IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JERE GRAY, et al., Plaintiffs, vs. GOVERNOR JANET T. MILLS, et al., Defendants.	)	Civil Action No. 1:21-cv-00071-LEW

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT

Plaintiffs, by and through undersigned counsel, hereby oppose Defendants' Motion to Dismiss with Incorporated Memorandum of Law under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the following reasons, the Motion should be denied:

I. FACTUAL BACKGROUND

The Court is familiar with the facts of this case. Facts relevant to specific legal arguments will be incorporated in the sections below.

II. LEGAL STANDARD

1. Motion to Dismiss Pursuant to Fed. R. Civ. Proc. 12(b)(1)

Subject matter jurisdiction may be challenged facially or factually. "[A] facial attack contests the sufficiency of the pleadings, whereas a factual attack concerns the actual failure of a plaintiff's claims to comport factually with the jurisdictional prerequisites." Constitution Party of Pa. v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014).

"[W]here the defendant challenges the legal sufficiency of the plaintiff's jurisdictional allegations, the court may resolve the challenge based on the face of the

complaint." Hill v. United States, 922 F.Supp. 2d 174, 176 (D. Mass. 2013). In doing so, "the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." Aversa v. United States, 99 F.3d 1200, 1209-1210 (1st Cir. 1996). "[A] facial attack calls for a district court to apply the same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6)." Aichele, 757 F.3d at 3-4.

Defendants make robust factual attacks on subject matter jurisdiction throughout their Motion, starting with "mootness." The standard applicable to such attacks, and the danger of prejudice to Plaintiffs arising from them, are discussed infra at pp. 32-43.

2. Motion to Dismiss Pursuant to Fed. R. Civ. Proc. 12(b)(6)

The general rules of pleading require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a)(2).

In order to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "The Plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (internal quotation omitted). As part of this examination, the court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the plaintiffs' favor. Gargano v. Liberty Int'l Underwriters, Inc., 572 F.3d 45, 48 (1st. Cir. 2009).

Courts apply a two-pronged approach in resolving a motion to dismiss under Rule 12(b)(6). First, courts must identify and disregard statements in the complaint that

merely offer legal conclusions couched as factual allegations. Levesque v. Iberdrola, S.A., 2021 U.S. Dist. LEXIS 147847 at *10-11 (D. Me. 2021). Second, courts "'must determine whether the remaining factual content allows a reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 80 (1st Cir. 2013)).

III. ARGUMENT

1. Plaintiffs' Claims are Not Moot

The Defendants have represented to this Court that this case is moot because "the State of Civil Emergency has ended." (ECF 33, Motion to Dismiss, at p. 5). Nothing could be further from the truth.

A. The Defendants Have Colluded to Perpetuate both their "State of Emergency" Legal Construct and the Broad Emergency Powers it Confers upon them as Executive Branch Officials

Defendant Governor Mills unilaterally proclaimed a "State of Civil Emergency to Protect Public Health" on March 15, 2020, and thereafter repeatedly renewed the state of emergency until it expired on midnight on June 30, 2021.[1]

However, on the same day that the Emergency declared by the Governor was set to expire, Defendant Jeanne M. Lambrew, Commissioner of the Maine Department of Health and Human Services, quietly declared her own. (DHHS Emergency, Exh. A). Defendant Lambrew's "DHHS COVID-19 Public Health Emergency Declaration" ("Lambrew Emergency Declaration") commenced at 12:01 am on July 1, 2021. Thus our State *still* has not emerged from Defendants' "state of emergency" legal construct, and we all *still* are subject to the broad emergency powers it confers. The perfect timing of this

[1] The Governor's proclaimed and extended emergency is referred to as "the Emergency" in the Amended Complaint, and will be referred to as such in this Opposition.

"declaration" is not coincidence; it further manifests the planning, coordination and collusion among the Defendants alleged by Plaintiffs in their Complaint. (Complaint, ECF 23, ¶ 82).

Close analysis of the Lambrew Emergency Declaration and of 22 M.R.S. § 802, the statute pursuant to which it was made, confirms the extension of the "state of emergency" legal construct and Defendants' broad emergency powers. The Declaration states:

- "[A] health emergency exists that poses a threat to the health and safety of Maine residents";
- "[E]fforts to combat the pandemic continue in Maine, where 68,989 residents have been infected, 2,072 hospitalized with the virus, and 858 people dying with the virus since January 2020";
- "[V]accination rates remain low in certain areas [ ] and among certain groups [ ], putting these groups at risk of contracting COVID-19, including the highly contagious variants"
- "[A]n effective response to new variants requires [ ] the authority to make immediate, targeted interventions and the continuation or extension of certain special measures [ ] to address risks"

22 M.R.S. § 802(2) authorizes the DHHS to declare an emergency "[i]n the event of an actual or threatened epidemic or public health threat." Once the Declaration has been made, the DHHS may "adopt emergency rules for the protection of the public health."

§ 802(1) sets out the general authority of the Department to address communicable, environmental and occupational diseases. The DHHS may:

> *A. Designate and classify communicable, environmental and occupational diseases;*

> *B. Establish requirements for reporting and other surveillance methods for measuring the occurrence of communicable, occupational and environmental diseases and the potential for epidemics;*
>
> *C. Investigate cases, epidemics and occurrences of communicable, environmental and occupational diseases;*
>
> *D. Establish procedures for the control, detection, prevention and treatment of communicable, environmental and occupational diseases, including public immunization and contact notification programs.*

Not surprisingly, Defendants have already begun to exercise their extended emergency powers. On August 12, 2021, DHHS issued a new rule (the "Emergency Rule") amending Immunization Requirements for Healthcare Workers, 10-144 Code of Maine Rules, Chapter 264. (Emergency Rule, Exh. B). The Basis Statement supporting the Emergency Rule asserts that there is an ongoing emergency: "The presence of the highly contagious Delta variant in Maine constitutes an imminent threat to public health, safety and welfare." The Emergency Rule requires Maine's healthcare workforce to be injected with a COVID-19 vaccine, and if they refuse, to be excluded from their workplaces.

The way in which the Defendants are actually exercising their extended emergency powers speaks for itself and demonstrates that, contrary to the self-serving words of the Governor's Chief Legal Counsel (ECF 32), they have absolutely *no intention* of being restrained by law, constitutional or otherwise. DHHS deliberately exceeded its statutory rulemaking authority when it issued the Emergency Rule. The Lambrew Emergency Declaration cites to 22 M.R.S. § 802(1) and (3) as the legal authority for the Emergency Rule, thereby omitting the only part of the statute that actually authorizes DHHS to promulgate emergency rules. 22 M.R.S. § 802(2) permits DHHS to issue emergency rules *only if* they relate to three specific procedures or actions:

> *A. Procedures for the isolation and placement of infected persons for purposes of care and treatment or infection control;*
>
> *B. Procedures for the disinfection, seizure or destruction of contaminated property; and*
>
> *C. The establishment of temporary facilities for the care and treatment of infected or exposed persons [ ].*

The statute does not authorize DHHS to undertake emergency rulemaking for *any* other purposes. Mandatory injections on pain of termination of employment have nothing whatsoever to do with "[p]rocedures for the isolation and placement", "[p]rocedures for the disinfection, seizure or destruction" or "[t]he establishment of temporary facilities".

Further, in a now well established pattern, the Defendants have once again circumvented the Legislature, this time by deliberately issuing the Emergency Rule as a "routine technical" rule,[2] when it is obviously a "major substantive" rule,[3] in violation of the Maine Administrative Procedure Act, 5 M.R.S.A. §§ 8001 *et seq.* The Emergency Rule is an exercise of "significant agency discretion", subjects units of local government to a mandate,[4] and imposes a serious burden on the thousands of Maine residents

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[2] "Routine technical" rules are "procedural rules that establish standards of practice or procedure for the conduct of business with or before an agency and any other rules that are not major substantive rules as defined in paragraph B". 5 M.R.S. § 8071(2)(A).

