

No. 21-717

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IN THE  
**Supreme Court of the United States**

JANE DOES 1-6, ET AL.

*Petitioners*

v.

JANET T. MILLS, Governor of the State of Maine, ET AL.

*Respondents.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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**STATE RESPONDENTS' RESPONSE TO MOTION TO EXPEDITE  
CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI**

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Janet T. Mills, Governor of the State of Maine; Jeanne M. Lambrew, Commissioner of the Maine Department of Health and Human Services (Department); and Dr. Nirav D. Shah, Director of the Maine Center for Disease Control and Prevention (Maine CDC), (collectively, “State Respondents”), submit this response to Petitioners’ motion to expedite consideration of their Petition for Writ of Certiorari (Petition).

Petitioners’ motion should be denied. First, there is no current exigency that warrants accelerated review in this interlocutory matter. Second, Petitioners’ appeal of the denial of injunctive relief is moot because the state agency rule at issue is no longer in effect, and there is no reason to expedite a moot petition. Third, even if the Petition is not moot, there is significant uncertainty as to whether Petitioners have any continuing personal stake in the outcome of the case. Fourth, subsequent federal action purports to preempt Maine’s COVID-19 vaccine medical exemption, creating further uncertainty regarding the Questions Presented in the Petition.

State Respondents intend to file a brief in opposition to the Petition with respect to Petitioners’ first and second Questions Presented. By separate motion, State Respondents are requesting an additional thirty days, until January 14, 2022, to do so.

## **STATEMENT**

Maine has a long history of mandating that hospitals and other healthcare facilities require their employees to be vaccinated against several highly communicable diseases. *See, e.g.*, 1989 Me. Laws 644 (requiring employees of

hospitals to be vaccinated against measles and rubella).<sup>1</sup> Under Maine’s existing framework, the Department and Maine CDC designate the required vaccinations for healthcare workers through state agency rule, Immunization Requirements for Healthcare Workers, 10-144-264 ME. CODE R., but the Legislature defines the vaccine exemptions in statute. *See* ME. REV. STAT. ANN. tit. 22, § 802(4-B) (Supp. 2021). Maine eliminated non-medical exemptions (both philosophical and religious) effective April 2020.<sup>2</sup> Pet. App. 13a, 61a-62a.

On August 12, 2021, the Department and Maine CDC promulgated an emergency amendment to the healthcare worker vaccination rule to require Designated Healthcare Facilities, Dental Practices, and EMS Organizations to require their employees to be vaccinated fully against COVID-19. 10-144-264 ME. CODE R. § 2 (eff. Aug. 12, 2021) [hereinafter “Emergency Rule”]. The Emergency Rule required these healthcare facilities to comply by October 1, 2021, but the Department and Maine CDC later announced they would not enforce the Rule until October 29, 2021. Pet. App. 23a, 53a.

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<sup>1</sup> State Respondents have outlined the history of Maine’s mandatory vaccinations law for healthcare workers in their opposition to Petitioners’ Emergency Application for Writ of Injunction. Only the portions relevant to the pending motion are repeated here.

<sup>2</sup> Petitioners continue to misstate when and what type of vaccination exemptions were eliminated in Maine. *See e.g.*, M. Expedite 2 (“Maine specifically and intentionally removed the religious exemption from mandatory immunizations effective September 1, 2021.”). The record demonstrates conclusively that religious and philosophical exemptions were eliminated in Maine at the same time. Pet. App. 13a, 61a-62a. The record also demonstrates that these nonmedical exemptions were eliminated by legislation enacted in 2019 that ultimately became effective in April 2020—not in August or September of 2021. Pet. App. 13a, 61a-62a.

Because the Emergency Rule could only be effective for 90 days, *see* ME. REV. STAT. ANN. tit. 5, § 8054(3) (Supp. 2021), on September 8, 2021, the Department and Maine CDC proposed permanent amendments to the healthcare worker vaccination rule. The proposed rule was subject to a full notice and comment period. On November 10, 2021, the Department and Maine CDC issued the final healthcare worker vaccination rule, thereby superseding the Emergency Rule. Immunization Requirements for Healthcare Workers, 10-144-264 ME. CODE R. (eff. Nov. 10, 2021) [hereinafter “Final Rule”].<sup>3</sup>

The pseudonymous Petitioners filed suit on August 25, 2021, along with a motion for temporary and preliminary injunctive relief seeking to enjoin the Emergency Rule. Pet. App. 53a. At the time they filed their complaint, seven Petitioners were employed by healthcare facilities subject to the Emergency Rule; one of the Petitioners (John Doe 1) owned his own practice subject to the Emergency Rule and employed the ninth Petitioner (Jane Doe 6). Pet. App. 58a-59a.

