IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1435

JANE DOES 1–6, *et al.*,

Plaintiffs – Appellants,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine, *et al.*,

Defendants – Appellees,

MTM ACQUISITION, INC., d/b/a Portland Press Herald, d/b/a Maine Sunday Telegram, d/b/a Kennebec Journal, d/b/a Morning Sentinel; SJ ACQUISITION, INC., d/b/a Sun Journal,

Intervenors – Appellees.

On Appeal from the United States District Court for the District of Maine
Case No. 1:21-cv-242 (Honorable Jon D. Levy)

MEDIA INTERVENORS' OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of Plaintiffs' continued efforts to avoid disclosing their real names while challenging the constitutionality of Maine's statewide COVID-19 vaccine mandate for healthcare workers. As the district court correctly recognized, Federal Rule of Civil Procedure 10(a), by requiring all parties to be named in complaints, "'protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.'" Plaintiffs' Emergency Motion for Stay Pending Appeal ("Pls.' Mot.") at Ex. A[1] (the "Order") at 3 (quoting *Plaintiff B v. Francis*, 631 F.3d 1310, 1315 (11th Cir. 2011)). And both the common law and the First Amendment create a presumption of public access to judicial records and proceedings that extends to parties' identities. *Id.* at 3–4 (citing *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 70 (1st Cir. 2011); *Courthouse News Serv. v. Quinlan*, 32 F.4th 15, 20 & nn.7–8 (1st Cir. 2022)). Only in "'exceptional cases'" can parties overcome the presumption of access and proceed using pseudonyms. *Id.* (quoting *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011)). This is not such a case.

On May 31, 2022, the district court entered an Order granting the Motion to Unseal Plaintiffs' Identities filed by MTM Acquisition, Inc., d/b/a Portland Press

[1] Hereafter, all "Ex." citations refer to exhibits filed in conjunction with Plaintiffs' Emergency Motion for Stay Pending Appeal.

Herald, Maine Sunday Telegram, Kennebec Journal, and Morning Sentinel, and SJ Acquisition, Inc., d/b/a Sun Journal (collectively, "Media Intervenors"). The district court correctly held that Plaintiffs had not made the requisite showing that they reasonably feared severe harm from disclosure of their names in connection with this lawsuit, and ordered them to file an amended complaint using their real names by June 7, 2022 if they wished to proceed with the litigation.

Plaintiffs appealed the Order to this Court on June 1 and filed a belated motion to stay in the district court on June 7. Exs. E, H. After considering briefing from all sides, including Media Intervenors' opposition, the district court denied Plaintiffs' motion to stay the Order pending appeal. Ex. F. The district court correctly determined that Plaintiffs were unlikely to succeed on the merits of their appeal; that they would not be harmed by the denial of a stay; and that a stay was contrary to the interests of Media Intervenors and the public. *Id.* at 2–3. The district court extended Plaintiffs' deadline to file an amended complaint to July 8. *Id.* at 3. On June 22, Plaintiffs filed in this Court an Emergency Motion for Stay Pending Appeal. Pls.' Mot. For the reasons set forth herein, Plaintiffs' Motion should be denied.

RELEVANT PROCEDURAL BACKGROUND

On August 31, 2021, Plaintiffs filed a motion to proceed under pseudonyms. Ex. C. The district court granted that motion, but "reserve[d] the authority to

revisit this issue should the case proceed past the preliminary-injunction stage," noting "Defendants' failure to object to the Plaintiffs proceeding pseudonymously," and "the limited record available at this point." Ex. B at 4. The district court also directed Plaintiffs to disclose their names to Defendants Janet T. Mills, Governor of the State of Maine, Jeanne M. Lambrew, Commissioner of the Maine Department of Health and Human Services, and Dr. Nirav D. Shah, Director of the Maine Center for Disease Control (collectively, "State Defendants"), finding "no credible support" for Plaintiffs' claim that such disclosure would harm them. *Id.* at 5–7.

The preliminary injunction phase of the proceedings concluded in October 2021, when—following the district court's denial of Plaintiffs' request for a preliminary injunction, and this Court's affirmance of that ruling—the Supreme Court denied Plaintiffs' application for injunctive relief. ECF 65; *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021); *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021). On December 30, 2021, in accordance with its order indicating that it would "revisit" Plaintiffs' use of pseudonyms after the preliminary-injunction stage, the district court granted Media Intervenors' motion to intervene for the limited purpose of challenging Plaintiffs' ongoing use of pseudonyms. ECF 95.

