UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JANE DOES 1-6, et al.,

Plaintiffs,

v.

JANET T. MILLS, Governor of the State of Maine, et al.,

Defendants.

Civil Action No. 1:21-cv-00242-JDL

STATE DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants 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 (Maine CDC), (collectively, "State Defendants") submit this reply memorandum in support of their Motion to Dismiss Plaintiffs' Complaint, ECF No. 109, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

ARGUMENT

I. The Court may properly consider materials and authority challenged by Plaintiffs in deciding State Defendants' Rule 12(b)(6) motion and Rule 12(b)(1) motion.

Plaintiffs incorrectly assert that the Court may not consider any document other than their complaint in evaluating State Defendants' motion. ECF No. 117 at 1, 4. It is well-established that in ruling on a Rule 12(b)(6) motion to dismiss, the court may consider materials other than the complaint, i.e., "documents the authenticity of which are not disputed by the parties"; "official public records"; "documents central to plaintiffs' claim"; and "documents sufficiently referred to in the complaint." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). State Defendants' Rule 12(b)(6) motion to dismiss relies on these species of documents—the authenticity of which

Plaintiffs have not challenged—which can and should be considered by the Court.[1] ECF No. 109 at n.1. Further, the Court may consider the declarations provided in support of State Defendants' Rule 12(b)(1) motion in order to determine its own jurisdiction. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363-64 (1st Cir. 2001) (highlighting materials, evidence, and methods federal courts may use to evaluate jurisdictional claims). Plaintiffs' arguments to the contrary are without merit.

Plaintiffs also argue that the Court cannot consider *Doe v. Mills*, 16 F.4th 20 (1st Cir. 2021), which affirmed this Court's denial of Plaintiffs' preliminary injunction motion in deciding the present motion. ECF No. 117 at 3, 5. It is true that the standards of review for a motion for preliminary injunction and motion to dismiss are not the same, but the materials before the Court on State Defendants' motion to dismiss are nearly identical to the materials that were before the Court on Plaintiffs' preliminary injunction motion. Moreover, the motion before the Court involves largely legal determinations. Thus, while *Doe* may not be binding, it does constitute persuasive authority that the Court can and should consider.

II. Plaintiffs failed to oppose State Defendants' Rule 12(b)(1) motion.

State Defendants' Rule 12(b)(1) motion to dismiss challenged the Court's jurisdiction in three ways. First, it challenged the Court's jurisdiction to award damages against State Defendants in their official capacity because such claims are barred by sovereign immunity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974). Second, the motion challenged the Court's jurisdiction as to the injunctive and declaratory relief claims brought by John Doe 1 and Jane Doe 6, which claims are now moot and not subject to any exception. *See Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 9 (1st Cir. 2021); *Bayley's Campground Inc. v. Mills*, 985 F.3d 153, 157 (1st Cir. 2021) ("a case is moot when the court cannot give any

[1] As noted by Plaintiffs, ECF No. 117 at 4, State Defendants inadvertently cited a declaration at page 15 of their motion to dismiss. The correct citation for that sentence is as follows: ECF Nos. 49-7; 48-2 to 48-5; 109-2 at 22-23.

effectual relief to the potentially prevailing party" (quotation marks omitted)). Third, the motion disputed the Court's jurisdiction as to Governor Mills because she was not responsible for enacting, promulgating, or enforcing the state authorities challenged by Plaintiffs. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534 (2021).

Plaintiffs failed to oppose State Defendants' 12(b)(1) motion, presenting no argument or evidence in favor of their damage claims, in opposition to State Defendants' mootness arguments, or in opposition to Governor Mills' standing and sovereign immunity arguments. Having seemingly abandoned these claims, the Court should grant State Defendants' 12(b)(1) motion and dismiss all damages claims and John Doe 1, Jane Doe 6, and Governor Mills from the case. *See Putney, Inc. v. Pfizer, Inc.*, No. 07-108-P-H, 2007 WL 3047159, at *8 (D. Me. Oct. 17, 2007) (plaintiff's failure to respond to arguments meant "motion to dismiss may be granted for that reason alone").

III. Plaintiffs' remaining claims against State Defendants fail under Rule 12(b)(6).

In large part, Plaintiffs misapprehend the federal pleading requirements under Fed. R. Civ. P. 8(a)(2) and 12(b)(6). Rule 8(a)(2) requires more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

> In order to show an entitlement to relief a complaint must contain enough factual material to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. In short, an adequate complaint must provide fair notice to the defendants and state a facially plausible legal claim.

Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011) (cleaned up). Plaintiffs' complaint lacks the essential requirement of plausibility.

Free Exercise. Plaintiffs' arguments that they have alleged a plausible violation of the Free Exercise Clause of the First Amendment fall short. ECF No. 117 at 4-16. State Defendants have already addressed many of Plaintiffs' arguments in their motion to dismiss, *see, e.g.*, ECF No. 109 at 11 (showing how Rule and Statute are facially neutral); *id.* at 11-12 (showing that Plaintiffs' claims that they were targeted for their religious beliefs are implausible); *id.* at 13-15 (showing that Rule and Statute are not systems of individualized exemptions), but address additional arguments as follows.

Plaintiffs contend that their complaint sufficiently alleges that the Statute and Rule are neither neutral nor generally applicable because both allegedly run afoul of the Supreme Court's decisions in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). ECF No. 117 at 6-8. But Plaintiffs are wrong in two interrelated ways. First, Plaintiffs are forcing the facts of *Roman Catholic Diocese* and *Tandon* onto this case, disregarding Maine's asserted interests in its statutory medical exemptions. Second, Plaintiffs misconstrue and misapply *Tandon*. *Tandon* explained that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. at 1296 (second emphasis added). Plaintiffs ignore the word "comparable" and what follows. The Supreme Court continued: "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.*

Maine's asserted interests are not the same as the governmental interests asserted in *Tandon* and *Roman Catholic Diocese*. In both cases, the States assessed the risks posed by different activities and settings and prohibited or limited religious gatherings while placing no restrictions (or fewer restrictions) on numerous, secular settings based on their risk assessments. *See Roman*

Cath. Diocese, 141 S. Ct. at 66 (noting regulation allowed houses of worship in a designated area to admit only ten persons, but "essential" businesses, such as "acupuncture facilities, camp grounds, garages, [and] plants manufacturing chemicals," to "admit as many people as they wish"); *see also Tandon*, 141 S. Ct. at 1297 (noting regulation permitted persons at "hair salons, retail stores, personal care services, movie theaters, [and] private suites at sporting events" "to bring together more than three households at a time," but did not allow the same for "at-home religious exercise"). In each case, the Court rejected the States' actual, asserted risk assessments because, in the Supreme Court's view, the States singled out religious activity for harsher treatment than secular activity that posed equal risk. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.").

In contrast, Maine's asserted interest in providing only a medical exemption in the Statute is not based on comparative assessments of risk between secular and religious activities. In eliminating nonmedical exemptions to vaccination requirements, the Maine Legislature sought to reverse the trajectory of falling vaccination rates in order to prevent communicable, preventable diseases from spreading in schools, healthcare facilities, and daycare facilities so that all persons medically unable to be vaccinated could be protected by the immunity of his or her classmates or co-workers. Plaintiffs fail to address Maine's actual, asserted interest in the Statute or, at a minimum, fail to adequately contest the State's asserted interest. *See* ECF No. 117 at 9 (relying on non-controlling law and reasoning). Framed properly, a medical exemption is not comparable to a religious exemption, and Plaintiffs' complaint does not plausibly allege otherwise.

Even if comparative assessments of risk were the correct inquiry, Plaintiffs have failed to address that the Centers for Medicare and Medicaid Services (CMS) rule requiring vaccination against COVID-19 provides a narrower medical exemption than the Statute: "confirm[ed]

recognized clinical contraindications to COVID-19 vaccines," based on guidance from United States Centers for Disease Control (US CDC).[2] Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,616 & 61,572 (proposed Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482-86, 491 & 494). As State Defendants have shown, those contraindications are limited to rare reactions (anaphylaxis and myocarditis) to a prior dose of a COVID-19 vaccine. According to US CDC, the rate of anaphylaxis to a COVID-19 vaccine is "approximately 5 people per one million vaccinated in the United States."[3] Put another way, there are more Plaintiffs seeking religious exemptions in this case than the approximately 7 persons that would suffer anaphylaxis from a COVID-19 vaccination based on Maine's entire population. The numerical risks are therefore not comparable.