Petitioners were not successful in their attempts to enjoin the Emergency Rule prior to its enforcement date of October 29, 2021. *See generally Does 1-6 v. Mills*, -- F. Supp. 3d ---, 2021 WL 4783626 (D. Me. Oct. 13, 2021); *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021). On October 29, 2021, when the Emergency Rule was already subject to enforcement, this Court denied Petitioners’ emergency application for injunctive relief from the Emergency Rule pending their petition for writ of certiorari. Pet. App. 1a.

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<sup>3</sup> The Final Rule is available on the Maine Secretary of State’s website at <https://www1.maine.gov/sos/cec/rules/10/144/144c264.docx>.

Then, on November 5, 2021, the Centers for Medicare and Medicaid Services (CMS) published an Interim Final Rule with Comment Period (IFC) entitled “Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination.” 86 Fed. Reg. 61,555 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482-86, 491 & 494). That IFC, which covers the same healthcare entities as Maine’s Emergency Rule and Final Rule, requires that those entities ensure that a broad swath of personnel<sup>4</sup> within those facilities be vaccinated against COVID-19. CMS has made clear that it intends for its vaccine mandate to preempt any arguably inconsistent state and local laws, including the scope of any applicable COVID-19 vaccine exemption. *See, e.g., id.* at 61,568 (“We intend . . . that this nationwide regulation preempts inconsistent State and local laws”); *id.* at 61,572 & 61,613 (“[T]his IFC preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFC.”).

## **ARGUMENT**

Petitioners’ motion to expedite consideration of their Petition should be denied.<sup>5</sup>

First, there is no current exigency that warrants accelerated interlocutory review. Petitioners themselves have described their Petition as “non-emergency” in

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<sup>4</sup> Whereas the Emergency Rule applied and the Final Rule applies only to “employees,” the IFC covers employees, licensed practitioners, students, trainees, volunteers, and persons providing patient care or other services at the facility by contract or other arrangement. *See, e.g.,* 86 Fed. Reg. 61,555, 61,616 & 61,619 (defining staff covered by mandate for ambulatory surgical centers and hospitals).

<sup>5</sup> Petitioners did not include any proposed timeline or schedule in their motion.

a motion pending in the District Court in this matter.<sup>6</sup> That characterization is unsurprising; to the extent Petitioners are subject to the Final Rule, the circumstances they face today are less urgent than when this Court denied their emergency application for a writ of injunction pending appeal three weeks ago.

Petitioners claim that they and hundreds of other healthcare workers are at risk of losing their ability to provide for their families. M. Expedite 5. Neither the Emergency Rule nor the Final Rule is so broad as Petitioners claim. The Emergency Rule covered (and the Final Rule covers) only employees of certain healthcare facilities; employees of private physician practices and urgent care clinics, among others, are not included in the scope of either Rule.<sup>7</sup>

State Respondents disagree that Petitioners are facing irreparable loss of their Free Exercise rights. M. Expedite 8-9. As explained by the District Court,

The vaccination requirement challenged here does not prevent [Petitioners] from exercising their religious beliefs by refusing to receive the COVID-19 vaccination. In contrast, in *Tandon [v. Newsom]*, 141 S. Ct. 1294 (2021) (per curiam),] interference with the free exercise of religion was direct because the statute prevented like-minded persons from gathering together to perform religious rituals. Here, the [Emergency] Rule does not compel the Plaintiffs to be vaccinated against their will, and the Plaintiffs have, in fact, freely exercised their religious beliefs by declining to be vaccinated. This is not to minimize the seriousness of the indirect consequences of the Plaintiffs' refusal to be vaccinated, as it affects their employment. Nonetheless, the [Emergency] Rule has not prevented the Plaintiffs from staying true to their professed religious beliefs.

