No. 20-1559

IN THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BAYLEY'S CAMPGROUND, INC, d/b/a Bayley's Camping Resort; FKT RESORT MANAGEMENT, LLC; FKT BAYLEY LIMITED PARTNERSHIP; DMJ PARKS, LLC, d/b/a Little Ossipee Campground, LLC; CURTIS BONNELL, DOLORES HUMISTON, and JAMES BOISVERT

Appellants - Plaintiffs,

v.

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

Appellee - Defendant.

On Appeal from the United States District Court for the District of Maine, Case No. 2:20-cv-00176-LEW

Principal Brief for Appellants

GENE R. LIBBY, Bar No. 13061
TYLER J. SMITH, Bar No. 1165609
LIBBY O'BRIEN KINGSLEY & CHAMPION, LLC
62 Portland Road, Suite 17
Kennebunk, ME 04043
(207) 985-1815
glibby@lokllc.com
tsmith@lokllc.com

Attorneys for Appellants

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The non-governmental corporate parties, Bayley's Campground, Inc., d/b/a Bayley's Camping Resort, FKT Resort Management, LLC, FKT Bayley Limited Partnership, and DMJ Parks, LLC, d/b/a Little Ossipee Campground, LLC, do not have parent corporations, and no publicly held corporation owns 10% or more in stock.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument should be heard because this appeal raises constitutional questions of considerable importance, such as identifying the level of scrutiny that should be applied when regulations enacted in response to the COVID-19 pandemic collide with constitutionally guaranteed freedoms. As a matter of first impression in this Court, Appellants-Plaintiffs respectfully suggest, pursuant to Fed. R. App. P. 34(a) and 1st Cir. R. 34(a), that oral argument will assist the Court in deciding the questions presented on appeal.

JURISDICTIONAL STATEMENT

A. The District Court has federal question jurisdiction, 28 U.S.C. § 1331, because this case involves questions of federal law arising under the United States Constitution and claims brought under 42 U.S.C. § 1983.

B. The Court of Appeals has jurisdiction under 28 U.S.C. § 1292(a)(1), because this is an interlocutory appeal of a decision of the District Court refusing to issue an injunction.

C. The District Court's decision denying the motion for preliminary injunction was entered on May 29, 2020, and the notice of appeal was timely filed on June 1, 2020.

D. This appeal is not of a final order or judgment, however, the Court of Appeals has jurisdiction nonetheless under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

A. In Executive Order 34 FY 19/20 ("EO34"), the Governor of the State of Maine mandated that every person entering the State quarantine at home for a period of 14 days. Does this 14-day quarantine mandate burden the constitutional right to interstate travel?

B. If the 14-day quarantine burdens the right to interstate travel, (1) is it subject to strict scrutiny under *Shapiro* v. *Thompson*, 394 U.S. 618, 643 (1969) (addressing the right to travel) or a lesser degree of scrutiny under *Jacobson v.*

Massachusetts, 197 U.S. 11 (1905) (addressing a substantive due process challenge to a mandatory vaccination law), and (2) in either case, does the 14-day quarantine satisfy the applicable standard?

C. After the notice of appeal was filed, the Governor issued Executive Order 57 FY 19/20, which relaxed the 14-day quarantine requirement by exempting travel to and from some States and providing an exception for those who have recently tested negative for COVID-19. Does EO57 render this appeal moot, and if so, does either the "voluntary cessation" or "capable of repetition yet evading review" exception apply?

D. Should this Court decide whether the campground plaintiffs have standing in the first instance, and if so, may the campground plaintiffs assert the constitutional rights of their patrons?

STATEMENT OF THE CASE

A. Chronology of Executive Actions.

On March 15, 2020, Governor Mills declared a state of civil emergency in response to the COVID-19 pandemic. (Joint Appendix ("J.A.") 112.) Soon thereafter, the Governor began issuing a series of executive orders. On March 18, 2020, the Governor issued Executive Order 14 FY 19/20, mandating that all restaurants and bars close to dine-in services for 14 days and prohibiting gatherings of 10 or more people. (J.A. 115.) Six days later, she issued Executive Order 19 FY

19/20, directing all "non-essential" businesses and operations to close their physical locations that are public facing, recommending that all "essential" businesses implement strategies to avoid congestion in stores, and directing all businesses to have their employees work from home, if possible. (J.A. 116-17.) Then, on March 31, 2020, the Governor issued Executive Order 28 FY 19/20, directing people living in Maine to stay at home unless leaving for an essential job or an essential reason, closing public K-12 schools, restricting public transportation, and imposing in-store customer and safety limits. (J.A. 115.)

On April 3, 2020, Governor Mills issued Executive Order 34 FY 19/20 ("EO34"), the executive order at issue here. EO34 orders that all lodging operations must close as non-essential businesses, subject to certain exceptions, and that, "any person, resident or non-resident, traveling into Maine must immediately self-quarantine for 14 days or for the balance of 14 days dating from the day of arrival, except when engaging in essential services as defined in Executive Order 19 FY 19/20." (J.A. 118; Addendum ("Add.) 33-34.) EO34 goes on to say that "Visitors are instructed not to travel to Maine if they are displaying symptoms of COVID-19, and are advised not to travel to Maine if they are travelling from cities and regions identified as COVID-19 'hot spots,' including, among others, the cities of Detroit, Chicago and New York City. In addition, residents of the States of New York, New Jersey and Connecticut should refrain

from travel to Maine in strict compliance with USCDC travel guidance issued Saturday, March 28, 2020 and any subsequent travel guidance that may be issued during the pendency of this Order." (Add. 34.)

Violations of EO34 are criminally punishable as a Class E crime subject to a penalty of up to six months in jail and a $1,000 fine. (Add. 35.) Relevant to Maine businesses, EO34 also states that it "may be enforced by any governmental department or official that regulates, licenses, permits or otherwise authorizes the operations of occupancy of buildings, parks and campgrounds[,]" and that a violation of the Order "may be construed to be a violation of any such license, permit or other authorization to which pertinent penalties may be assessed." (Add. 35.)

On April 29, 2020, Governor Mills issued Executive Order 49 FY 19/20, which (1) extended the effective dates of the Executive Orders described above, (2) mandated that individuals wear cloth face coverings in settings where social distancing is difficult to maintain, and (3) incorporated the *Restarting Maine's Economy* plan. (J.A. 60-79; Add. 44-48.). The *Restarting Maine's Economy* plan is published on the State of Maine's website and sets forth four stages for gradually reopening Maine's economy. State of Maine Covid-19 Response, *Restarting Maine's Economy*, available at https://www.maine.gov/covid19/restartingmaine. The plan has evolved over time. *Compare, e.g.*, *Restarting Maine's Economy* plan

at (J.A. 64-79) *with Restarting Maine's Economy* plan at https://www.maine.gov/covid19/restartingmaine. To implement the *Restarting Maine's Economy* plan, the Maine Department of Economic and Community Development ("DECD") has released a series of industry-specific checklists to allow businesses to safely reopen. *See generally* DECD, *COVID-19 Prevention Checklists*, available at https://www.maine.gov/decd/covid-19-prevention-checklists. The checklists expand the list of businesses-types that may reopen and provide the dates on which those businesses may reopen.

On June 9, 2020, the Governor issued Executive Order 57 FY 19/20, which repealed EO34. EO57 continues the 14-day quarantine on individuals arriving in Maine, but (1) exempts travelers from New Hampshire and Vermont, and (2) exempts all travelers who recently tested negative for COVID-19, in accordance with guidelines established by Maine CDC and the *Keep Maine Healthy* plan. (Add. 37-43). Under the *Keep Maine Healthy* plan, the test must be of a specimen taken within 72-hours of the person's arrival. State of Maine Covid-19 Response, *Keep Maine Healthy*, available at https://www.maine.gov/covid19/restartingmaine/keepmainehealthy. (App. 41-43.) The *Keep Maine Healthy* plan does not itself provide any information about the necessary criteria for obtaining a test before arrival. *Id.* Instead, the plan provides a link to a private website, "GET TESTED COVID-19," which explains (1) that many testing centers require a doctor's

screening and are limited to certain high risk populations or those experiencing symptoms, and (2) that the turnaround time is ideally 24 to 48 hours, but "depending on the lab's capacity, it may take up to a week to get your results back." GET TESTED COVID-19, *How Does Covid-19 Testing Work?*, available at https://get-tested-covid19.org/how-testing-works.