On January 27, 2022, Media Intervenors moved to unseal Plaintiffs' identities. ECF 105. Defendants took no position on the motion; Plaintiffs

opposed unsealing. ECF 110. On May 31, 2022, the district court granted Media Intervenors' motion. Order at 13. The district court recognized the public's presumptive right of access to civil proceedings and records, including litigants' names. *Id.* at 3–4. Observing that pseudonymity is permissible only in "'exceptional cases,'" the district court applied a non-exhaustive multi-factor test to assesses "'whether [Plaintiffs have] a reasonable fear of severe harm that outweighs the public's interest in open litigation.'" *Id.* at 4–5 (quoting *Megless*, 654 F.3d at 408–09). In doing so, the district court found "a near total absence of proof that [Plaintiffs'] expressed fears are objectively reasonable," and found their claimed privacy interests insufficient to outweigh the strong public interest in this litigation. *Id.* at 13. The district court set a seven-day deadline, of June 7, for Plaintiffs to file an amended complaint identifying themselves by name. *Id.*

On June 1, Plaintiffs appealed the Order to this Court. Ex. H. On June 7, their deadline to comply with the Order, Plaintiffs moved the district court for a stay of all proceedings pending resolution of their appeal or, in the alternative, a stay of the Order pending resolution of their appeal. Ex. E. Plaintiffs did not seek expedited resolution of their appeal or their stay request. The next day, on June 8, Media Intervenors filed an opposition to Plaintiffs' motion to stay, arguing that a stay would unduly delay public access to Plaintiffs' identities and was unwarranted

given Plaintiffs' low likelihood of success on the merits of their appeal.[2] ECF 139. The district court then directed Defendants to submit briefs outlining their positions by June 13, and gave Plaintiffs until June 15 to reply. ECF 140. Defendants stated that they did not oppose a stay of the Order. ECF 141–143.

The district court denied Plaintiffs' motion to stay on June 17. Ex. F. It analyzed the four factors that courts in this Circuit weigh in deciding whether to grant a stay pending appeal: (1) if the movant is likely to succeed on the merits, (2) if declining a stay would injure the movant, (3) if granting a stay would injure the other parties, and (4) the public interest. *Id.* at 2 (citing *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021)). The district court correctly held that Plaintiffs were not likely to succeed on the merits of their appeal given their inability to demonstrate a reasonable fear of severe harm from disclosure, and that the remaining factors likewise favored denying Plaintiffs' motion for a stay. *Id.* at 2–3. The district court set a new July 8

[2] Media Intervenors took no position on Plaintiffs' request for a stay of proceedings on Defendants' fully briefed motions to dismiss—proceedings limited to a now-completed June 24, 2022 hearing and any subsequent ruling that is issued by the district court. However, Media Intervenors asked that in the event the district court stayed the Order, that it also stay all other district court proceedings pending resolution of the appeal. If such further proceedings were to take place with Plaintiffs' identities still sealed, the press and public, including Media Intervenors, would be deprived of the ability to observe this litigation, despite the district court's finding that Plaintiffs have failed to overcome the public's strong interest in doing so.

deadline for Plaintiffs to file an amended complaint disclosing their names, and noted that they could seek relief in this Court in the interim. *Id.* at 3 (citing Fed. R. App. P. 8(a)). Plaintiffs filed their Emergency Motion for Stay Pending Appeal in this Court on June 22. Pls.' Mot.[3]

ARGUMENT

"Lawsuits are public events." *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992). Because "[p]seudonymous litigation undermines the public's right of access to judicial proceedings," it is warranted only "in exceptional circumstances." *Doe v. Pub. Citizen*, 749 F.3d 246, 274 (4th Cir. 2014) (internal quotation omitted). Plaintiffs seeking to proceed pseudonymously bear the burden of showing a compelling need for confidentiality that "overcomes the constitutional preference for openness in judicial proceedings." *MacInnis v. Cigna Grp. Ins. Co. of Am.*, 379 F. Supp. 2d 89, 90 (D. Mass. 2005).