[3] 5 M.R.S. § 8071(2)(A) provides that "major substantive rules" are rules that in the opinion of the Legislature:

> *Require the exercise of* ***significant agency discretion*** *or interpretation in drafting; or*
>
> *Because of their subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss of significant reduction of government benefits or services, the* ***imposition of state mandates on units of local government****…****or other serious burden on the public*** *or units of local government.* (emphasis added)

[4] Notably, local fire departments. On August 17, 2021, the Maine Fire Chiefs' Association publicly expressed its strong opposition to the Rule and the new mandate contained therein. It warned: "Enforcement of a COVID-19 Vaccination mandate on Maine's EMS agencies, both private and fire based, will have far reaching and long-lasting effects on the ability of EMS agencies to provide critical public safety services to the citizens of our communities." (Declaration of Emily Nixon, RN, Exh. C, ¶ 8, and Ex. 3 thereof).

employed in Maine's healthcare sector,[5] Maine businesses and organizations that employ healthcare workers, and the consumers of healthcare services. (*See generally*, Declaration of Emily Nixon, RN, Exh. C). As a "major substantive" rule, the Emergency Rule should have been adopted only provisionally, final adoption being authorized "only after" careful legislative review under § 8072. 5 M.R.S. § 8071(3)(B).

The Emergency Rule is not merely illegal agency rulemaking that exceeds statutory authority, it is also a deliberate, coercive violation of the fundamental right to personal autonomy and bodily integrity, including the right to reject medical treatment, guaranteed by the U.S. Constitution.[6] The COVID-19 vaccines available in this country have not been approved by the Food and Drug Administration,[7] are issued only pursuant

[5] The United States Bureau of Labor Statistics estimates that 41,040 individuals are employed in Maine in jobs categorized as "healthcare practitioners and technical occupations", while 34,540 individuals are employed in Maine in jobs categorized as "healthcare support occupations", for a total of 75,580. The Maine Department of Labor ("DOL"), Center for Workforce Research and Information, estimates that in calendar year 2018 (the most recent year for which this data is posted on the DOL's website), 84,842 individuals were employed in Maine in the field of health care.

[6] In the Supreme Court's seminal "right to die" case, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the Court addressed whether an individual in a persistent vegetative state could require a hospital to withdraw life-sustaining medical care based on her right to bodily integrity. 479 U.S. at 265-69. Chief Justice Rehnquist noted that "[b]efore the turn of this century, [the Supreme Court] observed that 'no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" Id. at 269 (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). He continued: "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment," Id. at 269, "generally encompass[es] the right of a competent individual to refuse medical treatment," Id. at 277, and is a right that "may be inferred from [the Court's] prior decisions." Id. at 278-79 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Washington v. Harper*, 494 U.S. 210 (1990); *Vitek v. Jones*, 445 U.S. 480 (1980); *Parham v. J.R.*, 442 U.S. 584 (1979).). In the words of Justice Sandra Day O'Connor, "[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's decision to reject medical treatment.…" *Cruzan*, 497 U.S. at 289. The Law Court has also recognized that individuals have a fundamental liberty interest in refusing medical treatment. *Green v. Commissioner of the Dept. of Mental Health, Mental Retardation & Substance Abuse Services*, 2001 ME 86, ¶ 15, 776 A.2d 612.

[7] The BioNTech Manufacturing GmbH Comirnaty Vaccine approved by the FDA on August 23, 2021 for use by persons 16 years of age and older is not available in the United States. "**Although COMIRNATY…is [now] approved to prevent COVID-19 in individuals 16 years of age and older, there is not sufficient approved vaccine available for distribution to this population.…**" (emphasis added). *See* Footnote 5, FDA letter to Pfizer, Inc. dated August 23, 2021, from RADM Denise M. Hinton, Chief Scientist, available at https://fda.gov/media/150386/download (last visited September 2, 2021).

to Emergency Use Authorizations[8] that *do not* require a final determination that they are "safe and effective",[9] are a highly experimental gene therapy technology never before used in the human population (Declaration of Lee Merritt, MD, Exh. F, ¶ 2), contain toxic chemicals (¶ 2), are still undergoing clinical trials and have not been adequately tested (¶ 3),[10] are not designed to prevent infection with or transmission of SARS-CoV-2 (the virus that can cause the disease COVID-19) (¶ 5), present a heightened risk of injury to healthcare workers injected with them (¶¶ 4, 6), and may harm some patients who come into close contact with injected healthcare workers (¶¶ 4, 6). Yet with a flick of her pen, Defendant Lambrew has decreed that thousands of Mainers must be injected with these substances, or lose their livelihoods.

The Defendants can drive a cart and horses through the statutory language in §§ 802(1) and (2), with the result being the imposition of dramatic restrictions on fundamental civil liberties. If an emergency rule mandating injection with experimental

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[8] Pfizer-BioNTech COVID-19 Vaccine, EUA issued December 11, 2020 (*see* https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine); Moderna COVID-19 Vaccine, EUA issued December 18, 2020 (*see* https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/moderna-covid-19-vaccine); Johnson & Johnson (Janssen) COVID-19 Vaccine issued February 27, 2021 (*see* https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/janssen-covid-19-vaccine).

[9] The Secretary of the federal Department of Health and Human Services may issue an EUA upon determining that "it is reasonable to believe that" the medical product in question "may be effective" and the "known and potential benefits" of the medical product "outweigh the known and potential risks." This is far from an ironclad determination that the medical product is actually and conclusively "safe and effective."

[10] The typical vaccine development process takes between 10 and 15 years, and consists of four sequential phases, phase four being a large-scale investigation into long-term safety. This process has been abandoned for purposes of the COVID-19 vaccines, which were developed at "warp speed" in a period of just one year. The phases have been overlapped, rather than sequenced. All of the COVID-19 vaccines are still in clinical trials, and none of them have commenced Phase 4 trials. The Pfizer-BioNTech COVID-19 Vaccine "Phase 1/2/3" clinical trial is estimated to end **May 2, 2023**. *See* https://clinicaltrials.gov /ct2/show/NCT04368728 (last visited September 1, 2021). The estimated completion date for the ongoing "Phase 2a" clinical trial for the Moderna COVID-19 Vaccine is **November 1, 2021**, and a "Phase 3" trial is also now underway. *See* https://www.clinicaltrials.gov/ct2/show/ NCT04405076 (last visited September 1, 2021). The estimated completion date for the ongoing "Phase 1/2a" clinical trial for the Johnson & Johnson COVID-19 Vaccine is **February 2, 2024.** A "Phase 3" trial is underway and expected to conclude **May 31, 2023**. *See* https://clinicaltrials.gov/ct2/show/ NCT04614948 (last visited September 1, 2021).

mRNA technology is authorized emergency rulemaking, then presumably so are rules (emergency or otherwise) requiring social distancing, masking, capacity limits, travel restrictions and quarantine, and closure of business, all of which could be characterized as procedures for the control, detection and prevention of COVID-19 under § 802(1)(D), or alternatively as procedures for the isolation and placement of infected persons for purposes of infection control under § 802(2)(A). The "interventions" that Defendants Lambrew and Shah have stated the DHHS needs to conduct in Maine in order to counter the growing threat from the Delta variant, could and probably would include the very interventions at issue in this lawsuit.[11]

After all, though the Governor proclaimed her Emergency pursuant to the Maine Emergency Management Act, Title 37-B of the Maine Revised Statutes, Chapter 13, 37-B M.R.S. § 742(1)(C) *does not expressly authorize any* of the countermeasures implemented by the Emergency Mandates, including mask requirements, business closures and capacity limits, religious institution closures and capacity limits, home confinement, quarantine and PCR testing. Yet the Governor invoked 37-B M.R.S. § 742(1)(C) as justification for all of the Emergency Mandates. The Defendants have established, and in all likelihood will follow, their own precedent for generously interpreting statutes conferring upon themselves emergency powers. Their recent Emergency Rule proves the point.

Importantly, none of the Defendants has excluded the possibility that the Emergency or the Emergency Mandates voluntarily rescinded by the Governor could be reinstated, either by the Governor under 37-B M.R.S. § 742(1)(A) and (C), or by her

[11] Those interventions are referred to as "the Emergency Mandates" in the Amended Complaint, and will be referred to as such in this Opposition.

executive officers (her agents, who collude with her) under 22 M.R.S. § 802 or some other pretext.