Although EO57 relaxes quarantine guidelines, it cautions that "[t]he application of this Order and the Keep Maine Healthy Plan shall be monitored and adjusted for appropriate or necessary changes." (Add. 40.) Likewise, the *Keep Maine Healthy* plan provides, "[i]f a review of these metrics in their totality and in context, finds evidence of a concerning increase in COVID-19, the State reserves the right to move swiftly to limit harm and protect Maine people[,]" *see* (Add. 43), and the *Restarting Maine's Economy* plan provides, "If the COVID-19 situation worsens in Maine for any reason, the state will move quickly to either halt progress *or return to an earlier stage*[,]" *see* (Add. 45 (emphasis added)). Finally, on June 15, 2020, the Governor released a protocol for delaying or rolling back the progress made to date, stating that the administration "is ready to take action to pause or reverse course if there is an imminent threat of COVID-19 resurgence." State of Maine Covid-19 Response, *Protocols For Delays or Rollbacks*, available at https://www.maine.gov/covid19/restartingmaine/protocolsfordelays.

B. The Plaintiffs

The Plaintiffs in this case are two businesses, operating two campgrounds, one with a restaurant, and three individuals.

Bayley's Campground (J.A. 25-27). Bayley's Campground received 715 reservation cancellations between March 16, 2020 and May 12, 2020 due to the 14-day quarantine, refunded $153,182 in reservation fees, and lost revenue of $260,455. The continued quarantine requirement will continue to dramatically impact the campground's revenue, employees, and campers. Bayley's Campground was following Maine law and CDC recommended guidelines, but law enforcement still attempted to shut down the campground after receiving reports of unlawful operation in violation of the Executive Orders. After investigation and explanation, the police ultimately took no action.

Little Ossipee Campground (J.A. 28-30). Little Ossipee Campground is a small family business in Waterboro, Maine that, at the time of filing, had 10 cancellations for seasonal campsites at a loss of revenue of $38,000. Several out-of-state campers did not pay their seasonal fees due to uncertainties about the mandatory quarantine. Revenue for this year related to the 14-day quarantine was down by $94,428. The 14-day quarantine requirement has dramatically impacted the campground's ability hold reservations, bring in guests, and earn income.

Dolores Humiston (J.A. 34-38). Dolores Humiston is a New Hampshire resident. She is employed as a schoolteacher. She is a seasonal camper at Bayley's Campground, and typically uses her camper on weekends during the spring and early summer. At the time of filing, it was her intention to travel to Bayley's Campground for the summer, thereby subjecting her to a 14-day quarantine. When this litigation was filed, Ms. Humiston had only left her home for grocery shopping, and was not displaying any symptoms of COVID-19.

Curtis Bonnell (J.A. 31-33). Curtis Bonnell is a New Hampshire resident and is normally a seasonal camper at Bayley's Campground. Generally, he and his wife make use of their camper on weekends throughout the summer; however, the 14-day quarantine under EO34 virtually eliminates their ability to enjoy their camper. Mr. Bonnell and his wife have each contracted and recovered from COVID-19, making them either low risk or immune based upon the latest medical and expert knowledge and data.

James Boisvert (36-38). James Boisvert is a Maine resident. He frequently travels to New Hampshire to visit friends and engage in other activities, but his ability to do so was practically eliminated by the 14-day quarantine requirement under EO34. In addition, Mr. Boisvert had a preplanned trip to Florida from May 18, 2020 through May 29, 2020. At that time, EO34 would have required him to quarantine for 14 days upon his return home, regardless of whether he took

recommended precautions or presented any risk whatsoever of contracting or spreading COVID-19.

C. Procedural History

Appellants-Plaintiffs commenced this action on May 15, 2020 by filing a complaint and a motion for preliminary injunction. (J.A. 4, 12.) The parties agreed to an expedited briefing schedule on the motion for a preliminary injunction, such that the case was fully briefed by May 28, 2020. (App. 2.) In addition, the United States filed a Statement of Interest, arguing that the 14-day quarantine's discriminatory treatment of non-residents violates the Privileges and Immunities Clause to the Constitution. (J.A. 6; Statement of Interest on Behalf of the United States (May 29, 2020).)

The District Court (Walker, J.), denied the motion for preliminary injunction on May 29, 2020. (Add. 1.) In response, the Appellants-Plaintiffs moved for an injunction pending appeal, asserting that the District Court incorrectly placed the burden of proof on Plaintiffs to prove that the 14-day quarantine fails strict scrutiny, rather than on the Governor to prove that the 14-day quarantine survives strict scrutiny. *See, e.g.*, (Add. 19 ("I am not persuaded, at this date, that the measure *is not* the least burdensome way to serve a compelling governmental interest, *given all that we do now know*" (emphasis added)); Add. 22 ("*without a developed factual record*, I find Plaintiffs have not yet shown they are likely to

succeed on this claim." (emphasis added)); Add. 23 ("*Because there is evidence pointing in both directions*, and the other three preliminary injunction factors do not lessen Plaintiffs' burden to show likelihood of success, I find Plaintiffs have failed to show they are likely to succeed on Count One, their claim that the Governor has violated their fundamental right to travel." (emphasis added))). The District Court issued an order on June 5, 2020 that denied Plaintiffs' Motion for Injunction Pending Appeal, for the reasons stated in its May 29, 2020 Order, and construed its May 29, 2020 order as having placed the burden on the Governor, not Plaintiffs. (Add. 29.)

SUMMARY OF THE ARGUMENT

A. The right to interstate travel is deeply rooted in our nation's history, playing an "important role . . . in transforming many States into a single Nation[.]" *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986). This right has been interpreted to protect both "the right of a citizen of one State to enter and to leave another State," and "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State[.]" *Saenz v. Roe*, 526 U.S. 489, 498 (1999). This latter component has origins in the Privileges and Immunities Clause of the Constitution, which prevents States from discriminating against citizens residing in other States.

As the District Court correctly found, the 14-day quarantine burdens these two components of the right to travel. At its core, the 14-day quarantine commands two-weeks of house arrest for exercising the constitutional right to cross the Maine border, all on the pain of criminal conviction. The 14-day quarantine also results in unjustified discrimination against nonresidents, all of whom are necessarily subject to quarantine upon their entry to Maine, and few of whom will have a place of abode within the State at which they can quarantine.

B. The Supreme Court has held that regulations substantially burdening the constitutional right to travel are subject to strict scrutiny. *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969). The Governor is mistaken that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) provides differently. *Jacobson*, decided during the *Lochner* era, applied a reasonableness test to a substantive due process challenge to a mandatory vaccination law that was intended to curb the spread of smallpox. It says nothing about how regulations burdening the right to travel should be assessed, particularly considering the more recent formulation of the test announced by the Supreme Court in *Shapiro*. As the District Court put it, "when the Supreme Court elaborates a new standard for analyzing a constitutional claim," as it did in *Shapiro*, "we use that most recent formulation, rather than the framework from a decision for a different constitutional claim, made by a different claimant, in a different state, facing a different public health emergency in a

different century." *Bayley's Campground Inc. v. Mills*, 2020 U.S. Dist. LEXIS 94296, at *20 (D. Me. May 29, 2020).

C. The 14-day quarantine fails this test. For a regulation to survive strict scrutiny, the proponent of the regulation must show that it is the least restrictive means of achieving a compelling governmental interest. As the record reflects, the Governor has shown neither the necessity of the 14-day quarantine (in any form), nor that less restrictive means would be ineffective in preventing the virus from overwhelming the capacity of Maine's healthcare system. This failure of proof is highlighted further by the subsequent issuance of Executive Order 57, which contradicts the Governor's stated rationale for rejecting less restrictive alternatives.

D. This case is justiciable, despite the Governor's objections premised on mootness and standing. First, although the 14-day quarantine as applied by EO34 has been repealed and replaced, the case is not moot because the challenged conduct was voluntarily ceased, and is capable of repetition yet evading review. Indeed, the Governor has never conceded that she will not again implement the 14-day quarantine as applied by EO34. Instead, her own proclamations explicitly reserve the right to reverse course if she deems it prudent.

Second, the appeal should not be dismissed as to the campground plaintiffs for lack of standing. Procedurally, the question of standing is waived because it was not pressed below and went unaddressed by the District Court. Considering

that this is an interlocutory appeal which will inevitably return to the District Court, the District Court should be given the first opportunity to pass on the issue. And substantively, the Governor's standing argument is misplaced because the campground plaintiffs have satisfied the requirements for third party standing, namely, an injury in fact, a close relationship to the third parties, and some hindrance to the third parties' ability to pursue claims in their own right.

ARGUMENT

I. The District Court should have enjoined the 14-day quarantine requirement, which violates the constitutional right to interstate travel.

