 705 F.3d 44, 55 n.9 (1st Cir. 2013), because "[m]ootness turns primarily on future threats, not upon penance." *Adams v. Bowater, Inc.*, 313 F.3d 611, 615 (1st Cir. 2002). But, the continuing defense of its constitutionality demonstrates neither penance, remorse, nor—most fatally—absolute clarity that the

challenged conduct cannot be expected to recur. Defendants have not carried their burden, and the district court's decision was in error.

D. Plaintiffs' Claims Are Not Moot Because The Challenged Mandate Is Capable Of Repetition Yet Evading Review.

Plaintiffs' claims are also not moot because the case "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* Both circumstances are present here. The district court held that Plaintiffs could not demonstrate any realistic probability that they would again be subject to a COVID-19 vaccination requirement, so the exception was inapplicable. (Addendum 19.) This, too, was in error.

1. The unconstitutional Rule's lifespan was too short to be fully litigated.

a. The litigation in this matter demonstrates that the challenged Rule was too short in duration to be fully litigated.

The duration of State Defendants' unconstitutional Rule was too short to be fully litigated. State Defendants contended below that the compulsory COVID-19 vaccination requirement "was in effect for nearly two years" and "that length of

time is not so short as to foreclose complete judicial review." (App. 120.) But, binding precedent holds that two years is too short for full litigation. *See Kingdomware Tech., Inc. v. United States*, 579 U.S. 162, 170 (2016) (two years is too short); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months is too short); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (two years is too short).

Kingdomware Tech. involved the claims of a veteran-owned business against the Department of Veterans Affairs (VA) for failing to follow procurement rules that would have given the business a competitive advantage in bidding for VA procurement contracts. *See* 579 U.S. at 170. Because the case reached the Court four years after it was commenced, and the work the business desired to perform for the VA was already complete, the Court found that "no live controversy in the ordinary sense remains because no court is now capable of granting the relief petitioner seeks." *Id.* at 169. The Court concluded, however, that the "capable of repetition, yet evading review" exception applied because the short-term procurement contracts at issue "were fully performed in less than two years after they were awarded," and "a period of two years is too short to complete judicial review of the lawfulness of the procurement." *Id.* at 170 (internal quotation marks omitted) (citing, *inter alia*, *Southern Pac. Terminal Co.*, 219 U.S. at 514–516). Thus, "we have jurisdiction

because the same legal issue in this case is likely to recur in future controversies between the same parties in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete." *Id.*

In *First Nat. Bank*, two banks that wanted to spend money to influence the vote on state referendum proposals were restricted in their advocacy by state criminal statutes. *See* 435 U.S. at 767–68. In determining whether the banks' claims were moot, because the vote on the most recent referendum was already concluded, the Court found that "[u]nder no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented in advance of a referendum on a similar constitutional amendment" because in each of the four previous referendum attempts by the state legislature "the period of time between legislative authorization of the proposal and its submission to the voters was approximately 18 months," which "proved too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Id.* at 774–75. Thus, the Court held the case was not moot. *Id.* at 775

Plaintiffs initiated the instant action on August 25, 2021 (dkt. 1). Since the filing of Plaintiffs' Verified Complaint and Motion for Temporary Restraining Order (dkt. 3) and continuing to this day, Plaintiffs have been incessantly pleading for relief from the unconstitutional injury forced upon them by State Defendants for nearly

three years—with all deliberate speed. Their efforts have produced eleven written opinions and orders on the merits of substantive motions from the district court (dkts. 11, 32, 65, 68, 95, 96, 131, 140, 145, 156, 211); four appeals to this Court, *see Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023); *Does 1-3 v. Mills*, 39 F.4th 20 (1st Cir. 2022); *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021); and four appeals to the Supreme Court of the United States, *e.g. Does 1-3 v. Mills*, 142 S. Ct. 17 (2021); *Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022); *Lowe et al. v. Mills, et al.*, Case No. 23-152 (U.S. 2023). *Yet Plaintiffs have not received one piece of paper in discovery*.

Because of the State Defendants' erroneous legal positions in this case, including their initially successful but ultimately defunct argument that this case should be dismissed, it took Plaintiffs nearly two years to obtain a decision from this Court that articulated what Plaintiffs have alleged since the beginning—"that the Mandate treats comparable secular and religious activity dissimilarly without adequate justification" in violation of the First Amendment. *Lowe*, 68 F.4th at 709. And, upon receiving this Court's decision permitting them to probe their claims in discovery, Plaintiffs were met with the news that State Defendants would now seek to evade review of the constitutional injury they forced upon Plaintiffs by revoking one rule of the Mandate challenged by Plaintiffs. (App. 086.) Thus, after putting Plaintiffs to the choice of their livelihoods or their religious beliefs, instituting a discriminatory vaccination requirement that resulted in Plaintiffs' unconstitutional

termination from their jobs, *Lowe*, 68 F.4th at 709, and contending at every turn that their religious beliefs had no accommodation in Maine, State Defendants poured salt in Plaintiffs' constitutional wounds by claiming, in essence, "never mind." State Defendants' compulsory vaccination Rule was too short-lived to be fully litigated, and because the Statute remains in effect, the controversy unquestionably is capable of repetition.

b. Defendants' short-lived unconstitutional Rule did not allow sufficient time for appellate and Supreme Court review *on the merits*.

Under the Supreme Court's test, a matter is not "fully litigated" unless complete review of the merits can be had by a trial court, appellate review, and Supreme Court review. Indeed, "fully litigated" means that the merits of the matter make their way "through the state courts (and arrive here) prior to its expiration." *Turner v. Rogers*, 564 U.S. 431, 440 (2011). As the Ninth Circuit has recognized, "[a]n action is 'fully litigated' if it is reviewed by this Court and the Supreme Court." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1287 (9th Cir. 2013).

That a matter is not fully litigated unless there is time for appellate and Supreme Court review is universally recognized. *See, e.g.*, *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 786-87 (9th Cir. 2012) ("We have recognized that 'evading review' means that the underlying action is almost certain to run its course before either this court or the Supreme Court can give the case full consideration."

(quoting *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999)); *Marshall v. Local Union 20, Int'l Broth. of Teamsters*, 611 F.2d 645, 648 (6th Cir. 1979) (matter is too short in duration to be fully litigated if it is "unlikely under these circumstances that this court could hear and decide an appeal"); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1165 (4th Cir. 1977) (fully litigated includes appeals of the underlying action); *Praxis Prop., Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 61 (3d Cir. 1991) ("fully litigated" requires enough time for an "appellate court to complete its review"); *id.* at 62 ("90-day automatic stay provision was too short in duration to ever be fully litigated and appealed"); *Video Tutorial Servs., Inc. v. MCI Tele. Corp.*, 79 F.3d 3, 6 (2d Cir. 1996) (matter too short in duration if it cannot be "effectively appealed before it expired').