The Declaration of the Governor's Chief Legal Counsel Gerald Reid provides no assurance. He forswears a 10-person gathering limit, nothing more. He essentially invites this Court to abdicate its role in providing judicial review, on the strength of his assurances that all will be well. His conjecture about the future is self-serving, non-binding, unenforceable and conditional ("it is highly unlikely that"). (ECF 32). The Governor has the unfettered legal authority to, and could, with the stroke of a pen, proclaim a new Emergency and restore the Emergency Mandates, or impose new ones, at any time. Nothing in Mr. Reid's Declaration alters that fact. Astonishingly, even though his Declaration is dated July 19, 2021, *weeks after* the Lambrew Emergency Declaration, it omits *any* reference to the latter. One has the sensation of watching a "shell game." By sleight of hand, the "state of emergency" has migrated from one statute and one Defendant, to a different statute and a different Defendant. This Court must not be fooled.

As a matter of honesty and common sense, it is simply impossible to reconcile the Defendants' statements in their Motion to Dismiss that there is no emergency (and their assertion that this case is therefore moot), with their repeated, deliberate, and very clear statements to the contrary in their June 30, 2021 Declaration of Emergency ("a health emergency exists that poses a threat to the health and safety of Maine residents"), the August 12, 2021 Basis Statement for the Emergency Rule ("The presence of the highly contagious Delta variant in Maine constitutes an imminent threat to public health, safety and welfare"), the August 12, 2021 Rulemaking Fact Sheet ("the Delta variant, which is

significantly more contagious than past versions of the virus and poses an immediate threat to public health, safety and general welfare"), or with the language of the statute under which they have acted ("[i]n the event of an actual or threatened epidemic or public health threat").

B. Applying the Defendants' Standards, an Emergency Persists Justifying Defendants' Re-imposition of Emergency Mandates

Even if the gratuitous assurances of Mr. Reid were something that this Court should rely upon, and they are not, the Defendants cannot be heard to argue "mootness" when the very conditions that they themselves have identified as justifying the re-imposition of the Governor's Emergency and her Emergency Mandates exist.

Mr. Reid explains that the Governor allowed the Emergency to expire because of low COVID-19 case counts and high COVID-19 vaccination rates: "Among the principle [sic] reasons for this determination [the Governor's decision to not review the state of emergency because there was no underlying "civil emergency"] were the consistently low daily COVID-19 case counts and the high and increasing vaccination rates." (ECF 32, ¶12). He further claims that it is "highly unlikely" the Governor would reinstate her Emergency and Emergency Mandates, given these two factors He states:

- "Since the end of the State of Civil Emergency, case counts have remained low and in the double digits" (ECF 32, ¶13);
- "Consistent with the Governor's recent determination not to renew the State of Civil Emergency, it is highly unlikely that the Governor will reinstate any of these prior emergency measures aimed at slowing and managing the spread of COVID-19" (referring to face coverings, travel restrictions, indoor gathering limits) (ECF 32, ¶14)
- "[G]iven Maine's high vaccination rates, it is highly unlikely that the Governor will again proclaim a Civil State of Emergency [sic] and reinstate a requirement that face coverings be worn in public settings" (ECF 32, ¶15)

- "[W]ith regard to travel restrictions, given current vaccination rates and future vaccine projections in the United States …it is highly unlikely that the Governor will reinstate any future mandatory self-quarantine requirement for out of state travelers" (ECF 32, ¶16)

- "[T]he high vaccination rates in Maine and the increasing vaccination rates nationally make it highly unlikely that the protection of public health will again require the imposition of gathering limits." (ECF32, ¶17)

Yet according to COVID-19 "case" count data published by Defendant Maine CDC,[12] the count of new daily COVID-19 "cases" in Maine has risen from the low double digits hailed by Mr. Reid in his Declaration, to a high of 661 on September 2, 2021. Indeed, the count has consistently been in the *triple digits* (well above the low "double digits" referenced as the basis for lifting the Emergency in Mr. Reid's Declaration) since July 19, 2021, and is on a rising trajectory. The chart at Exh. D presents Maine CDC's raw data, and it is shown in graphic form in two graphs prepared by Maine CDC at Exh. E.

In the corresponding period a year ago - July 19, 2020 to August 25, 2020 - the Governor's Emergency was in full swing, the Emergency Mandates that Plaintiffs contest were in force, and the new daily COVID-19 case count in Maine never exceeded 55![13] The highest new daily case count in the current period, is *over 12 times* the highest new daily case count from the same period last year. Thus the "low case count" rationale proffered by Mr. Reid for denying Plaintiff's standing breaks down, and in fact the case count has become a strong argument supporting standing.

[12] *See* Coronavirus Disease 2019 (COVID-19) - Updates and Information, https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/data.shtml (last visited September 4, 2021).
[13] Id.

Mr. Reid's arguments based on the COVID-19 vaccines fair no better and have boomeranged. Maine's relatively high COVID-19 vaccination rates support Mr. Reid's argument *only if* the COVID-19 vaccines are a safe and effective means of halting infection with and transmission of SARS-CoV-2. There is mounting evidence that they are not. (*See generally*, Declaration of Lee Merritt, MD, Exh. D, and discussion *supra*). Recent data from the U.S. (in Massachusetts[14]) and abroad (for example, in Israel and the United Kingdom[15]) suggest that COVID-19 vaccines are failing to provide protection against COVID-19, that vaccinated and unvaccinated people are equally likely to carry and spread the virus, and that viral variants, such as the Delta variant, appear to be infecting vaccinated and unvaccinated individuals in roughly equal numbers. The prestigious Oxford University Clinical Research Group recently published a paper in the premier British medical journal, *The Lancet*, documenting their finding that individuals injected with the COVID-19 vaccines carry 251 times the load of COVID-19 virus in their nostrils compared to the unvaccinated. Defendant Shah, Maine's CDC Director, has admitted that the fully vaccinated harbor the virus in their nose and mouth and transmit it to others.[16] In July 2021, in response to the so-called "Delta variant", Defendant Shah

[14] *See* Catherine M. Brown, DVM; Johanna Vostok, MPH; Hillary Johnson, MHS et al., *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts*, CDC Morbidity and Mortality Weekly Report MMWR (July 2021) available at https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w#suggestedcitation (last visited August 24, 2021).

[15] *See* Nathan Jeffay, *Israeli, UK data offer mixed signals on vaccine's potency against Delta strain*, The Times of Israel (July 22, 2021), available at https://www.timesofisrael.com/israeli-uk-data-offer-mixed-signals-on-vaccinespotency-against-delta-strain/; Ian Sample, *Scientists back Covid boosters as study finds post-jab falls in antibodies*, The Guardian (July 22, 2021), available at https://www.theguardian.com/world/2021/jul/22/uk-scientists-back-covidboosters-as-study-finds-post-jab-falls-in-antibodies (both visited most recently August 24, 2021).

[16] *See* https://www.newsbreak.com/news/2326596533751/fully-vaccinated-people-at-risk-of-spreading-covid-19-delta-variant-maine-public-health-officials-say?s=oldSite&ss=i16 (last visited September 1, 2021).

recommended that even the fully vaccinated wear face masks, and that all teachers, staff and students in K-12 schools wear face masks, and recently warned: "We need to be ready to surge back up, whether its around PPE, whether its around vaccination, testing, as well as case investigations, and planning for those possibilities."[17] On September 1, 2021, the federal Center for Disease Control and Prevention ("CDC") updated its mask guidance to recommend that residents *in every county in Maine* wear masks indoors, regardless of vaccination status, and in spite of the fact that 71.91% of Mainers are now fully vaccinated.[18] Governor Mills has made it clear Maine will follow the CDC guidance.[19] On August 27, 2021, Illinois Governor J. B. Pritzker re-imposed that state's indoor mask mandate to address the surge in COVID-19 cases caused by the Delta variant.[20] On these facts, Plaintiffs contend that the only reason Defendants have not re-imposed their mask mandates is the pendency of this litigation in Maine. The Court cannot turn a blind eye to this evidence.