As the district court held, Plaintiffs failed to show that their purported fears of harm from disclosure of their identities outweigh the public's interest in open courts. Order; Ex. F. Indeed, the district court found "a near total absence of proof that [Plaintiffs'] expressed fears are objectively reasonable." Order at 13. On the

[3] On June 23, 2022, Media Intervenors also filed a Motion to Intervene in this Court and corporate disclosure statements. The Court granted that motion on June 28.

other side of the balance, the district court found that there is significant public interest in learning Plaintiffs' identities, given that the case addresses the government's COVID-19 response and the obligations of healthcare workers across Maine, and because Plaintiffs bring as-applied challenges that will turn on individualized facts. *Id.* at 11–12.

"'A stay is not a matter of right, even if irreparable injury might otherwise result.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,'" and "the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34 (quoting *Virginian R. Co.*, 272 U.S. at 672–73). In determining whether to issue a stay pending appeal, courts consider:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Bos. Parent Coal. for Acad. Excellence Corp., 996 F.3d at 44 (quoting *id.*). The first two factors are most important, *id.*, and "'[t]he *sine qua non* of the stay pending appeal standard is whether the movants are likely to succeed on the merits,'" *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 (1st Cir. 2002) (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)) (cleaned up). To

prevail, the movant must show "[m]ore than a mere possibility of relief" and more than "some possibility of irreparable injury." *Nken*, 556 U.S. at 434 (internal quotation marks and citation omitted).

Here, all four factors weigh in favor of denying Plaintiffs' motion to stay the Order pending appeal. The Order is well reasoned and correct, and it should be promptly implemented. Should this Court nevertheless stay the Order pending appeal, Media Intervenors ask that it expedite Plaintiffs' appeal, including by moving up the briefing schedule set forth in this Court's June 16 order, so that the public's ability to monitor the ongoing litigation is not unduly delayed.

I. Plaintiffs are unlikely to succeed on the merits of their appeal.

Plaintiffs are unlikely to succeed on their claims that their purported fears of severe harm are reasonable and sufficiently substantial to overcome the strong presumption of open access to civil proceedings and records. The district court's decision was rooted in the foundational principle that the Federal Rules of Civil Procedure, common law, and—as courts around the country have generally held—the First Amendment all create a strong presumption of public access to parties' names. Order at 3–4. The district court, as other courts throughout the Circuit have done, applied the non-exhaustive, multi-factor test articulated by the Third Circuit in *Megless* to assesses "'whether [Plaintiffs have] a reasonable fear of severe harm that outweighs the public's interest in open litigation.'" *Id.* at 4–5

(quoting *Megless*, 654 F.3d at 408–09); *see also, e.g.*, *Doe v. Reg'l Sch. Unit No. 21*, No. 19-CV-341 (NT), 2020 WL 2833248, at *2 (D. Me. May 29, 2020) (applying *Megless*); *Doe v. Univ. of Maine Sys.*, No. 19-CV-415 (NT), 2020 WL 981702, at *4 (D. Me. Feb. 20, 2020) (same).[4]

A. Plaintiffs have failed to demonstrate a reasonable fear of severe harm from disclosing their identities.

Although Plaintiffs claim to have "a reasonable fear of harm and ostracism from their community if their identities are made known to the public," Pls.' Mot. at 27, the district court correctly found that the record reflects "a near total absence of proof" supporting that claim, Order at 13. As a preliminary matter, debate over the scope of constitutional rights is often subject to controversy, and federal courts regularly handle such matters without permitting pseudonymous litigation. *See,*

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[4] The *Megless* test considers:

> (1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives.

Megless, 654 F.3d at 409.

e.g., *Carson v. Mankin*, 2022 WL 2203333 (U.S. June 21, 2022) (naming Maine-based plaintiffs in constitutional challenge regarding religion). More importantly, however, Plaintiffs' argument overlooks the hundreds of similarly situated litigants who have brought constitutional challenges to COVID-19 health and safety measures without the use of pseudonyms.[5] Plaintiffs have presented no evidence, nor is there any, that any of those plaintiffs have been subjected to serious harm as a result. Moreover, in the few cases where plaintiffs have moved for leave to proceed under pseudonyms to challenge government actions related to COVID-19, most courts have denied their motions, holding that the plaintiffs' interest in anonymity was insufficient to overcome the constitutionally rooted presumption of openness. *See*, *e.g.*, *Doe #1 v. Austin*, 22-CV-121 (JLB) (SPF), 2022 WL 2116797 (M.D. Fla. June 10, 2022); *Oklahoma v. Biden*, No. 21-CV-1136 (SPF), 2022 WL