Where – as here – "there is a realistic possibility that no trial court ever will have enough time to decide the underlying issues," *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001), the claims are too short in duration to ever be fully adjudicated. And, despite State Defendants' contention that two years is not too short to be fully litigated, even the premise of that argument fails the relevant test. The relevant inquiry is whether Plaintiffs' claims can be "fully litigated," *Wisconsin Right to Life*, 551 U.S. at 463, not whether a preliminary injunction or other interlocutory decision can be reached. Indeed, "there is, of course, an important distinction between a decision at the preliminary injunction stage and a final decision

on the merits," *Ryan v. U.S. Immigration & Customs Enforcement*, 974 F.3d 9, 18 (1st Cir. 2020), where the claims are at "an embryonic stage in the litigation," and decisions "are to be understood as statements of probable outcomes." *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991). That such a preliminary decision can be made quickly has no bearing on the question of whether Plaintiffs have had enough time to fully litigate their claims before the district court, this Court, and the Supreme Court. The history of this litigation demonstrates that they did not.

c. Inherently transitory and temporary actions are necessarily capable of repetition, yet evading review.

Moreover, the capable of repetition, yet evading review exception "normally arises where the underlying facts are inherently temporary such that they will predictably have been changed and foreclosed meaningful relief by the time the case has worked its way through the legal system." *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48, 54 (1st Cir. 2004). *See also Marek v. Rhode Island*, 702 F.3d 650, 655 (1st Cir. 2012) (noting that challenged action that is "inherently transitory" meets the requirements for capable of repetition, yet evading review); *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001) (same). State Defendants admitted below, as they must, that the public health emergency upon which the Vaccine Mandate was purportedly based, and their consideration of compulsory vaccination programs, were transitory and subject to change. (App. 110.) Thus, State

Defendants' own admission suggests that the mandate at issue here was transitory, and therefore capable of repetition yet evading review.

2. Plaintiffs maintain a reasonable fear that the challenged Mandate could be reinstated at any moment.

The district court held that Plaintiffs could have no reasonable fear of the recurrence of a COVID-19 vaccine mandate, so the matter was not capable of repetition yet evading review. (Addendum 019.) That decision is in error. There is no question that Plaintiffs reasonably maintain a fear that the challenged requirements will be reinstituted. Defendants' submissions demonstrate the well-founded nature of Plaintiffs' fears. (*See, e.g.*, App. 119 ("the Department and Maine CDC still have authority to amend the Rule in the future").) As the Ninth Circuit just noted in a similar COVID-19 vaccine mandate matter, the case is not moot where "the evidence shows that [defendant] acted at least partially in bad faith to avoid litigation risks" and defendant "has shown that they *can or will reimpose similar restrictions*." *Health Freedom*, 104 F.4th at 724 (emphasis added) (cleaned up). State Defendants' own submissions below demonstrates that they can reimpose similar restrictions and requirements.

Claims remain live where – as here – the rescission of the challenged law is accompanied by affirmative statements by State Defendants that they "do not have to concede any unlawful conduct." (App. 119.) As the Eleventh Circuit has noted, a court is "more likely to find that the challenged behavior is not reasonably likely to

recur where it constituted an isolated incident, was unintentional, or was at least engaged in reluctantly." *Sheely*, 505 F.3d at 1184. Defendants' actions were none of these things. The application of State Defendants' Rule and Statute was not an isolated incident but rather resulted in the universal denial of every religious accommodation request to the Vaccine Mandate. Every Plaintiff's requested religious accommodation was denied based solely on the Rule and the Statute, and all Plaintiffs were terminated because of the Rule and the Statute. (App. 039-041, FAVC ¶¶10-16.)

The record, including State Defendants' motion to dismiss below, reveals that the application of State Defendants' policy was not unintentional, but deliberate. (App. 108 (contending that "requiring COVID-19 vaccinations for healthcare workers in DCHFs was necessary to protect public health" and that State Defendants adopted an emergency rule to require COVID-19 vaccinations that lasted for 90 days and then adopted it as a permanent rule thereafter).) The imposition of the Rule, when coupled with the deliberate nature it takes to enact a Statute prohibiting religious accommodations from compulsory vaccination, demonstrates that this was not unintentional, but deliberate. "[W]e are more likely to find a reasonably expectation of recurrence when the challenged behavior constituted a continuing practice or was otherwise deliberate." *Sheely*, 505 F.3d at 1184-85. Defendants have

failed to make it absolutely clear that such deliberate conduct is unlikely to recur again. Plaintiffs' claims are not moot.

IV. PLAINTIFFS CLAIMS FOR DECLARATORY AND PERMANENT INJUNCTIVE RELIEF AGAINST THE STATUTE AND RULE ARE NOT MOOT.

Plaintiffs' claims for declaratory relief and a permanent injunction preventing Defendants from reinstating the previous mandate (or some modification thereof) are not moot. Indeed, when claims for permanent injunctive relief pend, as here, "a government ordinarily cannot establish mootness just by promising to sin no more." *Strawser v. Strange*, 190 F. Supp. 3d 1078, 1081 (S.D. Ala. 2016) (cleaned up). As the Seventh Circuit eloquently stated, "[t]he court may consider how easily former practices might be resumed at any time in determining the appropriateness of injunctive relief." *United Air Lines, Inc. v. Air Line Pilots Ass'n Int'l.*, 563 F.3d 257, 275 (7th Cir. 2009) (emphasis added); *see also Scotch Whisky Ass'n v. Barton Distilling Co*., 489 F.2d 809, 813 (7th Cir. 1973) (holding district court did not abuse its discretion when entering an injunction against unlawful conduct that "has ceased before the trial has taken place"). Indeed,

> While the preliminary injunction diminished the *immediate* threat of prosecution, it is important not to confuse the threat of enforcement that existed relative to Hatchett's immediate advocacy, with the broader threat of enforcement that must be considered by this Court with respect to Hatchett's requests for declaratory and permanent injunctive relief.

Hatchett v. Barland, 816 F. Supp. 2d 583, 593 (E.D. Wis. 2011).

And, though preliminary injunctive relief against the rescinded Rule may be moot, "[t]he case itself is not moot, because a request for a permanent injunction was pending," especially where plaintiff is subject to potential sanction for similar conduct in the future. *Certified Grocers of Ill., Inc. v. Produce, Fresh, & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florist, Nursery, Landscaping & Allied Emps., Drivers, Chauffeurs, Warehouseman & Helpers Union, Chicago & Vicinity, Ill., Local 703*, 816 F.2d 329, 331 (7th Cir. 1987). Claims for a permanent injunction are not moot where—as here—"prior patterns of contradictory behavior left the court with no assurances that the alleged constitutional violations would not recur." *Brown v. Colegio De Abagados de Puerto Rico*, 613 F.3d 44, 48 (1st Cir. 2010). That is precisely what the district court did in *Harvest Rock Church, Inc. v. Newsom*, No. 2:20-cv-6414, Doc. 95 (C.D. Cal. May 14, 2021)—issue a permanent injunction against restrictions that had been rescinded but could be reinstated at any time.