C. Exceptions to Mootness

The Defendants have voluntarily terminated the Emergency proclaimed by the Governor, and simultaneously, tactically, they have tactically maneuvered to continue it under a different statutory provision that is broad enough to allow the re-imposition of the very countermeasures that have injured Plaintiffs. The "state of emergency" due to

[17] "We probably need to be prepared, even for fully vaccinated folks, for the time being, to go back to wearing masks in indoor settings." *See* https://observer-me.com/2021/07/27/news/shah-vaccinated-mainers-should-be-prepared-to-wear-masks-indoors-again/ (last visited September 6, 2021).
[18] *See* https://www.wagmtv.com/2021/09/01/every-county-maine-now-recommended-indoor-public-mask-wearing-by-us-cdc/ (last visited September 1, 2021).
[19] *See* https://www.msn.com/en-us/news/us/maine-recommends-masks-in-high-transmission-indoor-areas-regardless-of-vaccination-status/ar-AAMFxkx (last visited September 6, 2021).
[20] *See* https://www.mtphist.org/pritzker-reimposes-statewide-indoor-mask-mandate-and-vaccinations-for-several-groups/ (LAST VISITED September 6, 2021).

COVID-19 persists. The individual countermeasures have been lifted, but that does not render this case moot.

Voluntary Cessation Exception

This case falls within the "voluntary cessation" exception to mootness. City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 289 (1982) (articulating "well settled" rule 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."). The Defendants have not alleged that their lifting of the Emergency or the Emergency Mandates was involuntary. On the contrary, they have admitted both that the Governor allowed the Emergency and the Emergency Mandates to expire, and that under 37-B M.R.S. § 742 she could unilaterally re-impose them, by proclamation and executive order respectively, at any time. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 68 (2020); Bayley's Campground, Inc. v. Mills, 985 F.3d 153, 157 (1st Cir. 2021). Defendant Lambrew can impose mandates coterminous with those imposed by the Governor at any time (*see* discussion *supra*).

There is no requirement that Plaintiffs prove the subjective intention of the Defendants to lift their Emergency and Emergency Mandates for tactical litigation reasons. Bayley's Campground, Inc., 985 F.3d at 157 (denying mootness challenge even though "[to] be sure, nothing in the record suggest that the Governor rescinded EO 34 for litigation-related reasons rather than to account for changing conditions owing to the course of the virus itself"). However, the obviously planned seamless transition to a new "state of emergency" declared by a different Defendant under a different statute, granting equally broad and perhaps greater powers, strongly suggests maneuvering.

There is more than "a reasonable expectation of recurrence." The likelihood that a challenged activity will be renewed is "highly sensitive to the facts of a given case." Am.C.L. Union of Mass. ("ACLUM") V. U.S. Conf. of Cath. Bishops, 705 F.3d 44, 56 (1st Cir. 2013). The facts and circumstances in Maine have already changed profoundly since the decision rendered in Calvary Chapel of Bangor v. Mills, 2021 U.S. Dist. LEXIS 105400 (D. Me. 2021), relied upon by Defendants in their Motion.

First, the Defendants have colluded and maneuvered to extend the Emergency under a new statutory provision. As a result, the emergency "dial" they repeatedly referred to (First Amended Complaint, ECF 23, ¶¶ 22, 57) still exists, and is available to be turned up or down as they see fit. The dial works - the Defendants have just declared there is an "imminent threat to public health, safety and welfare" (Exh. A), and have turned up the dial to address the Delta variant (as they predicted they would before lifting the Emergency and Emergency Mandates) (ECF 23, ¶ 57) by imposing new emergency mandates, the first being mandatory injection with an experimental gene therapy for healthcare workers (Exh. B). This countermeasure is even more intrusive and constitutionally offensive than those imposed by the Emergency Mandates, since **it obliges the injection of chemicals and experimental viral based genetic therapies into our bodies. If Defendants are willing and able to mandate this new countermeasure in the present circumstances, then we can reasonably infer that they are willing and able to reinstate the old ones.**

Secondly, the factors that Mr. Reid (ECF 32, ¶¶ 11-13) claims were the "principle reasons" for lifting the Emergency and the Emergency Mandates and the basis for his "highly unlikely" to be re-imposed assessment - "double digit" new daily COVID-19 case

counts in Maine, and effective vaccination - no longer exist. "Case" counts are now in the triple digits, cresting at over 12 times their peak during the same period last year, and climbing. There is a growing body of evidence that the experimental Emergency Use Authorization COVID-19 gene therapy is neither safe nor effective. (Exh. D). As identified by Defendants through Mr. Reid, the causal vector of the unlawful Emergency Mandates is not merely "likely to recur" - it persists, and there is no clear end in sight. In other words, the government's stated rationale for its changed practices has collapsed. Fikre v. Fed. Bureau of Investigation, 904 F.3d 1033, 1039 (9th Cir. 2018).

Third, since the decision in Calvary Chapel, the Defendants have wasted no time in renewing and intensifying their attack on the 1st Amendment free exercise right at stake in that case, which Mr. Reid promised (in a different Declaration offered to protect the Governor in Calvary Chapel) would henceforth be respected. A mere two months following that decision, the Defendants have issued the Emergency Rule, which, on its face and as applied, impermissibly burdens the sincerely held religious beliefs of Maine healthcare workers who have religious objections to the COVID-19 vaccines. This time Defendants are not merely restricting access to places of worship, they are actually compelling believers, with coercion (flowing from the threat of unemployment and the loss of income, housing and food insecurity it brings), either to change their beliefs or betray them.[21]

Finally, neither the Governor nor Defendant Lambrew has "denied" that circumstances could lead them to re-impose countermeasures at least as strict as the Emergency Mandates. Bayley's Campground, Inc., 985 F.3d at 157-158. Indeed,

[21] *See Jane Does 1-6, et al v. Janet T. Mills, et al*, United States District Court, District of Maine, Civil Action No. 1:21-cv-00242-JDL.

speaking for the Governor only, and not Defendant Lambrew, Mr. Reid has expressly acknowledged the possibility that the Governor could proclaim a new state of emergency and re-impose her mandates, *and has carefully avoided a categorical denial*:

- "it is highly unlikely" (ECF 32, ¶¶ 14, 15, 16, 17);
- "Even if the Governor were to determine it is again necessary to proclaim a new State of Civil Emergency" (ECF 32, ¶ 19)
- "even if circumstances were to change so dramatically and unexpectedly as to warrant consideration of new gathering limits" (ECF 32, ¶ 17)

Mr. Reid's Declaration and purported concern for constitutionality cannot be accorded substantial weight. He chose not to disclose to the Court the fact of the Lambrew Emergency Declaration, even though it has obvious relevance. He forswears only a 10-person gathering limit, nothing more. As General Counsel, he must be aware of his client's strategy to secure mere *Jacobson v. Massachusetts* "rational basis" review ("[Jacobson] barely authorizes judicial review at all." Bayley's Camground, Inc., 463 F.Supp. 3d at 31.) of its police power actions in proceedings like this one.

Neither the Governor nor Defendant Lambrew has renounced the Emergency Mandates as being illegal. The Legislature has not made any statutory change to curb their powers. The Defendants have not themselves restricted their powers. The courts in this judicial district have not struck down any of their Emergency Mandates as being illegal. There are no "procedural safeguards insulating the new state of affairs [the lifting of those Emergency Mandates] from arbitrary reversal." Fikre, 904 F.3d at 1039. "[A]n executive action that is not governed by any clear or codified procedures cannot moot a claim." Id. at 1038 (citing Trinity Lutheran Church v. Comer, 137 S.Ct. 2012, 2019 n. 1 (2017)).

"Thus, we cannot say that [either the Governor or Defendant Lambrew] has carried 'the formidable burden' that she bears 'of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur.'" Id. (quoting Am.C.L. Union of Mass. ("ACLUM") V. U.S. Conf. of Cath. Bishops, 705 F.3d 44, 52 (1st Cir. 2013)) (emphasis added).

Capable of Repetition, Yet Evading Review

This case also fits within the "capable of repetition, yet evading review" exception to mootness. City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983), since "'(1) the challenged action was in its duration too short to be *fully litigated* prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" ACLUM, 705 F.3d at 57 (quoting Gulf of Me. Fishermen's Alliance v. Daley, 292 F.3d 84, 89 (1st Cir. 2002) (emphasis added).