[5] For cases in the First Circuit alone, see, for example, *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021); *Fortuna v. Town of Winslow*, No. 21-CV-248 (JAW), 2022 WL 2117717 (D. Me. June 13, 2022); *Choi v. Brown Univ.*, No. 20-CV-191 (JJM) (LDA), 2022 WL 843762 (D.R.I. Mar. 22, 2022); *Brox v. Hole*, No. 22-CV-10242 (RGS), 2022 WL 715566 (D. Mass. Mar. 10, 2022); *Barkhordar v. President & Fellows of Harvard Coll.*, No. 20-CV-10968 (AK), 2022 WL 605820 (D. Mass. Mar. 1, 2022); *Gray v. Mills*, No. 21-CV-71 (LEW), 2021 WL 5166157 (D. Me. Nov. 5, 2021); *Together Emps. v. Mass Gen. Brigham Inc.*, No. 21-CV-11686 (FDS), 2021 WL 5234394 (D. Mass. Nov. 10, 2021); *Mass. Corr. Officers Federated Union v. Baker*, 567 F. Supp. 3d 315 (D. Mass. 2021); *Harris v. Univ. of Mass., Lowell*, 557 F. Supp. 3d 304 (D. Mass. 2021); *Delaney v. Baker*, 511 F. Supp. 3d 55 (D. Mass. 2021); *Beaudoin v. Baker*, 530 F. Supp. 3d 169 (D. Mass. 2021); *Rodriguez-Velez v. Pierluisi-Urrutia*, No. 21-CV-1366 (PAD), 2021 WL 5072017 (D.P.R. Nov. 1, 2021); *Savage v. Mills*, 478 F. Supp. 3d 16 (D. Me. 2020).

356736 (W.D. Okla. Feb. 2, 2022); Order Denying Joint Motion to Proceed Anonymously, *Am.'s Frontline Drs. v. Wilcox*, No. 21-CV-1243 (JGB) (KKx) (C.D. Cal. filed Jan. 7, 2022); *Doe v. Trs. of Indiana Univ.*, No. 21-CV-2903 (JRS) (MJD), 2022 WL 36485 (S.D. Ind. Jan. 3, 2022); Order, *Brnovich v. Biden*, No. 21-CV-1568 (MTL) (D. Ariz. filed Dec. 15, 2021); *Doe v. City Univ. of N.Y.*, No. 21-CV-9544 (NRB), 2021 WL 5644642 (S.D.N.Y. Dec. 1, 2021); Order, *Coker v. Austin*, No. 21-CV-1211 (AW) (N.D. Fla. filed Dec. 1, 2021); Order, *Doe v. Raimondo*, No. 21-MC-27 (UNA) (D.D.C. filed Oct. 14, 2021); *Doe v. Vanderbilt Univ.*, No. 20-CV-356 (JSF), 2021 WL 6496833 (M.D. Tenn. Mar. 11, 2021).

If the denial of pseudonymity in this kind of litigation caused real harm, we would know that by now. And Plaintiffs put forth no evidence that those courts' denial of pseudonymity requests has caused any real harm to any plaintiff. Rather, formerly pseudonymous plaintiffs challenging COVID-19 vaccine mandates have filed amended complaints disclosing their names after courts ordered them to do so. *See, e.g.*, Amended Complaint, *City Univ. of N.Y.*, No. 21-CV-9544 (NRB) (S.D.N.Y. filed Feb. 14, 2022) (naming formerly pseudonymous student plaintiff challenging university vaccine mandate); Second Amended Complaint, *Am.'s Frontline Drs.*, No. 21-CV-1243 (JGB) (C.D. Cal. filed Jan. 11, 2022) (same); *see also Doe #1*, 2022 WL 2116797, at *2 (noting that 22 of 39 plaintiffs elected to

proceed under their real names rather than submit sealed affidavits substantiating their pseudonymity requests).[6]

A plaintiff's demonstration of serious, non-speculative physical or mental harm—not economic harm, or mere discomfort or embarrassment—is essential, including in the COVID-19 context. Courts have rejected arguments "centered upon [a plaintiff's] economic well-being and possible embarrassment or humiliation." *Trs. of Indiana Univ.*, 2022 WL 36485, at *6 (internal quotation marks and citation omitted); *see also* Order at 4, *Am.'s Frontline Drs.*, *supra* (denying motion to proceed anonymously in case challenging vaccine mandate, where plaintiffs' claims of harm were "vague, conclusory, and do not hint at potential repercussion, retaliation, or intimidation," adding that "[c]ommunity disagreement which results in 'embarrassment . . . is not enough' to support the use of pseudonyms" (quoting *Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981))).