Simply put, "[w]hen a defendant corrects the alleged infirmity after suit has been filed, a court may nevertheless grant injunctive relief unless the defendant shows that absent an injunction, *the institution would not return to its former, constitutionally deficient state*." *LaMarca v. Turner*, 995 F.2d 1526, 1541 (11th Cir. 1993) (emphasis added). *See also Walker v. Inch*, No. 3:17cv206- MCR-HTC, 2019 WL 3400720, at *7 (N.D. Fla. May 10, 2019) (same). Here, Defendants have plainly

not demonstrated that a return to the prior infirmities will not happen. In fact, as demonstrated *supra*, Defendants have explicitly maintained the potential for that to recur at any time. (App. 119.)

Moreover, though the COVID-19 vaccination mandate's "recission would ordinarily moot the [plaintiffs'] request for injunctive relief, it does not do so here." *Bacon v. Woodward*, 104 F.4th 744, 750 (9th Cir. 2024) (cleaned up). The reason for this is simple: a permanent injunction can be geared towards restoration of the status quo *ante*. *See id.* Indeed,

> Here, the firefighters filed the Complaint before the Proclamation required them to get vaccinated and thereby violate their religious beliefs. Since then, some firefighters lost their jobs because of the Proclamation. These factual developments are relevant to our mootness analysis, as the request for prospective relief requires a return to the pre-termination status quo between the firefighters and Spokane. Thus, the last legally relevant relationship between the parties is the firefighters' gainful employment for Spokane.

Id. As such, the Ninth Circuit held that the claims for prospective injunctive relief were not moot. *Id.* The same is true here.

V. THE DISTRICT COURT ERRED IN REFUSING TO PERMIT PLAINTIFFS TO AMEND THEIR COMPLAINT.

A. State Defendants' Contention, And The District Court's Adoption Of It, That Plaintiffs' Challenge To The Statute Was Insufficiently Plead To Save The Complaint From Mootness Is Incorrect.

State Defendants asserted below that the Statute's continuing existence and effect does not preclude Plaintiffs' constitutional challenge from being moot because

Plaintiffs have not sufficiently pleaded claims for relief against the Statute. (App. 116.) The district court largely adopted this contention and faulted Plaintiffs for failing to clearly articulate that "the Amended Complaint [would] address any pleading concerns." (Addendum 011.) It further held that Plaintiffs have not demonstrated that anything happened "after the date of the pleading to be supplemented" such that amended was unwarranted. (*Id.*) This is factually incorrect, legally irrelevant, and an abuse of discretion.

First, the Vaccine Mandate—as pleaded in Plaintiffs Complaint—includes both the Rule and the Statute. (*See* App. 044-045, FAVC ¶¶31-39.) And, the First and Fourteenth Amendment challenges are all specifically tied to the Vaccine Mandate and its prohibition on religious accommodations. (*See, e.g.*, App. 062, FAVC ¶114 (alleging that the "Vaccine Mandate, on its face and as applied, targets Plaintiffs' sincerely held religious beliefs by prohibiting Plaintiffs from seeking and receiving exemption and accommodation for their sincerely held religious beliefs against the COVID-19 vaccines"); App. 063, FAVC ¶120 (alleging that the Vaccine Mandate "creates a *system* of individualized exemptions for preferred religious accommodation requests while discriminating against requests for exemption and accommodation based on sincerely held religious beliefs" (emphasis added)); *id.* ¶121 (same).) Thus, it is plain that Plaintiffs' challenge to the Vaccine Mandate sufficiently states a claim against both the Rule *and* the Statute for joint operation.

See Lowe v. Mills, 68 F.4th 706, 711 (1st Cir. 2023) ("The Mandate is the produce of this rule and the related state statutes.") Both operate conjunctively to deprive Plaintiffs of their constitutional liberties.

If Plaintiffs' complaint was allegedly deficient in articulating this clearly, then leave to amend should be freely given to clarify any ambiguity in their claims. *See, e.g.*, *Alvarado-Cordero v. Hernandez*, 837 F.2d 26, 29 (1st Cir. 1988) ("amendment possible even after appeal if party did not have sufficient opportunity to clarify a pleading below, or if new issues presented by amendment are consistent with appellate court decision"). The district court's refusal to permit Plaintiffs the opportunity to amend was an abuse of discretion and should be reversed.

B. Even If The District Court Was Correct That Plaintiffs' Complaint Did Not Sufficiently Plead A Challenge To The Statute Independent Of The Rule, The Appropriate Remedy Was To Grant Leave To Amend, Not Dismissal.

Even if the district court's mootness contentions were correct—which they are not—the appropriate remedy would not be dismissal, but permitting Plaintiffs to file an amended complaint to more specifically state such related claims over which this Court would doubtlessly have jurisdiction. *See, e.g.*, *Frye v. Gardner*, No. 20-cv-751-SM, 2020 WL 7246532, *6 (D.N.H. Dec. 9, 2020) ("The lack (or loss) of subject matter jurisdiction over the original complaint does not necessarily compel dismissal of that complaint. Nor does it preclude a plaintiff from timely amending that complaint."). Indeed, Rule 15's explicit policy of freely granting leave to amend,

Fed. R. Civ. P. 15(a)(2), or permitting a party to supplement the complaint if subsequent events render that necessary, Fed. R. Civ. P. 15(d), requires permitting Plaintiffs to amend and supplement their pleadings should the Court deem it necessary. Plaintiffs maintain that the operative Complaint more than sufficiently pleads a constitutional challenge to Defendants' unconstitutional scheme, including the remaining Statute. But even if the district court disagreed with that contention, it should have permitted Plaintiffs the opportunity to amend, which they specifically requested below. (*See* Addendum 011 (citing dkt. 195 at 5.).) Its failure to do so was an abuse of discretion.

CONCLUSION

For the foregoing reasons, the district court should be reversed.

Respectfully submitted,

Dated: July 22, 2024

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiffs-Appellants

No. 24-1283

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ALICIA LOWE; DEBRA CHALMERS; JENNIFER BARBALIAS; GARTH BERENYI; NICOLE GIROUX; ADAM JONES; NATALIE SALAVARRIA,

Plaintiffs–Appellants,

v.

JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services, PUTHEIRY VA, in her official capacity as Director for the Maine Center for Disease Control and Prevention,

Defendants–Appellees.