There is "*a realistic threat* that no trial court ever will have enough time to decide the underlying issue[ ]." Id. (quoting Cruz v. Farquharson, 252 F.3d 530, 535 (1st Cir. 2001) (emphasis added). Cases in which courts have found that this requirement has not been satisfied, involved comparatively static challenged actions in force for far longer periods of between 4 and 5 years. Id. By contrast, the Emergency Mandates were imposed and lifted for comparatively brief periods of time, and constantly ratcheted up and down without notice, during the window that opened on March 18, 2020 and closed again on June 30, 2021. (Complaint, ECF 23, pp. 41-48).

Consideration of the quarantine and testing requirements applicable to travelers from Massachusetts illustrates the point. On April 3, 2020, the Governor imposed a 14-day quarantine requirement on all travelers into Maine. (ECF 23, p. 43). Two months

later, on June 9, 2020, the Governor imposed a requirement on travelers from Massachusetts to quarantine for 10 days or test. (ECF 23, p. 44). Three months later, on September 23, 2020, Governor Mills exempted travelers from Massachusetts from the requirement that they quarantine and test. (ECF 23, p. 45). Then, two months later, on November 13, 2020, she re-imposed it. (ECF 23, p. 45). These are precisely the transient circumstances that should attract the Court's concern, and the other Emergency Mandates that have injured Plaintiffs can be presented in similar terms.

Further, for all the reasons discussed *supra*, there is a "reasonable expectation" that Plaintiffs will again be subjected to the Emergency Mandates or their equivalent. It is perfectly clear that a ruling against Plaintiffs "would run the risk of effectively insulating from judicial review an allegedly overbroad executive emergency response, so long as it is iteratively imposed for only relatively brief periods of time." Bayley's Campground, Inc., 985 F.3d at 158.

For all of the foregoing reasons, Defendants' various objections and defenses to Counts I - VIII based on mootness and "retrospective" versus "prospective" relief must fail. Further, Plaintiffs' 42 U.S.C. § 1983 claims for civil money damages in Count IX are not subject to any of Defendants' mootness arguments.

2. The 11th Amendment Does Not Bar Any of Plaintiffs' Claims

Plaintiffs have sued the Executive Defendants in both their "personal" and their "official" capacities. (ECF 23, stylus on p. 2, ¶¶ 78-82). Plaintiffs have sued Defendant Gideon in her personal capacity only (ECF 23, stylus on p. 2, ¶ 83), and Defendant Jackson in both his "personal" and "official" capacities (ECF 23, stylus on p. 2, ¶ 84).

All Defendants have been sued in their personal capacities only for the purposes of the civil money damages claims asserted under 42 U.S.C. § 1983 in Count IX. (ECF 23, ¶ 262). "[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983." Hafer v. Melo, 502 U.S. 21, 30-31 (1991). "[S]tate officials, sued in their individual capacities, are 'persons' within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officials absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts." Id.

The declaratory and injunctive relief requested for the federal constitutional violations is not barred as "retrospective." As discussed *supra*, the Defendants have colluded to ensure that the state of emergency legal construct persists, and the Defendants continue to have and to exercise their police powers. Plaintiffs allege the emergency is a sham. Thus the Defendants' misconduct is ongoing, and there is a real threat of Defendants violating federal law in the future, which sets this case apart from the case Defendants rely upon, Green v Mansour, 474 U.S. 64, 73 (1985) ("Nor can there be any threat of state officials violating the repealed law in the future."). Nothing has been repealed here, only voluntarily lifted. The lifting is illusory. All or any part of the Emergency Mandates can be reinstituted at will, without any notice or process, by the Governor or by Defendant Lambrew under their respective statutes, "at the flick of a pen." Roman Catholic Diocese v. Cuomo, 141 S.Ct. 63, 69 (2020). Thus this case is more analogous to Steffel v. Thompson, 415 U.S. 452, 475 (1974) (no criminal prosecution pending, but plaintiff faced threat of future enforcement of unconstitutional law), than to Mansour.

The Supreme Court has said that the Eleventh Amendment "does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so." Wisconsin Dept. of Corr. V. Schacht, 524 U.S. 381, 389 (1998).

It is well established that parties may not, by their conduct, confer subject matter jurisdiction on a federal court. Franzel v. KerrMfg. Co., 959 F.2d 628, 629 (6th Cir. 1992). Yet it is also well established that the State may waive its sovereign immunity. *See, e.g.*, Lapides v.Bd. of Regents of Univ. Sys. Georgia, 535 U.S. 613, 623 (2002). Moreover, a federal court has no obligation to raise an Eleventh Amendment issue on its own. "Unless the State raises the matter, a court can ignore it." Schacht, 524 U.S. at 389.

That the sovereign immunity defense can be waived by the State and ignored by a court demonstrates that it is a defense of immunity and not of subject matter jurisdiction. *See* Kovacevich v. Kent State Univ., 224 F.3d 806, 816 (6th Cir. 2000) (reasoning that the Supreme Court has stated that "the Eleventh Amendment is not jurisdictional, and is not akin to the complete diversity requirement").

The sovereign immunity defense does not preclude this Court from certifying questions of Maine law to the Maine Supreme Judicial Court. Plaintiffs welcome the opportunity to discuss certification at hearing on this Motion, or in supplemental briefing requested by the Court. Even if Pennhurst State Sch.& Hosp. v. Halderman, 465 U.S. 89 (1984) precludes this Court from adjudicating Count II, and the state law aspect of Count IV, as an alternative to dismissal, this Court can and should navigate the federalism concerns by certifying these extremely important questions of Maine state law to the

Maine Supreme Judicial Court, as authorized by 4 M.R.S. § 57,[22] since they may be determinative and there is no clear controlling precedent.

"If the unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem, the Supreme Court has held that district courts should utilize the certification process." Midwest Inst. of Health, PLLC v. Whitmer, 2020 U.S. Dist. LEXIS 104784 at *7-8 (D.Mich. June 16, 2020) (internal quotations and citations omitted) (certifying to Michigan Supreme Court question whether Michigan's Emergency Powers of the Governor Act of 1945 violated the separation of powers and/or non-delegation clauses of the Michigan Constitution).

3. This Court Has Supplemental Jurisdiction Over the State-Law Claims

§ 1367(a) codified the Supreme Court's analysis in United Mine Workers v. Gibbs, 383 U.S. 715 (1966).[23] The federal and state claims in this case derive from "a common nucleus of operative fact," namely the Governor's declaration of Emergency under MEMA, and the exercise of her police powers under MEMA to issue and enforce the Emergency Mandates. Gibbs, 383 U.S. at 725. The federal claims, which allege violations of the U.S. Constitution, have substance sufficient to confer subject matter jurisdiction on the Court under 28 U.S.C. § 1331. Id. The federal and state claims are

[22] When it appears to the Supreme Court of the United States, or to any court of appeals or district court of the United States, that there is involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may certify any such questions of law of this State to the Supreme Judicial Court for instructions concerning such questions of state law, which certificate the Supreme Judicial Court sitting as the Law Court may, by written opinion, answer. 4 M.R.S. § 57.

[23] *A Federal Practititoner's Guide to Supplemental Jurisdiction under 28 U.S.C. 1367*, 78 Marq.L. Rev. 973 (1995).

such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding. Id.

The Maine Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 et seq. ("DJA"), states in relevant part:

> ***Any person*** *interested under a deed, will, written contract or other writings constituting a contract, or* ***whose rights, status or other legal relations are affected*** *by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.*

14 M.R.S. § 5954 (emphasis added). The DJA "should be liberally construed to provide a simple and effective means by which parties may secure a **binding judicial determination** of their legal rights, status or relations…" Gamash v. Bank of America, N.A., 2018 Me. Bus. & Consumer LEXIS 51, * 8 (emphasis added). "[I]t is an appropriate vehicle for establishing rights…" Id. Thus, if it is not itself a cause of action, it is certainly akin to one.

In Conservation Law Foundation ("CLF") v. LePage, 2018 Me. Super. LEXIS 156, two private plaintiffs sued then Governor LePage under separate complaints, challenging an Executive Order on the ground that it violated the same Separation-of-Powers and Non-Delegation provisions in the Maine Constitution that are the subject of Plaintiffs' Count II in this case. The plaintiffs sought declaratory relief that the Executive Order was unconstitutional because it "usurp[ed] the Legislature's authority, and [was] therefore void." Id. at * 2-5. Governor LePage defended by arguing that the complaints were "deficient because they fail to aver the cause of action that Plaintiffs seek to litigate." Id. at * 8. He argued that the Law Court had limited private causes of action

under the Maine Constitution to those authorized by the Maine Civil Rights Act, 5 M.R.S. §§ 4681 et seq. ("MCRA"), and neither plaintiff had invoked the MCRA.