[6] In the handful of COVID-related cases where courts did grant plaintiffs' motions to proceed under pseudonyms, they did so only for the early stages of the litigation, *see, e.g.*, *Omori v. Brandeis Univ.*, 533 F. Supp. 3d 49, 56 (D. Mass. 2021), or based on individualized declarations from the plaintiffs, *see, e.g.*, *Navy Seal 1 v. Austin*, No. 21-CV-2429 (SDM), 2022 WL 520829, at *1 (M.D. Fla. Feb. 18, 2022); *id.* at ECF 60-1–60-2 (declarations); *Air Force Officer v. Austin*, No. 22-CV-9 (TES), 2022 WL 468030, at *2 (M.D. Ga. Feb. 15, 2022); *id.* at ECF 47-1 (declaration); *Doe 1 v. NorthShore Univ. HealthSystem*, No. 21-CV-5683 (JFK), 2021 WL 5578790, at *9 (N.D. Ill. Nov. 30, 2021); *id.* at ECF 37-1–37-9 (declarations); Declaration of Student A, *Does 1 through 11 v. Bd. of Regents of Univ. of Colorado*, No. 21-CV-2637 (RM) (D. Colo. filed Sept. 19, 2021). In this case, the preliminary injunction phase is complete, and Plaintiffs failed to submit any evidence beyond a generalized, conclusory attorney affidavit. Ex. D.

Here, Plaintiffs' sole basis for their alleged fear of potential retaliation consists of a declaration from their attorney citing statements from Governor Mills and a handful of public comments on a news article reporting on this litigation. Ex. D. But courts have found that generalized statements in the news "expressing a lack of patience or frustration at unvaccinated people do not support [a] claim that [plaintiffs] would be subject to extensive harassment and perhaps even violent reprisals, and do not suffice to justify anonymity." *City Univ. of N.Y.*, 2021 WL 5644642, at *3 (internal quotation marks and citation omitted). Similarly, courts reviewing criticism on social media have found that "such unpleasantness, without threats indicating that [plaintiff] is at risk of actual harm in real life, does not rise to the level of severity that justifies maintaining anonymity while prosecuting a federal lawsuit." *Vanderbilt Univ.*, 2021 WL 6496833, at *2. Here, in quoting online statements from Governor Mills and unnamed commenters on a news article, Plaintiffs rely on the same expressions of opinion and "unpleasantness" properly rejected as insufficient by other courts, without showing any "risk of actual harm in real life." *Id.* (finding plaintiff's "[d]eclaration of such fears alone is insufficient"); *see also Doe #1*, 2022 WL 2116797, at *5 ("[T]he record evidence here simply does not support the vilification that Plaintiffs allege they will face."). Simply put, Plaintiffs' vague and unspecified "fears of reprisals from disclosure of their identities," Pls.' Mot. at 13, fall far short of constituting a

"substantial privacy right" sufficient to outweigh "the customary and constitutionally-embedded presumption of openness in judicial proceedings," *Doe v. Univ. of Rhode Island*, No. 93-CV-560B (RWL), 1993 WL 667341, at *2 (D.R.I. Dec. 28, 1993) (internal quotation marks and citations omitted).

That is all the more evident as support for COVID-19 vaccine mandates and proof-of-vaccination requirements continues to decline, with most Americans now opposing such measures. *See, e.g.*, *National: Shifting Support for Some, But Not All, Covid Mandates*, Monmouth Univ. (Mar. 28, 2022), https://perma.cc/3XL4-WUHE. Plaintiffs are no different from the hundreds of others who have challenged—and continue to challenge—COVID-related protocols and vaccine mandates under their own names, and they should not be permitted to continue to proceed pseudonymously in this case.

B. The religious and medical issues asserted by Plaintiffs are insufficient to constitute a "substantial privacy interest."