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<sup>6</sup> Motion to Stay Proceedings Pending Disposition of Petition for Writ of Certiorari at 4, *Does 1-6 v. Mills*, 1:21-cv-00242-JDL (D. Me. Nov. 19, 2021), ECF No. 81.

<sup>7</sup> Petitioners have made inconsistent allegations on this point. In the pending motion, they assert that the Emergency Rule renders them and others “jobless,” M. Expedite 5, but in their Petition, they acknowledge the Emergency Rule did not apply to employees of “urgent care centers or private physician’s offices,” Petition at 20-21.

Pet. App. 73a-74a. Further, the alleged harm Petitioners argue supports expedited review, the loss of employment, is “serious and substantial, [but] not irreparable. [Petitioners] may pursue remedies at law for alleged discriminatory firings, including reinstatement, back pay, and damages.” Pet. App. 95a. *See also Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“it seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury”).

Petitioners raise solemn constitutional questions in their Petition, but the significance of the issues weighs in favor of regular order. *See Felkner v. Turpin*, 517 U.S. 1182, 1182 (1996) (Stevens, J., dissenting). The Court and all parties will benefit from complete, deliberate briefing.

Second, Petitioners’ challenge to the First Circuit’s affirmance of the denial of a preliminary injunction is moot because the Emergency Rule analyzed in that opinion is no longer in effect. There is no reason to expedite a moot petition in order to render an advisory ruling on a state law no longer in effect. The Petition is therefore unlike the “watershed constitutional cases” cited by Petitioners because in each of those cases, there was an ongoing, definite controversy requiring resolution. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (concluding detained petitioner could not be tried in military tribunal); *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (deciding whether Presidential executive orders after Iranian hostage crisis prevented execution of judgment against foreign entities); *United States v. Nixon*, 418 U.S. 683 *passim* (1974) (determining whether and how subpoenaed evidence could be used in ongoing criminal prosecution); *New York Times Co. v. United States*, 403 U.S.

713, 714 (1971) (per curiam) (vacating stays and allowing Pentagon Papers to be published); *Hannah v. Larche*, 363 U.S. 420 *passim* (1960) (evaluating legality and constitutionality of challenged procedural rules in upcoming Congressional commission hearing); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 *passim* (1952) (evaluating legality of Presidential seizure of steel mills during Korean War); *Ex parte Quirin*, 317 U.S. 1, 45-48 (1942) (upholding detention and trial of habeas petitioners charged with wartime offenses in military tribunal).

Third, and relatedly, there is significant uncertainty as to whether Petitioners have any continuing personal stake in the outcome of the case. “Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.” *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). The Court has “no power to issue advisory opinions,” and “federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.” *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam).

The proceedings to date, including the Petition, have challenged only the Emergency Rule. That rule is no longer in effect, and was set to expire on November 11, 2021, according to the statutory time limitation of 90 days.<sup>8</sup> The Final Rule that has superseded and replaced the Emergency Rule is narrower in scope. Whereas the Emergency Rule applied to Designated Healthcare Facilities, Dental Practices, and

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<sup>8</sup> *See Trump v. Hawai‘i*, 138 S. Ct. 377 (2017) (Mem.) (dismissing case as moot when executive order at issue expired by its own terms); *Spell v. Edwards*, 962 F.3d 75, 179 (5th Cir. 2020) (voluntary cessation exception to mootness does not apply when statute “expires by its own terms”).

EMS Organizations, the Final Rule applies only to Designated Healthcare Facilities. The Final Rule also defines employee more narrowly than the Emergency Rule.

At this stage, the record does not include any information on whether some or all of Petitioners are subject to the Final Rule. Further, the record does not reveal whether some Petitioners may have chosen to get vaccinated in the wake of their unsuccessful legal challenges to the Emergency Rule prior to the enforcement date of October 29, 2021.<sup>9</sup>

Even if one Petitioner still has sufficient personal stake in the litigation to challenge the Final Rule, not all Petitioners present the same arguments. For example, in the first Question Presented, Petitioners seek certiorari on whether the Emergency Rule “violates the employers’ and employees’ rights under the Free Exercise Clause of the First Amendment.” Petition at i-ii. The only Petitioner that is also an employer is John Doe 1; whether John Doe 1 is subject to the Final Rule has not been established yet. Indeed, Petitioners do not mention the Final Rule or allege that any of them are subject to it in the subject motion or their Petition.<sup>10</sup> Expediting the Petition therefore could result in unnecessary briefing.