The plaintiffs "point[ed] to numerous Maine cases involving requests for declaratory judgment in which there is no particular reference to a statutory or constitutional basis for jurisdiction, and contend[ed] that these cases show that the only requisites for the court to assume jurisdiction over a claim for declaratory relief are a justiciable controversy and a party with standing." Id. at 10. The Court agreed with the plaintiffs, and held that "the Plaintiffs do not need to identify a cause of action beyond what their complaints indicate…" Id. at * 11.

Similarly, Plaintiffs need not identify a state law cause of action in order to have a right to access the DJA and obtain a binding judicial determination thereunder.[24, 25, 26] Like the Plaintiffs in CLF, they have a "genuine controversy" arising from the Governor's orders, Gamash at * 8, and have been injured by them in concrete and particular ways described in detail in their Complaint (ECF 23, ¶¶ 23-76).

4. Plaintiffs' Claims Satisfy both 12(b)(1) and 12(b)(6)

Jacobson is Not the Correct Standard of Review

[24] However, Plaintiffs note that the MCRA includes an element of "threat of physical force or violence." 5 M.R.S. 4682. "Claims brought under the [MCRA] are interpreted in the same manner as claims brought under 42 U.S.C. § 1983, as the state statute is modeled upon the federal," K v. City of S. Portland, 407 F. Supp. 2d 290, 298 (M. De, 2006). All of the Emergency Mandates are punishable as Class E crimes, with arrest and imprisonment, which intrinsically involves force. The federal 42 U.S.C. § 1983 jurisprudence is replete with claims grounded in wrongful arrest and imprisonment.

[25] Plaintiffs also note that the Maine Administrative Procedures Act, 5 M.R.S. §§ 8001 *et seq*., provides that "[j]udicial review of an agency rule, or of an agency's refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court…" 5 M.R.S. § 8058. See also 5 M.R.S. § 11001.

[26] Finally, in alleging in Count II that Governor Mills has usurped the authority of the Legislature and thus acted in contravention of the separation-of-powers clause of the Maine Constitution, Plaintiffs seek vindication of a "public wrong." CLF, 2018 Me.Super. LEXIS 156 at *15 (citing Baker v. Carr, 369 U.S. 186, 208 (1962) (stating that the operation of the government in accordance with the law is a public right possessed by every citizen of the state).

Predictably, Defendants ask the Court to make a blanket application of the "rational basis" standard in Jacobson v. Massachusetts, 197 U.S. 11 (1905). But "the permissive *Jacobson* rule floats about in the air as a **rubber stamp** for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review." Bayley's Campground, Inc., 463 F.Supp. 3d at 32 (emphasis added). The Court has already rejected this ploy, and should not turn back. Id.; Savage v. Mills, 478 F.Supp. 3d 16, 26 (D. Me. Aug. 7, 2020) ("Because the facts of that case are distinguishable — a different public health crisis in a different time, threatening different types of injuries to the Plaintiffs — I do not consider Jacobson to be a *de jure* immunity talisman, which is what it will be if judges routinely dismiss cases at the pleading stage based on the immediate evaluation of the merits of governmental action in derogation of constitutional rights. Nor am I convinced that Jacobson will be the Rosetta Stone for evaluating the merits of a challenge to any COVID-19-related government regulation.").

The Court must apply the appropriate level of scrutiny to each of the constitutional injuries alleged by Plaintiffs, in line with the tiered system of constitutional review that has evolved since Jacobson. Id. (citing Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992) ("a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."). To do otherwise invites the crisis that Justice Gorsuch has cautioned against. Cuomo, 141 S.Ct. at 71 (2020) ("[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do.").

Defendants Misconstrue the Federal Pleading Standard Under Iqbal, Twombly and Fed. R. Civ. P. 8

Although couched as a Rule 12(b) dismissal motion, Defendants effectively require Plaintiffs to prove their case - plead evidence - in their Complaint, and ask the Court to use this Motion to resolve contests surrounding the facts, merits of claims, or the applicability of defenses. Defendants have also introduced new facts that are outside the pleadings for the purpose of contesting the merits of the claims. A few examples (by no means exhaustive):

- Count IV: Defendants reject Plaintiffs' allegation that the Diocese acted involuntarily to comply, and allege instead that the Portland Diocese "chose to implement" and made an "independent response." (ECF 33, p. 20).
- Count IV: Defendants present evidence of the Portland Diocese's COVID-19 response plan, and also of a new Diocese protocol, and use it to contest the merits of these claims. (ECF 33, p. 21).
- Count IV: Defendants reject Plaintiffs' factual allegations regarding restaurants, and state "there was no comparable secular activity that poses an equal or greater risk to spreading the virus that is permitted to 'proceed with caution' …" (ECF 33, p. 23).
- Count V: Defendants present facts regarding COVID-19 policies adopted by the Maine Legislative Council, as well as evidence of polling undertaken by Defendants Gideon and Jackson and voting by Plaintiff Sampson, and use it to contest the merits of these claims. (ECF 33, p. 25).
- Count VII: Plaintiffs allege that a face mask is a medical device. Defendants quarrel with Plaintiffs as to whether a face mask is a medical device. This is a

factual question that can be resolved by an appropriate expert. At the very, least it is a mixed question of fact and law. (ECF 33, p. 30).

- Count VIII: Defendants present facts regarding COVID-19 protocols adopted by the Portland Diocese, and then use it to contest the merits of these claims. (ECF 33, p. 35).
- Count IX: Defendants initially introduce Mr. Reid's Declaration in the context of a mootness challenge, but then go on to use it to contest the merits of claims (ECF 33, p. 20).

All of this is directly contrary to Rule 8 jurisprudence. A 12(b) motion is not appropriate to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." King v. Rubenstein, 825 F.3d 206, 214 (4th Cir. 2016).

Defendants have found fault in Plaintiffs' allegations based on an erroneously stringent interpretation of Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Contrary to the position advanced by Defendants, the requirement that the plaintiff must allege facts rather than mere conclusions of law does not require that a plaintiff prove his case in the complaint.

> *Iqbal and Twombly do not require a plaintiff to prove his case in the Complaint. The requirement of nonconclusory factual detail at the pleading stage is tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset. A complaint need not "make a case" against a defendant or forecast evidence sufficient to prove an element of a claim. It need only allege facts sufficient to state elements of the claim.*

Robertson v. Sea Pines Real Estate Cos., Inc., 679 F.3d 278, 288 (4th Cir. 2012) (citing Iqbal, 556 U.S. at 679). This is especially true in this case, where a trove of illuminating and incriminating documents related to the facts set forth in ECF 23, ¶¶ 82 and 85 are believed to be in Defendants' possession, but shielded from public knowledge. *See, e.g.*,

Rotella v. Wood, 528 U.S. 549, 560 (2000); Corley v. Rosewood Care Center, Inc., 142 F.3d 1041, 1051 (7th Cir. 1998) (explaining that heightened pleading standard for fraud cases under Fed. R. Civ. P. 9 must be relaxed where "specific information is in the hands of the defendants").

Similarly, the "'plausibly suggesting' threshold … remains considerably less than the 'tends to rule out the possibility' standard for summary judgment." SD3, LLC v. Black & Decker, Inc., 801 F.3d 412, 425 (4th Cir. 2015) (quotation marks and citation omitted). In judging whether allegations of the complaint meet the "plausibility" test, a court is not to pass on the believability of the complaint's allegations. "A lawsuit need not be meritorious to proceed past the motion-to-dismiss stage." Id. at 434. "Skepticism" regarding the truth of the allegations "does not render the allegations 'conclusory.'" Id. at 431 (explaining that "allegations cannot be called 'conclusory' merely because a judge views them as 'extravagantly fanciful,' 'unrealistic,' or 'nonsensical'"). "In fact, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote or unlikely.'" Id. (quoting Twombly, 550 U.S. at 556).