Plaintiffs also assert that they should be permitted to proceed using pseudonyms because their claims relate to their "sincerely held religious beliefs and private medical decisions," which have led them to oppose COVID-19 vaccines. Pls.' Mot. at 16. The district court correctly held, however, that "Plaintiffs' religious beliefs and their resulting medical decisions not to be vaccinated against COVID-19 . . . do not present privacy interests so substantial as to support pseudonymous proceedings." Order at 8. While in certain cases a

plaintiff's religious beliefs or highly sensitive medical condition may constitute a substantial privacy right, this is not such a case. *See, e.g.*, *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (granting pseudonymity request where plaintiff's religious beliefs were "shown to have invited an opprobrium analogous to the infamy associated with criminal behavior"); *Doe v. Standard Ins. Co.*, No. 15-CV-105 (GZS), 2015 WL 5778566, at *2 (D. Me. Oct. 2, 2015) (same, where "the sole focus of the litigation is Plaintiff's serious mental health condition"). A plaintiff "disclosing that he is Christian in a country where the majority of the population also identifies as Christian" is hardly the same as disclosing a religious belief that would invite an "'opprobrium'" like that directed at "'criminal behavior.'" *City Univ. of N.Y.*, 2021 WL 5644642, at *3 (quoting *Stegall*, 653 F.2d at 186). Plaintiffs have not offered any individualized testimony as to what their religious beliefs and affiliations are, much less how these beliefs justify the rare dispensation of pseudonymity.

As to medical privacy, as other courts have held in similar COVID-related litigation, opposition to receiving the vaccine (based on religious beliefs or otherwise) is insufficient to overcome the presumption against pseudonymous litigation. Where, as "here, there is no independent medical issue separate and apart from plaintiff's refusal to receive a COVID-19 vaccine on religious grounds," the fact "'that a case involves a medical issue is not a sufficient reason

for allowing the use of a fictitious name.'" *Id.* at *2 (quoting *Doe v. N.Y. State Dep't of Health*, No. 20-CV-4817 (GHW), 2020 WL 5578308, at *3 (S.D.N.Y. Sept. 17, 2020)). Indeed, even courts that have granted plaintiffs' pseudonymity requests agree that COVID-19 "'[v]accination status simply is not at that level'" of the "'very private matters'" that may overcome the presumption of access. *Air Force Officer*, 2022 WL 468030, at *2 (first quoting Order, *Coker*, *supra*; and then quoting *Frank*, 951 F.2d at 324); *see also Does 1 through 11 v. Bd. of Regents of Univ. of Colorado*, No. 21-CV-2637 (RM) (KMT), 2022 WL 43897, at *3 (D. Colo. Jan. 5, 2022); *Navy Seal 1*, 2022 WL 520829, at *1.

For these reasons, Plaintiffs are unlikely to succeed on the merits of their appeal and have failed to demonstrate that a stay of the Order is warranted.

II. Staying the district court's Order would not irreparably injure Plaintiffs, but would harm Media Intervenors and the press and public at large.

Media Intervenors acknowledge that, absent a stay of the Order, Plaintiffs will be required to reveal their identities, which would moot the relief sought by their appeal. But as the district court recognized, "the Plaintiffs will not be irreparably injured absent a stay" given their failure to demonstrate that disclosure would harm them, while "the requested stay would substantially injure the interests of the Media Intervenors," who stand in the shoes of the public. Ex. F at 2–3; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (linking the press's right of access to the public's "in a society in which each individual has but limited time and resources"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("[E]ven a one to two day delay impermissibly burdens the First Amendment . . . .").

In response, Plaintiffs say that the Constitution does not create a presumption of access to civil proceedings. Pls.' Mot. at 28. Here they misconstrue this Court's recent holding in *Courthouse News Service v. Quinlan*, which stated that although the Supreme Court and First Circuit have not yet recognized a First Amendment right to access records filed in civil cases, other circuits have held that such a right exists. 32 F.4th at 20. The Court in *Quinlan* accepted the parties' agreed-upon position "that there is a qualified First Amendment right in the public to access newly filed complaints," and rested its decision on that basis. *Id.* Likewise in the pseudonymity context, there is an indisputable "presumption of public access and the need for a compelling countervailing interest to justify limitations to that access." *Doe v. Trs. of Dartmouth Coll.*, No. 18-CV-40 (LM), 2018 WL 2048385, at *4 (D.N.H. May 2, 2018). Further delaying that access—especially in light of Plaintiffs' failure to demonstrate any "compelling countervailing interest," *id.*—would significantly

injure Media Intervenors. Accordingly, though Plaintiffs' stay request should be denied, if this Court stays the Order pending appeal, Media Intervenors respectfully request that, in order to minimize irreparable injury to Media Intervenors and the public, the Court expedite the appeal.