Plaintiffs also rely on *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), claiming it requires Maine to provide a religious exemption because the Statute provides a medical exemption. ECF No. 117 at 9-11. In *Fraternal Order*, police officers challenged the City of Newark's no-facial hair policy on First Amendment grounds; the City allowed for several secular exemptions, including a medical exemption, but not a religious exemption. There, the constitutional defect identified by the court was not that the medical exemption was secular per se—the problem was that it undermined the City's stated goal in maintaining a uniform, easily identifiable appearance for its officers. 170 F.3d at 365-66. In the same decision, the court explained that a different nonreligious exception—an exemption for undercover officers—was not problematic because those officers were not held out as members of

[2] Centers for Disease Control & Prevention, Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States (Nov. 5, 2021), *available at* https://www.cdc.gov/vaccines/covid-19/downloads/summary-interim-clinical-considerations.pdf.

[3] Centers for Disease Control & Prevention, Selected Adverse Events Reported after COVID-19 Vaccination (last visited Apr. 6, 2022), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html. Myocarditis after vaccination is also rare. *See id.*

the force. *Id.* at 366. Thus, exempting undercover officers from the no-facial-hair policy did not undermine the City's interest in a uniform appearance for its officers. *Id*. On the other hand, the City could not explain why a medical motivation for a beard undermined its interest less than a religious motivation for a beard. *Id.* In other words, the undercover officer exception was acceptable because it was consistent with the City's goal; the medical exemption was not. *Cf. Emp't Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 874, 876-82 (1990) (categorical exemption for possession of controlled substance prescribed by a physician from criminal law otherwise prohibiting such conduct did not defeat neutrality or general applicability of state law).

Unlike the medical exemption in *Fraternal Order*, Maine's allowance for a medical exemption furthers Maine's interest in protecting the health of healthcare workers and patients and those unable to be vaccinated. *See also Doe*, 16 F.4th at 34 ("Rather than undermine Maine's asserted governmental interest, the health exemption supports it."); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (2d Cir. 2021) ("applying the vaccination requirement to individuals with medical contraindications and precautions would not effectively advance" New York's "asserted interest in protecting the health of covered personnel"); *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, -- F. Supp. 3d ---, No. 3:21-cv-597-JBA, 2022 WL 105191, at *11 (D. Conn. Jan. 11, 2022) ("The decision to exempt individuals from the vaccine requirement for medical reasons does not undermine its interest, as Connecticut would not be protecting the health and safety of schoolchildren if it required these children to undergo medically contradicted treatment."); *cf. Fraternal Order*, 170 F.3d at 366 ("the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing").

Plaintiffs next argue, again in reliance on *Fraternal Order* and a series of similar cases, that State Defendants have made a value judgment in favor of a secular, medical exemptions and prioritized it over a religious exemption. ECF No. 117 at 11. But whether a medical exemption

reflects a value judgment that discriminates against religious exercise must be evaluated based on the policy objective to be achieved. *Cf. Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014) (Gorsuch, J.) (explaining a State may "identify[] a qualitative or quantitative difference between the particular religious exemption requested and other secular exceptions already tolerated, and then explain[] how such differential treatment furthers" the State's concern). Here, Maine's vaccination requirement and the statutory medical exemption further the same goal: protecting the health of patients and healthcare workers, and Plaintiffs have not plausibly alleged otherwise. None of Plaintiffs' arguments demonstrate that their Complaint sufficiently alleges that the Rule and Statute are not neutral laws of general applicability that are not rationally related to the State's interests. *See* ECF No. 109 at 11-16.

Last, Plaintiffs assert that their Complaint sufficiently alleges that the Rule and Statute are subject to and cannot satisfy strict scrutiny review. ECF No. 117 at 12-16. Plaintiffs' assertion that protecting persons from a deadly disease cannot qualify as a compelling interest forever is plainly belied by case law. ECF No. 117 at 13-14. Preventing the spread of communicable diseases is a compelling state interest, *Roman Cath. Diocese*, 141 S. Ct. at 67, regardless of whether there is an ongoing pandemic, *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353-54 (4th Cir. 2011) (holding States have a clear, compelling interest in preventing the spread of communicable diseases even when there is no ongoing pandemic and when those diseases are not prevalent), *cert. denied*, 565 U.S. 1036 (2011). That interest is not undermined by providing an exemption to persons medically unable to be vaccinated, and State Defendants have already shown how each alternative put forth by Plaintiffs was considered by the Department but rejected. *See* ECF No. 109 at 17-18.[4]

[4] Plaintiffs rely on *Navy Seal 1 v. Austin*, -- F. Supp. 3d ---, No. 8:21-CV-2429-SDM, 2022 WL 534459 (M.D. Fla. Feb. 18, 2022), which granted a preliminary injunction under the Religious Freedom Restoration Act, and *U.S. Navy*

Supremacy Clause. Plaintiffs present no argument in opposition to State Defendants' motion to dismiss the Supremacy Clause claim, which should be dismissed as not plausibly stating a claim. *See Ocasio-Hernández*, 640 F.3d at 12; *Putney,* 2007 WL 3047159, at *8.