To be clear - the following facts (among others) are alleged in the Complaint, are incorporated by reference into *each Count*, and must be taken as true in deciding this Motion to Dismiss under Rule 12(b)(6) and a Rule 12(b)(1) facial challenge, and factored and weighed when deciding it under a Rule 12(b)(1) factual challenge (cited to paragraph numbers in the Complaint at ECF 23):

1. The polymerase chain reaction ("PCR") testing that drives the COVID-19 case and death counts published by Maine CDC produces false positive results in 97% of

all tests, the Defendants know it, and the Defendants continue to use the PCR test and publish the results. (¶¶ 8, 106-132).

2. Maine CDC deliberately counts anyone who dies with a positive COVID-19 test, as a COVID-19 death "case", even if that person had co-morbidities that were factually and legally the primary cause of death, and Maine CDC deliberately includes that individual in the COVID-19 death count. (¶¶ 8, 101-105).

3. There is no credible scientific evidence that people without COVID-19 symptoms (the asymptomatic) are transmitting COVID-19 to others, and in fact there is credible scientific evidence indicating the complete absence of such transmission, and yet the Defendants use "asymptomatic spread" to justify their Emergency Mandates. (¶¶ 11, 136-135).

4. Face-masks are ineffective in slowing or stopping the spread of COVID-19; they do not reduce the incidence of infection with SARS-CoV-2. (¶¶ 11, 134-148).

5. Lockdowns, including stay-at-home orders, business closures, and restrictions on travel and movement, have no significant beneficial effect, and are futile in slowing or stopping the spread of COVID-19. (¶¶ 149-155).

6. There is no obvious or positive correlation between any of the Emergency Mandates and positive COVID-19 outcomes. (¶ 10).

7. The Defendants have performed no individualized analysis or assessment determining that these Plaintiffs or their businesses or activities constitute a particular threat vector for COVID-19. (¶ 133).

8. COVID-19 did not overwhelm Maine's healthcare capacity, at peak using only 11.6% of Maine's ventilator capacity, only 4.8% of Maine's combined ventilator and

"alternate ventilator" capacity, and only 18.4% of Maine's critical care beds, the Defendants knew that, and yet the Defendants used the threat to healthcare capacity to justify their Emergency Mandates. (¶ 97).

9. From the very beginning the Defendants knew that COVID-19 presented a threat of fatality to the elderly almost exclusively; 85% of all COVID-19 deaths in Maine occurred in the 70+ age group; 58.8% of all COVID-19 deaths in Maine were elderly nursing home residents; 94% of Mainers in the 70+ age group who contracted COVID-19 survived it; 84% of Mainers in the 80+ age group who contracted COVID-19 survived it (¶¶ 5, 90-94).

10. Cancer, heart disease, accidents and chronic lower respiratory disease killed more Mainers than COVID-19 in the same period. (ECF 23, ¶¶ 6, 95-96).

12. The Defendants cannot demonstrate that the restrictions imposed through the Emergency Mandates are necessary in order to achieve their public health goals. (¶ 133).

13. The Emergency Mandates caused Maine's worst job loss dating back through 8 recessions to 1969; caused spikes in mental health crises, domestic violence, drug overdose, and child abuse and neglect; and financially damaged Maine's healthcare infrastructure. (¶¶ 156-173).

14. The Defendants have used fear-based appeals and the PCR-driven COVID-19 case and death counts to manipulate the public and justify their Emergency and Emergency Mandates. (¶¶ 9, 82, 131, 157, 170, 172).

15. The Defendants knowingly, intentionally and actively collaborated, assisted, participated, supported, encouraged, aided and abetted and conspired, each with

the others, through the Coronavirus Response Team and otherwise,[27] in creating the Emergency through Proclamation, sustaining the Emergency through repeated extensions thereof, justifying the Emergency through the publication of fear-inducing COVID-19 case and death counts that they knew to be inflated and based on laboratory tests producing false positive test results, and crafting, imposing and enforcing the Emergency Mandates. (¶ 82).

On these facts, all of the Counts survive even Jacobson review were it to apply, since Jacobson allows that:

> [I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of persons.

Jacobson, 197 U.S. at 28. Put another way, on these facts, the Defendants cannot possibly satisfy any level of scrutiny. These facts may be politically damaging, surprising, inconvenient or even offensive for the Defendants, but they cannot be ignored.

Defendants' Factual Attack on Subject-Matter Jurisdiction Must Not be Allowed to Prejudice Plaintiffs

Defendants have made numerous factual challenges to subject matter jurisdiction, for example (not exhaustive): ("at midnight on June 30, 2021, the State of Civil Emergency ceased", "given Maine's high vaccination rates, it is highly unlikely that the Governor will again proclaim…", "it is highly unlikely that the Governor will reinstate

[27] *See* ECF 23, p. 41 ("Governor Mills convenes Coronavirus Response Team, including without limitation herself and all other named Executive Defendants, 'to share information and coordinate Coronavirus preparation and response across State government.'"; ¶ 97 ("Declaring a State of Emergency is essential to the state meeting the magnitude of this public health crisis. The Legislature will continue working closely with the Governor's office and the Maine CDC to respond to this outbreak."). Illuminating and incriminating documents related to the facts set forth in ECF 23, ¶ 82 are believed to be in Defendants' possession, but shielded from public knowledge. Plaintiffs require discovery. *See, e.g.*, Rotella v. Wood, 528 U.S. 549, 560 (2000); Corley v. Rosewood Care Center, Inc., 142 F.3d 1041, 1051 (7th Cir. 1998).

any of these…" - ECF 33, p. 2); ("Plaintiffs chose to implement a different policy", "Plaintiffs' church took a different approach", "the Portland Diocese's COVID-19 response plan", "clearly exercised its own broad and legitimate discretion", "these injuries, if any, were caused by a third party" - ECF 33, pp. 20-21); ("the only party that prevented a special session of the 129th Legislature was Plaintiff Sampson's party" - ECF 33, p. 25).

"Because a factual attack under Rule 12(b)(1) 'inverts the burden of persuasion,' the Court must take care not to allow a 'motion to dismiss for lack of subject matter jurisdiction to be turned into an attack on the merits.' Indeed, 'dismissal via a Rule 12(b)(1) factual challenge to standing should be granted sparingly.'" Abante Rooter & Plumbing v. Creditors Relief, 2020 U.S. Dist. LEXIS 253558 (D. NJ. 2020) (quoting Davis v. Wells Fargo, 824 F.3d 333, 346, 348-349, 350 (3rd Cir. 2016)) (citations omitted). Further, "[i]mproper consideration of a merits question under Rule 12(b)(1) significantly raises both the factual and legal burden on the plaintiff. Given the differences between the two rules, '[a] plaintiff may be prejudiced if what is, in essence, a Rule 12(b)(6) challenge to the complaint is treated as a Rule 12(b)(1) motion." Davis, 824 F.3d at 349 (quoting Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

"In this situation, the court 'enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction.'" Hill, 922 F.Supp. 2d at 176. Plaintiffs contest Defendants' allegations, and will be prejudiced by any dismissal prior to discovery regarding these matters.

Finally, a "[j]urisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and the substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of the action." Schuchardt v. President of the United States, 802 Fed.Appx. 69, 73 (3rd Cir. 2020).

5. Various Issues Not Addressed Elsewhere in this Opposition

Each of the Counts must be analyzed under Rule 12(b)(6) with the truth of the factual allegations set forth in the Complaint presumed. (*See especially*, ECF 23, ¶¶ 82, 85, ¶¶ 85-173 and discussion *supra* at pp. 28-32 of this Opposition).

A. Count I: Cessation of Emergency

As Chief Justice Roberts has said:

> [T]he Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States. But the Constitution also entrusts the protection of the people's rights to the Judiciary—not despite judges being shielded by life tenure, but because they are. Deference, though broad, has its limits.

S. Bay United Pentecostal Church v. Newsom, 2021 U.S. LEXIS 758 * 4 (internal quotation marks omitted). Have we not reached that limit in Maine?