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<sup>9</sup> Compare Verified Complaint at 20-21, *Does 1-6 v. Mills*, No. 1:21-cv-242-JDL (D. Me. Aug. 25, 2021), ECF No. 1 (Petitioners’ “sincerely held religious beliefs compel them to abstain from obtaining or injecting any of [the available COVID-19 vaccines] into their bod[ies], regardless of perceived benefit or rationale”), with Plaintiffs-Appellants’ Reply in Support of Emergency Motion for Injunction Pending Appeal at 2, *Does 1-6 v. Mills*, No. 21-1826 (1st Cir. Oct. 15, 2021) (noting given the “choice” between employment termination and vaccination, “some P[etitioners] will undoubtedly choose the latter, because they are only human beings after all”).

<sup>10</sup> In order to ascertain some of these critical facts, State Respondents and Provider Respondents have moved to amend the Protective Order entered by the district court. See Joint Motion to Modify Protective Order at 1-2, *Does 1-6 v. Mills*, 1:21-cv-242-JDL (D. Me. Nov. 9, 2021), ECF No. 74.

Fourth, subsequent federal action purporting to preempt Maine's COVID-19 vaccine medical exemption also weighs against expediting consideration of the Petition. The IFC purports to preempt "the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFC." 86 Fed. Reg. 61,555, 61,572 & 61,613.

The medical exemption in CMS's vaccine mandate is narrower than Maine's medical exemption. Maine's COVID-19 vaccine medical exemption provides: "A medical exemption is available to an employee who provides a written statement from a licensed physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable." ME. REV. STAT. ANN. tit. 22, § 802(4-B)(A). In comparison, the COVID-19 vaccine medical exemption in the IFC includes more stringent substantiation and documentation requirements:

For staff members requesting a medical exemption from vaccination, documentation confirming recognized clinical contraindications to COVID-19 vaccines, and which supports the staff member's request, must be signed and dated by a licensed practitioner, who is not the individual requesting the exemption, and who is acting within their respective scope of practice as defined by, and in accordance with, all applicable State and local laws. Such documentation must contain all information specifying which of the authorized COVID-19 vaccines are clinically contraindicated for the staff member to receive and the recognized clinical reasons for the contraindications; and a statement by the authenticating practitioner recommending that the staff member be exempted from the facility's COVID-19 vaccination requirements based on the recognized clinical contraindications.

86 Fed. Reg. 61,555, 61,572.

Three members of this Court have criticized the breadth of Maine’s COVID-19 vaccine medical exemption as a system or mechanism of “individualized exemptions,” Pet. App. 4a-5a, criticisms that may not apply if Maine’s COVID-19 vaccine medical exemption is preempted by the IFC. At least twenty-four states have challenged the preemptive effect of the IFC in four separate cases pending in federal district court. *See Florida v. Dep’t of Health & Human Servs.*, No. 3:21-cv-2722-MCR-HTC (N.D. Fla. Nov. 17, 2021); *Texas v. Dep’t of Health & Human Servs.*, No. 2:21-cv-229-Z (N.D. Tex. Nov. 15, 2021); *Louisiana v. Becerra*, No. 3:21-cv-3970 (W.D. La. Nov. 15, 2021); *Missouri v. Biden*, 4:21-cv-1329-MTS (E.D. Mo. Nov. 10, 2021). Briefing on various injunctive relief motions in most of these cases is ongoing, but one court has already declined to enjoin the IFC. *See Florida v. Dep’t of Health & Human Servs.*, No. 3:21-cv-2722-MCR-HTC, 2021 WL 5416122, at \*1 (N.D. Fla. Nov. 20, 2021).

Because the Petition also challenges the breadth of Maine’s COVID-19 vaccine medical exemption, Petition at 20, resolution of the preclusive effect of the IFC will directly affect all briefing of this case and likewise counsels against expedited briefing in this matter.

## CONCLUSION

Petitioners’ motion to expedite consideration of the Petition should be denied.

Respectfully submitted,

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