Maine's 14-day quarantine is unconstitutional and should have been enjoined by the District Court. "In considering a motion for a preliminary injunction, a district court must consider: (1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiffs; and (4) the effect, if any, on the public interest." *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009) (internal quotation omitted). The denial of a motion for preliminary injunction may be reversed "upon finding a mistake of law, a clear error in fact-finding, or other abuse of discretion[.]" *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 117 (1st Cir. 2011) (citing *Gonzalez-Droz*, 573 F.3d at 79). As explained below, the District

Court's order should be reversed because it erroneously concluded that Maine's 14-day quarantine survives the strict scrutiny analysis. This erroneous conclusion tainted the District Court's weighing of the remaining factors, ultimately leading to the denial of the motion for a preliminary injunction.

A. The Appellants demonstrated a likelihood of success on the merits because the 14-day quarantine is unconstitutional.

The Plaintiffs-Appellants established a likelihood of success on the merits below. As the District Court correctly found, the 14-day quarantine burdens the fundamental right to interstate travel, mandating strict scrutiny review. And as explained below, the Governor has not proven that the 14-day quarantine is the least restrictive means of achieving a compelling governmental interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 666 (2004).

1. The 14-day quarantine substantially burdens the right to interstate travel.

The right to interstate travel has a cherished place in our Nation's history. Indeed, virtually no boundary on State police power is "more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Edwards v. California*, 314 U.S. 160, 173 (1941). "[I]n the words of Mr. Justice Cardozo: 'The Constitution was framed . . . upon the

theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" *Id.* (quoting *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935)). To that end, the principle that citizens may freely travel from State to State has played an "important role . . . in transforming many States into a single Nation[.]" *Soto-Lopez*, 476 U.S. at 902. This principle also serves as an important check on governmental power, a concern all too familiar to the framers of the Constitution. *Aptheker v. Sec'y of State*, 378 U.S. 500, 519 (1964) (Douglas, J., concurring) (stating that "[f]ree movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interests of security").

Because of this, "[t]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). The right is so fundamental that it was recognized by the Continental Congress when adopting the Articles of Confederation. *Guest*, 383 U.S. at 758; *see also Kent v. Dulles*, 357 U.S. 116 (1958) ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage"). Centuries later, the "freedom to travel throughout the United States" continues to be recognized "as a basic right under the Constitution." *Id.* (citing *Williams v. Fears*, 179 U.S. 270, 274 (1900);

see also Saenz, 526 U.S. at 498. "This freedom has roots in our Nation's history and is preserved and protected by several constitutional provisions; among them the Privileges and Immunities Clause, the Commerce Clause, the Due Process Clause, and the Equal Protection Clause." *Bayley's Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *22 (citing *Soto-Lopez*, 476 U.S. at 902-904; *Jones v. Helms*, 452 U.S. 412, 418-19 (1981)). Given the "unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation[,]" the Supreme Court has never "felt impelled to locate this right definitively in any particular constitutional provision[.]" *Soto-Lopez*, 476 U.S. at 902; *see also Saenz*, 526 U.S. at 498 (characterizing the right to travel as "a virtually unconditional personal right, guaranteed by the Constitution to us all." (quoting *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring)).

The freedom to travel between the States embraces three basic components: (1) "the right of a citizen of one State to enter and to leave another State," (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz*, 526 U.S. at 500. Read as a whole, the Supreme Court's right to travel decisions establish that "[a] state law implicates the right to travel when it

actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Soto-Lopez*, 476 U.S. at 903 (citations and quotations omitted).

Maine's 14-day quarantine does just that, by effectively commanding two weeks of house arrest for all travelers entering the State of Maine. This implicates both the "right of a citizen of one State to enter and to leave another State" and "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State[.]" *Saenz*, 526 U.S. at 500. As the District Court explained, "Maine's 14-day quarantine combined with its Restarting Plan, which allows hotels, motels, and campgrounds to open to out-of-state residents only if they have 'completed quarantine guidelines' within the state, effectively closes the border for many would-be travelers." *Bayley's Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *27. This is because, "[i]f an out-of-state resident wishes to travel to Vacationland this summer, but does not have their own property from which to comfortably shoulder the burden of 14 days of quarantine, they are unable to come to the state without violating the Governor's Orders." *Id.* Although the Governor notes that the 14-day quarantine is unlike other regulations that the Supreme Court has held are unlawful, this merely establishes that "[t]he barrier-to-entry here is unique," *see id.*, not that it is constitutional.

Although the facts are unique, the discriminatory result is the same. For example, *Edwards* invalidated a California law making it a misdemeanor to knowingly bring a non-resident indigent person into the State. 314 U.S. at 177. As Justice Douglas explained, the California law infringed upon the right to travel because its consequence was to "obstruct[] or in substance prevent[]" movement between the States. *Id.* at 181 (Douglas, J., concurring); *see also Saenz*, 526 U.S. at 500 (characterizing *Edwards* as "vindicating" the right to interstate travel); *id*. at 512 (Rehnquist, J., dissenting) (referring to the law in *Edwards* as a "classic barrier to travel or migration"). Years earlier, the Supreme Court held that Nevada could not levy a tax on all travelers passing through the State, even though the tax applied to residents and non-residents alike. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44-49 (1868). And since then, the rule that a State may not deter, impede, or penalize travel has arisen in a wide array of circumstances, such as employment preferences, voting rights, welfare benefits, medical services, and even interference by private actors. *See, e.g.*, *Soto-Lopez*, 476 U.S. at 905-12 (1986) (invalidating a law that denied bonus points to otherwise qualified veterans who were non-residents at the time they entered military service); *Zobel v. Williams*, 457 U.S. 55, 64 (1982) (invalidating a dividend program that distributed income to adult citizens based on their length of residency in the State); *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (invalidating a residency requirement for obtaining certain medical services

"as violative of the right to travel stressed in [*Shapiro*] and other cases"); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (invalidating a durational residency requirement for voting); *Shapiro*, 394 U.S. 618, 634 (invalidating the denial of welfare benefits to otherwise eligible applicants solely because they recently moved to the jurisdiction); *Guest*, 383 U.S. at 760 (construing the right to travel as protecting against private attempts "to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right").

In addition to the 14-day quarantine's practical obstructions, the 14-day quarantine also has a substantial deterrent effect. Many travelers are understandably deterred from exercising their right to travel when faced with the prospect of a 14-day quarantine. *See, e.g.*, (Bonnell Decl. ¶¶ 15-17, J.A. 35; Boisvert Decl. ¶ 6, J.A. 37.) Some nonresidents may still come, but they will be treated as presumptively-diseased by the State of Maine, at least until they have "completed quarantine guidelines." *See, e.g.*, (Humiston Decl. ¶¶ 6-11, J.A. 35.) As a result of this presumption, a nonresident is prohibited from going grocery shopping, visiting the pharmacy, attending church, or moving about in public, even if the nonresident takes all precautions and observes all of the recommended guidance by medical and public health experts. Meanwhile, most Maine residents may freely enjoy all that Maine has to offer, including riskier "non-essential" activities like visiting tattoo parlors, going to the movies, and gambling at a casino.

This discriminatory effect impermissibly burdens the rights of nonresidents to enjoy Maine, especially for short trips such as shopping, visiting a friend, or spending the weekend at a campground, all of which are constitutionally protected. *See generally Saenz*, 526 U.S. at 502 (discussing the breadth of the second component of the right to travel). This, at the very minimum, violates the Privileges and Immunities Clause of the Constitution, which guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." U.S. Const., art. IV, § 2. Or, in the words of the Supreme Court, the 14-day quarantine brands non-residents as "unfriendly alien[s] when temporarily present in the [State of Maine.]" *Saenz*, 526 U.S. at 500.

The 14-day quarantine does not escape review simply because Maine residents are also burdened upon their return to Maine. Supreme Court precedent establishes that facial neutrality is insufficient to save a regulation that has the practical effect of discriminating against nonresidents. *See, e.g., Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 67 (2003) ("we agree with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim"); *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 217-18 (1984) ("We conclude that Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some

instate residents are similarly disadvantaged."); *Chalker v. Birmingham & Northwestern Railroad Co.*, 249 U.S. 522 (1919) (stating that "we are unable to agree" with the argument that a facial distinction based on the basis of residency is a necessary component of a claim). For example, the tax at issue in *Chalker* was levied based on the location of an individual's chief office, regardless of whether the individual was a resident of Tennessee or elsewhere. *Id.* at 527. Much like the Governor argues here, Tennessee argued that this facial neutrality as to residency foreclosed any claim of discrimination against nonresidents. The Supreme Court disagreed, and held that the law discriminated against non-residents because, "[a]s the chief office of an individual is commonly in the State of which he is a citizen, Tennessee citizens engaged in constructing railroads in that State will ordinarily have their chief offices therein, while citizens of other States so engaged will not." *Id.*

So too here. Whereas a Maine resident will, by definition, have a home in Maine at which he or she can quarantine in after entering the State, a nonresident ordinarily will not. As the District Court correctly highlighted, this approach effectively discriminates against nonresidents:

> Restrictions of the kind challenged in this action — i.e., restrictions that indiscriminately impact strangers from away who do not own property in the state — clearly burden fundamental rights. Although the quarantine rule purports a certain neutrality insofar as it imposes a restriction on all who enter the state, including state residents, it effectively discriminates among members of the public in practical

> application because it grants or denies access to Maine's goods and services based on citizenship status and access to realty, without regard to the presence or absence of circumstances that would justify imposition of such a burden on a person when considered as an individual.

