UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
Bangor Division

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING INTERLOCUTORY APPEAL

Pursuant to the Court's Order of June 8, 2022 (ECF No. 140), Plaintiffs file this reply in support of their Motion to Stay Proceedings Pending Interlocutory Appeal (ECF No. 138).

INTRODUCTION

Boiled to its essence, Plaintiffs seek a stay of these proceedings that would preserve the status quo ante while Plaintiffs seek interlocutory appellate review of the Court's Order on Motion to Unseal Plaintiffs' Identities (ECF No. 131, the "Unsealing Order"), requiring a fundamental alteration of the status quo that can never be undone. State Defendants oppose a stay of the proceedings, but do not oppose a stay of the Unsealing Order pending resolution of the appeal. (ECF No. 142 at 1-2, 5.) Defendant Northern Light opposes staying the proceedings and staying the Unsealing Order, but proposes that the Court proceed with the pending and fully briefed motions to dismiss even if the Unsealing Order is stayed, and then stay all proceedings if the Court denies the motions to dismiss. (ECF No. 141 at 3.) Defendants MaineHealth, MaineGeneral, and Genesis oppose a stay of the proceedings "at least through resolution of the pending motions to dismiss," but do not oppose a stay of the Unsealing Order pending appeal. (ECF No. 143 at 1.) Media Intervenors, by contrast, oppose a stay of Unsealing Order pending appeal, but favor staying

all proceedings—after resolution of the pending motions to dismiss—if the Court stays the Unsealing Order. (ECF No. 139 at 2–3, 5.)

Leaving aside the merits of Plaintiffs' stay motion (addressed *infra*), and acting in good faith towards efficient and prompt resolution of the case, Plaintiffs would not object to an order staying the Unsealing Order pending appeal while proceeding with hearing and disposition of the pending motions to dismiss. Given that denial of Plaintiffs' stay motion (or, specifically, denying a stay of the Unsealing Order) pending the interlocutory appeal would forever alter the status quo and force Plaintiffs "'to let the cat out of the bag, without any effective way of recapturing it,'" *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 407 (1st Cir. 1987), staying the Unsealing Order while proceeding with pending motions may strike the appropriate balance. And, among Defendants and Media Intervenors, there is no unanimous opposition to this balance.

ARGUMENT

I. PLAINTIFFS HAVE A SUFFICIENT LIKELIHOOD OF SUCCESS ON THE MERITS TO WARRANT A TEMPORARY STAY.

A stay of an order that would impose irreparable injury upon Plaintiffs, merely to preserve—not alter—the status quo, demands a significantly diminished justification as compared to an injunction pending appeal. *See, e.g.*, *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (request for injunction pending appeal "'demands a significantly higher justification' than a request for a stay"); *Boston Parent Coalition for Academic Excellence Corp. v. Sch. Comm.*, 996 F.3d 37, 44 (1st Cir. 2021) ("bar is harder to clear" for injunction pending appeal). The reason is simple: a stay "simply suspend[s] judicial alteration of the status quo." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986).

As the First Circuit taught in *Providence Journal Co. v. FBI*, a case involving similar irremediable alteration of the status quo, Plaintiffs need to show that "their appeals have potential

merit" but "need not show an absolute probability of success in order to be entitled to a stay." 595 F.2d 889, 890 (1st Cir. 1979). There, as here, the appeal involved questions "wherein respectable minds might differ" but "failure to grant a stay will entirely destroy appellants' rights to secure meaningful review." *Id.* (cleaned up). Because of those counterbalanced interests, the First Circuit held that appellants had made a sufficient showing of success on the merits.

Here, there can be little dispute that the question presented by Plaintiffs' appeal is one in which reasonable minds may differ. Indeed, this Court itself has reached two different conclusions. (*Compare* ECF No. 32 at 4 ("I conclude that the Plaintiffs have a reasonable fear of harm that outweighs the public's interest in open litigation" because of the "substantial public controversy surrounding public and private mandates requiring individuals to be vaccinated for the COVID-19 coronavirus"), *with* ECF No. 131 ("Plaintiffs have not shown that their fear of severe harm if their identities are revealed is objectively reasonable.").) If the Court can reach opposite conclusions on the same question, then the question involves issues on which reasonable minds might differ. Moreover, as the Court recognized in the Unsealing Order, several courts addressing the same question have reached conflicting opinions. (*See* ECF No. 131 at 6 n.6.)