Equal Protection Clause. In Equal Protection claims, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Davis v. Coakley*, 802 F.3d 128, 132-33 (1st Cir. 2015). As shown, this case does not involve a classification that requires strict scrutiny review. Plaintiffs seem to suggest that the rational basis test under the First Amendment is somehow different than the rational basis test under the Equal Protection clause. ECF No. 117 at 17-18. Both the Supreme Court and the First Circuit have rejected this approach; there is no "separate and distinct framework for analyzing claims of religious discrimination under the Equal Protection Clause." *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 354 (1st Cir. 2004) (citing *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004)). As explained above, the State's goals of stopping the spread of COVID-19 in certain facilities and protecting those unable to be vaccinated are legitimate state interests. Requiring vaccination, the most effective method of stopping the spread of communicable diseases, ECF No. 109-2 at 21-24, is rationally related to achieve those goals.

Civil Conspiracy. Last, Plaintiffs' arguments that they have alleged a plausible claim for civil conspiracy as between Plaintiffs' employers and State Defendants fall short. ECF No. 117 at 30-35. To plead a civil rights conspiracy, a plaintiff "must," among other requirements, "plausibly allege facts indicating an agreement among the conspirators to deprive the plaintiff of her civil

Seal 1 v. Biden, 27 F.4th 336 (5th Cir. 2022), which denied the Navy's request for a stay of a preliminary injunction pending appeal. Both decisions involve the Navy's COVID-19 vaccine requirement for operational personnel, and both decisions have been vacated in part. *See, e.g.*, *Austin v. U.S. Navy Seal 1*, -- S. Ct. ---, 2022 WL 882559 (Mar. 25, 2022) (granting stay of preliminary injunction "as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions").

rights." *Parker v. Landry*, 935 F.3d 9, 18 (1st Cir. 2019). But all Plaintiffs have done is allege that their employers agreed with the Emergency Rule, which added COVID-19 to the list of required vaccinations in August of 2021. Plaintiffs have alleged no facts demonstrating that State Defendants and their employers formed an agreement to violate these particular Plaintiffs' First Amendment rights by not allowing religious exemptions. "Vague and conclusory allegations about persons working together, with scant specifics as to the nature of their joint effort or the formation of their agreement, will not suffice to defeat a motion to dismiss." *Alston v. Spiegel*, 988 F.3d 564, 578 (1st Cir. 2021).

Plaintiffs also do not allege, plausibly, that any of the State Defendants engaged in an overt act in furtherance of the alleged conspiracy. The only overt act by State Defendants alleged or argued is the Department's supposed removal of religious exemptions from the Rule in August of 2021. ECF No. 117 at 34. Plaintiffs here cite paragraphs 46-49 of the Complaint, which relate a sequence of events that is at odds with reality. As should be abundantly clear at this point in the litigation, the Maine Legislature removed nonmedical exemptions from the Statute in 2019, which change became effective in April of 2020. ECF Nos. 48-27 & 62-1. In April of 2021, the Department amended the Rule to comply with the statutory change. ECF No. 49-6. And Plaintiffs' argument that State Defendants have "publicly stat[ed] that religious accommodations" "were no longer permissible in Maine" is unsupported by the citation and simply untrue, as they acknowledge earlier in their opposition. *Compare* Compl. ¶ 49 *and* ECF No. 117 at 34, *with* ECF No. 117 at 28-29 (quoting State Defendants' motion to dismiss which explains that the Rule does not prohibit accommodations under Title VII). In sum, Plaintiffs' civil conspiracy claim is implausible and should be dismissed. *See* ECF No. 109 at 20.

CONCLUSION

For the reasons set forth above, and in their motion to dismiss, State Defendants request that Plaintiffs' complaint be dismissed.

DATED: April 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2022, I electronically filed this document and any attachments with the Clerk of the Court using the CM/ECF system and that the same will be sent electronically to registered participants as identified in the CM/ECF electronic filing system for this matter.

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