Bayley's Campground Inc., 2020 U.S. Dist. LEXIS 94296, at *25-26. And, "in case there is any doubt, the Governor has flatly conceded that the quarantine is intended to reduce the risk posed by a large influx of people entering Maine during the summer vacation season." *Id*. The 14-day quarantine cannot conceal its discriminatory effect and purpose under the cloak of facial neutrality.

2. Regulations substantially burdening the right to interstate travel are subject to strict scrutiny.

The Supreme Court has specifically and repeatedly held that restrictions penalizing the right to interstate travel are subject to strict scrutiny. *Saenz*, 526 U.S. at 500-504; *Shapiro*, 394 U.S. at 634. Contrary to the Governor's argument, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) does not displace all standards of constitutional scrutiny developed during the ensuing eleven decades, serving 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.*, 2020 U.S. Dist. LEXIS 94296, at *21. Instead, "*Jacobson* provides that an emergency may justify temporary constraints *within* [normal constitutional] standards." *S. Bay United Pentecostal Church v.*

Newsom, 2020 U.S. App. LEXIS 16464, at *9 (9th Cir. May 22, 2020) (Collins, J., dissenting).

Starting with basics, it is firmly established that the Constitution is not "suspended during any of the great exigencies of government." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). Rather, the Constitution "applies at all times, and under all circumstances." *Id.* at 120-21; *see also Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398, 415 (1934) ("This Court has stated positively and squarely, in a case involving an actual emergency arising during the Civil War, that even the war power of the Federal Government is not without limitations, and that such an emergency does not suspend constitutional limitations and guaranties."). This is how it should be, considering that the risk of governmental interference with individual freedoms is at its greatest during times of emergency. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1884 (2017) (Breyer, J., dissenting) ("History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) ("[The framers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for

usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.").

Consistent with these principles, meaningful judicial review is as important now as ever. The judiciary – independent, unelected, unrestrained by fear-based clamoring to "close the borders" – is "perhaps the only institution that is in any structural position to push back against potential overreaching by the local, state, or federal political branches." Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against 'Suspending' Judicial Review*, 133 HARV. L. REV. F. at p. 4 (forthcoming 2020);[1] *see also* Ilya Somin, *The Case for "Regular" Judicial Review of Coronavirus Emergency Policies*, THE VOLOKH CONSPIRACY (Apr. 15, 2020).[2] That is especially so here, where the targets of the 14-day quarantine are nonresidents who cannot place political pressure on the Governor when she violates their constitutionally guaranteed freedoms. *See, e.g., Edwards*, 314 U.S. at 174. If courts abandon "the usual constitutional analysis" in times like these, "we risk ending up with decisions like *Korematsu*—in which courts sustain gross violations of civil rights because

[1] Available at SSRN: https://ssrn.com/abstract=3585629 or http://dx.doi.org/10.2139/ssrn.3585629.

[2] Available at https://reason.com/2020/04/15/the-case-for-normal-judicial-review-of-coronavirus-emergency-policies/.

they are either unwilling or unable to meaningfully look behind the government's purported claims of exigency." Wiley & Vladek, *supra* at 4.

Jacobson was decided in the *Lochner*-era and must be understood in that context. It was "one of the Supreme Court's earliest efforts to articulate *any* standard for adjudicating individual rights claims under the Fourteenth Amendment[,]" and "predated the entire modern canonization of constitutional scrutiny." Wiley & Vladeck, *supra* at 10, 13 (citing *Caroline Products* and later seminal cases). When *Jacobson* was decided, the prevailing constitutional standard was whether the challenged regulation is "a fair, reasonable and appropriate exercise of the police power of the State, or . . . an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . .?" *Adair v. United States*, 208 U.S. 161, 173-74 (1908). These amorphous and internally inconsistent options have been appropriately criticized as a "wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected." *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting); *see also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded.").

Properly understood, *Jacobson* does not override the framework that has been carefully developed by the Supreme Court over the course of the past century to enumerated or fundamental liberties, such as the right to interstate travel. Instead, it simply applied the prevailing constitutional standard of the day to "what we would now call a 'substantive due process' challenge to a compulsory vaccination requirement, holding that such a mandate 'was within the State's police power.'" *S. Bay United Pentecostal Church*, 2020 U.S. App. LEXIS 16464, at *10 (Collins, J., dissenting); *see also Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 2020 U.S. App. LEXIS 13357, at *29 (6th Cir. 2020) ("*Jacobson* cannot be read to effectively demote well-recognized liberties to second-class rights, enforceable against only the most extreme and outlandish violations" because "[s]uch a notion is incompatible not only with *Jacobson*, but also with American constitutional law writ large." (citing *Ex Parte Milligan*, 71 U.S. at 76)); *Roberts v. Neace*, 2020 U.S. App. LEXIS 14933, at *12 (6th Cir. May 9, 2020) (applying strict scrutiny to a Free Exercise Clause challenge, notwithstanding *Jacobson*); *Berean Baptist Church v. Cooper*, 2020 U.S. Dist. LEXIS 86310, at *27 (E.D.N.C. May 16, 2020) (same). Long after *Jacobson* was decided, the Supreme Court held – without reference to a *Jacobson* qualifier – that courts should apply strict scrutiny when the right to travel is hindered. *See, e.g., Saenz*, 526 U.S. at 500-504; *Shapiro*, 394 U.S. at 634. *Jacobson*, which involved "a framework . . . for a different constitutional

claim, made by a different claimant, in a different state, facing a different public health emergency in a different century[,]" has nothing to say on the matter. *Bayley's Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *20; *see also S. Bay United Pentecostal Church*, 2020 U.S. App. LEXIS 16464, at *10-11 (Collins, J., dissenting) ("*Jacobson* says nothing about what standards would apply to a claim that an emergency measure violates some other, *enumerated* constitutional right; on the contrary, *Jacobson* explicitly states that other constitutional limitations may continue to constrain government conduct.").

The Supreme Court is unlikely to follow the Governor's lead. *See generally* Wiley & Vladek, *supra* at 13. In the 115 years since *Jacobson* was decided, the Supreme Court has never stated that *Jacobson* stands for the proposition that the "usual constitutional analysis does not apply" when public health is at issue. In fact, the Supreme Court had an opportunity to invoke *Jacobson* in a right to travel case but declined to do so. *Doe*, 410 U.S. at 200 (holding that a residency requirement on abortion services violates the right to travel, even though it "could be deemed to have some relationship to the availability of post-procedure medical care for the aborted patient").

The Governor is also mistaken that the Supreme Court somehow blessed suspending meaningful judicial review in *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380 (1902) and *Zemel v. Rusk*¸

381 U.S. 1 (1965). Those two cases merely recognized that it is within State police power to control the movement of people in the face of an emergency, i.e., that such laws are not per se unconstitutional. *Zemel*, 381 U.S. at 15-16 (acknowledging that States may quarantine areas "ravaged by flood, fire or pestilence . . . when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole"); *Compagnie Francaise De Navigation A Vapeur*, 186 U.S. at 392-97 (upholding a law that was utilized to prevent passengers on a ship from disembarking during a local outbreak of yellow fever, as such laws are not inherently "repugnant to the Constitution of the United States"). Neither case so much as suggested that judicial review is suspended when public health is at issue, or that the "ordinary constitutional analysis" may be discarded when State action in response to a pandemic collides with fundamental rights. This falls in line with Justice Stewart's point in his *Shapiro* concurrence – that it is within a State's police power to temporarily control travel. *Shapiro*, 394 U.S. at 643, n.4 (Stewart, J., concurring). Again, nowhere in Justice Stewart's concurrence does he suggest that, when this power is exercised, courts must disregard established norms of constitutional scrutiny. *Id.* If Justice Stewart believed that *Jacobson* provided differently, one would expect that he would have said so. In sum, these cases all support Judge Collins' well-reasoned reading of *Jacobson*: that "an emergency

may justify temporary constraints *within* [normal constitutional] standards." *S. Bay United Pentecostal Church*, 2020 U.S. App. LEXIS 16464, at *9 (Collins, J., dissenting).