On Appeal from the United States District Court for the District of Maine
In Case No. 1:21-cv-242-JDL before The Honorable John D. Levy

ADDENDUM TO PLAINTIFFS-APPELLANTS' OPENING BRIEF

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ALICIA LOWE et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**1:21-cv-00242-JDL**
	)	
JANET T. MILLS et al.,	)	
	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION
TO DISMISS SURVIVING CLAIMS AS MOOT

The remaining Defendants—Jeanne M. Lambrew, Commissioner of the Maine Department of Health and Human Services ("Department"), and Dr. Puthiery Va, Director of the Maine Center for Disease Control and Prevention ("Maine CDC")—move to dismiss the outstanding claims against them as moot (ECF No. 188). The motion is premised on the removal of COVID-19 from the list of diseases against which workers in designated healthcare facilities ("DHCFs") in Maine must be immunized under the DHCF worker immunization rule: 10-144 C.M.R. ch. 264. The Plaintiffs, several former healthcare employees who were subject to the immunization rule, filed a response (ECF No. 195) that opposes the Defendants' motion and requests permission to amend their Amended Complaint (ECF No. 152) "to address any pleading concerns." ECF No. 195 at 5. For the reasons that follow, I grant the Defendants' motion and deny the Plaintiffs' request.

I. BACKGROUND

The procedural history of this case is complex, and includes three appeals to the United States Court of Appeals for the First Circuit and two petitions for writ of certiorari to the United States Supreme Court.[1] The background and essential facts are set out in my prior decision, *Lowe v. Mills*, No. 1:21-cv-00242-JDL, 2022 WL 3542187, at *2-5 (D. Me. Aug. 18, 2022), and I do not repeat them here.

A. Remaining Defendants and Surviving Claims

In the wake of the First Circuit's decision (ECF No. 163) on the Plaintiffs' appeal from my Order (ECF No. 156) granting the original Defendants' prior Motions to Dismiss (ECF Nos. 107, 108, 109), the only surviving claims against the remaining Defendants, Commissioner Lambrew and Dr. Va, are the Plaintiffs' constitutional claims alleging violations of the First Amendment's guarantee of the free exercise of religion and the Fourteenth Amendment's equal protection guarantee (the "surviving claims"). The Plaintiffs' other claims against Commissioner Lambrew and Dr. Va—alleging violations of Title VII of the Civil Rights Act of 1964; the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2; and 42 U.S.C.A. § 1985

[1] *See Does 1-6 v. Mills*, 566 F. Supp. 3d 34 (D. Me. 2021) (denying Plaintiffs' motion for a preliminary injunction), *aff'd*, 16 F.4th 20 (1st Cir. 2021), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022) (mem.); *Does 1-6 v. Mills*, No. 1:21-cv-00242-JDL, 2022 WL 1747848 (D. Me. May 31, 2022) (granting intervenor's motion to unseal the Plaintiffs' identities), *modified*, No. 1:21-cv-00242-JDL, 2022 WL 2191701 (D. Me. June 17, 2022), and *appeal dismissed sub nom. Does 1-3 v. Mills*, No. 22-1435, 2022 WL 17367462 (1st Cir. July 14, 2022); *Lowe v. Mills*, No. 1:21-cv-00242-JDL, 2022 WL 3542187 (D. Me. Aug. 18, 2022) (granting Defendants' motions to dismiss); *aff'd in part, rev'd in part and remanded*, 68 F.4th 706 (1st Cir. 2023), *cert. denied*, 144 S. Ct. 345 (2023) (mem.).

(West 2024)—have been dismissed, as have all of the claims against Governor Mills and the private healthcare provider Defendants.[2]

B. Facts Underlying Defendants' Latest Motion to Dismiss

The following facts, drawn from the Defendants' Motion to Dismiss as well as the attached affidavit of Deputy Director of the Maine CDC Nancy Beardsley (ECF No. 188-1) and Maine CDC data on COVID-19 hospitalizations and deaths from January 2022 through August 2023 (ECF Nos. 188-2,188-3), are largely uncontested by the Plaintiffs in their response to the pending motion. *See Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) (acknowledging that courts may consider materials outside the pleadings on a Rule 12(b)(1) motion).

On May 11, 2023, the federal COVID-19 public health emergency ended. Maine's state-level COVID-19 health emergency, which when declared was designated to be coterminous with the federal public health emergency, ended that same day. Neither event came as a surprise; in late January 2023, the Biden Administration announced that it would end the federal public health emergency on May 11, 2023. That announcement, by implication, forecast an imminent, definitive end to the parallel health emergency in Maine declared under state law.

[2] As a consequence of the earlier proceedings, all claims against Governor Mills as well as the private healthcare providers who had been named as Defendants in this action—MaineHealth; Genesis Healthcare of Maine, LLC; Genesis Healthcare, LLC; Northern Light Eastern Maine Medical Center; and MaineGeneral Health—have been dismissed. *Lowe*, 2022 WL 3542187. Final judgment as to those claims has been entered against the private healthcare provider Defendants (ECF Nos. 207, 208). Dr. Puthiery Va became the Director of the Maine CDC on August 28, 2023, and replaced former Acting Director of the Maine CDC, Nancy Beardsley, as a party to this action on September 20, 2023 (ECF No. 189).

In the months leading up to May 11, 2023, the Department began planning for the end of the twin health emergencies, which included "identifying program[s] and services that would be ending or transitioning back to pre-COVID standards." ECF No. 188-1 at 3, ¶ 8. On June 5, 2023, the Centers for Medicare and Medicaid Services ("CMS"), a federal agency within the U.S. Department of Health and Human Services, withdrew its COVID-19 vaccination requirement (the "CMS rule") for healthcare workers employed by many of the same facilities affected by the COVID-19 vaccination requirement in the Department's DHCF worker immunization rule. *See* Medicare and Medicaid Programs; Policy and Regulatory Changes to the Omnibus COVID-19 Health Care Staff Vaccination Requirements, 88 Fed. Reg. 36485 (June 5, 2023) (codified at 42 C.F.R. pts. 416, 418, 441, 460, 482, 483, 484, 485, 486, 491, and 494). The CMS rule change became effective on August 4, 2023. *Id.*

In late May and early June 2023, after the federal and state COVID-19 health emergency declarations had formally terminated, the Department and Maine CDC reviewed then-current risks of COVID-19 in healthcare settings for the stated purpose of ensuring that the State's rules and policies were consistent with the latest available science and research. That exercise included reviewing the evidentiary basis for the COVID-19 vaccination requirement in the DHCF worker immunization rule.[3] The review revealed declining hospitalizations and deaths from COVID-19 in Maine since January 2022 as well as increasing rates of vaccination against

[3] Although the Plaintiffs imply that they are skeptical that this review ever occurred, *see* ECF No. 195 at 5 (asserting that the Defendants "purportedly" reviewed the relevant science and research), they do not directly contest this fact or offer evidence to substantiate their skepticism.

COVID-19 in Maine over the same period. The review also showed other changed circumstances: Omicron variants of COVID-19 that were more contagious but less virulent than their precursors were predominant, and new treatments like Paxlovid and Lagevrio had become widely available. Based on these trends and changed circumstances, the Department concluded that requiring DHCF workers to be immunized against COVID-19 was no longer necessary to protect individual patients, individual workers, and Maine's healthcare infrastructure. On July 11, 2023, the Department announced its plan to remove COVID-19 from the list of diseases against which DHCF workers must be immunized. In the same announcement, the Department stated it would not enforce the then-existing COVID-19 vaccination requirement during the pendency of the rulemaking process to repeal it.