Plaintiffs argue that they would be harmed by having to reveal their identities in an amended complaint. However, "[t]he First Circuit has observed that irreparable harm works in conjunction with the likelihood of success on the merits," requiring courts to evaluate "'the risk of such harm in light of the party's chance of success on the merits.'" *NCTA - Internet & Television Ass'n v. Frey*, No. 19-CV-420 (NT), 2020 WL 2529359, at *2 (D. Me. May 18, 2020) (quoting *Coastal Cntys. Workforce, Inc. v. LePage*, No. 17-CV-417 (JAW), 2018 WL 545712, at *4 (D. Me. Jan. 24, 2018)). The district court carefully considered, but rejected as speculative, Plaintiffs' arguments regarding the harms they claimed to fear; as such, both Plaintiffs' likelihood of success and risk of harm are *de minimis* at best. Moreover, as the district court noted, no Plaintiff elected to drop out of the case rather than comply with its December 2021 order requiring Plaintiffs to disclose their identities to Defendants, nor have any of the Plaintiffs claimed any harm resulted from that disclosure. Order at 10 (citing ECF 94).

III. Media Intervenors take no position on whether staying the district court's Order would prejudice Defendants.

Media Intervenors take no position on whether staying the Order would prejudice Defendants. Defendants did not participate in the briefing on the Motion to Unseal Plaintiffs' identities and took no position on Plaintiffs' request to stay the Order granting that motion. ECF 141–143. None of the parties has asked this Court to stay further proceedings on Defendants' pending and fully briefed motions to dismiss; the district court heard argument on those motions on June 24.

IV. Staying the district court's Order is contrary to the public interest.

There is a strong public interest in open courts, including public access to the names of plaintiffs pursuing claims in civil lawsuits. "Public access to judicial records and documents allows the citizenry to 'monitor the functioning of our courts, thereby [e]nsuring quality, honesty and respect for our legal system.'" *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (quoting *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984)). Put simply, "[t]he people have a right to know who is using their courts." *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997). Pseudonymity is a deviation from the "customary and constitutionally-embedded presumption of openness in judicial proceedings," and is permitted only in "exceptional cases." *Univ. of Rhode Island*, 1993 WL 667341, at *2 (internal quotation marks and citations omitted). It prevents the press, and by extension the public, from learning

who the litigants are, exploring their acts and views in connection with the litigation, and understanding its full context and significance.

Here, Plaintiffs have failed to demonstrate the requisite "reasonable fear of severe harm that outweighs the public's interest in open litigation." *Megless*, 654 F.3d at 409. Plaintiffs' religion-based opposition to COVID-19 vaccines is shared by many; they have not pointed to any specific threats of severe harm against them; nor have they demonstrated that they have kept their identities confidential to date. Meanwhile, the public's interest in this case is substantial, given that its resolution will affect the state's public health authority, Maine healthcare workers' rights and obligations, and issues of constitutional law. For these reasons, the district court was correct in concluding that the public interest compels disclosure of Plaintiffs' identities. Ex. F at 2–3. A stay of the Order would unduly delay that disclosure and undermine the public interest. Should this Court nevertheless stay the Order pending appeal, the strong public interest in open courts warrants expediting the appeal. To rule otherwise would allow Plaintiffs to continue to cloak their identities in secrecy while litigating a case of great public concern.

CONCLUSION

For the foregoing reasons, Media Intervenors respectfully request that this Court deny Plaintiffs' emergency motion to stay the Order. Alternatively, should

the Court stay the Order pending appeal, Media Intervenors ask that the Court expedite the briefing schedule set in its June 16, 2022 Order.

Dated: June 28, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Katie Townsend, do hereby certify that the foregoing Media Intervenors' Opposition to Plaintiffs' Emergency Motion for Stay Pending Appeal: (1) complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 5,072 words; and (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman in size 14 font.

Dated: June 28, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on June 28, 2022.

Dated: June 28, 2022

/s/ Katie Townsend
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