Finally, the Supreme Court's denial of an application for injunctive relief in *S. Bay United Pentecostal Church v. Newsom*, 207 L.Ed.2d 154 (U.S. 2020), suggests no differently. That decision was not a ruling on the merits, there was no majority opinion, and the Court's decision reads (in its entirety), "The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied." *Id.* at 154. The fundamental disagreement between Chief Justice Roberts' individual concurrence and Justice Kavanaugh's dissent (joined by two other Justices) did not focus on *Jacobson*, but upon identifying the correct comparator group for churches. *See generally Elim Romanian Pentecostal Church v. Pritzker*, 2020 U.S. App. LEXIS 18862, at *13 (7th Cir. June 16, 2020) (discussing the concurrence and dissent in *S. Bay United Pentecostal Church*). Chief Justice Roberts believed that churches are similar to "lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time[,]" and dissimilar from "grocery stores, banks, and laundromats[,]" where smaller groups of people congregate. *Id.* at 154-55 (Roberts, C.J., concurring). In contrast, Justice Kavanaugh believed that churches are more comparable to "offices, supermarkets,

restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries[,]" which were not subject to the 25% gathering limit. *Id.* at 155 (Kavanaugh, J., dissenting). To be sure, Chief Justice Roberts' concurrence can be read as viewing *Jacobson* more expansively, but at the same time, Justice Kavanaugh's dissent, which was joined by two other Justices, implicitly rejects the broad reading of *Jacobson* that the Governor seeks here. Few clues remain as to the views of the other Justices, who could have voted as they did for a myriad of other reasons. *See, e.g., Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (discussing the Supreme Court's more limited authority to issue an injunction pending appeal under the All Writs Act); *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (citing *Jacobson* as "see also" authority for the proposition that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims"); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (pointing to *Jacobson* as a potential limit on the right of privacy); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020) (applying an expansive reading of *Jacobson* to justify infringement on reproductive rights); *Opp. of State Respondents to Emergency Application for Writ of Injunction*, Supreme Court No. 19A1044 at 19-22 (arguing that (1) the 25% gathering limit survives under traditional constitutional analysis, and (2) the Supreme Court should deny certiorari).

We are thus left with decades of precedent from the Supreme Court, unambiguously holding that strict scrutiny should be applied to regulations that impair the right to travel, characterizing the right as "virtually unconditional." *Saenz*, 526 U.S. at 500-504; *Shapiro*, 394 U.S. at 634. This is the law of the land, and there is no reason to believe that these decisions are subject to an unwritten "*Jacobson* asterisk," *see* Wiley & Vladek, *supra* at 14, demoting the right to travel to a second-class right whenever the State asserts the existence of a public health exigency. Such a holding would not only contradict *Saenz* and *Shapiro*, but also the long-standing principle that the Constitution applies equally in times of peace and in times of emergency. *Ziglar*, 137 S. Ct. at 1884 (Breyer, J., dissenting); *Home Bldg. & Loan Asso.*, 290 U.S. at 415; *Ex Parte Milligan*, 71 U.S. at 76. The Court should reject the Governor's invitation to abandon meaningful judicial review of her actions.

3. The Governor did not carry her burden of proving that the 14-day quarantine is sufficiently tailored.

Even at the preliminary injunction stage, the burden is on government to prove that a regulation is the least restrictive means of achieving a compelling governmental interest. *Gonzales*, 546 U.S. at 429; *Ashcroft*, 542 U.S. at 666. In the absence of this showing, the party seeking a preliminary injunction is "deemed likely to prevail" on the merits. *Ashcroft*, 542 U.S. at 666. Although the denial of a preliminary injunction is normally reviewed for abuse of discretion, "the legal

conclusions on which they are based are reviewed de novo[,]" and "[w]hether a regulation is narrowly tailored is a legal question that is reviewed de novo." *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1297 (11th Cir. 2017). Thus, if this Court determines that the Governor has not proven that the 14-day quarantine is the least restrictive means for achieving a compelling governmental interest, the District Court's conclusion to the contrary would be an abuse of discretion. *Cf. id.*; *see also United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992) ("Whether the regulation meets the 'narrowly tailored' requirement is of course a question of law, to be reviewed by an appellate court *de novo.*").

a. The 14-day quarantine is not the least restrictive means of achieving a compelling governmental interest.

For the 14-day quarantine to survive strict scrutiny, the Governor "would have to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016). "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989). Conclusory assertions of unworkability and perceived shortcomings are not enough; the Governor must point to evidence affirmatively demonstrating the ineffectiveness of less restrictive means. *See, e.g.*, *McCullen v. Coakley*, 573

U.S. 464, 496 (2014) (affirming a preliminary injunction where the government failed to establish the ineffectiveness of less restrictive means); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (same); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 826 (2000) (holding that the strict scrutiny was not satisfied where "[t]he record is silent as to the comparative effectiveness of the two alternatives").

The Governor fails to meet this standard. The justification for the 14-day quarantine is avoiding the possibility that "Maine's healthcare system will be over-taxed by a sudden flow of new cases." (Shah Decl. ¶ 37, J.A. 108; *see generally* Langhauser Decl., J.A. 112-127.) As explained below, the Governor has not proven that a 14-day quarantine is the least restrictive means of achieving this goal. *See, e.g. Roberts v. Neace*, 2020 U.S. Dist. LEXIS 77987, *12 (E.D. Ky. May 4, 2020) (invalidating a similar 14-day quarantine requirement).

As a starting point, the record affirmatively demonstrates that the 14-day quarantine is intentionally overbroad. *See, e.g.* Shah Decl. ¶¶ 43-44, J.A. 112 (providing that the requirement was designed to "err[] on the side of caution," even if that meant implementing a restriction that may not be necessary in all instances); Langhauser Decl. ¶ 30, J.A. 127 (discussing the Governor's "broad-based" orders which will "be subject to claims of being both over- and under-inclusive"); Maine DECD Weekly Update (May 27, 2020) at 10:10 (referring to the 14-day quarantine in June as a "blunt instrument" and "not quite as targeted" at the issues the State is

trying to solve).[3] This is perhaps unsurprising, given that the 14-day quarantine was likely developed under the belief that the Governor's powers are subject to a lesser degree of scrutiny, rather than the strict scrutiny standard.

Now, some background. Based on a recent analysis by the CDC, which Dr. Shah has cited as authoritative, *see* (Shah Decl. ¶ 17, J.A. 104), the CDC's "best estimate" is that 35% of those infected with COVID-19 are asymptomatic, and would thus require no healthcare at all. (U.S. CDC, COVID-19 Pandemic Planning Scenarios ("Planning Scenarios") at 4, J.A. 132.)[4] Although it is true that individuals "can be infected with the disease for up to 14 days before exhibiting symptoms," *see* (Shah Decl. ¶ 38, J.A. 108), the mean time of symptom onset is just 6-days. (Planning Scenarios at 4, J.A. 132.) Among the 65% of those individuals who become symptomatic, there is a 0.034 hospitalization ratio, resulting in an overall hospitalization ratio of 0.0221. (*Id.*) And an even smaller percentage-of-a-percentage of those requiring hospitalization will need intensive care, and then ventilation. (*Id.* at 5, J.A. 133.) The mean duration of hospital stays for those who are not admitted to the ICU ranges, from 3.7-days for those who are

[3] Available at https://www.maine.gov/decd/home. This public statement was relied on by the District Court. *Bayley's Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *29.

[4] Available at https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html.

ages 0-45, to 5.1-days for those age 65 and older. (*Id.*) In those rare instances where a patient is admitted to the ICU, those numbers increase to approximately 10-days. (*Id*.) The mean number of days of mechanical ventilation is approximately 5 days. (*Id.*) As of July 7, 2020, there are only 22 people in the entire State of Maine who are hospitalized with COVID-19, and a total of 494 active cases. Maine CDC, COVID-19: Maine Data.[5]

Turning to the 14-day quarantine itself, the record is silent as to how or why a 14-day quarantine is the least restrictive means of sparing the healthcare system from being overwhelmed with new cases of the virus. And it is not as if the preliminary state of the record is to blame: The process below was agreed-to by the parties, and any evidence the Governor had to support the 14-day quarantine was uniquely within her own possession. Despite this, all the Governor offers is the criticism that alternatives to the 14-day quarantine are imperfect and would not prevent every single traveler who might have the virus from entering the State. Imperfection is not the same as ineffectiveness, and there is no explanation of how the delta between a *mandatory* 14-day quarantine and a *recommended* 14-day quarantine translates to overwhelming Maine's healthcare system. *Cf. Carmichael v. Ige*, 2020 U.S. Dist. LEXIS 116860, at *16 (D. Haw. July 2, 2020) (finding that

[5] Available at https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus.shtml (last accessed June 7, 2020 at 10:34 p.m.).

a quarantine restriction bore a substantial relation to public health where the State admitted a model demonstrating how the State's hospital capacity would likely be exceeded the restriction's absence). After all, social distancing and the use of face coverings appear to be the best available methods for controlling the spread of the virus, and those measures appear to be working effectively. (Shah Decl. ¶¶ 22-26, J.A. 105); COVID-19: Maine Data, *supra*. The record's silence as to the projected impact of lesser restrictions on Maine's healthcare system is fatal to the Governor's argument. *See, e.g., Playboy Entm't Grp.*, 529 U.S. at 826.

b. Executive Order 57 contradicts the Governor's defense of the 14-day quarantine.