On August 31, 2023, the Department formally amended the DHCF worker immunization rule to remove COVID-19 and the attendant vaccination requirement; the amendment became effective on September 5, 2023. *See* 10-144 C.M.R. ch. 264, § 2, amended by order 2023-149 (effective Sept. 5, 2023). Three days later, the Defendants moved to dismiss, arguing that the surviving claims had become moot.

II. DISCUSSION

A. Threshold Question: What is the Scope of the Plaintiffs' Claims?

In the Amended Complaint, the Plaintiffs challenge what they characterize as the "COVID-19 Vaccine Mandate," ECF No. 152 at 2, ¶ 1, which they refer to alternatively as both the "Governor's COVID-19 Vaccine Mandate," *see, e.g.*, ECF No. 152 at 12, ¶ 31, and the "Governor's mandate," *see, e.g.*, ECF No. 152 at 2, ¶ 1. The

Plaintiffs' various characterizations of the mandate do not make clear whether they challenge the constitutionality of (1) the pre-repeal regulation that listed COVID-19 among the diseases against which DHCF workers must be immunized without religious exemptions, 10-144 C.M.R. ch. 264, § 2, amended by emergency order 2021-166 (effective Aug. 12, 2021); (2) the authorizing statute whose exemptions are expressly incorporated into that regulation, 22 M.R.S.A. § 802 (West 2024); or (3) some combination of the two.[4] For the following reasons, I conclude that the Plaintiffs mount an as-applied challenge to the tandem operation of the pre-repeal regulation and statute, but no more.

First, the specific document that the Plaintiffs identify as the mandate they challenge compels that conclusion. Both the Original Complaint (ECF No. 1) and the Amended Complaint incorporate as Exhibit A "a true and correct copy of the Governor's COVID-19 Vaccine Mandate" in the form of an August 12, 2021, announcement available on the website of the Office of Governor (ECF No. 1-1). ECF Nos. 1 at 15, ¶ 41; 152 at 12, ¶ 31. The "mandate" provided, in pertinent part:

> The Maine Department of Health and Human Services (DHHS) and Center for Disease Control and Prevention (Maine CDC), utilizing their authority under existing law to require certain vaccinations of people who work in health care settings, issued an emergency rule that will require health care workers to be fully vaccinated [against COVID-19] by October 1, 2021.

[4] The Amended Complaint states expressly that the Plaintiffs are mounting both facial and as-applied challenges to the mandate under the First Amendment's Free Exercise Clause, *see* ECF No. 152 at 30-32, ¶¶ 114-126, and the Fourteenth Amendment's Equal Protection Clause, *see* ECF No. 152 at 34-36, ¶¶ 142-155. Those labels, however, are "not what matters"—whether a constitutional claim is facial depends on whether the "plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs." *Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010).

ECF No. 1-1 at 1. The mandate's express reference to an "emergency rule" announced on August 12, 2021, firmly supports concluding that the DHCF worker immunization rule is the primary focus of the Plaintiffs' claims. *See* 10-144 C.M.R. ch. 264, § 2, amended by emergency order 2021-166 (effective Aug. 12, 2021) (adding COVID-19 to the diseases against which "all employees" of "Designated Healthcare Facilit[ies]" must be immunized).[5]

The language that the Plaintiffs use in the Amended Complaint to describe the challenged "mandate" and the broader context established by the accompanying allegations further support this conclusion. The "COVID-19 Vaccine" qualifier plainly narrows the Plaintiffs' claims as challenging the vaccination requirement for one of the diseases listed in the version of the regulation in effect after August 12, 2021, or, at most, the statutory exemptions as applied by enforcing that subsection of the rule.[6] The "Governor" qualifier similarly limits the Plaintiffs' constitutional challenges: promulgating the regulation is within the Governor's executive power, as exercised by the Department pursuant to 22 M.R.S.A. § 42 (West 2024), whereas enacting the statutory exemptions that the regulation incorporates—a legislative function—is not. *See Baxter v. Waterville Sewerage Dist.*, 146 Me. 211, 215, 79 A.2d

[5] Lending credence to this conclusion, the "mandate" cribs from the DHCF worker immunization rule's definition of "Designated Healthcare Facility" to identify the persons to whom the then-newly announced COVID-19 vaccination requirement applied. *Compare* ECF No. 1-1 at 1 (applying the rule to "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") *with* 10-144 C.M.R. ch. 264, § 1(D), amended by order 2021-068 (effective Apr. 14, 2021) (defining a DHCF as "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").

[6] Section 802 does not mention COVID-19 or enumerate the diseases against which immunization is required. *See generally* 22 M.R.S.A. § 802.

585, 588 (1951) (defining the scope of legislative power under the Maine Constitution); *cf.* Me. Const. art. III (distribution of powers); *Doane v. Dep't of Health & Hum. Servs.*, 2021 ME 28, ¶ 17, 250 A.3d 1101 ("[T]he separation of powers clause of the Maine Constitution . . . precludes a statutory delegation to a regulator . . . [that] amounts to a surrender of legislative authority to the executive branch."); *Stucki v. Plavin*, 291 A.2d 508, 510 (Me. 1972) ("[N]o legislative body may delegate legislative powers to administrative officers . . . ."). Because the Governor enforces the statutory exemptions through the regulation, the Amended Complaint, read in the light most favorable to the Plaintiffs, plausibly alleges an as-applied challenge to the tandem operation of the regulation and the statute. *See Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011) (stating the standard of review applicable to determine whether plaintiff states a claim for which relief can be granted). By the same token, however, the Amended Complaint does not plausibly bring a standalone, as-applied challenge to the statute because its exemptions only take effect in this context when the regulation is enforced.

Nor does the Amended Complaint bring facial challenges to either the regulation or the statute. To facially challenge the DHCF worker immunization rule and the statute whose exemptions the rule expressly incorporates, the Plaintiffs must allege facts to support a claim that the regulation and statute are unconstitutional in every instance—*i.e.*, whenever vaccination requirements for any and all diseases listed in the regulation may be enforced. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult

challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *see also Facial Challenge*, Black's Law Dictionary (11th ed. 2019) ("A claim that a statute is unconstitutional on its face — that is, that it always operates unconstitutionally."). The version of the DHCF worker immunization rule in effect immediately before the August 2021 emergency order adding COVID-19 included six diseases. 10-144 C.M.R. ch. 264, § 2(A)(1)-(6), amended by order 2021-068 (effective Apr. 14, 2021).[7] The Amended Complaint does not allege any facts supporting a claim that enforcing vaccine requirements for each of those diseases without religious exemptions fails to accommodate the Plaintiffs' sincerely-held religious beliefs.