On balance, however, this Court's decision represents the minority view on allowing pseudonymity for plaintiffs challenging COVID-19 vaccine mandates. In fact, in the two cases involving identical plaintiffs (healthcare workers) bringing identical challenges (First Amendment and Title VII) against identical defendants (state and hospital provider defendants) with identical evidence of potential harms from disclosure (attorney declarations demonstrating public comments and vitriol directed at plaintiffs), the courts decided differently from this Court. *See, e.g.*, *Does v. Hochul*, No. 1:21-cv-5067-AMD-TAM, 2022 WL 836990 (E.D.N.Y. Mar. 18, 2022) (relying on a declaration submitted from the undersigned presenting identical evidence of vitriol and hostility

directed at healthcare workers espousing sincere religious objections to COVID-19 vaccines); *Does 1-14 v. Northshore University Healthsystem*, No. 21-cv-05683, 2021 WL 5578790 (C.D. Ill. Nov. 30, 2021) (relying *inter alia* on declarations submitted from counsel regarding the substantial public controversy and vitriol directed at healthcare workers espousing religious objections to COVID-19 vaccines); ECF No. 110 at 7-11 (showing majority of courts permitting plaintiffs with sincere religious objections to COVID-19 vaccines to proceed pseudonymously).) As numerous courts have found on the same evidence, Plaintiffs have a likelihood of success on the merits of their claims. (*Id.*) At minimum, when compared to the inalterable revocation of the status quo, Plaintiffs have satisfactorily demonstrated a sufficient probability of success on the merits to warrant a temporary stay of the Unsealing Order on appeal. *Providence Journal*, 595 F.2d at 890.

And, respectfully, this Court's opinion on the issue presented asked the wrong question when addressing Plaintiffs' sincerely held religious objections to COVID-19 vaccine mandates. The Court, taking judicial notice of public polling data,[1] suggested that "religious-based opposition to abortion" is a long-standing position, widely held, and cannot serve as a basis for pseudonymity. But the question pseudonymous proceedings present is different—namely, whether "the plaintiffs have, by filing suit, made revelations about their personal beliefs and practices that are shown to have invited an opprobrium analogous to the infamy associated with criminal behavior." *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (cleaned up). Thus, while there may be a great many who hold pro-life beliefs in general and thus are not likely to subject Plaintiffs to vitriol,[2] the

[1] Plaintiffs respectfully submit that reliance on public opinion polling is prone to error and improper when not subject to the evidentiary burdens. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 360 (1972) (Marshall, J., concurring) ("While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great."); *Shapiro v. Kauffman*, 855 F.2d 620, 621 (8th Cir. 1988) (noting that public opinion polls "have found little favor with courts").

[2] Outside the vaccine context, the views of pro-life religious adherents are themselves controversial, and have resulted (even recently) in not only hostility and vitriol, but also violence. *See* Caroline Downey, *Pro-Abortion Terrorists Firebomb Buffalo Pro-Life Pregnancy Center* (June 7, 2022), https://news.yahoo.com/pro-abortion-

properly focused inquiry is whether Plaintiffs' sincerely held religious objections *to the COVID-19 vaccines* invite opprobrium and hostility. They do. (*See* ECF No. 110 at 11-16.)