Defendants have successfully colluded to perpetuate their state of emergency legal construct, and to extend and enlarge their emergency powers. The judicial review that Plaintiffs seek under Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934) and Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) ("Whether an emergency exists upon which the continued operation of the law depends is **always** open to judicial inquiry.") (emphasis added), and that Defendants seek to evade with their statutory shell game, is now even more relevant and pressing. Maine is under a seemingly interminable

state of emergency, and has been subject to governance by unchecked executive police power continuously for 18 months, all because of a disease that has killed fewer Mainers than cancer, heart disease, accidents and chronic lower respiratory disease in the same period! (ECF 23, ¶¶ 6, 95-96).

In Sterling v. Constantin, 287 U.S. 378 (1932), the Supreme Court upheld a federal district court's review of whether or not an emergency existed, justifying the Texas Governor's actions in declaring martial law and then issuing executive orders that interfered with oil well production in a manner that impaired private drilling rights. The Governor claimed his orders were "acts of military necessity to suppress actually threatened war" and that "unless they kept the production of oil down to within 400,000 barrels, a warlike riot and insurrection, in fact a state of war, would ensue." Sterling, 287 U.S. at 391. The federal district court took evidence, inquired into the underlying factual matrix allegedly supporting the Governor's declaration, and made findings:

> ***As to the actual conditions in the area affected by these orders*** *the District Court made the following finding: "We find, therefore, that not only was there never any actual riot, tumult, or insurrection, which would create a state of war existing in the field, but that, if all the conditions had come to pass, they would have resulted merely in breaches of the peace to be suppressed by the militia as a civil force, and not at all in a condition constituting, or even remotely resembling, a state of war. ...The evidence shows no insurrection nor riot, in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities. It shows that at no time has there been in fact any condition resembling a state of war..."*

Id. at 391-392.

The Supreme Court affirmed and relied upon the approach and findings of the federal district court: "In the present case, the findings of fact made by the District Court are fully supported by the evidence. They leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful." Id.

at 403-404. The Court cautioned against judicial reticence to undertake this kind of review:

> *If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.*

287 U.S. at 397-98. Similarly, the purported basis for the Emergency and Emergency Mandates must be subject to judicial review. "[A] Court is not at liberty to shut its eyes to an obvious mistake when the validity of the law depends upon the truth of what is declared." Sinclair, 264 U.S. at 547.

The extremely dangerous interpretation of Jacobson urged by Defendants - that courts must always eschew the review of facts underlying public health policy - transforms "the science" into a kill switch for our Constitution. It must surely be the fastest and safest route to authoritarian excess that any tyrant can have imagined. If the science that is the basis for suspending our constitutional freedoms cannot be challenged, then it can be politicized, exaggerated, minimized, erroneous or even simply made up, and used by government with impunity to frighten the populace into submission and justify its otherwise unconstitutional policies. *Neither* the basis for an emergency declaration, nor the individual police power actions taken pursuant to the declaration, should be "rubber stamped" with Jacobson non-review.

B. Count III: Travel

This Court has already found that the Emergency Mandates burdened the fundamental right to travel. Bayleys' Camground, 463 F.Supp. 3d at 34. For third party standing, the "court examines the relationship between plaintiff and the person whose right he seeks to assert and determines if (1) the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, and (2) if the litigant is as effective a proponent of the right as the third party." El Dia, Inc. v. Rossello, 30 F.Supp. 2d 160, 170 (D.P.R. 1998) (citing Singleton v. Wulff, 428 U.S. 106 (1976)). ("In such cases, the court weighs the importance of the relationship between the litigant and the third party, the ability of the third party to vindicate his own rights, and the risk that rights of the third party will be diluted if standing is not allowed." Id. (citation omitted)). These standards are *relaxed* when civil rights are at stake. Plaintiff Kessler has suffered an actual, substantial economic injury directly traceable to the travel and quarantine requirements. ECF 23, ¶¶ 32-38). This injury is inextricably bound to the rights her customers wish to enjoy - the right to travel to Maine.

Plaintiffs Gray and EG have plead the content, timing and impact of the travel, quarantine and testing mandates in detail, and reject Defendants factual counter-narrative as false, and for purposes of a 12(b)(6) motion wholly irrelevant. (ECF 23, ¶¶ 25-31). It is untrue that Plaintiffs have not alleged that the Emergency Mandates were not narrowly tailored. In fact, they have alleged that *none* of them were narrowly tailored. (*See, e.g.,* ECF 23, ¶ 94, which is incorporated by reference into each Count).

C. Count IV: Religion

Plaintiffs reject Defendants factual counter-narrative that the Diocese voluntary adopted the restrictions on free exercise detailed by Plaintiffs Jennifer Jenkins, AJ and EJ

(ECF 23, ¶¶ 39-52). Plaintiffs have plead that "in correspondence and conversation with the Executive Defendants and their counsel, the Bishop…objected to these deprivations, but his objections were ignored." (ECF 23, ¶¶ 51, 205-213). They have plead they would not have been instituted, "but for" the Emergency Mandates and threats of arbitrary and capricious enforcement. (ECF 23, ¶ 52). If there is a factual dispute regarding third party involvement, it must to be explored in discovery and resolved at trial. Here, clearly, the jurisdictional issue and the substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits. Schuchardt, 802 Fed.Appx. at 73.

Plaintiffs have plead that, with respect to the masking requirement in the Emergency Mandates, dining in restaurants is a "comparable secular activity" that poses an equal or greater risk to spreading the virus, but was allowed to proceed with caution. (ECF 23, ¶¶ 43, 47, 209). Defendants want to restrict the comparison very narrowly to the act of eating, but that is artificial and inappropriate. People gather in churches not just to consume the Eucharist (in fact, one is not supposed to consume the Eucharist at all if not in a state of grace),[28] but also to converse, socialize and fellowship with others, activities that also occur in restaurants. If there is a factual dispute regarding whether or not restaurants pose an equal or greater risk, then it should be resolved by expert evidence at trial.

D. Count V: Political Speech

Plaintiffs have alleged that Defendants conspired and acted to block them from entering the Legislature for the purpose of debating the Emergency, using the

[28] "Anyone who desires to receive Christ in Eucharistic Communion must be in the state of grace." (Catechism of the Catholic Church, 1415).

manufactured Emergency and concerns for safety as justification, but were willing to allow them in for other purposes notwithstanding the Emergency (ECF 23, ¶¶ 217-218). Again, Defendants have presented facts that create a counter-narrative contradicting those plead by Plaintiffs, regarding the special session to debate the Emergency that never happened. (ECF 33, ¶¶ 43, pp. 24-26). They have created a factual dispute regarding third party involvement, and intertwined jurisdictional and substantive issues. A Motion to Dismiss is not the proper vehicle for resolving that factual conflict. These facts should be subjected to discovery, and established at trial.

E. Count IX: Damages

Legislative Immunity

Tenney v. Brandhove, 341 S.Ct. 367 (1951) involves a private citizen's interactions with a fully functioning, sitting legislative committee. The state legislature in that case was open and conducting hearings. Here, the Legislature was shut down. Defendants have attacked the institution of the legislature itself, using a manufactured Emergency for the improper purpose of neutralizing a branch of the state government, so that their Emergency could not be challenged. Rationally, it cannot be a "traditional legislative area" to neutralize the legislature using a manufactured Emergency.

Qualified Immunity

"Generally, qualified immunity is better left for the summary judgment stage, rather than the 12(b)(6) stage. This is because at this point in the case, the precise factual basis for the plaintiffs' claim or claims may be hard to identify, meaning the court's task can be difficult." Courser v. Mich. House of Representatives, 831 Fed.Appx. 161, 175 (6th Cir. 2020) (internal quotations and citations removed).

Plaintiffs have alleged that the Defendants conspired and colluded to impose and sustain the Emergency, and impose the Emergency Mandates, even though, in fact, there was no underlying public health emergency justifying their abuse of "this extraordinary power" (Motion, ECF 33, p. 5), and they knew it. This is a factual dispute, and for the purposes of this 12(b)(6) Motion, Plaintiffs' factual allegations must be presumed to be true. At trial, Plaintiffs will establish with expert evidence and testimony, and documents and information procured through discovery will show, that there is no "reasonable disagreement." The Defendants had "fair warning" that they cannot use a manufactured emergency to infringe on Plaintiffs' liberties.

IV. CONCLUSION

For all of the foregoing reasons, and those to be argued at a hearing on the Motion, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

DATED: September 7, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I electronically filed this document 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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