Instead, the Plaintiffs' challenge has been and remains focused on the now-repealed COVID-19 vaccination requirement in 10-144 C.M.R. ch. 264, § 2, amended by emergency order 2021-166 (effective Aug. 12, 2021). The Plaintiffs allege injuries arising from their religious objection to receiving the COVID-19 vaccines that were available when they filed the Amended Complaint, which, they assert, were "derived from, produced or manufactured by, tested on, developed with, or otherwise connected to aborted fetal cell lines." ECF No. 152 at 16, ¶ 50; *see also* ECF No. 152 at 15-18, ¶¶ 48, 51, 54-56, 58-59 (describing basis of Plaintiffs' religious objections to the COVID-19 vaccines manufactured by Johnson & Johnson, Moderna, and Pfizer/BioNTech). Indeed, the Plaintiffs currently contend that "the COVID-19

[7] The current version of the DHCF worker immunization rule maintains vaccination requirements for those same six diseases. 10-144 C.M.R. ch. 264, § 2(A)(1)-(6), amended by order 2023-149 (effective Sept. 5, 2023).

vaccination requirement was what crystalized [sic] their injury under the statute." ECF No. 210 at 10:17-19. The Amended Complaint similarly asserts: "The *Governor's COVID-19* Vaccine Mandate, on its face and as applied, targets Plaintiffs' sincerely held religious beliefs by prohibiting Plaintiffs from seeking and receiving exemption and accommodation for their sincerely held religious beliefs against *the COVID-19 vaccine*." ECF No. 152 at 30, ¶ 114 (emphasis added); *accord* ECF No. 152 at 28, ¶¶ 102-104 (alleging irreparable injuries that the Plaintiffs have suffered "[a]s a result of the *Governor's COVID-19* Vaccine Mandate" (emphasis added)); *see also* ECF No. 152 at 31, ¶ 120 ("The *Governor's COVID-19* Vaccine Mandate, on its face and as applied, creates a system of individualized exemptions for preferred exemption requests while discriminating against requests for exemption and accommodation based on sincerely held religious beliefs." (emphasis added)).

The Amended Complaint does not contain allegations that support a reasonable inference that *all* of the vaccines for *all* of the diseases listed in the version of the DHCF worker immunization rule that included COVID-19 have some connection to aborted fetal cells. Thus, as pleaded, the Plaintiffs' religious objections to receiving a COVID-19 vaccine do not apply to the remaining vaccines and the circumstances in which the statutory exemptions may apply. More fundamentally, the Plaintiffs do not allege any facts showing that they have standing to mount so broad a challenge. In sum, the Amended Complaint alleges an as-applied challenge to the tandem operation of the regulation and section 802, but does not contain allegations supporting a facial challenge to either the rule or the statute.

Finally, the Plaintiffs have not shown cause for granting their request to amend the Amended Complaint "to address any pleading concerns." ECF No. 195 at 5. Though courts "freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), justice does not require permitting the Plaintiffs to further amend the Amended Complaint to drastically broaden the scope of their claims to challenge all possible applications of the DHCF worker immunization rule and the Department's authorizing statute. Nor, contrary to the Plaintiffs' contentions, is leave to amend warranted under Federal Rule of Civil Procedure 15(d). Under Rule 15(d), courts allow parties to amend pleadings to add transactions, occurrences, or events that happen *after* the date of the pleading to be supplemented. Fed. R. Civ. P. 15(d). The Plaintiffs filed the Amended Complaint on July 11, 2022. The challenged statute was enacted in 1989, amended to add exemptions to immunization in 2001, and further amended to repeal a religious exemption in 2019. 22 M.R.S.A. § 802 (1989), *amended by* P.L. 2001, ch. 185, § 2 (effective Sept. 21, 2001) and P.L. 2019, ch. 154, § 9 (effective Sept. 19, 2019).[8] Because the Plaintiffs have not identified any post-filing transactions, occurrences, or events that would justify additional amendments, their request to amend the Amended Complaint under Rule 15(d) is properly denied.

B. Whether the Plaintiffs' Claims are Moot

The Defendants' Motion to Dismiss centers on the following question: Did the Department's removal of COVID-19 from the DHCF worker immunization rule moot

[8] The Maine Legislature has also amended section 802 to revise provisions within the statute unrelated to exemptions; those amendments occurred before the Plaintiffs filed the Amended Complaint.

the Plaintiffs' claims so that this Court no longer has jurisdiction over this matter? Article III, section 2 of the United States Constitution confines the jurisdiction of federal courts "to those claims that involve actual 'cases' or 'controversies.'" *Redfern v. Napolitano*, 727 F.3d 77, 83 (1st Cir. 2013) (quoting U.S. Const. art. III, § 2, cl. 1). It follows that "federal courts 'lack constitutional authority to decide moot questions.'" *Id.* (quoting *Barr v. Galvin*, 626 F.3d 99, 104 (1st Cir. 2010)). "When a case is moot—that is, when the issues presented are no longer live or when the parties lack a [legally] cognizable interest in the outcome—a case or controversy ceases to exist, and dismissal of the action is compulsory." *Id.* at 83-84 (quoting *Maher v. Hyde*, 272 F.3d 83, 86 (1st Cir. 2001)). Put differently, "a case is moot when the court cannot give any effectual relief to the potentially prevailing party," *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157 (1st Cir. 2021) (quoting *Town of Portsmouth v. Lewis*, 813 F.3d 54, 58 (1st Cir. 2016)), and the action must be dismissed, *Harris v. Univ. of Massachusetts Lowell*, 43 F.4th 187, 192 (1st Cir. 2022). "Unless an exception to [mootness] applies, to do otherwise would be to render an advisory opinion, which Article III prohibits." *Harris*, 43 F.4th at 192 (quoting *Pietrangelo v. Sununu*, 15 F.4th 103, 105 (1st Cir. 2021)); *see also ACLU of Massachusetts v. U.S. Conf. of Cath. Bishops*, 705 F.3d 44, 52-53 (1st Cir. 2013) (dismissal required where "events have transpired to render a court opinion merely advisory" (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003))).

Mootness manifests differently as to claims for declaratory and injunctive relief. "[R]equests for declaratory relief can only survive a mootness challenge where

'the facts alleged . . . show that there is a substantial controversy . . . *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment*.'" *Harris*, 43 F.4th at 192 (quoting *ACLU of Massachusetts*, 705 F.3d at 54) (emphasis in original). Claims for injunctive relief are moot when the "challenged [rule] no longer adversely affect[s] any plaintiff's primary conduct." *Id.* (alterations and quotation marks omitted).[9]

The "proper vehicle" for challenging a court's subject-matter jurisdiction on the basis of mootness is Federal Rule of Civil Procedure 12(b)(1). *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362-63 (1st Cir. 2001). Where a motion to dismiss for lack of jurisdiction is premised on mootness, the "key question 'is whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation).'" *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 8 (1st Cir. 2021) (quoting *Air Line Pilots Ass'n, Int'l v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990)). "The 'heavy' burden of showing mootness is on the party raising the issue." *Id.* (quoting *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008)).