II. PLAINTIFFS' IRREPARABLE INJURY WARRANTS A TEMPORARY STAY.

Plaintiffs will unquestionably suffer irreparable injury if forced to reveal their identities to the public during the pendency of their appeal. *Providence Journal*, 595 F.2d at 890. State Defendants, MaineHealth, MaineGeneral, and Genesis do not contest this point, noting only that proceeding to the hearing on the motions to dismiss would not impose injury because Defendants already know Plaintiffs' identities. (ECF No. 142 at 4; ECF No. 143 at 5.) Where, as here, the disclosure of Plaintiffs' identities cannot be undone, irreparable injury is certain. *Doe v. Coll. of N.J.*, 997 F.3d 489, 494 (3d Cir. 2021) ("[W]e cannot anonymize a litigant's already publicized identity with a new trial. That bell cannot be unrung."); *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979) (reasoning that disclosure of plaintiffs' identities during an appeal "would risk irremediable injury to the rights that plaintiffs assert"). Defendants are largely correct that proceeding to hearing and disposition of the motions to dismiss will not impose any irreparable harm (ECF No. 142 at 4; ECF No. 143 at 5), and the reason is simple: it would maintain the status quo. Maintaining the status quo is all Plaintiffs seek with their stay motion.

III. THE PUBLIC INTEREST FAVORS A STAY.

As the Court has recognized, "there is undeniably a strong public interest in protecting litigants' identities if they would face harm if their identities are publicized." (ECF No. 131 at 9.) As demonstrated *supra*, and in their opposition to the Media Intervenor's motion to unseal (ECF No. 110 at 11-16), Plaintiffs certainly face severe repercussions from disclosure of their identities.

terrorists-firebomb-buffalo-162838322.html; CatholicVote, *Summer of Rage: Tracking Attacks on Pregnancy Centers & Pro-Life Groups* (June 14, 2022), https://catholicvote.org/pregnancy-center-attack-tracker/.

Media Intervenors claim that their First Amendment rights would be injured by a stay for even a minimal period. (ECF No. 139 at 5.) But Media Intervenors' irreparable harm is premised on a supposed concrete First Amendment injury resulting from their having access to *every* detail of these proceedings *except* Plaintiffs' identities. No such concrete right, and thus, no such concrete injury, exists. In fact, as the First Circuit just recognized in a similar challenge by the same media corporations to access judicial records, "[n]either [the First Circuit] nor the Supreme Court has recognized any right under the First Amendment to access documents filed in civil cases." *Courthouse News Service v. Quinlan*, 32 F.4th 15, 20 (1st Cir. 2022). And, in the First Circuit, there appears doubt as to whether any First Amendment right to access exists in civil proceedings. *Id.*; *see also El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 495 (1st Cir. 1992) ("[W]e are doubly skeptical. . . . [W]e seriously question whether *Richmond Newspapers* and its progeny carry positive implications favoring rights of access outside the criminal justice system."). For this reason, Media Intervenors' claims of irreparable injury must be tempered by "the problematic nature of [their] constitutional claims." *Id.*

And, to the extent Media Intervenors have a right of access, the right is satisfied by the current status quo. As the court recognized in *Navy SEAL 1 v. Austin*, as to the "public's interest" in open court proceedings, because the proceedings are otherwise open concerning the claims made, the issues presented, the filings with the court, and the orders of the court, "[t]he names add nothing substantial, but enable those who—through 'social media,' as well as more immediate mechanisms—intimidate, harass, and defame." No. 8:21-cv-2429-SDM-TGW, 2022 WL 520829, at *2 (M.D. Fla. Feb. 18, 2022). Similarly, in *Air Force Officer v. Lloyd*, the court noted that it was "confident that the public's interest regarding Plaintiff's free exercise claims can be served without the general public knowing who she is." No 5:22-cv-00009-TES, 2022 WL 468030, at *2 (M.D.

Ga. Feb. 15, 2022). The same is true here, and preserving the status quo while Plaintiffs pursue further review will impose no harm on the public interest.

CONCLUSION

Because Plaintiffs have made a sufficient showing of irreparable harm and a sufficient likelihood of success on the merits, and because the public's interest is adequately protected during the pendency of Plaintiffs' appeal, their stay motion should be granted. To the extent the Court is inclined to stay only the Unsealing Order, Plaintiffs do not oppose proceeding with hearing and disposition of the pending motions to dismiss if the proceedings are subject to the status quo as established in the Court's Protective Order (ECF No. 36).

Respectfully submitted,

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