The 14-day quarantine's overbreadth is highlighted by EO57, which lifts quarantine requirements for travelers from certain states, in two ways. First, EO57 flatly contradicts the Governor's central criticism of less restrictive means, namely, that less restrictive alternatives are "unworkable" and "not scientifically sound" because they will not eradicate the possibility that asymptomatic travelers will unwittingly bring the virus into Maine. Appellee's Resp. to Appellants' Emerg. Mot. for Inj. Pend. Appeal at 20-21 (asserting why alternatives to the 14-day quarantine are unworkable); (Langhauser Decl. ¶ 14, J.A. 121-22 (stating that the 14-day quarantine is designed "to limit the potential introduction of new infections" into the State of Maine)). The same criticism can be made of allowing travelers from New Hampshire and other exempted States, regardless of whether

those States are experiencing comparable rates of infection to Maine. This inconsistency belies the argument that alternatives to the 14-day quarantine were actually rejected as being "not scientifically sound" or "unworkable," as the Governor has argued. Far more likely is that the 14-day quarantine is exactly what public officials have admitted it is: a blunt instrument that is designed to "err on the side of caution."

Second, EO57 demonstrates that a 14-day quarantine is unnecessary. Currently, residents of New Hampshire, Vermont, Connecticut, New Jersey, and New York are exempted from Maine's quarantine requirement because of the success those States have had in reducing the spread of COVID-19. *See, e.g.*, (*Keep Maine Healthy* plan, Add. 41 (authorizing travel from New Hampshire and Vermont because, "when adjusted for population, the prevalence of active cases in COVID-19 . . . is similar to that in Maine")); Office of Governor Janet T. Mills, *With Improving Public Health Metrics, Mills Administration Exempts Connecticut, New York, and New Jersey From Quarantine & Testing Requirement* (Jul. 1, 2020)[6] (citing low positivity rates to justify exempting residents of Connecticut, New Jersey, and New York from quarantine requirements). Despite achieving positivity rates that are either similar to or better than Maine's, few of the

[6] Available at https://www.maine.gov/governor/mills/news/improving-public-health-metrics-mills-administration-exempts-connecticut-new-york-and-new.

exempted-States have implemented strict quarantine requirements like Maine has chosen to enact. For example, New Hampshire imposes no quarantine requirements on short-term visitors, allows longer-term visitors to self-quarantine in their home States before arrival, defines "quarantine" less strictly than Maine does, and places no quarantine requirement on travelers from surrounding New England states (including Rhode Island and Massachusetts). *See generally* New Hampshire Safer at Home: Out of State Visitors; NH Stay at Home 2.0 (Lodging).[7] Meanwhile, New Jersey, Connecticut, and New York have comparable or better positivity rates than Maine, but have only recently enacted a more limited quarantine that applies to "hot spots" with a positivity rate of 10% or greater. Governor Phil. T. Murphy, *Updated Quarantine Advisory Issued for Individuals Traveling to New Jersey from 16 States* (Jun. 30, 2020)[8]; Johns Hopkins University School of Medicine, *Which U.S. States Meet WHO Recommended Testing* (Jul. 7, 2020) (showing positivity rates for Connecticut (0.77%), Vermont (0.80%), New York (1.11%), Maine (1.27%), New Jersey (1.61%), New Hampshire (1.97%), and

[7] Available at https://www.covidguidance.nh.gov/out-state-visitors and https://www.covidguidance.nh.gov/sites/g/files/ehbemt381/files/inline-documents/2020-05/guidance-lodging.pdf.

[8] Available at https://nj.gov/governor/news/news/562020/approved/20200630b.shtml.

Massachusetts (2.40%));[9] Boston.com, *Charlie Baker is 'surprised' Maine did not exempt Massachusetts from quarantine order* (Jul. 2, 2020).[10] In contrast, Maine's approach makes quarantine the rule rather than the exception, and conspicuously applies a presumption-of-disease for residents of the Bay State, despite Massachusetts' considerable progress in reducing its own COVID-19 numbers. Boston.com, *supra*. All of this is to say that the effectiveness of the less burdensome approaches taken elsewhere is fatal to Maine's more sweeping 14-day quarantine. *See McCullen*, 573 U.S. at 494 (holding that a law failed strict scrutiny where the State failed to "consider[] different methods that other jurisdictions have found effective").

c. The 14-day quarantine also fails the substantial relationship test.

Finally, even if the Court applied the substantial relationship test, the 14-day quarantine still fails. *Jacobson* held that "if a statute purporting to have been enacted to promote the public health, the public morals or the public safety, *has no real or substantial relation to those objects*, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." 197 U.S. at 31

[9] Available at https://coronavirus.jhu.edu/testing/testing-positivity.

[10] Available at https://www.boston.com/news/coronavirus/2020/07/02/maine-quaratine-order-massachusetts.

(emphasis added). As explained in subsequent decisions, regulations that are markedly over- or underinclusive fail to meet this test. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 285 n.19 (1985) ("Because it is markedly overinclusive, the residency requirement does not bear a substantial relationship to the State's objective"); *see also United States v. Alvarez*, 567 U.S. 709, 730-740 (2012) (Breyer, J., concurring) (discussing intermediate scrutiny and concluding that the government's objective could have been substantially achieved in less burdensome ways).[11] The 14-day quarantine is both.

As explained above, the 14-day quarantine is purposely overinclusive and was crafted to sweep more broadly than needed. As originally enacted, it requires all travelers to quarantine upon arrival in Maine, regardless of whether there is reasonable cause to believe that the person has been exposed to COVID-19, regardless of whether there is reasonable cause to believe that the person is infected with COVID-19, and regardless of whether the person comes from an area with a comparatively higher or lower prevalence of the disease. Likewise, travelers "are not allow[ed] . . . to patronize campgrounds without self-quarantining for an additional fortnight in Maine[,]" despite it being "not at all obvious why a 14-day

[11] This standard likewise places the burden on the State to justify its action. *See generally United States v. Virginia*, 518 U.S. 515, 533 (1996) (placing the burden of meeting an intermediate level of scrutiny "entirely on the State" in a case involving gender discrimination).

self-quarantine" in a nearby State such as Massachusetts is less effective than the same 14-day quarantine in Maine. Statement of Interest of the United States at 8; *see also Piper*, 470 U.S. at 285-86 (rejecting New Hampshire's argument that non-resident attorneys are less likely to comply with the law).

Conversely, the 14-day quarantine is underinclusive in that it allows Mainers who have not quarantined to enjoy many "non-essential" public activities, such as shopping at a retail store, eating in a restaurant, watching a movie in an indoor movie theatre, or gambling at a casino, all of which carry the risk that an asymptomatic Mainer might unwittingly pass the virus on to others. Adding to this, Maine has allowed nonresidents to enter the State for "legal, business, professional, environmental permitting and insurance services" without quarantine. (J.A. 46, 57). As the United States rightly observed below, "[i]f Maine wants to prevent the spread of COVID-19, one would think it would start by preventing outsiders from attending a boardroom meeting, not from pitching a tent." Statement of Interest of the United States at 9. These, along with the other flaws discussed above, demonstrate that the 14-day quarantine does not achieve the "fit" that is required to meet the substantial relationship test.

Ultimately, the Governor's desire to err on the side of caution is understandable. And, as to regulations such as mandating face coverings, implementing COVID-19 prevention checklists, temporarily suspending operations

where social distancing is difficult to maintain, and imposing restrictions on the size of certain gatherings, it is likely a constitutional approach. But a desire to err on the side of caution does not authorize Maine to effectively isolate itself from the rest of the Nation as the country confronts the COVID-19 pandemic. *Edwards*, 314 U.S. at 173 ("The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"). The Governor did not satisfy her constitutional burden of showing that the 14-day quarantine is the least restrictive means of achieving a compelling governmental interest, establishing the Plaintiffs-Appellants' likelihood of success on the merits.