As a direct consequence of the Department removing the COVID-19 vaccination requirement from the DHCF worker immunization rule, which operated in tandem with section 802's exemptions to immunization, this Court cannot provide

[9] Although "a claim for damages will keep a case from becoming moot where equitable relief no longer forms the basis of a live controversy," *Thomas R.W. v. Massachusetts Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) (quoting Laurence H. Tribe, *American Constitutional Law* § 3-11, at 84 (2d ed. 1988)), all of the Plaintiffs' claims for damages against the remaining Defendants have been previously dismissed. *See Lowe*, 2022 WL 3542187, at *6.

any relief to the Plaintiffs that would redress injuries that arise from an actual case or controversy. To the extent the Plaintiffs seek injunctive relief, they have effectively received it through the repeal of the COVID-19 vaccination requirement. *Cf. Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 393 (2d Cir. 2022) (holding that a court "cannot enjoin what no longer exists"). Relatedly, the Plaintiffs' earlier refusal to comply with the since-repealed COVID-19 vaccination requirement does not presently create a barrier to their employment at DHCFs operating in Maine. The Plaintiffs' former employers who might be enjoined to reinstate the Plaintiffs have previously been dismissed as parties to this dispute, *see supra* note 2, which also places the requested injunctive relief beyond the Court's authority. Finally, declaring the repealed requirement unconstitutional or unlawful at this juncture would constitute an unnecessary advisory opinion that would not redress injuries resulting from an actual case or controversy. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (observing that federal courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong").

In short, the Plaintiffs' surviving claims are moot, and I therefore consider whether any exception to the mootness doctrine applies.

C. Whether an Exception to the Mootness Doctrine Applies

Two recognized exceptions to mootness are relevant here: the "voluntary cessation" exception and the "capable of repetition yet evading review" exception.

1. Voluntary Cessation Exception

Government action that "withdraws or modifies a COVID restriction in the course of litigation . . . does not necessarily moot the case . . . where [plaintiffs] 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (quoting *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 20 (2020)). Animated by such threats, the voluntary cessation exception exists "to stop a scheming defendant from trying to 'immunize itself from suit indefinitely' by unilaterally changing 'its behavior long enough to secure a dismissal' and then backsliding when the judge is out of the picture—'repeating this cycle until it achieves all its unlawful ends.'" *Boston Bit Labs*, 11 F.4th at 10 (twice quoting *Lewis*, 813 F.3d at 59 (alteration omitted), then quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (alterations omitted)). The exception "'can apply when a defendant voluntarily ceases the challenged practice in order to moot the plaintiff's case and there exists a reasonable expectation that the challenged conduct will be repeated' after the suit's 'dismissal.'" *Id.* at 9 (quoting *Lewis*, 813 F.3d at 59) (alteration omitted). By contrast, the exception "'does *not* apply' if the change in conduct is '*unrelated* to the litigation.'" *Id.* at 10 (quoting *Lewis*, 813 F.3d at 59). The party claiming mootness has the burden to show that the voluntary cessation exception does not apply. *Id.*

The Defendants contend that the Department repealed the COVID-19 vaccination requirement "based on changed circumstances of the COVID-19 pandemic, not on this litigation." ECF No. 188 at 12. As evidence of this fact, the

Defendants cite declining hospitalizations and death rates over the period between January 2022 and August 2023,[10] rising COVID-19 vaccination rates, the predominance of less virulent variants of the original virus, the availability of new treatments, and increased population immunity from vaccination and prior infection.

In response, the Plaintiffs strive to cast the repeal decision as a bad-faith litigation tactic. Their reframing of the repeal decision rests on the close temporal proximity between the First Circuit's opinion in *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023), *aff'g in part and rev'g in part* 2022 WL 3542187 (D. Me. Aug. 18, 2022), entered on May 25, 2023, and the launch of the Defendants' review of the science underlying the COVID-19 vaccination rule in late May/early June 2023. The Plaintiffs contend that the review being launched on the heels of the First Circuit's decision is circumstantial evidence of a spurious scheme by the Defendants to rid themselves of a case they thought they had won, but that was revived on appeal.[11]

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[10] At oral argument on the pending motions (ECF No. 210), the Plaintiffs contended that the Defendants' proffered statistics (ECF Nos. 188-1, 188-2, 188-3) show increasing rates of COVID-19-related hospitalizations and death rates between July and August 2023 when rulemaking to repeal the COVID-19 vaccination requirement occurred. The Plaintiffs are correct: the average number of daily hospitalizations attributable to COVID-19 increased from 31 to 44 between July and August 2023, and the number of deaths per month attributable to COVID-19 rose from three to eight during the same period. Those short-term upticks notwithstanding, the Defendants' proffered statistics, viewed in their entirety, show broader, unambiguous trends of consistently declining rates of COVID-19-related hospitalizations and deaths between January 2022 and August 2023, which the Plaintiffs' selective statistical subset does not refute.

[11] The Plaintiffs argue:

> State Defendants explicitly admit that it was not until "around the end of May 2023 and the beginning of June 2023," that they purportedly "reviewed the available science and research on the then current risks of COVID-19 in healthcare settings." (MTD 5.) And, on July 11, 2023, "the Department announced that it was proposing to end the requirement that DHCFs require their employees to be vaccinated against COVID-19." (*Id.* at 7.) This timing is unequivocally relevant to the determination of whether State Defendants' contentions of mootness have any merit. One need not ponder too long to see the importance of this admission. The First Circuit released its decision on Plaintiffs' appeal of the dismissal of their Complaint *on May 25, 2023*, *see*

The meaning that the Plaintiffs attribute to the sequence of key events ignores the undisputed fact that the Defendants' reassessment of the need for the vaccination requirement followed shortly after the federal and state COVID-19 public health emergencies ended on May 11, 2023. The Plaintiffs also overlook the fact that the reassessment coincided with the June 5, 2023, announcement of the withdrawal of the CMS rule. The Plaintiffs' suggestion that the Defendants engaged in a bad faith litigation tactic, while not accounting for obviously relevant Federal and State governmental actions, is based on a substantially incomplete and, therefore, misleading narrative of the relevant events. Further, the Plaintiffs have not supported their position with declarations under oath or exhibits, nor have they requested permission to perform discovery on the issue.

Accordingly, the Plaintiffs do not credibly dispute the fact that the review that led the Department to reconsider the continued need for the COVID-19 vaccination requirement for DHCF workers was prompted by the termination of the federal and Maine COVID-19 public health emergency declarations on May 11, 2023. It is

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Lowe v. Mills, 68 F.4th 706 (1st Cir. 2023), and held that Plaintiffs had stated a claim upon which relief can be granted and that "it is plausible, in the absence of any factual development, that the Mandate" violates the Free Exercise Clause. *Id.* at 714.

> Thus, precisely "around the end of May 2023" (MTD 5) when the First Circuit held that Plaintiffs were entitled to probe their First and Fourteenth Amendment claims in discovery, State Defendants had a sudden revelation that they should reconsider the evidence concerning the Vaccine Mandate. That timing is critical here. After Plaintiffs fought for two years to have their day in Court, and despite State Defendants admitting that they were aware of changed circumstances concerning the risk of COVID-19 beginning "in *January 2022*" (MTD 6 (emphasis added)), State Defendants did nothing to alter the challenged Vaccine Mandate until the eve of discovery commencing in this Court. That is a litigation tactic, not a genuine change of heart, and it precludes a finding of mootness.

ECF No. 195 at 5-6.

self-evident that responsible public officials who are charged with protecting public health would reevaluate Maine's vaccination policies in response to the simultaneous termination of federal and state public health emergency declarations. It is also beyond serious dispute that the events leading up to the Department's reconsideration of the need for the COVID-19 vaccine requirement were outside the Defendants' control. Moreover, the Plaintiffs have not challenged the scientific basis for the Department's conclusion in July 2023 that requiring DHCF workers to be immunized against COVID-19 was no longer necessary to help protect individual patients, individual workers, and Maine's healthcare infrastructure. The Defendants have met their burden of demonstrating that the Department initiated its review and ultimately decided to repeal the COVID-19 vaccination requirement for substantial reasons unrelated to this litigation, and not out of bad faith. The voluntary cessation exception to mootness does not apply.

2. Exception for Conduct Capable of Repetition but Evading Review

The Plaintiffs fare no better with the other relevant exception to mootness, which relates to conduct capable of repetition but evading judicial review. This exception "'applies only in exceptional situations' where . . . '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Spencer*, 523 U.S. at 17 (first quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), then quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990) (alterations omitted)). In contrast to the voluntary cessation

exception, the Plaintiffs have the burden to show that both prongs in this conjunctive test are satisfied. *ACLU of Massachusetts*, 705 F.3d at 57.

On this record, the Plaintiffs have not met their burden as to the second prong because they fail to present any positive, non-speculative evidence to support a reasonable expectation that they will be subject to the challenged COVID-19 vaccination requirement—or one substantially similar to it—again. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993). Nor do the Plaintiffs demonstrate a "probability" of the same. *ACLU of Massachusetts*, 705 F.3d at 57 (quotation marks omitted)). Instead, Plaintiffs pin their reasonable expectation argument on the Defendants' (1) retained authority to amend the DHCF worker immunization rule in the future, leaving open the possibility that the Defendants could return COVID-19 to the rule's list of required vaccinations; and (2) refusal "to concede any unlawful conduct" in this litigation. ECF No. 195 at 17 (quoting ECF No. 188 at 14 n.5). Under similar circumstances, however, the First Circuit has squarely rejected the same argument.

In *Boston Bit Labs*, the First Circuit reiterated that the "sheer 'power to reinstitute a challenged law is not a sufficient basis on which a court can conclude that a challenge remains live.'" 11 F.4th at 11 (alteration omitted) (quoting *Am. Bankers Assoc. v. Nat'l Credit Union Admin.*, 934 F.3d 649, 661 (D.C. Cir. 2019)). That the *Boston Bit Labs* Court weighed the risk of recurrence in light of a governor's power to issue executive orders, 11 F.4th at 10, is a distinction without a difference. Here, the Plaintiffs' alleged expectation of recurrence derives from the Department's

power to promulgate rules under 22 M.R.S.A. § 802. Rules adopted under section 802 are routine technical rules, as defined in 5 M.R.S.A. § 8071(2)(A) (West 2024), 22 M.R.S.A. § 802(3), that are subject to rulemaking procedures under 5 M.R.S.A. § 8052 (West 2024), 5 M.R.S.A. § 8071(3). The rulemaking procedures under section 8052 include an opportunity for the public to provide comments to raise their concerns and an accompanying requirement that the promulgating agency specifically address the comments and provide a rationale for incorporating or dismissing them. 5 M.R.S.A. § 8052(1), (5). These procedures function as a check on executive agencies' authority to adopt rules that is not present when Maine's Governor issues executive orders during emergencies, like the COVID-19 state health emergency. *See* 37-B M.R.S.A. § 741(3)(A) (West 2024). Even the more relaxed emergency rulemaking procedures that agencies follow when "necessary to avoid an immediate threat to public health, safety or general welfare," 5 M.R.S.A. § 8054(1) (West 2024)—and that the Department presumably followed when promulgating the now-repealed COVID-19 vaccination requirement for DHCF workers, *see* 10-144 C.M.R. ch. 264 (2023) (characterizing the August 12, 2021, rule change adding COVID-19 to section 2 as "EMERGENCY ROUTINE TECHNICAL")—include the possibility of public checks that do not apply when Maine's Governor issues emergency orders.

As a fallback, the Plaintiffs argue that the "Defendants have failed to make it absolutely clear that such deliberate conduct is unlikely to recur again." ECF No. 195 at 18. This argument, however, conflates the Defendants' burden as to the second prong of the voluntary cessation exception, *see Friends of the Earth, Inc. v. Laidlaw*

Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (articulating the "absolutely clear" requirement), with the Plaintiffs' burden to show that the conduct-capable-of-repetition exception to mootness applies.

The Plaintiffs have not presented any affirmative support to substantiate that their expectation that the challenged conduct will recur is reasonable. Accordingly, the conduct-capable-of-repetition exception to mootness does not apply.

III. CONCLUSION

Because the Plaintiffs' surviving claims are moot following the repeal of the COVID-19 vaccination requirement from the DHCF worker immunization rule and no exception to mootness applies, it is **ORDERED** that the Defendants' Motion to Dismiss (ECF No. 188) is **GRANTED**; the Plaintiffs' request to amend the First Amended Complaint (ECF No. 195 at 5) is **DENIED**; and the First Amended Complaint (ECF No. 152) is **DISMISSED**.

SO ORDERED.

Dated this 23rd day of February, 2024.

/s/ Jon D. Levy
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ALICIA LOWE et al.,	)	
	)	
Plaintiff(s),	)	
	)	
v.	)	CIVIL NO. 1:21-cv-00242-JDL
	)	
JANET T. MILLS et al.,	)	
	)	
Defendant(s),	)	

JUDGMENT OF DISMISSAL

In accordance with the Order on Defendants' Motion to Dismiss Surviving Claims as Moot entered by Chief U.S District Judge Jon D. Levy on February 23, 2024,

JUDGMENT of Dismissal is hereby entered as to Defendants Jeanne M. Lambrew and Dr. Puthiery Va.

CHRISTA K. BERRY
CLERK

By: /s/ Charity Pelletier
Deputy Clerk

Dated: February 23, 2024