B. Appellants established irreparable harm.

When a plaintiff establishes a likely violation of the right to interstate travel, "it can be presumed that irreparable injury is extremely likely." *Walsh v. City & Cty. of Honolulu*, 423 F. Supp. 2d 1094, 1108 (D. Haw. 2006). In claims involving the deprivation of a constitutional right, the violation itself will typically suffice to demonstrate irreparable injury. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *DeNovellis v. Shalala*, 135 F.3d 58, 71-72 (1st Cir. 1998) (Bownes, J., dissenting). So, if the 14-day quarantine unconstitutionally burdens the right to travel, then irreparable injury is proven.

The 14-day quarantine is also causing actual harm. Like other businesses spanning from Kittery to Eastport, the campgrounds are suffering devastating financial harm at the hand of the 14-day quarantine. (Bayley Decl. ¶ 4, J.A. 25-27; Bozza Decl. ¶¶ 5-7, J.A. 28-30.) This harm is inextricably bound to the right that the campgrounds' primary customer base wish to enjoy, that is, the right to visit and enjoy Maine. Had the preliminary injunction been granted, the flood of cancellations caused by the 14-day quarantine would have ceased, others would have been reversed, and new bookings would have been made. But instead, it continues to be the Maine hospitality industry "whose ox is being gored" by the 14-day quarantine. *Bayley's Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *21; *see generally Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). As such, the campgrounds have a personal and economic stake in the outcome of this litigation, such that they can fairly vindicate the rights of their broader clientele. *See, e.g.*, *El Dia Inc. v. Rossello*, 30 F. Supp. 2d 160, 168 (D.P.R. 1998) (analogizing to shareholder suits in analyzing third party standing); *Md. Shall Issue, Inc. v. Hogan*, 2019 U.S. Dist. LEXIS 62690, at *49 (D. Md. Mar. 31, 2019) ("case law establishes that retailers may have standing to sue in certain circumstances when their customers suffer constitutional violations").

C. The balance of equities and the public interest favored enjoining the ongoing constitutional violation.

Finally, the balance of equities and public interest each supported granting a preliminary injunction. "[T]he public as a whole has a predominant interest in seeing that the functions of government are conducted *lawfully* for the benefit of all citizens." *Westenfelder v. Ferguson*, 998 F. Supp. 146, 159 (D.R.I. 1998); *see also Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 103 (6th Cir. 1989). In contrast, the State cannot claim harm from being enjoined from enforcing a 14-day quarantine restriction that it had no authority to enact in the first place, because a State has "no right to the unconstitutional application of state laws[.]" *Platte v. Thomas Twp.*, 504 F. Supp. 2d 227, 247 (E.D. Mich. 2007) (quoting *Tyson Foods, Inc.*, 865 F.2d at 103). As such, the Appellants' likelihood of success on the merits below also established the third and fourth preliminary injunction factors.

II. Executive Order 57's limited exceptions to the 14-day quarantine do not render this controversy moot.

"The burden of demonstrating mootness 'is a heavy one.'" *Cty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). "A case becomes moot on appeal if 'events have completely and irrevocably eradicated the effects of the alleged violation,' and there is 'no reasonable . . . expectation that the alleged violation will recur.'" *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1019 (9th Cir.

2012) (citing *Cty. Of L.A.*, 440 U.S. at 631). Executive Order 57 ("EO57") does not moot this appeal, because (1) the challenged conduct was voluntarily ceased, such that it may be resumed as swiftly as it ended, and (2) the constitutional violation is capable of repetition yet evading review.

A. A dispute is not moot when a litigant voluntary ceases the wrongful behavior but reserves the right to resume it.

The voluntary cessation exception to the mootness doctrine "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *ACLU of Mass. v. United States Conference of Catholic Bishops*, 705 F.3d 44, 54 (1st Cir. 2013) (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001)). As such, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). When a litigant asserts mootness after voluntarily ceasing the challenged conduct, that party bears "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *United States Conference of Catholic Bishops*, 705 F.3d at 55 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). This showing "must be viewed with a critical eye[.]" *Id*. (quoting *Knox*, 132 S. Ct. at 2287).

The Governor has not come close to meeting that formidable burden here. Indeed, the Seventh Circuit just ruled that the voluntary cessation exception allowed a challenge to a gathering order to move forward, even though the executive order in question is no longer in effect. *Elim Romanian Pentecostal Church*, 2020 U.S. App. LEXIS 18862, at *9. This is because "the Governor could restore the approach of [the challenged executive order] as easily as he replaced it—and that the 'Restore Illinois Plan' (May 5, 2020) reserves the option of doing just this if conditions deteriorate." *Id.* at *8. As such, the court determined that "it is not 'absolutely clear' that the terms of Executive Order 2020-32 will never be restored[,]" and that "[i]t follows that the dispute is not moot and that we must address the merits of plaintiffs' challenge to Executive Order 2020-32 even though it is no longer in effect." *Id.* at *9; *accord McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) ("while a statutory change is usually enough to render a case moot, an executive action that is not governed by any clear or codified procedures cannot moot a claim" (internal quotation omitted)); *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260, 1274 (9th Cir 1998) (applying the voluntary cessation doctrine where the defendant has "neither asserted nor demonstrated that [she] will never resume the complained of conduct"); *Alt v. United States EPA*, 2013 U.S. Dist. LEXIS 65093, at *16 (N.D.W. Va. Apr. 22,

2013) (pointing to reservation of rights language as supporting application of the voluntary cessation doctrine).

The Governor's repeal of EO34 is no different, considering (1) Maine's initial reopening plan envisioned maintaining a 14-day quarantine on all travelers through at least September 1, 2020, *see* (Richard Decl., J.A. 78), and (2) the Governor has expressly reserved her right to reverse course if desired, *see* (EO57, Add. 40 ("[t]he application of this Order and the Keep Maine Healthy Plan shall be monitored and adjusted for appropriate or necessary changes"); *Keep Maine Healthy* plan, Add. 43 ("[i]f a review of these metrics in their totality and in context, finds evidence of a concerning increase in COVID-19, the State reserves the right to move swiftly to limit harm and protect Maine people")). It is also difficult to overlook that the Governor's abrupt policy change came on the heels of the District Court's May 29, 2020 order, which cautioned that the 14-day quarantine was in danger of being held unconstitutional. *Bayley's Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *25 ("Plaintiffs have not persuaded me that they are, ***at present***, 'likely' to be able to prove that the quarantine violates their constitutional rights. But, as the Governor points out, '[c]onditions on the ground can change quickly.'"). Especially so now, because the new framework of allowing travel from some States but not others is at odds with the Governor's earlier defense of the 14-day quarantine.

All of this establishes that the challenge to the 14-day quarantine is not moot. At a minimum, the Governor has not demonstrated that it is "absolutely clear" that she will not restore the 14-day quarantine as defined in EO34. And at worst, the abrupt and inconsistent change in policy suggests that mooting what the District Court called "a civil rights action that has potential" may have been a motivating factor. The Governor cannot escape judicial review of the 14-day quarantine through a voluntary and potentially tactical cessation of the challenged conduct, while at the same time reserving the right to snap back to her earlier restrictions.

B. The challenged conduct is capable of repetition yet evading review.

Another reason that the mootness doctrine does not apply is that EO34's restrictions are capable of repetition yet evading review. This exception applies where "(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.'" *United States Conference of Catholic Bishops*, 705 F.3d at 57 (quoting *Gulf of Me. Fishermen's Alliance v. Daley*, 292 F.3d 84, 89 (1st Cir. 2002)). Both elements are met.

First, it was impossible to fully litigate the constitutionality of EO34, which was rescinded 25 days after this lawsuit was filed and 65 days after it was first

enacted. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988) (holding that the chance of fully litigating an election dispute within six months is "slim at best"); *Roe*, 410 U.S. at 125 (finding termination of pregnancy did not render case moot). *Ferreira v. Duval*, 887 F. Supp. 374, 380 (D. Mass. 1995) (finding that an inmate's 92-day disciplinary confinement fell within the exception); *Ctr. for Envtl. Sci., Accuracy & Reliability v. Cowin*, 2016 U.S. Dist. LEXIS 29016, at *17 (E.D. Cal. Mar. 4, 2016) (finding that the termination of emergency measures after six months did not render a case moot).

Second, the issue is capable of repetition because there is a reasonable expectation that the restrictions in EO34 may be reimplemented later. As noted above, both EO57 and the *Keep Maine Healthy* plan contemplate that the Governor will implement more restrictive measures if she deems it appropriate. (EO57, Add. 40; *Keep Maine Healthy* plan, Add. 43.) The *Restarting Maine's Economy* plan reflects this principle as well. (Add. 45 ("If the COVID-19 situation worsens in Maine for any reason, the state will move quickly to either halt progress *or return to an earlier stage*." (emphasis added)).) Indeed, medical experts have opined that the virus may resurge this fall and winter, increasing the likelihood that the Governor will return to prior restrictions. *See, e.g.*, Kissler, S., et al., *Projecting the transmission dynamics of SARS-CoV-2 through the postpandemic period*. Science

Magazine, Vol. 368, Issue 6493, pp. 860-68 (May 22, 2020);[12] *CDC Director Warns Second Wave of Coronavirus Is Likely to Be Even More Devastating*, Wash. Post, Apr. 21, 2020.[13] *See also Foster v. Comm'r of Corr. (No. 1)*, 484 Mass. 698, 741 (2020) (Gants, J., concurring) (referring to a resurgence of COVID-19 this winter as a "now-foreseeable threat"). There is no reason to think that the Governor will hesitate to reverse course if she perceives the need to do so. So, although the 14-day quarantine has been loosened for now, there is a reasonable expectation that it may be tightened in the future.

III. The campground plaintiffs are permitted to assert the constitutional rights of their patrons.

Finally, the Governor's argument that the appeal should be dismissed for lack of standing should be rejected.

A. The District Court should decide whether the campground plaintiffs have standing.

"There are both constitutional and prudential limitations on the jurisdiction of the federal courts." *G&S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 540 (7th Cir. 2012) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Under Article III of the Constitution, the jurisdiction of the courts is limited to claims presenting

[12] Available at https://science.sciencemag.org/content/368/6493/860.

[13] Available at https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector.

a case or controversy between the plaintiff and the defendant." *Id.* (citing *Warth*, 422 U.S. at 498). This constitutional standard can be met with an injury in fact, causation, and redressability. *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 351 (1st Cir. 2004). Separately, the concept that a party may generally not assert the constitutional rights of others is considered a prudential limitation on standing. *Id.*; *RK Co. v. See*, 622 F.3d 846, 851 (7th Cir. 2010). Whereas constitutional standing is jurisdictional, prudential standing is not. *Eulitt*, 386 F.3d at 351. And because of this, it can be forfeited or waived. *June Med. Servs. L.L.C. v. Russo*, 2020 U.S. LEXIS 3516, at *24 (June 29, 2020) (holding that a litigant had failed to preserve the argument that the opposing party lacked third party standing).

The Governor's prudential standing argument was not preserved for purposes of this appeal. The Governor never asked the District Court to dismiss the campground plaintiffs from the litigation for lack of standing, nor did she assert that the campground plaintiffs were unlikely to succeed on the merits for lack of standing. Although the Governor did discuss lack of standing in her opposition to the motion for preliminary injunction, she only did so in the context of whether the campground plaintiffs suffered irreparable harm. Opp. to Mot. for Prelim. Inj. at 19 (Dkt. 12). Especially when considering that this is an interlocutory appeal, which will inevitably find its way back the District Court, the Governor's standing argument should be considered in the first instance by the District Court, not by the

Court of Appeals. *Bayley's Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *16, n.7 (reserving the question of standing for another day); *see also Carijano v. Occidental Petroleum Corp.*, 686 F.3d 1027, 1032 (9th Cir. 2012) (declining to consider standing in the first instance on appeal).

B. The Supreme Court has held that litigants such as the campground plaintiffs have third party standing.

Third party standing exists where "[1] the litigant personally has suffered an injury in fact that gives rise to a sufficiently concrete interest in the adjudication of the third party's rights; [2] the litigant has a close relationship to the third party; and [3] some hindrance exists that prevents the third party from protecting its own interests." *Eulitt.*, 386 F.3d at 351 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). This standard is relaxed in civil rights cases, where enforcement of the restriction against the litigant would indirectly violate a third party's rights, or where the regulation is likely to have a chilling effect on the third party's exercise of his or her rights. *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *see also El Dia, Inc.*, 30 F. Supp. 2d at 169 ("the Supreme Court has lowered [standing] requirements to allow third-party standing in certain cases in order to protect civil rights").

Applying these principles, the Supreme Court has found third party standing in a variety of contexts. For example, in *Powers*, the Supreme Court permitted a criminal defendant to assert the equal protection rights of prospective jurors

excluded from jury service based on race, in part because "there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation." 499 U.S. at 415. Although it is conceivable that an excluded juror could bring an equal protection claim, "[t]he reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id*. In *Craig v. Boren*, the Supreme Court permitted a drive-through convenience store to assert the equal protection rights of male customers to challenge a regulation prohibiting the sale of 3.2% beer to young men, but not to young women. 429 U.S. 190, 194 (1976). In *Joseph H. Munson Co.*, the Supreme Court permitted a professional fundraiser to assert the First Amendment rights of charities to challenge an ordinance requiring charities to spend at least 75% of their receipts for "charitable purposes." 467 U.S. at 949-950, 959. And just last week, in *June Med. Servs. L.L.C.*, the Supreme Court permitted several medical providers to assert the due process rights of their patients to challenge a restriction placing an undue burden on the patients' ability to obtain an abortion. 2020 U.S. LEXIS3516, at *26-29 (Jun. 29, 2020). As the Supreme Court explained, "we have generally permitted plaintiffs to assert third-party rights in cases where the 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Id.* at *26-27 (quoting *Kowalski v. Tesmer*, 543

U.S. 125, 130 (2004)). And, "[i]n such cases, we have explained, 'the obvious claimant' and 'the least awkward challenger' is the party upon whom the challenged statute imposes 'legal duties and disabilities.'" *Id.* at *27. Taken together, these decisions embody the "quite forgiving" approach the Supreme Court has taken to third party standing when civil rights are in play. *Kowalski*, 543 U.S. at 130.

This case is no different. As to an individual traveler, the 14-day quarantine is likely to chill the exercise of the right to enter Maine by imposing criminal consequences for failure to comply with quarantine guidelines, and by restricting the availability of lodging to those travelers who would otherwise agree to heed quarantine guidelines. *See generally* Opp. to Mot. for Prelim. Inj. (Dkt. 12), at p. 20 (discussing that many travelers have opted to "temporarily put . . . summer plans on hold" in response to the quarantine). And, as in *Powers*, there is no reason for residents of States such as Massachusetts or Rhode Island to incur the legal expense of suing the Governor of Maine to challenge the 14-day quarantine. Far more likely is that out-of-state residents will simply take their business elsewhere.

The campgrounds, on the other hand, are suffering devastating financial losses from the 14-day quarantine, and "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Playboy Enters. v. Pub. Serv. Comm'n*, 906 F.2d 25, 37 (1st Cir. 1990) (quoting *Joseph H.*

Munson Co., 467 U.S. at 956). The Governor's executive orders specifically threaten campgrounds with licensing consequences for failure to comply with the orders, establish a regulatory framework under which the campgrounds must now secure "certificates of compliance" from out-of-state visitors, and constrict the available market of campers by limiting those who may patronize campgrounds. As in *June Med. Servs, L.L.C.*, this threat of enforcement against the campgrounds "eliminates any risk that [the campgrounds'] claims are abstract or hypothetical[,]" and assures that the campgrounds have every reason to vigorously advance the rights of their patrons. 2020 U.S. LEXIS 3516, at *27 (June 29, 2020). Or, stated differently, the campgrounds are "obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of [their] buyers' market, or to disobey the statutory command and suffer . . . 'sanctions and perhaps loss of license.'" 429 U.S. at 194; (EO34, Add. 35 (warning that EO34 "may be enforced by any governmental department or official that regulates, licenses, permits or otherwise authorizes the operations of . . . campgrounds[,]" and that a violation of the Order "may be construed to be a violation of any such license, permit or other authorization to which pertinent penalties may be assessed"); EO57, Add. 40 (same).)

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the Court of Appeals reverse the District Court's order below.

Dated: July 8, 2020

/s/ Gene R. Libby
Gene R. Libby, Esq., Bar No. 13061

Dated: July 8, 2020

/s/ Tyler J. Smith
Tyler J. Smith, Esq., Bar No. 1165609
Libby O'Brien Kingsley & Champion, LLC
62 Portland Road, Suite 17
Kennebunk, Maine 04043
(207) 985-1815
glibby@lokllc.com
tsmith@lokllc.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements of Fed R. App. P. 27(d)(2). Not counting items excluded from the length by Fed. R. App. P. 32(f), this brief contains 12,973 words according to the word count feature in Microsoft Word.

2. This brief 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). This document has been prepared using Microsoft Word in 14-point Times New Roman font.

Dated: July 8, 2020

/s/ Tyler J. Smith
Tyler J. Smith, Esq. Bar No. 1165609

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I certify that, on the date stated below, I filed the above brief electronically via the CM/ECF system, and therefore service will be effectuated by Court's electronic notification system upon all counsel or parties of record.

Dated: July 8, 2020

/s/ Tyler J. Smith
Tyler J. Smith, Esq. Bar No. 1165609

ADDENDUM

Court Orders

Regulations and Executive Orders